Legal Framework for Free Movement of People Within Africa – A View from the East African Community (EAC)

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Abstract

Cross-border movement of persons within Africa has been an important aspect of African regional integration since the 1970s. Since then, various treaty frameworks have been put in place to facilitate the free movement of people seeking employment in other African countries, as well as those crossing borders for purposes like study, visit or business transactions. While all those instruments were adopted through Regional Economic Communities (East African Community [EAC], Economic Community of West African States [ECOWAS], Common Market for Eastern and Southern Africa [COMESA] etc.) on the sub-regional level, the African Heads of State came up with the Free Movement Protocol in 2018, which is the first treaty instrument governing cross-border movement on the continental scale. The Protocol is meant to draw upon the experiences in the African

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sub-regions. However, as a matter of practice, the migration policies of African states have been viewing migrants rather as a risk to national security and the local labour market. The present article analyses the regulatory approach taken by the Free Movement Protocol (FMP) against the backdrop of the sub-regional instruments. The focus is not only on the treaty texts, but also on their political and ideological underpinnings as well as the practice of implementation. By comparing the various sub-regional legal frameworks, the article pays particular attention to the experience of the East African Community, regarded as one of the most advanced sub-regional integration regimes.

I. Introduction

In January 2018, the African Union (AU) Assembly of Heads of State adopted a Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (Free Movement Protocol).[1] The first 30 signatures were appended by the African leaders during an Extraordinary Summit on the African Continental Free Trade Area (AfCFTA) held in March 2018 in Kigali.[2] At the time of writing,[3] 32 African states are signatories to the Protocol with some of the continent's major economies, such as South Africa, Nigeria or Egypt missing on the list and only Rwanda having it ratified. The number is lower than the list of AfCFTA Agreement signatories, which stands at 49 with six ratifications.[4]

According to the FMP preamble, the Heads of State and Government recognise the contribution of the African Regional Economic Communities (RECs) – the EAC being one of them – to the progress on the free movement and rights of residence, and express awareness of the challenges the RECs face in this endeavour. Accordingly, the present paper seeks to look into the actual lessons that can be drawn from the regulations on free movement in the RECs. Particular attention will be given to the experience within the EAC, often considered as one of most advanced RECs.[5] The ar-

[1] Trade Law Centre Resources website on the African Continental Free Trade Area, <https://www.tralac.org>.

[2] Trade Law Centre Resources (note 1).

[3] See the Status List available at <https://au.int>.

[4] Trade Law Centre Resources (note 1).

[5] See *J. Thuo Gathii*, African Regional Trade Agreements as Legal Regimes, 2011, 188; *M. M. Kiggundu/T. Walter*, Introduction to the AJOM-GIZ/EAC Special Issue, Africa Journal of Management 1 (2015), 295.

ticle proceeds in the following way: Firstly, it briefly summarises the potential benefits and risks of free movement, and explores the ideological underpinnings of the same in Africa and the policy declarations on migration. Secondly, it compares the legal solutions adopted in the FMP with those in place within the EAC, looking also at other RECs. This section focuses in particular on the question, to what extent enforceable individual rights to free movement have been created. And thirdly, the article offers insights into some examples for implementation of the international commitments, the actual political discourse and the resulting actions taken on immigration by various African governments.

II. Background

1. Benefits and Risks

In his classic book on the theory of regional integration, *B. Balassa* looks at the free movement of people as a factor of production (labour). According to *Balassa*, economic integration is a process of abolishing discrimination between economic units belonging to different national states; the integration takes several forms representing its different degrees: a free-trade area, a customs union, a common market, an economic union and complete economic integration.[6] In this model, the free movement of workers is to be achieved as a constituent element of a common market, in which discrimination is removed not only with regard to the movement of commodities (free movement of goods), but also other factors, notably labour and capital. *Balassa* examines the integration efforts based on their positive impact on resource allocation and growth,[7] which he uses as indicators for a potential increase in welfare.[8] He argues that the factor movements in integrated areas are desirable, since the labour mobility would improve efficiency, contribute to exchange of skills and bring about more trade through increased productivity.[9]

Also more studies, most notably the recent one on migration by the United Nations Commission on Trade and Development (UNCTAD), suggest that enhanced migration creates net economic gains and a win-win situation for the economies sending migrants as well as those receiving mi-

6 *B. Balassa*, The Theory of Economic Integration, 1962, 1.
7 *B. Balassa* (note 6), 14.
8 *B. Balassa* (note 6), 13.
9 *B. Balassa* (note 6), 84.

grants; it contributes to the GDP-growth and poverty reduction.[10] These gains are triggered by migration of both high-skilled and low-skilled labourers: the receiving economy profits form the transfer of knowledge by the high-skilled migrants, while the low-skilled migrants "fill occupations neglected by citizens, allowing the latter to move to higher-skilled jobs".[11] The sending countries benefit form remittances sent by migrants – both high-skilled and low-skilled – whose contribution to their economies exceeds by far the contributions of Foreign Direct Investment (FDI) and foreign "development aid".[12] It is suggested that the remittances are of particular importance in the low-income sectors of the sending state's economy. They help to create capital in emigrant's household, e.g. making a move to more capital-intensive farming methods possible.[13] In addition, emigration may create a chance for the low-skilled workers to upgrade their skills and acquire new ones; the accumulated skills and knowledge can be transferred to the migrant's country of origin ("social remittances").[14] Therefore, remittances are considered as an important factor of structural change.[15] The regulation of free movement of low-skilled workers seems to be of particular importance, since, as observed in the 2018 UNCTAD report, the migration in Africa takes place predominantly precisely in this domain.[16] Finally, it should not be forgotten that the decision to migrate or even to travel is also an important dimension of individual freedom.

There are of course risks of labour migration. One of these risks is the brain drain: if emigration tends to be skewed towards high-skilled migrants, their home country is likely to suffer loss of skilled labour.[17] Yet, as said, the

[10] Economic Development in Africa Report 2018. Migration for Structural Transformation (UNCTAD, 2018); see also *S. Nita*, Regional Free Movement of People: The Case of African Regional Economic Communities, Regions & Cohesion 3 (2013), 10 et seq.

[11] UNCTAD (note 10), 29.

[12] According to the 2018 UNCTAD study, remittances constituted 51 % of all private capital flows into Africa. See specifically for Ghana *V. Dodoo/W. Donkoh*, Nationality and the Pan-African State, in: T. Falola/K. Essien (eds.), Pan-Africanism, and the Politics of African Citizenship and Identity, 2014, 158; for Kenya *Y. Basnett*, Labour Mobility in East Africa: An Analysis of the East African Community's Common Market and the Free Movement of Workers, Development Policy Review 32 (2013), 134.

[13] By leaving his household, the emigrant also reduces the number of persons available in it as labourers. See UNCTAD (note 10), 140; also *Y. Basnett* (note 12), 133 with further references.

[14] UNCTAD (note 10), 140.

[15] UNCTAD (note 10), 143.

[16] UNCTAD (note 10), 84.

[17] UNCTAD (note 10), 30. The report's observation that the states losing high-skilled labour will be more likely to invest in education is a poor consolation. States losing high-skilled labour would normally struggle to mobilise resources for education only to see the graduates who have been educated using those limited resources leaving the country. Therefore, the

intra-African migration actually does not have that bias. Moreover, there is even some evidence that the facilitation of migration between Kenya and Rwanda for example, eventually boosted trade and investment and contributed to the creation of jobs both for Rwandans and Kenyans.[18] Secondly, migration is portrayed as a real, perceived, created, or exaggerated security threat and invoked by the governments to justify crackdowns on migrants.[19] No link has however been established between the presence of migrants and increased risk of conflicts; even though empirical research suggests such a likelihood due to "large numbers of refugees", this probability is still very low and it depends on many variables.[20] Thirdly, some economists have highlighted the detrimental effects of low-skilled migrants on the low-skilled workers in the host country.[21] And fourthly, some risks, such as e.g. human trafficking, concern the migrants themselves. The low-skilled workers are especially vulnerable as they are likely to work in an informal economy sector, where protection through the labour laws is very limited. This is a legitimate concern considering that the size of the informal sector is huge, amounting e.g. to 90 % of the total workforce in Tanzania, 82 % in Kenya and 72 % in Rwanda.[22]

The history of European integration is a classic example of capitalising on the benefits of free movement of labour. *Balassa's* script on regional integration was generally followed: a common market was established and common economic policies were introduced followed by a monetary union. Europe went even further and delinked the free movement of people from their economic activity in 1992, thereby progressing towards a political union. *Balassa's* script also laid groundwork for the regional integration in Africa. The Treaty Establishing the African Economic Community (AEC) signed 1991 in Abuja, often referred to as Abuja Treaty and the 1999 Treaty

South African government, e.g., prohibited the recruitment of foreign health-care professionals from developing countries, including from SADC partner States (UNCTAD [note 10], 82). Yet on the other hand, South Africa still pursues policies to attract high-skilled workers in other areas (UNCTAD [note 10], 79).

[18] UNCTAD (note 10), 80. The UNCTAD study suggests a general "pro-trade effect" of migration (UNCTAD [note 10], 109).

[19] See further below, Sections IV. 2. and 3.

[20] *B. E. Whitaker*, Migration within Africa and Beyond, African Studies Review 60 (2017), 213.

[21] *S. Nita* (note 10), 12.

[22] *J. Masabo*, Harmonisation of Labour Laws in the East African Community: An Assessment of Progress and Prospects, in: J. Döveling/H. I. Majamba/R. Frimpong Oppong/U. Wanitzek (eds.), Harmonisation of Laws in the East African Community, 2018, 192 et seq.

for the Establishment of the East African Community provide for some versions of this script as obligatory steps of integration to be followed.[23]

However, *Balassa's* script, in addressing economists, does not say *how* the various integration steps are to be achieved and implemented. And the major difference between the regional integration in Africa and in Europe is not the integration script itself, but the methods of its implementation.[24] As will be demonstrated, the usefulness of decision-making mechanisms devised to achieve the free movement in Africa, have been quite limited.

2. Pan-Africanist Ethos

The free movement can or could be driven not only by the economic benefits, but also by the ideology of Pan-Africanism, an "enduring dedication" which is affirmed in the FMP preamble.[25] Although Africa was never a homogeneous territory historically, the Pan-Africanism emerged as an idea of "common struggle"[26] for liberation from white oppression; it was carved by African intellectuals in the diaspora and born out of a common traumatic experiences of slavery and subjugation by whites and the yearning for freedom and dignity by Africans.[27] But Pan-Africanism also had its "territorial turn";[28] the reality of a partitioned continent by the European colonialists made the independence of the individual territories a paramount objective of the Pan-Africanists, without which an African unity, even if considered to be of crucial importance, could not be accomplished.[29] There

[23] See Art. 2 of the EAC-Treaty (as read together with the preamble) and Art. 6 (1) of the AEC-Treaty (Abuja Treaty) respectively.

[24] See *T. Milej*, Legal Harmonisation in Regional Economic Communities – The Case of the European Union, in: J. Döveling/H. I. Majamba/R. Frimpong Oppong/U. Wanitzek (eds.), 139.

[25] See also the preamble of the 2000 Constitutive Act of the African Union.

[26] *V. Dodoo/W. Donkoh* (note 12), 155. A comprehensive and quite recent overview over the history of the Pan-Africanist movement is offered by *H. Adi*, Pan-Africanism. A History, 2018.

[27] *M. N. Amutabi*, Nationalism in Africa: Concepts, Types and Phases, in: S. Ojo Oloruntoba/T. Falola (eds.), The Palgrave Handbook of African Politics, Governance and Development, 2018, 188, 192 et seq., 196 et seq. ("a collective nationalist appeal against foreigners"); *V. Dodoo/W. Donkoh* (note 12), 151; *S. Ogungbemi*, The Spirit of Pan-Africanism and Nationalist Consciousness: The Way Forward in the 21st Century, in: T. Falola/K. Essien (note 12), 202 and 205.

[28] *S. Ogungbemi* (note 27), 208 with further references.

[29] *V. Dodoo/W. Donkoh* (note 12), 152; *S. Ogungbemi* (note 27), 208.

were already differing views on how to go about achieving Pan-Africanism, even before African states got independent.[30]

An interesting question, explored in detail further below, is why Pan-Africanism, having proven itself as a powerful vehicle for liberation, is not equally powerful when it comes to bringing about free movement of Africans across borders. While deliberating on why the achievement of African unity remains elusive, African authors cite a number of factors, many of them focusing on the African leaders: mutual mistrust, a loyalty conflict between the Pan-African commitment and the well-being of their own people, but also simply lack of willingness to give up the position within one's own country and persistence of dictatorial rulers in some of the African states; other reasons include ideological divisions, particularly visible during the cold war, and entrenched foreign interests, which include support for dictators.[31] *M. N. Amutabi* speaks of different competing types nationalisms: local nationalism, regional nationalism, nation-state nationalism, continental African nationalism, Black nationalism and Pan-Africanism [32] (which includes the African diaspora), which resulted in tensions in which even the leading protagonists of Pan-Africanism were caught up.[33] But notwithstanding, it is a fact that the idea of Pan-Africanism inspires and keeps alive various projects for African integration since decolonisation, most notably the Organisation of African Unity (OAU) and the African Union.[34]

3. Pan-Africanism Translated into Regional Integration Approaches

Seeing that the international regulations on free movement are embedded in broader regional integration schemes (modelled after *Balassa's* script), the progress on free movement is intrinsically linked to the implementation of those schemes. And as much as Pan-Africanism provides a strong incentive for Africa to integrate, the aforementioned tensions within Pan-Africanism have affected the way the regional integration has been approached. *E. Haas*

[30] *S. Ogungbemi* (note 27), 208; *G. N. Uzoigwe*, Pan-Africanism in World Politics: The Geopolitics of the Pan-African Movement, 1900-2000, in: T. Falola/K. Essien (note 12), 228.

[31] *M. N. Amutabi* (note 27), 199; *V. Dodoo/W. Donkoh* (note 12), 159 and 161; *G. N. Uzoigwe* (note 30), 230 et seq.

[32] *M. N. Amutabi* (note 27), 188.

[33] *H. Adi* (note 26), 149 et seq.; *M. N. Amutabi* (note 27), 199; *G. N. Uzoigwe* (note 30), 230.

[34] See *V. Dodoo/W. Donkoh* (note 12), 156 et seq.

famously identified three major approaches to decision-making within an integration project: the "minimum common denominator" approach, typical for classic diplomatic negotiations, in which "equal bargaining partners gradually reduce their antagonistic demands by exchanging concessions of roughly equal value";[35] the "splitting the difference" approach, where the bargaining parties use mediatory services of a secretary-general or an expert gremium;[36] and finally the "upgrading the common interest" method, which is aligned to procedures "typical of a political community with its full legislative and judicial jurisdictions, lacking in international relations" and described by *Haas* as "supranational".[37] It relies on an institutionalised mediator with autonomous powers combining intergovernmental negotiations with the participation of experts, interests groups, and parliamentary representation.[38] It further has a tendency to produce "spill-over" effects; the initial tasks conferred upon the institutionalised mediator are expended, since the mediator cannot complete them without being conferred further powers.[39] Nonetheless, *Haas* links the greatest amount of integration, even if not necessary consisting in the "upgrading of common interest", to what he calls parliamentary diplomacy, which is based on a framework for cross-border public debates governed by rules for its conduct, conclusion and formal resolution arrived at by majority vote.[40] The efficiency of this method lies in the fact that it does not involve only appointed government agents, but a variety of other actors (e.g. parliaments, professional organisations, civic groups etc.); it "opens up areas of manoeuvre which are foreclosed in negotiations exclusively conducted by carefully instructed single agents of foreign ministries".[41] The two latter models are in line with a more recent, liberal conception of international relations put forward by *Anne-Marie Slaughter*.[42] According to this conception, international law should aim at "encouraging and strengthening the formation and development of transnational society" through "disaggregation of sovereignty" and involvement in the creation of the society of various centers of political authority – for example, the national parliaments, the courts, and the adminis-

35 *E. B. Haas*, International Integration: The European and Universal Process, International Organisation 15 (1961), 366 (367).
36 *E. B. Haas* (note 35).
37 *E. B. Haas* (note 35), 368.
38 *E. B. Haas* (note 35).
39 *E. B. Haas* (note 35).
40 *E. B. Haas* (note 35).
41 *E. B. Haas* (note 35).
42 *A.-M. Slaughter*, International Law in a World of Liberal States, EJIL 6 (1995), 503 et seq.

trators. A regional integration community relying on such a "transnational society" would ensure a more effective representation of social actors,[43] compared to a regional community driven solely by intergovernmental cooperation. However, the "transnational society" will generate a pull towards integration only if the government allows for a certain degree of pluralism and democracy, which will in turn allow for the across-border cooperation of social groups and actors with converging interests to develop and articulate their agendas and put pressure on the governments and institutions.[44]

Even though the "common interest" of African states lies in the enhancement of free movement,[45] the decision-making mechanisms in the African RECs – unlike in the European Union (EU) – rarely go beyond the minimum common denominator approach and are owned by the executive branch of the government. As section III of the present paper demonstrates, it is this approach that has been used to regulate on the free movement of people in Africa. In the EAC, liberalism and parliamentary diplomacy might be embraced on the level of declarations of principles (democracy, people-centeredness, subsidiarity),[46] but not in the actual procedural rules and practice. As has been argued elsewhere,[47] law-making in the EAC is limited to deals between national bureaucracies; the recourse to supranational legislation is minimal, each Head of State can veto a piece of legislation passed by the regional parliamentary body[48] and the Protocols – treaties negotiated by representatives of the executive branch of the national government – remain the major instrument of the integration agenda.[49]

It is important to note that the persistent use of the minimum common denominator approach to the African regional integration in general and the free movement in particular can be traced back to a split in the Pan-African movement. Originally, free movement as such has not been on the Pan-Africanist agenda. But the visions that were discussed prior to independence went further than ensuring cross-border movement of people. For example, the West African National Secretariat established in 1945 in London envisaged "building of African National Unity",[50] while the Pan-African confer-

[43] *A.-M. Slaughter* (note 42), 522 et seq.
[44] The point is also made by *E. B. Haas* (note 35), 374.
[45] This is at least what the policy declarations referred to in the following section attest.
[46] See Arts. 6 (d) and 7 (2) of the EAC-Treaty.
[47] *T. Milej*, What Is Wrong about Supranational Laws? The Sources of East African Community Law in Light of the EU's Experience, HJIL 75 (2015), 579 (609).
[48] See Art. 63 of the EAC-Treaty.
[49] It is a situation of implementation of one piece of primary law (the EAC-Treaty) by another piece of primary law (a Protocol), *T. Milej* (note 47), 583.
[50] *H. Adi* (note 26), 129.

ence held in Kumasi in 1953 was convened with a view of establishing a "strong and truly federal State".[51] But the enthusiasm for a common African state faded as the divisions within the Pan-African movement set in. The All-African People's Conference held in Accra in 1958 spoke of creating a "United States of Africa" or a "Pan-African Commonwealth of Free States". The split within the Pan-African movement was sealed in 1961 with two conferences: one held in Casablanca and another one in Monrovia. A group of States led by Ghanaian president and the dedicated Pan-Africanist *Kwame Nkrumah* met for the Casablanca conference, forming an informal group of states commonly referred to as Casablanca group, which was advocating for a political unity and federation of all African States.[52] *Nkrumah* himself was stressing the need to "surrender of our sovereignty, in whole or in part, in the wider interest of African unity".[53] This program was followed by action: an ultimately short lived Union of African States comprising Ghana, Guinea and Mali was created as a pilot scheme for the future continental unity.[54] But the bid for a federation and *Nkrumah's* leadership met opposition from the larger Monrovia group led by Nigeria. The Monrovia conference resolved that Pan-Africanism was not about a political integration, but a unity of aspirations.[55] With regard to *Nkrumah*, the conference rejected political leadership and opted for gradual economic integration guided by the principle of non-interference;[56] this principle eventually became bedrock for the Organisation of African Unity. The basis for integration by minimum common denominator was thus set. In his concession, *Nkrumah* warned that the rejection of political unity would lead to pursuit of self-interest by African leaders.[57]

It is evident that *Nkrumah's* call for the political unity was closer to the "upgrading of common interest" approach to integration advanced by *Haas*, compared to the approach eventually adopted in Africa. *Nkrumah* also floated the idea of a common market, discussed as early as 1960, during the Second All African People's Conference in Tunis.[58] Characteristic for this *Nkrumahnian* common market concept were three elements. First, *Nkrumah* did not really discuss the free movement of people as the com-

51 *H. Adi* (note 26), 136.
52 *V. Dodoo/W. Donkoh* (note 12), 152.
53 *K. Nkrumah*, Africa Must Unite, 1963, 149.
54 *K. Nkrumah* (note 53), 142; *H. Adi* (note 26), 150.
55 *H. Adi* (note 26), 151.
56 *H. Adi* (note 26); see also *K. Nkrumah* (note 53), 156 and *V. Dodoo/W. Donkoh* (note 12), 152.
57 *K. Nkrumah* (note 53), 147 and 158.
58 *H. Adi* (note 26), 146.

mon market's constituent element, seeing that free movement would be difficult to achieve in the early sixties due to weak infrastructure inherited from colonialists. Rather, the common market itself was meant to overcome the colonial structure of communication with "all forms of communication pointed outwards".[59] Second, the African common market would serve as an alternative to the linking of some selected African economies to the European common market emerging at that time.[60] And finally, the concept was not based on private sector initiatives; it was a rather statist (developmentalist) agenda of a common selling policy geared towards more trade revenues, common economic planning and top-down deployment of resources.[61] Ironically, the last point is perhaps the most lasting legacy of *Nkrumah's* pan-Africanist thought. Traces of it are still evident in the current thinking about free movement of people, despite the many treaty stipulations providing for more liberal, private-sector-driven projects. As will be discussed, the states are reluctant to relinquish their control of the movement of people, since they regard this as an economic instrument of allocation of resources (in form of labour and skills) rather than as an individual freedom.

4. Policy Declarations on Free Movement

Various policy agendas on the global, regional (African) and sub-regional (African RECs) levels acknowledge the benefits of "safe, orderly and regular migration",[62] as the 2030 Agenda for Sustainable Development terms is. At the global level, the said agenda recognises "the positive contribution of migrants for inclusive growth and sustainable development".[63] However, when it comes to action plans, the approach to opening of borders is rather cautious, to say the least. Accordingly, the Sustainable Development Goal (SDG) 8 concerns the working environment of migrant workers (target 8.8), while the SDG 10 aims at facilitation of "orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies" (target 10.7). In addition, target 10.c sets the year 2030 as the deadline for reducing "to less than 3 per

59 *K. Nkrumah* (note 53), 154.
60 *K. Nkrumah* (note 53), 143.
61 *K. Nkrumah* (note 53), 163 et seq.
62 Resolution adopted by the General Assembly on 25.9.2015, UN Doc. A/70/L.1, Transforming Our World: the 2030 Agenda for Sustainable Development, para. 29.
63 UN Doc. A/70/L.1 (note 62).

cent the transaction costs of migrant remittances and eliminate remittance corridors with costs higher than 5 per cent". The commitment to "cheaper, faster and safer" migrant remittances is reaffirmed in the New York Declaration for Refugees and Migrants,[64] while the "facilitation" of migration is put in the context of "national legislation"[65] and each State's right "to determine whom to admit to its territory, subject to that State's international obligations".[66] One can hardly discern a call to open borders to free movement of people and labour from these formulations. The Global Compact on Migration[67] which emanated from the New York declaration makes a significant contribution to the global discourse on migration, moving it away from securitised vocabulary,[68] and seeing it also e.g. as a resource for development.[69] But by reaffirming the states' sovereign right to admit aliens,[70] the Global Compact on Migration stops short of advancing an open door policy. Moreover, even if it sets important standards for safe and orderly migration,[71] those standards are not legally binding.[72]

The policy documents on movement of persons and labour within the African continent are different.[73] Already the 1980 OAU Lagos Plan of Action recognised explicitly a need for cross-border movement of labour, even if with some caution; African Heads of State envisaged an "adoption of employment policies that permit free movement of labour within sub-regions, thus facilitating employment of surplus trained manpower of one country in other Member States lacking in that requisite skill".[74] This objective was translated into legal commitments in the 1991 Abuja Treaty discussed further below. Much more ambitious is the current AU policy framework "Agenda 2063. The Africa we want". As one of its aspirations, it proclaims an "integrated continent, politically united based on the ideals of Pan Afri-

64 UN Doc. A/70/L.1 (note 62), para. 46.
65 UN Doc. A/70/L.1 (note 62), para. 41.
66 UN Doc. A/70/L.1 (note 62), para. 42.
67 Resolution adopted by the General Assembly on 19.12.2018, UN Doc. A/73/L.66, Global Compact for Safe, Orderly and Regular Migration.
68 On the securitised discourse on migration, see further below, sections IV. 2. and 3.
69 Global Compact (note 67), para. 8 (our vision and guiding principles).
70 Global Compact (note 67), para. 15 (c).
71 The compact sets out 23 objectives for safe and orderly migration, which are broken down to more concrete commitments (Global Compact [note 67], paras. 16 et seq.).
72 Global Compact (note 67), para. 7.
73 For a comprehensive overview see *O. A. Maunganidze*, Freedom of Movement. Unlocking Africa's Development Potential, 2017, 3 et seq.
74 Lagos Plan of Action for the Economic Development of Africa, 1980-2000, OAU Conference Document, para. 111.

canism and the vision of Africa's Renaissance";[75] the "free movement of people" is mentioned alongside "continental institutions" as one of the elements of the political unity in Africa – a culmination of the integration process.[76] The Preamble to the FMP cites a number of further policy documents and decisions by the AU organs promoting the idea of free movement of people and labour, one of them being a decision of the AU Peace and Security Council from 2017 acknowledging that benefits of free movement "far outweigh" the real and potential security treats.

However, looking at more concrete policy documents, such as the 2016 revised Migration Policy Framework for Africa and Plan of Action 2018-2027, one realises that the objectives set out there do not go as far as the Agenda 2063. While acknowledging the benefits of labour migration and declaring the FMP and the African Passports "flagship projects", the Migration Policy Framework does not forthrightly call for abolishment of barriers to free movement; it is more about putting in place "better migration governance"[77] through harmonisation of policies and laws protecting migrants' rights, transparent recruitment policies, recognition of qualifications, etc. As the document puts it, "migration is inevitable, and needs to be better governed in an integrated manner through comprehensive, human-rights based and gender-responsive national migration strategies and policies".[78] It further stresses the economic importance of remittances[79] and that "regional skills pooling enabled through mobility can help to address this challenge and allocate labour where it is most productive and needed".[80]

In the Regional Economic Communities, the free movement also ranks at the top of policy agendas. Describing the aspirations of East Africans, the 2016 EAC document "East African Community – Vision 2050" – a political commitment of the Heads of State – speaks of a future in which the free movement of people is guaranteed, as they "live in a borderless single region, providing a single space for operations within the framework of an East African Federal State".[81] Quite interestingly, the EAC Vision 2050 treats the free movement as already achieved and depicts it even as one of the strengths of the Community, in a chapter devoted to a "situational anal-

75 African Union Commission, Agenda 2063. The Africa we want, Addis Abbaba 2015, para. 8.
76 African Union Commission, Agenda 2063 (note 75), para. 23.
77 African Union Commission, Agenda 2063 (note 75), para. 11.
78 African Union Commission, Agenda 2063 (note 75).
79 African Union Commission, Agenda 2063 (note 75), para. 19.
80 African Union Commission, Agenda 2063 (note 75), para. 14.
81 African Union Commission, Agenda 2063 (note 75), para. 34.

ysis".[82] As will be shown, this statement is far from reality. The Common Market for Eastern and Southern Africa medium-term strategic plan 2016-2020 looks at the free movement of people including the right of residence and establishment as an important strengthening element of the markets' integration, which it defines as the organisation's first strategic objective.[83] The COMESA Secretariat and the Member States are urged to embark on the sensitisation campaigns "to increase awareness on the benefits of free movement of persons as well as how to address vices that comes with it such as human trafficking".[84] The ECOWAS Commission, in exercising an explicit mandate conferred upon it by the Heads of State, developed a strategy paper devoted exclusively to migration issues: the ECOWAS Common Approach on Migration. Even though the paper is quite conservative in outlining steps towards a full realisation of free movement, it states that "free movement of persons within the ECOWAS zone is one of the fundamental priorities of the integration policy of ECOWAS Member States".[85]

This brief overview of political declarations suggests that the general attitude towards migration is positive and that the states would upscale their efforts to make the free movement of people and labour possible within a foreseeable time. As a bottom line, it is expected that there exists a legal framework for migration governance that would maximise migration's benefits and minimise its risks. There are indeed repeated calls for such a managed migration framework.[86] The following sections will show how the policy declarations, which acknowledge the benefits of regularised migration and seek to promote it, are translated into the language of legal commitments as well as how those commitments actually affect the reality on the ground.

[82] East African Community – Vision 2050, Arusha, February 2016, 16 et seq., see also 27.

[83] COMESA Secretariat, Medium Term Strategic Plan 2016-2020. In pursuit of Regional Economic Transformation and Development, no date indication, <www.comesa.int>, 19.

[84] COMESA Secretariat, Medium Term Strategic Plan 2016-2020 (note 83).

[85] ECOWAS Commission, 33rd Ordinary Session of Heads of State and Government, Ouagadougu, 18.1.2018, ECOWAS Common Approach on Migration, 4.

[86] See e.g. *S. Nita* (note 10), 7.

III. Legal Framework for the Free Movement

1. Regulation in the EAC

According to the EAC-Treaty, the Community was established by Kenya, Tanzania and Uganda – Burundi, Rwanda and South Sudan joining later – in order to "develop policies and programmes aimed at widening and deepening co-operation among the Partner States in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit" (Art. 5 (1) of the EAC-Treaty). As noted earlier, the establishment of a Common Market is regarded as one of the milestones towards the establishment of a political federation, which is, according to Art. 5 (2) of the Treaty, the ultimate goal of the integration within the EAC. In Art. 76 (1), the Treaty specifies that there shall be a Common Market characterised by the free movement of labour, goods services, capital, and the right to establishment. The Common Market shall be established through a Protocol concluded by the Partner States (Art. 76 (4) of the EAC-Treaty); its establishment shall be "progressive" and "in accordance with schedules approved by the Council" (Art. 76 (4)). More specifically, according to Art. 104 of the EAC-Treaty,

> "[t]he Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence of their citizens within the Community".

Also in this case, the cooperation should be operationalised through a Protocol (Art. 104 (2) of the EAC-Treaty). Clearly, these norms spell out policy objectives and cannot be directly invoked by individuals seeking to move across borders; they lack sufficient precision and are conditional upon further action of the Partner States. Hence, they do not meet the criteria for being directly effective.[87] And the idea of free movement operationalisation through a Protocol – a Treaty under international law – reflects the minimum common denominator approach.

The Protocol on the Establishment of the East African Community Common Market Protocol (CMP) concluded in 2009 presents a different case as it is more forceful in its formulation: according to Art. 7 of the CMP, the Partner States "guarantee" the free movement of persons for the citizens

[87] See *T. Milej* (note 47), 581. In the *Mohochi* case (*Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*, EACJ Ref. No. 5 of 2011), the East African Court of Justice (EACJ) found a violation of Art. 104 of the EAC-Treaty, but did so in conjunction with Art. 7 of the CMP (see further below), which spells out concrete guarantees.

of the Partner States. A similar "guarantee" applies to the free movement of workers (Art. 10), the freedom of establishment (Art. 13) and the freedom of residence (Art. 14).

However, the ample meaning of these provisions can only be established if read together with various Annexes to the CMP, which according to Art. 52 of the CMP, form an integral part of the Protocol. These annexes severely limit the personal scope of application of the CMP's free movement rights and make their enjoyment subject to various procedures, often referred to in vague terms and thus leaving to the Partner States space for discretion. To start with the structure of this regulatory framework, Annex I on the free movement of persons specifies that its provisions do not apply to citizens of the Partner States entering a Partner State as a worker or as a self-employed person (Regulation 4 (e)). Accordingly the free movement applies only to visitors, students, medical patients, persons in transit etc.[88] On the other hand, Annex IV specifies that the right of residence is an accessory right, meaning that a citizen of the Partner States is entitled to this right, only if she moves to another State as a worker or a self-employed person or as a spouse, child or dependant of such a person (Regulation 4 of Annex IV).

The Annexes on the freedom of establishment, free movement of services (involving the physical presence of the service provider in another Partner State) and the free movement of workers are interrelated. The Annex on the freedom of establishment (Annex III) provides that the removal of restrictions regarding the freedom of establishment "relating to trade in services" shall be in accordance with the schedule on the freedom of services, which is included in Annex V. This is a crucial provision, since many self-employed persons establish themselves as service providers. All other "administrative restrictions" to the right of establishment shall be removed "immediately after the coming into force of the protocol". Annex V on its part, lists different service sectors (e.g. legal services, architectural services, research, advertising etc.) in which the services should be "liberalised". There is a separate list for each Partner State and there are different deadlines for different sectors; the last deadline for "liberalising" expired in 2015. Within each sector, the Partner State concerned makes a separate commitment to liberalise with regard to each of the four different modes of service provision specified therein; separate commitments are also made with respect to the market access and with respect to the national treatment. And almost all commitments regarding service provision that includes physical

[88] Regulation 4 of the Annex I lists precisely those categories of persons, but the list is not intended to be an exhaustive enumeration.

presence of a service provider in another Partner State are made with reference to a Schedule on the Free Movement of Workers.

The Schedule on the Free Movement of Workers is included in Annex II. As does Annex V, it also takes a positive list approach. There is a separate list of professions for each Partner State with regard to which the free movement of workers is to be implemented within different deadlines (see Regulation 15 of Annex II). Also here, the last deadline expired in 2015. The lists of professions for different countries vary: while Kenya commits to open its labour market to the highest number of professions, the list applying to Burundi is the shortest. Yet, none of these lists goes beyond a quite small circle of specialists. The commitment to the free movement is thus limited to high-skilled workers; it is exclusive to the detriment of the overwhelming majority of workers in the EAC. And this bias towards high skilled workers does not maximise the potential benefits of the free movement. As explained above, this would require the opening of markets also to low-skilled workers.

To sum up, by virtue of multiple cross-references in the annexes, the Annex II schedule on the free movement of workers is the decisive regulation of the opening of the labour markets in the EAC. And this opening is meant to benefit only a small group of high-skilled workers. In addition, self-employed persons, who are *not* engaged in service-related activities, may benefit from the freedom of establishment according to Annex III. One may assume that also this group will not be particularly big.

Also the substance of the CMP's free movement guarantees as determined in the annexes are quite restricted. Some progress can be reported mainly on the free movement of persons who are crossing borders for other purposes than gainful activities. For instance, the retention of work permit requirement impedes the freedom of establishment and the free movement of workers. There is no waiver for the professionals listed in the annexes; rather, the annexes set out some procedural rules on how the work permit should be applied for and processed. These rules do not substantially deviate from what is a standard application procedure;[89] they leave much discretion for the immigration authorities. For example, while listing documents, which the applicant must present on application, the relevant annex regulations obligates her to present also "any other document the competent au-

[89] For example, while outlining the work permit requirements for the EAC citizens, the website of Ugandan Immigration simply refers to the categories of work permits applicable to all foreigners: "Applicant should fill work permit form and fulfill requirements under the specific category of work permit sought. (Refer to categories above)", <http://www.immigration.go.ug>.

thority may require".[90] The work permit is also to be issued for only two years, subject to renewal.[91] Importantly, there is no clear provision on the work permit fees, which are generally quite high (2000-2500 US$ per year).[92] In practice, Uganda charges EAC citizens full fees, Tanzania charges a reduced fee, while Kenya and Rwanda do not charge the EAC citizens any fees.[93] Finally Regulation 7 (1) of each of the relevant annexes makes a – quite shocking – statement that "a competent authority may reject an application for a work permit" without making any references to the valid grounds for such a rejection. The "competent authority" is only obligated to state its reasons; there is also a right to appeal. This provision must be interpreted in the sense that the only valid reason for the rejection must be that the applicant does fulfil the requirements expressly stated in the CMP or the Annexes, e.g. she does not belong to the categories of professionals listed in Annex II. Bearing in mind the language of the CMP, which "guarantees" the respective free movement freedoms, the decision on the rejection should not be left to the discretion of the Partner States' administrations. Otherwise the "guarantee" would be void of any significance and the very object and purpose of the CMP would be defeated.

On a positive note, it is evident that as meagre as the CMP's free movement guarantees appear, they must be regarded as directly effective and can be enforced in the national courts. Earlier ambiguities in this regard were clarified by the East African Court of Justice (EACJ) in *The Attorney General of the Republic of Uganda v. Tom Kyahurwenda,* where the Court confirmed that the national courts have concurrent jurisdiction over the Treaty.[94] Moreover, the EACJ itself is a very accessible court; individuals may refer cases to it without fulfilling the usual standing requirements;[95] there is also no need to exhaust domestic remedies. Accordingly, an individual who is denied a work permit, but her profession is listed in Annex II or she intends to establish a business not related to provision of services may challenge such a denial in a national court of the Partner State concerned or in the EACJ.[96] However, no such case has ever been filed to date.

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90 Regulation 6 (2) of Annex II and Regulation 6 (4) (e) of Annex III.

91 Regulation 6 (7) of Annex II and Regulation 6 (5) of Annex III.

92 According to Regulation 6 (9) of Annex II, the EAC Council of Ministers is to come up with a fee schedule.

93 Information according to the websites of the relevant Immigration Departments and the EAC, <https://www.eac.int>.

94 *The Attorney General of the Republic of Uganda v. Tom Kyahurwenda*, EACJ App. Division, Case stated No. 1 of 2014.

95 *T. Milej*, Human Rights Protection by International Courts – What Role for the East African Court of Justice, AJICL 26 (2018), 108, (113 et seq.).

96 *T. Milej* (note 47), 598.

2. Regulation in other African Regional Economic Communities

Virtually all treaties establishing the RECs contain a provision on the facilitation of the free movement of people.[97] Those regulations have two facets in common: first, they look at the free movement as an aspect of a broader integration project (establishment of an economic community or a common market). Second, the language of the provisions is quite cautious; the obligations to remove obstacles to free movement are framed as policy objectives and not as enforceable rights. The COMESA-EAC-Southern African Development Community (SADC) agreement establishing a tripartite free trade area is only indirectly relevant for the free movement of people as far as free trade in services and cross-border investments are concerned.[98]

As is the case of the EAC, the free movement stipulations in the founding treaties are to be further elaborated upon and concretised in Protocols to be adopted subsequently, or – as this is the case of the Economic Community of Central African States (ECCAS) – jointly with the Treaty as its annex. Some of the RECs have already adopted such Protocols, others – like the Intergovernmental Authority on Development (IGAD) – are planning to do so.[99] The minimum common denominator approach is very visible here too.

The ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment is the oldest document of this type, adopted as early as in 1979 (Implementing Protocol). Its text starts on a high note proclaiming the right of the Community citizens to "enter, reside, and establish in the territory of Member States".[100] Yet, this right is not self-executing, as according to the same provision, it shall be established progressively. Moreover, it is subjected to a very long transitional period of 15 years (Art. 2 (3)). The right to "enter, reside and establish" shall be implemented in 3 phases corresponding to the three components of the said right. Substantive provisions are made only for the phase one concerning visa free entry and use of vehicles abroad (Art. 5); the two subsequent phases (right of residence and right of establishment) are left to regulation by subsequent Annexes to the

97 For an overview see UNECA, <https://www.uneca.org>; also *S. Nita* (note 10), 17.

98 Those aspects are however to be dealt with in later negotiation stages (Phase II negotiations), see Art. 45 of the Agreement Establishing a Tripartite Free Trade Area among the Common Market for Eastern and Southern Africa, the East African Community and the Southern African Development Community.

99 See Press IGAD press release, 25.3.2018, available at <www.igad.int>.

100 Art. 2 (1) of the ECOWAS 1979 Protocol.

Protocol.[101] Such instruments were indeed concluded, a supplementary protocol on the implementation of the second phase was concluded in 1986 (Second Phase Protocol) and a similar one on the third phase in 1990 (Third Phase Protocol) bringing the minimum common denominator approach to a higher level. While the former instrument retains a work permit requirement,[102] the latter one simply states that "in matters establishment", non-discriminatory treatment shall be provided to nationals of other Member States.[103] This right in nonetheless also not self-executing: it is for the member states to implement it through "legislative and other measures".[104] And even more importantly, the Member States are authorised to opt out of the obligation to provide non-discriminatory treatment if the state is "unable" to provide for the same for a "specific activity". For such an opt-out, it is sufficient to simply give notice to the ECOWAS-Secretariat.[105] The Second Phase Protocol provides for non-discrimination of those who already enjoy the right of residence.[106] The Implementing Protocol does not provide for mechanisms to enforce the "enter, reside and establish" rights of individuals, but rather leaves it for the States to settle all disputes amicably.[107] Interestingly, the Second Phase Protocol goes further and obligates the states to provide for a "right of recourse, even when this infringement has been committed by persons exercising their official functions"; this obligation is however subject to the Member States' "constitutional procedures".[108] But again, the Third Phase Protocol does not include such an obligation.

As noted, the ECCAS protocol on free movement forms an annex to the treaty establishing the ECCAS.[109] It uses a relatively forceful language with regard to individual rights; the protocol proclaims that "Nationals of Member States shall have freedom of movement" defining different categories of persons (tourists, workers etc.) enjoying the free movement. It provides for

101 Art. 2 (4) of the ECOWAS 1979 Protocol.

102 Art. 5 of the 1986 ECOWAS Supplementary Protocol on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, The Right of Residence and Establishment (Doc. A/SP.1/7/86).

103 Art. 4 (1) of the 1990 ECOWAS Supplementary Protocol on the Third Phase (Right of Establishment) of the Protocol on Free Movement of Persons, The Right of Residence and Establishment (Doc. A/SP.2/5/90).

104 Art. 13 of the 1990 ECOWAS Supplementary Protocol.

105 Art. 4 (2) of the 1990 ECOWAS Supplementary Protocol.

106 Art. 23 of the 1986 ECOWAS Supplementary Protocol.

107 Art. 7 of the 1979 ECOWAS Protocol.

108 Art. 26 of the 1986 ECOWAS Supplementary Protocol.

109 Protocol Relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States signed in Libreville in 1983, Annex IV-11. (ECCAS Protocol).

the limitations of those rights on one hand,[110] while providing for national treatment of those who have already accessed the labour market. Again, the implementation should be through a gradual abolishment of restrictions by the Member States.[111] Similarly to the ECOWAS-Protocol, the ECCAS instrument provides for long transitional periods: in the case of freedom of movement (of both tourists and workers), it should take four years, while the freedom of establishment should be operationalised within twelve years. Yet, even if the free movement is framed as an individual right, no enforcement mechanisms for individuals are provided for.

Under COMESA, the 1984 Protocol on the Gradual Relaxation and Eventual Elimination of Visa Requirements (sometimes referred to as COMESA Visa Protocol) was to give way to a more comprehensive instrument adopted in 1998: the Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence (COMESA Free Movement Protocol). The 1993 COMESA Treaty stipulates that the COMESA Visa Protocol should remain in force until a new comprehensive instrument, which the COMESA Free Movement Protocol from 1998 became, enters into force.[112] Given that the latter has been signed only by very few states,[113] the old COMESA Visa Protocol is still the treaty which actually governs the liberalisation of visa regimes. The guarantees it gives are rather weak as the protocol neither creates any individual rights, nor provides for remedies; the implementation is a matter of the Member States,[114] which are merely called upon to cooperate.[115] They retain the right to refuse entry for persons whose presence is "not conducive to the public interest".[116] The signatory States however made two meaningful promises in the COMESA Visa Protocol: first, to introduce visa on arrival as a first step for liberalisation of the visa regime,[117] and second, to grant a visa-free entry for the nationals of other Member States for up to 90 days no later than eight years after the definitive entry into force of the Protocol.[118] This implementation deadline expired a long time ago.

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[110] E.g. a person entering as a tourist must prove that she can support herself (Art. 3 (2) of the ECCAS Protocol). The freedom of workers is subject to limitations subject to on the grounds of public order, public safety, and public health. (Art. 3 (4) of the ECCAS Protocol).

[111] Art. 4 (a) of the ECCAS Protocol.

[112] Art. 164 (3) of the COMESA Treaty.

[113] For references see <https://www.uneca.org>.

[114] Art. 7 of the 1984 COMESA VISA Protocol.

[115] Art. 5 of the 1984 COMESA VISA Protocol.

[116] Art. 3 of the 1984 COMESA VISA Protocol. This awkwardly broad formula leaves it to the States to refuse entry to individuals covered by the Protocol at their whim.

[117] Art. 2 (1) of the 1984 COMESA VISA Protocol.

[118] Art. 2 (2) of the 1984 COMESA VISA Protocol.

Interestingly, the COMESA Free Movement Protocol from 1998 signed 14 years after the conclusion of the COMESA Visa Protocol takes up the issue of visa requirements again, but in a very cautious manner. According to Art. 3, the first step towards achieving free movement should be granting of visas on arrival; only after two years after entry into force of the Protocol, the citizens of the Member States "shall be free to enter into the territory of another member State without requirement of a visa".[119] The respective provisions do not establish an individual right to move freely; rather, they outline a working programme for the Member States. This approach is consistent with the COMESA Free Movement Protocol's preamble, which speaks of adopting measures to "gradually and on step by step basis" remove restrictions to the free movement. However, the language of the Protocol is not consistent: providing for a freedom of movement of labour, Art. 9 (2) e.g., proclaims that this freedom shall entail a "right to" and subsequently lists various components of this right, e.g. "[right to] accept offers of employment actually made".[120] On the other hand, the implementation of this right is left to the Partner States, which shall remove restriction to the movement of labour within six years.[121] The "Right of Establishment" is referred to in the heading of Protocol's Part V, but the substantive provisions do not refer to individual rights. According to Art. 11, the Member States agree to abolish restrictions to right of establishment in progressive stages, within a period determined by the Council and in accordance with a "general programme" to be adopted by the same.[122] It should be added that pursuant to the COMESA Treaty, each Member State is allowed to unilaterally block the adoption of such a programme.[123] The "Right of Residence" is to be granted by the Member States in accordance with the "conditions to be adopted by the Council" within the time period which the Council determines.[124] Quite tellingly, the right is not granted by the Protocol itself, which, unlike the provisions on the right to establishment, also does not include any substantial provision on the right's content.

The SADC Protocol on Facilitation of Movement of Persons from 2005 (SADC Protocol) follows a modest objective "to develop policies aimed at the progressive elimination of obstacles to the free movement of persons",[125] making clear from the onset that it is not about conferring en-

119 Art. 4 (1) of the 1998 COMESA Free Movement Protocol.
120 Art. 9 (2) (a) of the 1998 COMESA Free Movement Protocol.
121 Art. 9 (1) of the 1998 COMESA Free Movement Protocol.
122 Art. 11 (1) and (2) of the 1998 COMESA Free Movement Protocol.
123 Art. 9 (6) and (7) read together with Art. 8 (9) of the COMESA-Treaty.
124 Art. 12 of the 1998 COMESA Free Movement Protocol.
125 Art. 2 of the SADC Protocol.

forceable individual free movement rights. It is not yet in force.[126] The implementation is subject to a further agreement between the parties to the Protocol ("Implementation framework"), which has to be agreed to after nine SADC Member States have signed. Such an agreement is apparently not yet in place. The Protocol further clarifies that "entry, residence and establishment" – the terms "right to" or "freedom of" are carefully avoided throughout the Protocol text – are to be understood as "phases in the process of building the Community". The visa-free entry is provided for in Art. 14, but it is not unconditional; e.g. the entitled person must prove to have sufficient means of support for the duration of the visit.[127] In addition, the parties may apply by "a notice in writing and for good reason" for an exemption from Art. 14.[128] The permit regime is explicitly retained for the rights of residence[129] and establishment.[130] Evidently, the cross-border movement of people is subject to so many caveats, that one cannot speak of "movement rights" or "free movement" at all. This is a huge contrast to the original draft of the Protocol from 1995 whose objective was to "to confer, promote and protect (a) the right to enter freely and without a visa the territory of another Member State for a short visit; (b) the right to reside in the territory of another Member State; and (c) the right to establish oneself and work in the territory of another Member State".[131] The watering down of the free movement guarantees was a deliberate move prompted by the opposition to the rights approach by the Governments of the SADC Member States.[132]

The regulation of free movement in the various REC Treaties and Protocols may be summarised as reluctant at best, in particular when it comes to granting of enforceable rights to individuals. Promises to act are made, sometimes even prescribing deadlines, but without offering credible enforcement mechanisms. Those actually in place are limited to oversight by political bodies of which the member States' governments are in full control. No mechanisms for "upgrading common interest" or "parliamentary diplomacy", according to *Haas*, have been put in place. The Treaties include various exceptions and opt-outs without clear spelling of the substance of rights leading to the ideas of progressiveness and incrementalism with long

126 For references see <www.sadc.int>.
127 Art. 14 (2) (c) of the SADC Protocol.
128 Art. 15 of the SADC Protocol.
129 Art. 17 (1) of the SADC Protocol.
130 Art. 19 of the SADC Protocol.
131 Cited after *J. O. Oucho/J. Crush*, Evaluating South African Immigration Policy after Apartheid, Africa Today 48 (2001), 139 et seq. (144).
132 For the history see *J. O. Oucho/J. Crush* (note 131), 149 et seq.

transitional periods carrying the day. Consequently, the relevant instruments, despite using legal language, remain more of political declarations rather than legally binding commitments.

3. Regulation in the FMP, the Abuja Treaty and the African Convention on Human and Peoples' Rights

An adoption of a Free Movement Protocol, which was effectuated in 2018 in Kigali, was envisaged in the 1991 Abuja Treaty Establishing the AEC. The Abuja Treaty forms a blueprint for the regional integration in Africa and also contains provisions for the free movement of people. It however takes rather a statist approach by looking at the free movement not as an individual right, as an entitlement or as an important element of personal freedom, but rather as an element of macro-economic planning. Moreover, it does not accord to the free movement any particularly prominent position.

Accordingly, Art. 4 (1) (b) of the Abuja Treaty sets the establishment of "a framework for the development, mobilisation and utilisation of the human and material resources of Africa in order to achieve a self-reliant development" as an objective of the Community and it is in the context of an effective use or deployment of human resources that the free movement of people is mentioned.[133] While Art. 42 (1) seems to proclaim a self-standing obligation to "adopt […] necessary measures to achieve progressively free movement" and to conclude a Protocol to this effect (Art. 42 (2)), Art. 71 (2) (e) of the Abuja Treaty links the free movement of people with "developing, planning and utilising" of human resources and even filling of "shortages of skilled manpower", revealing a bias towards the free movement of skilled professionals.

But as *Helfer* observes, the right to free movement is a hybrid right, which means that it can be found not only in the Treaties related to economic integration, but also in those concerning human rights.[134] Relevant provisions can also be found in the 1981 African Charter on Human and Peoples' Rights (AfChHPR) and the Abuja Treaty[135] as well as the EAC-

[133] See Art. 4 (2) (i) and Art. 71. Measures listed in Art. 4 (2) are meant to promote the objectives listed in Art. 4 (1).

[134] *R. L. Helfer*, Subregional Courts in Africa: Litigating the Hybrid Right to Free Movement of Persons, I.CON 16 (2018), 235 et seq. (236).

[135] Art. 3 (g) of the Abuja Treaty (note 23).

Treaty,[136] as the latter two declare the recognition, promotion and protection of African Charter's human rights guarantees as a fundamental principle. Yet, the scope of the respective guarantee is quite limited: Art. 12 of the AfChHPR provides for a right to leave a country (including one's own country), to return to one's own country and to move freely and choose a place of residence within the country. Within this scope of application, the said right indeed proved useful in a number of cases.[137] One must still be aware though, that Art. 12 of the Charter does not confer a right to enter any country (other than one which an individual is a national of), let alone to establish a business in another country or to seek employment abroad.

The FMP itself generally repeats the regulatory patterns from the RECs and the EAC in particular. It is again about one Treaty – the Abuja Treaty – being implemented by another Treaty – the FMP. What is striking is the time span: a 27 year difference between the conclusion of the former and the conclusion of the latter. This is however understandable since, the regional integration and free movement of people should have first been pursued within the RECs,[138] pursuant to the integration blueprint of the Abuja Treaty.

The right of entry, free movement of workers, the rights of establishment and residence are unequivocally framed by the FMP as individual rights, and in so doing, the FMP goes beyond e.g. the SADC-Protocol guarantees.[139] Some of the regulations, if implemented, are very specific, relevant and helpful; e.g. according to Art. 11 of the FMP, entry to another Member State by vehicle will not be any longer conditional on obtaining a temporary import permit and (under certain conditions) payment of a road tax. The rights guaranteed by the FMP also go quite far; e.g. the free movement of workers as provided for in Art. 14 confers a right to seek and accept employment without discrimination. However, as in the case of the RECs – with exception of the EAC CMP as interpreted in the light of the EACJ *Kyahurwend*a judgement – none of these rights is self-executing. Quite similarly to the regulations in the RECs, the implementation shall be progres-

136 Art. 6 (d) of the EAC-Treaty.

137 *R. L. Helfer* (note 134), 241 et seq.

138 See Art. 43 (1) of the Abuja Treaty (note 23). The Abuja Treaty does not explicitly prescribe that the free movement on the continental level may be pursued only after free movement at the regional level has been fully achieved. What is however required, is the strengthening of the RECs as the first integration stage. The free movement on a continental level is mentioned as an element of the fifth integration stage (see Art. 6 of the Abuja Treaty).

139 It must be noted that the list of SADC Member States who are not among the FMP signatories is quite long including Botswana, Eswatini, Madagascar, Mauritius, Namibia, Seychelles, South Africa, and Zambia.

sive and is broken down into three phases.[140] Art. 27 (1) vests the responsibility for implementation with the Member States, which, to this end, shall review their "laws, policies, agreements, immigration procedures and other procedures"[141] and adopt "necessary legislative and administrative measures".[142] The inter-governmental approach is underlined by the obligations to co-operate, coordinate, and harmonise laws and policies.[143] More specifically, the crucial questions of mutual recognition of qualifications[144] and portability of security benefits[145] are expressly left to further inter-state arrangements. The roles of RECs and the AU Organs are quite limited; their task is to monitor and evaluate implementation of the FMP; the RECs should act as "focal points" and should also "promote" the implementation.[146]

In a striking similarity to the EAC CMP, the gradual implementation of the FMP is subjected to an implementation plan annexed to the Protocol.[147] However, there is a crucial difference in the legal character of the obligations under the respective plans. Annex III to the EAC CMP on the free movement of workers explicitly states that implementation "shall be in accordance with the Schedule"[148] and the Schedule itself specifies what it terms as "implementation dates". With regard to the FMP, although Art. 5 (2) uses similar language ("shall be implemented"), the implementation plan itself, titled "implementation roadmap" speaks of "indicative dates" only. Moreover, it reaffirms the Member States' responsibility for the major implementation steps. Under these circumstances, there can be no direct effect of the FMP after the deadline is expired: first, the deadline is only "indicative" and second, the implementation is explicitly under the responsibility of the Member States. Consequently, the conditions for the direct effect, namely precision and unconditionality of the legal norm concerned, are not met. As argued in the previous sections, this is different in the case of the EAC CMP.

Another difference between the FMP Road Map and the annexes to EAC CMP is the content of the regulation. Whereas the latter contains specific technical regulations and an agreed list of professions for which the Partner

140 Art. 5 of the FMP.
141 Art. 27 (3) of the FMP.
142 Art. 27 (2) of the FMP.
143 Arts. 26 and 27 of the FMP.
144 Art. 18 of the FMP.
145 Art. 19 of the FMP.
146 Arts. 28 and 29 of the FMP.
147 Art. 5 (2) of the FMP.
148 Regulation 15 of the Annex III to the EAC CMP.

States' labour markets shall be opened, the FMP Road Map lists legislative and administrative measures to be taken by the Parties; it is more of an action plan or a time-line for the progressive realisation of free movement, than a regulatory framework for the same. A common feature of both sets of regulation is the bias towards high-skilled workers, which is visible in the EAC CMP Annex III list of professions. Although the FMP itself does not reveal such bias, the statements made in the FMP Road Map suggest that the opening of the signatory states' markets will not accommodate all categories of workers, and those who will benefit from this opening will be mostly high-skilled professionals.[149] Insofar, there is more resemblance between the FMP and the free movement arrangements made within RECs other than the EAC.

The FMP pays some attention to the enforcement of the provisions, linking it with the African system for the protection of Human Rights. Alongside the general obligation imposed upon the Member States to provide for administrative and judicial remedies for individuals aggrieved by the denial of the FMP rights,[150] the FMP provides for a reference to the African Commission on Human and Peoples' Rights (AfComHPR) after the domestic remedies are exhausted.[151] The inter-states disputes are to be adjudicated by the yet to be operationalised African Court of Justice and Human Rights.[152]

As much as the remedy to the AfComHPR underscores the enforceable individual rights character of the FMP guarantees – once given effect by the Member States – the practical advantage to the affected individuals is still quite limited. This is due to the fact that the recommendations adopted by the AfComHPR are not legally binding; they are directed to the AU Assembly which is composed of the Heads of State and Government[153] and it

[149] According to the FMP Roadmap (section 13), the States are urged "to identify and assess existing categories of workers and skills within the African Union in accordance with the Migration Policy Framework for Africa" and "classify the priority of skills (skills gaps) and workers required by individual Member States and RECs".

[150] Art. 30 (1) of the FMP.

[151] Art. 20 (2) of the FMP.

[152] The planned African Court of Justice and Human Rights is going to be created through a merger of the existing African Court on Human and Peoples' Rights with the African Court of Justice envisaged in the AU Constitutive Act (see Arts. 5 (1) d and 18 of the Act), but never operationalised. At the time of writing, the 2008 Merger Protocol was not yet in force. According to the Status list available on the AU website <www.au.int>, only six states ratified it, while according to Art. 9 of the Protocol, for entry into force 15 ratifications are needed. Not in force was also the 2014 Malabo Protocol aimed at expanding the Court's jurisdiction; out of required 15 ratification instruments, not a single one was deposited as of early 2019.

[153] Art. 6 (1) of the AU Constitutive Act.

is upon this organ to take necessary action.[154] The record of compliance with the Commission's recommendations is generally poor[155] and the AU Assembly has not always been supportive of the Commission's activities.[156]

Finally, the link with the AfChHPR includes also substantive elements, which contribute to the earlier mentioned "hybrid character" of the free movement rights in the FMP. Interestingly, the FMP preamble refers to the AfChHPR, "which guarantees the right of an individual to freedom of movement and residence." As already pointed out, this statement is not fully correct, as the Charter does not confer the right to be admitted to the territory of any state. Further reference to the Charter is made in Art. 4 of the FMP, which prohibits discrimination. This reference merely underscores the congruence with the Charter's anti-discrimination clause (Art. 2), as it also lists the proscribed grounds for discrimination. Art. 4 goes even further than the Charter prohibiting discrimination of individuals "entering" the territory of a Member State.[157] Also in this respect, it must be remembered that this prohibition is not self-executing, but subject to the implementation plan, which ultimately rests upon the goodwill of the Member States.

IV. Free Movement in Practice

1. Continental Trends

Recent empirical research[158] suggests that the highest number of migrants still move within Africa,[159] although the patterns have started to change. While intra-African immigration remains the preferred option for nationals of poorer, land-locked countries, it is generally on the decrease, while the

[154] See Art. 58 of the African Charter on Human and Peoples' Rights.

[155] *M. Kiwinda Mbodenyi*, International Human Rights and Their Enforcement in Africa, 2011, 333.

[156] *M. Kiwinda Mbodenyi* (note 155), 417.

[157] Although the AfChHPR does not include limitations on the scope of its territorial applicability, it also does not explicitly impose an obligation prohibiting discrimination against individuals entering a territory of a Signatory State. The issue has not been addressed by the Charter organs, but it can become a subject of scrutiny, given the tendency to recognise the extraterritorial applicability of the AfChHPR, see *G. Pascale*, Extraterritorial Applicability of the African Charter on Human and Peoples' Rights, Diritti Umani e Diritto Internazionale 8 (2014), 644 et seq. (652).

[158] *M.-L. Flahaux/H. de Haas*, African Migration: Trends, Patterns, Drivers, Comparative Migration Studies 4 (2016), 1 et seq.

[159] *M.-L. Flahaux/H. de Haas* (note 158), 8; UNCTAD (note 10), 91; also *B. E. Whitaker* (note 20), 210.

number of Africans moving to countries outside of the continent keeps increasing.[160] Most Africans migrate for family, work, and study, whereas the conflict-related migration represents 14 % of international migrants in Africa; these proportions do not differ substantially from migration patterns within other world regions.[161]

The declining trend of intra-African migration is attributed to a generally hostile public discourse with regard to immigrants and high levels of visa restrictiveness.[162] In the present context, it is particularly noteworthy that there has been no decrease in overall visa restrictiveness for nationals of other African countries.[163] This is despite the on-going regional integration processes and the various legal instruments adopted to facilitate intra-African movement of people. As one study for the years 1973-2013 observes:

> "Perhaps surprising, Africa turns out to be the continent with the highest levels of inbound visa restrictiveness, which has been particularly increasing in West, East, and Central Africa."[164]

And further:

> "Africa and Asia appear to be the most restrictive regions in the world with regard to the restrictions they impose on travellers from other world regions as well as from their own regions."[165]

The above-mentioned hostile political discourse involves not only xenophobia, whose outbreak in the Republic of South Africa was widely reported,[166] but also the tendency of governments to portray immigrants as a threat, emphasising the security concerns[167] while concealing the positive

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160 *M.-L. Flahaux/H. de Haas* (note 158), 8. The 2015 African Union Report on Labour Migration in Africa, available at <https://au.int>, statistics showed that migration within the group of Labour Migrants between 2008 and 2014 remained more or less constant (32).

161 *M.-L. Flahaux/H. de Haas* (note 158), 2 et seq.

162 *M.-L. Flahaux/H. de Haas* (note 158), 9; *B. E. Whitaker* (note 20), 211, see also "The EastAfrican" 9th December 2018.

163 *M.-L. Flahaux/H. de Haas* (note 158), 18.

164 *M. Czaika/H. de Haas/M. Villares-Valera*, The Global Evolution of Travel Visa Regimes, Population and Development Review 44 (2018), 589 et seq. (602).

165 *M. Czaika/H. de Haas/M. Villares-Valera* (note 164), 607. The authors of the study describe the levels of inbound visa restrictiveness in Africa as "extremely high". For intra-African mobility nearly 80 % of all visa corridors (dyads) are visa-restricted.

166 For a scholarly analysis see *N. Trimikliniotis/S. N. Gordon/B. Zondo*, Globalisation and Migrant Labour in a "Rainbow Nation": A Fortress South Africa, Third World Quarterly 29 (2008), 1323 et seq.

167 *M.-L. Flahaux/H. de Haas* (note 158), 6; *S. Nita* (note 10), 21.

impact, which migrants can have on the host state's economy and society. As *Trimikliniotis*, *Gordon* and *Zondo* observe:

> "The ideology of free movement and a 'borderless continent' remains wishful thinking: the postcolonial states perceived 'economic emancipation' as a national cause premised on ideas of 'developmentalism', and not as a whole continent-wide project." [168]

2. EAC

According to a recent study titled "Free and Safe Movement in East Africa",[169] focusing on Kenya, Rwanda, Tanzania, and Uganda,[170] the levels of commitment to the free movement vary; while Rwanda and Uganda are credited for openness towards migrants, Kenya and Tanzania are reported to have restrictive policies in place, in the latter case even hostile.[171] Yet, the general conclusion is not encouraging, as the report identifies a number of "persistent challenges" to free movement.[172] What the report further points out is, among others, unaffordable costs of work permits – as noted earlier only Kenya and Rwanda scrapped the work permit fees for EAC-citizens – combined with lengthy and cumbersome processing of applications,[173] lack of reliable statistical data on migration, lack of knowledge of relevant stakeholders with regard to migrants' rights, inhospitable public discourse about migration (e.g. "migrants are stealing our jobs")[174] and also "restrictive and hostile frameworks" aimed at penalising refugees and irregular migrants,[175] which lack incentives to move to another state, such as portability of social security benefits.[176] African migrants, especially lower-skilled migrants who, according to the report, commonly assume that it is impossible to ob-

168 *N. Trimikliniotis/S. N. Gordon/B. Zondo* (note 166), 1336. As suggested earlier, the nationalistic ideologies are not uncommon. One may here also mention the idea of "Ivoirité", see *V. Dodoo/W. Donkoh* (note 12), 163.

169 African Centre for Migration and Society, University of Witwatersrand, and Samuel Hall. "Free and Safe Movement in East Africa. Research to Promote People's Safe and Unencumbered Movement across International Borders", Open Societies Foundations, 2018 (EAC Migration Report).

170 Yet the primary focus of the study was on Kenya and Tanzania, EAC Migration Report (note 169), viii.

171 EAC Migration Report (note 169), 28 et seq.

172 EAC Migration Report (note 169), 5.

173 EAC Migration Report (note 169), 12 et seq.

174 EAC Migration Report (note 169), 16.

175 EAC Migration Report (note 169), 17.

176 EAC Migration Report (note 169), 20.

tain a work permit[177] are adversely affected by this approach. Accordingly, out of 1227 "illegal immigrants" deported from Kenya in 2018 in the wake of what Kenyan media refer to as "war on illegal immigrants",[178] the overwhelming majority were African migrants.[179] The top three nationalities on the list of expulsions were Tanzanians (217 persons), Ethiopians (210) and Ugandans (158), which means that the list is topped by EAC-citizens. Similarly, another "crackdown" going on in Tanzania since 2013 entailed massive expulsions of teachers from Kenya and Uganda.[180] The teachers were not the only group affected; the crackdown was intensified in 2016 with the operation "Timua Wageni" driven by the Tanzanian President himself.[181] In 2017, violent protests against expulsions of Kenyans from Tanzania took place at the Namanga border post.[182]

All cited reports say a lot about the state of free movement within the EAC, but not necessarily about the implementation of the EAC CMP whose personal scope of application is, as said, quite limited. It can however be assumed that individuals covered by the CMP's labour market opening are also negatively affected, since the work permit requirement is also applicable to them and – save for Kenya and Rwanda – the work permit fees were not scrapped.[183] If not covered by the CMP, the described difficulties of obtaining work permits – whether real or imagined[184] – discourage the EAC-nationals from moving to another EAC Partner State and/or could push them to go undocumented thereby exposing them to the risk of being victims of "crackdowns".

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177 EAC Migration Report (note 169), 18.

178 See for example the popular "Nairobi News" website report of 27.8.2018, <https://nairobinews.nation.co.ke> which informs *inter alia* on the toll free hotline for reporting illegal immigrants. The essence of the operation was re-registration of all work permit holders in the country and subsequent crack down on those, who failed to re-register.

179 "The Standard" (Nairobi), 26.10.2018.

180 "The Observer" (Kampala), 21.3.2018, also "Daily Nation" (Nairobi), 13.9.2013, "The EastAfrican" (Nairobi) 13.2.2016. The report by "The EastAfrican" estimated the number of teachers deported by February 2016 at 5,500.

181 See "The Star" (Nairobi), 16.01.2016.

182 "The Star" (Nairobi), 27.3.2017.

183 An example of a high skilled professional who after lengthy processing was eventually denied a work permit in Tanzania is a Kenyan national, Ms *Sylvia Mulinge*, who had been appointed CEO by Vodacom, which is Tanzania's Largest Telecom Company. See "Daily Nation" (Nairobi), 28.9.2018.

184 *Balassa* points out that potential migrants tend to overestimate the costs of migration, hence the need for positive state action to compensate these costs and make the migration attractive. According to *Balassa* "[l]ack of sufficient knowledge on the possibilities of assimilation, on cultural and social facilities, uncertainty about job security, etc., all contribute to this result. Irrational motives, such as national, religious, and racial prejudices, the 'propensity to stick to the birth place,' pull in the same direction". *B. Balassa* (note 6), 87.

On the positive side, the 2018 UNCTAD report cites the increase in labour mobility between Kenya and Rwanda attributing it precisely to the abolishment of the work permit fees by those two countries.[185] Most notably, Rwanda's policies aimed at attracting investment from other EAC Partner States generated growth and employment for domestic and migrant workers, in particular professionals from Kenya.[186] The labour migration potential could be increased with better portability of professional qualifications. And some progress has been made in this regard with the conclusion of Mutual Recognition Agreements (MRAs).[187] According to the information of the EAC Secretariat, MRAs are already in place for accountants, architects, engineers and veterinarians, further MRAs being in the pipeline.[188]

Some substantial progress in the free movement of people within the EAC has been made with regard to the free movement of persons outside the scope of labour migration; visa requirements have been scrapped and the citizens of Kenya, Rwanda, and Uganda do not even require a passport, as they are allowed to move within those three states with a national ID card. Moreover, there is EACJ case-law in strong support of the free movement of persons (which is yet distinct from the free movement of labour). But even these gains are quite fragile, as a political conflict, which erupted between Rwanda and Uganda in early 2019 led to restrictions of the cross-border movement between those two countries.[189]

The leading case is *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda*. This case was about the denial of entry to Uganda for a Partner of a delegation (the applicant) of a Kenyan non-governmental organisation (NGO) scheduled to meet the Chief Justice of Uganda. The applicant claimed to have been arrested and detained by the airport immigration authorities and later deported back to the Republic of Kenya as an illegal immigrant. The court pointed out that Uganda's sovereign rights to deny entry to unwanted citizens of other EAC Partner States have been limited by the EAC provisions on the free movement[190] – the EACJ cited Art. 104 of the EAC-Treaty, Art. 7 of the CMP and the respective regula-

185 UNCTAD (note 10), 79 et seq.
186 UNCTAD (note 10).
187 UNCTAD (note 10).
188 EAC HQ Press release from 17.7.2018, available at <www.eac.int>.
189 See "The EastAfrican" (Nairobi), 2.3.2019.
190 *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda* (note 87), paras. 49-50 and 52-53.

tions.[191] Further, referring to the Ugandan Domesticating Act conferring upon the EAC-Treaty the force law (as required by the same), the EACJ stated that the relevant sections of Ugandan immigration legislation must be read together with the Treaty guarantees and are not applicable to the nationals or the EAC-Partner states as far as they contravene the EAC-law, which includes the EAC-Treaty with its Protocols and Annexes.[192] In declaring the Ugandan immigration authorities' action unlawful and the relevant sections of the Ugandan immigration legislation inoperative with regard to EAC nationals, the EACJ affirmed the enforceable and directly effective character of the free movement guarantee in Art. 7 CMP.

3. Other RECs

Comparing the state of free movement rights within the EAC with the same on the continental level would not be appropriate, since the CMP has already been in operation for quite some time, while the FMP has just been signed. But as noted already, the very high levels of intra-African visa-restrictiveness are a clear indication of the work that still needs to be done.

There are some definitely positive developments, as in the case of unilateral decisions made by some states (Ethiopia, Kenya and Rwanda) to grant visas on arrival for holders of African passports.[193] Some progress has been made with regard to visa-free movement within the RECs.[194] Apart from the EAC, visa restrictions have been significantly reduced within ECOWAS.[195]

However, even the visa-free movement *within* RECs is by no means a rule. For example, within SADC, visa is required for the SADC citizens wishing to enter Angola, Democratic Republic of the Congo (DRC), and Madagascar.[196] Quite telling is also the fate of the 1984 COMESA Visa Protocol which was already discussed. Although this instrument was concluded 34 years ago and promised a visa-free entry for all nationals of the Con-

[191] *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda* (note 87), para. 43.

[192] *Samuel Mukira Mohochi v. The Attorney General of the Republic of Uganda* (note 87), paras. 122-123.

[193] For Kenya see "The EastAfrican" (Nairobi) 13.11.2017; for Ethiopia: "The EastAfrican" (Nairobi) 4.11.2018, for Rwanda: "The EastAfrican" (Nairobi) 17.11.2017, Rwanda's visa on arrival policy applies also to Non-Africans.

[194] See *S. Nita* (note 10), 19.

[195] *M. Czaika/H. de Haas/M. Villares-Valera* (note 164), 613.

[196] See UNECA, <https://www.uneca.org>.

tracting Parties within eight years, the COMESA Business Council was still campaigning for the free movement of business people (not to mention other groups of COMESA citizens) and complaining about the high visa fees "being a high cost to business, and an impediment to intra-regional and cross border trade" as late as in 2012.[197] The Council concluded that "the level of political commitment in member states to address the implications of Visa requirements on regional integration is in word but not in action".[198] What has happened, therefore, is the replacement – instead of implementation – of treaty commitments from 1984 with other commitments, meaning the 1998 COMESA Free Movement Protocol, which are more far-reaching, but equally weakly implemented.

With regard to the labour migration, it is the EAC which is specially credited for the progress it has made, even despite all the challenges described above.[199] Apart from the EAC, the progress on implementation of the labour mobility agendas has been slower,[200] as issues with the visa restrictiveness may already suggest. And where such progress has been made, it is limited to highly skilled professionals.[201] The kind of "crackdowns" on "illegal immigrants", which occurred in the EAC states were also engineered in other regions, e.g. in 2018, Angola started a big scale violence-marred operation against migrants from the DRC;[202] yet both countries are members of SADC. On the other hand, it has been observed that in the actual stock of migrants within the RECs has been on the increase, in particular between 2000 and 2010.[203]

V. Conclusion

The examined migration regimes in Africa limit the legal labour migration to a small number of potential migrants and do little to make relocation attractive. The EAC's regime is more conducive towards free movement

197 COMESA Business Council (CBC), Brief – COMESA Business Council Position. Addressing the following NTB; facilitation of movement of business persons in the region and elimination of visa requirements, no date indication, available at <www.comesabusinesscouncil.org>, para. 157.

198 COMESA Business Council (note 197), para. 150.

199 UNCTAD (note 10), 56 et seq.

200 UNCTAD (note 10), 56; *S. Nita* (note 10), 23.

201 UNCTAD (note 10), 56.

202 See the Office of the High Commissioner for Human Rights (OHCHR) Statement from 26.10.2018 "Mass expulsions from Angola have put thousands of Congolese at risk in DRC", available at <www.ohchr.org>.

203 UNCTAD (note 10), 56.

than similar regimes in other RECs – especially given the enforceability of the EAC CMP guarantees – but the challenges it faces, like work permit regimes, high fees, and red tape are a common feature of the RECs. A network of MRAs on the governmental level, still by no means covering all sectors, seems to be a unique EAC achievement. It should also not be forgotten that the competition for high-skilled labour is not only intra-African, but also global. For example, Kenya competes for highly trained specialists not only with Uganda, but also e.g. with New Zealand.[204] The analysed legal frameworks do not adequately respond to the benefits which intra-African migration outside of the high-skills sector may bring. And in this regard the EAC CMP is not different.

The current political climate does not promote free movement; despite the lofty proclamations and promises, the real life situations of the migrants or potential migrants tell a different story. The progress on facilitating free movement is unsurprisingly modest, given the minimum common denominator method used to advance the same. If a migrant wants to establish her rights in a court, there will be not much left from the spirit of Pan-Africanism, as the same is not translated into enforceable individual entitlements or innovative and inclusive approaches to integration. A comparison of the modest progress made insofar with regard to the free movement with the complexity of the international regulatory framework reveals inflation of announcements, worse still, of legally binding announcements, which eventually might undermine the already fragile confidence in the international rule of law. Pan-Africanism is not much more than a myth (in a positive sense) which can make people more receptive to the "historical-cultural arguments of mythmakers" and thus facilitate the advocacy for the regional integration,[205] but which fails to generate a meaningful compliance pull. It would have been different, if Pan-Africanism, instead of taking the "territorial turn", had created some sort of a "*Nkrumahnian*" polity with supranational institutions, which would facilitate robust instruments advancing free movement and oversee their implementation. Using *Haas'* terminology, Pan-Africanism would then speak to an integration based on the upgrading of common interest (in the free movement), rather than the minimum common denominator, which is even not high enough to prompt the governments to implement what they agreed upon. Instead of repeatedly laying out *Balassa*-styled integration schemes, more emphasis should have

[204] See the website of Immigration New Zealand, <https://www.immigration.govt.nz>.

[205] See *E. B. Haas* (note 35), 367. Interestingly, *Haas* made those observations with regard to the European experience of two world wars noting that this specificity of European experience would be unlikely to occur elsewhere.

been put on improving the decision making and implementation mechanisms, thus ensuring that the integration efforts are embedded in supranational structures and procedures geared towards upgrading the common interest in regional integration and free movement. As practice shows, popular clamour for free movement rights is hardly visible. There is also a question as to whether the people of Africa are given enough democratic space to debate this idea, to own it and to get engaged in parliamentary diplomacy. For it seems to be easy for the governments to speak different languages in different fora: announcing liberalisation of free movement on one hand and mobilising fears against strangers on the other. The bureaucracies are in charge of the script.

The FMP still repeats the regulatory patterns of the RECs. Even if the rights spelled out in the Protocol are quite tangible, there is no paradigm change in the implementation strategy. FMP's implementation does not rely on individual rights enforceable in courts, but on incrementalism based only on indicative dates and operationalised by progressive rounds of negotiations or, simply put, on the goodwill of the states, which, as experience shows, is not abundant. Accordingly, the Protocol provides for a framework, which the signatory States can, but do not have to, use to reduce barriers to free movement of people.