

**THE IMPLICATIONS FOR SOUTH AFRICA OF IMPLEMENTING CHAPTER 6 OF  
THE TREATY ESTABLISHING THE AFRICAN ECONOMIC COMMUNITY (THE  
ABUJA TREATY) IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY**

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## ACRONYMS

AEC:	African Economic Community
AIDS:	Acquired Immune Deficiency Syndrome
AU:	African Union
CAFTA-DR:	Central America–Dominican Republic Free Trade Agreement
CUSFTA:	Canada–United States Free Trade Agreement
COMESA:	Common Market for Eastern and Southern Africa
EAC:	East African Community
ECOWAS:	Economic Community of West African States
EU:	European Union
HIV:	Human Immunodeficiency Virus
HSRC:	Human Sciences Research Council
Mercosur:	Mercado Común del Sur/Mercado Comum do Sul or Southern Common Market
MPFA:	Migration Policy Framework for Africa
MRA:	Mercosur Residence Agreement
NAFTA:	North American Free Trade Agreement
Nepad:	New Partnership for Africa's Development
OAU:	Organisation of African Unity
REC(s):	Regional economic communities
SADC:	Southern African Development Community
US:	United States of America

## Chapter one

### Introduction and background

#### 1. Background

In 1991 the African Union (AU), then called the Organisation of African Unity (OAU), signed the Treaty establishing the African Economic Community (“Abuja Treaty”). The Abuja Treaty came into operation in 1994 after it was ratified by 50 AU countries. Its implementation will be realised in six stages over a period of 34 years. The aim of the Abuja Treaty is to establish an African Economic Community (AEC) which would be achieved through the mutual coordination of policies and activities by the regional economic communities (RECs) and to enhance regional and continental economic integration through a free trade area<sup>1</sup> and a single currency,<sup>2</sup> amongst other measures. Article 4 of the Abuja Treaty provides that the objectives of the Abuja Treaty are to promote economic, social and cultural development and the integration of African economies,<sup>3</sup> as well as to achieve self-reliant development<sup>4</sup> within the AU.

Furthermore, the Abuja Treaty requires member states gradually to remove any obstacles to the free movement of persons and the right of residence and establishment.<sup>5</sup>

In the Southern African Development Community (SADC), two treaties address the facilitation and promotion of regional integration and the realisation of a common market.<sup>6</sup> The Treaty establishing the Southern African Development Community (1992) provides for the “freer” movement of production, goods and services across

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<sup>1</sup> Art 4(2)(d) of the Treaty establishing the African Economic Community, 12 May 1994.

<sup>2</sup> Art 6(2)(f)(iii) of the Abuja Treaty.

<sup>3</sup> Art 4(1) of the Abuja Treaty.

<sup>4</sup> Art 4(2) of the Abuja Treaty.

<sup>5</sup> As above.

<sup>6</sup> Treaty establishing the Preferential Trade Area for Eastern and Southern Africa, 30 September 1982 and the Treaty of the Southern African Development Community, 17 August 1992.

national boundaries<sup>7</sup> in an equitable manner and for the mutual benefit of the member states. The use of the word “freer” implies that that movement should have less restriction than it might currently have and not be completely free.

Secondly, the Treaty does not speak of the free movement of persons but rather of production, goods and services. This further implies that the opening up of borders, specifically, is aimed at economic integration and not simply to allow people free movement as they wish.<sup>8</sup>

## **2. Aims and objectives**

The dissertation examines the impact of the implementation of the rights to freedom of movement, the rights to residence and to establishment contained in the Abuja Treaty on the SADC and South Africa in particular.

The concept of free movement within the AU is similar to that implemented in the European Union (EU). This dissertation, therefore, examines how free movement has been implemented in the EU and how the AU, having adopted a similar policy, can learn lessons (or not) and apply them in a continent made up of developing countries at different stages of their development.

## **3. Problem statement**

The Abuja Treaty requires member states to take the necessary measures for the realisation of the aims and objectives of the treaty.<sup>9</sup> If South Africa were to implement the freedom of movement provision, contained in article 43 of the Abuja

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<sup>7</sup> Art 5(2)(d) of the Treaty establishing the Southern African Development Community, 1992.

<sup>8</sup> Centre for Sociopolitical Analysis Human Sciences Research Council ‘A research review of the policies surrounding the issue of the free movement of people across international borders with specific reference to Southern Africa and the particular effect thereof on South Africa’ (1995) 29.

<sup>9</sup> Art 5 of the Abuja Treaty.

Treaty, what would the consequences be for South Africa, the SADC and the AU as a whole? Furthermore, the AU has not provided much guidance in terms of what should be understood to mean freedom of movement.

The dissertation, therefore, considers the dichotomy that exists between the obligations to adhere to and to implement treaty obligations and how that affects a state's responsibility to protect its territorial integrity and sovereignty.

Article 43 of the Abuja Treaty provides that member states should conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment which essentially will provide guidance on how member states are to realise the objectives of the Abuja Treaty. The proposed Protocol has not yet been concluded, leaving a vacuum in terms of how regional integration with regards to migration can and should be realised by member states.

South Africa's ratification of the Abuja Treaty poses a number of challenges with regards to the implementation of article 43 of the Treaty. According to Crush J *et al*,<sup>10</sup> owing to employment and economic opportunities South Africa is a major migrant-receiving country in the SADC. This assertion is further supported by the Evaluation of the African Union Migration Policy Framework for Africa<sup>11</sup> which found three major migration routes in Africa. The three routes consist of the Northern, Eastern and Southern routes.<sup>12</sup> The Southern route consists of migration through African countries into South Africa,<sup>13</sup> while the other identified routes result in migration

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<sup>10</sup> Crush J *et al* 'Migration in southern Africa: A paper prepared for the policy analysis and research programme of the global commission on international migration' (2005) 8.

<sup>11</sup> Sourced from [https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english\\_report\\_evaluation\\_of\\_the\\_migration\\_policy\\_framework\\_for\\_africa.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_report_evaluation_of_the_migration_policy_framework_for_africa.pdf).

<sup>12</sup> African Migration and Development Policy Centre 'Evaluation of the African Union migration policy framework for Africa' (2016) 8 [https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english\\_report\\_evaluation\\_of\\_the\\_migration\\_policy\\_framework\\_for\\_africa.pdf](https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_report_evaluation_of_the_migration_policy_framework_for_africa.pdf) (accessed on 28 August 2017).

<sup>13</sup> As above. See also C Horwood 'Sub-Saharan Africa' in F Laczko *et al* (eds) (2017) 'Fatal journeys volume 3 part 2: improving data on missing migrants'.



outside of the AU. Over 80% of migration in the AU is within the continent and directed towards the SADC.<sup>14</sup>

It is thought by many that the implementation of the freedom of movement provision in the Treaty will overburden South Africa's resources and impede the development of other African countries. The question then is: how can South Africa implement this right without contradicting the aims and objectives of the Abuja Treaty? In this regard one may argue that article 43 places a special, unfair burden on South Africa that is not necessarily felt by the rest of the AU.

#### **4. Research questions**

- I. What is meant by the freedom of movement of persons?
- II. What are South Africa's international obligations under treaty law in this regard?
- III. Will article 43 of the Abuja Treaty infringe on South Africa's territorial integrity and sovereignty and, if so, to what extent?
- IV. What are the broader implications of Chapter 6 of the Abuja Treaty for South Africa?
- V. How are other (developing) countries fulfilling the obligations placed upon them by the Treaty?
- VI. What may we learn from the EU in this regard?

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<sup>14</sup> n 12 above, 9.

## 5. Literature review

The literature reviewed for this dissertation relates to the obligations of a state arising from treaty law and to the freedom of movement of persons and the rights to residence and establishment. The literature reviewed includes books, research papers and articles.

### 5.1 Overview

Migration in Africa, which refers to the movement of people from one place to another, is made up of movement within the territory of one's country and also across national borders.<sup>15</sup> There is a strong indication that voluntary migration<sup>16</sup> across national borders in Africa is primarily due to economic considerations<sup>17</sup> which are significantly influenced by the growing inequality of development amongst African states.<sup>18</sup>

The Human Sciences Research Council (HSRC) conducted research on policies related to the issue of free movement across international borders and the effects thereof on South Africa in 1995.<sup>19</sup> The HRSC indicated that considerable thought was to be given to what free movement in terms of the Abuja Treaty means and how that will have an impact on South Africa. Furthermore, if movement of persons to South Africa is predominantly influenced by economic reasons, then other measures may be deployed (such as those provided for in the Treaty establishing the Southern African Development Community, 1992) to encourage economic development without prompting the completely free movement of people into the country.<sup>20</sup> Adepoju argues that the benefits of migration for the development of receiving and

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<sup>15</sup> S Amir 'Migrations in contemporary Africa: A retrospective view' in J Baker & TA Aina (eds) *The migration experience in Africa* (1995) 30.

<sup>16</sup> The movement of people across national borders owing to socio-economic reasons and not owing to natural disasters or civil/political unrest.

<sup>17</sup> A Adepoju 'Linkages between internal and international migration: The African situation' (1998) 50(157) *International Social Science Journal* 387.

<sup>18</sup> As above.

<sup>19</sup> n 8 above, preface.

<sup>20</sup> As above, 48.

sending countries depend on cooperation and the creation of economic opportunities by the regional communities.<sup>21</sup> The economically and politically beneficial aspects relative to the movement of people are also highlighted by Peters-Berries.<sup>22</sup>

The free movement of people, aside from being an extremely complex issue in the African context, is not a concept that will be realised without the regional integration of policies through the surrender of national sovereignty by each member state to a supra-regional organisation as asserted by Adepaju.<sup>23</sup> The AU may need to define the concept of free movement of people in the African context and provide a more specific plan as to how regional integration can be achieved successfully to benefit the development of all member states.

## **6. Research methodology**

### **6.1 Methodology**

The principal research methodology applied in this dissertation will be a desk-top study of applicable international law instruments and academic writings. The study will consider books, articles, journals, legislation and case law on the subject matter. Secondly, this dissertation will utilise the comparative legal analysis method of research.

### **6.2 Limitations**

The concept of the free movement within the AU is currently evolving and the AU is still grappling with the implementation of the Abuja Treaty's obligations on freedom of movement. This dissertation, therefore, is limited to relevant developments up to and including 31 October 2017.

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<sup>21</sup> A Adepaju 'Regional organizations and intra-regional migration in sub-Saharan Africa: Challenges and Prospects' (2001) 39 *International migration* 55.

<sup>22</sup> C Peters-Berries *Regional integration in Southern Africa – A guidebook* (2007) on behalf of Federal Ministry for Economic Cooperation and Development 14.

<sup>23</sup> Adepaju (n 21 above) 56.

The dissertation further places a greater emphasis on the free movement of persons resulting in migration to South Africa and less on the rights to residence and establishment as these rights are premised on the achievement of the free movement of persons.

For the purposes of this dissertation, migration excludes internal migration as this type of migration does not present legal constraints,<sup>24</sup> and migration arising from conflict, and illegal and irregular migration (such as smuggling and human trafficking).

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<sup>24</sup> n 12 above, 7.

## CHAPTER 2

### Obligations arising out of International law

#### 1. Introduction

This chapter analyses the international law principles governing territorial integrity and state sovereignty and how they are balanced against state obligations arising from international law in terms of treaties. The chapter then examines the African Union (AU) and Southern African Development Community (SADC) agreements which attempt to realise the obligation on member states to eradicate obstacles for the free movement of persons in the AU and the enjoyment of the rights to residence and establishment as stated in article 43 of the Abuja Treaty.

#### 2. International law principles of territorial integrity and state sovereignty

##### 2.1 Territorial integrity

The territory of a state can be understood simply to mean the physical borders indicating the parameters of the state. The territorial integrity of a state in international law is understood to mean more than just the borders of the state as it includes the political independence of the state to govern the territory without any interference or intervention from other states.<sup>1</sup> The fact that states can make laws governing their territory without the interference of other states in their internal affairs is a norm in international law.<sup>2</sup> The territory of a state gives rise to state sovereignty as there can be no governing without territory.<sup>3</sup>

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<sup>1</sup> C Marxsen 'The concept of territorial integrity in international law – What are the implications for Crimea?' (2015) 75(1) *Heidelberg Journal of International Law* 9-10.

<sup>2</sup> MN Shaw *International law* (2008) 487.

<sup>3</sup> As above.

## 2.2 State sovereignty

The Peace of Westphalia<sup>4</sup> established the norm of state sovereignty in international law. State sovereignty can be defined as a right to territory and the competence of a state over its territory.<sup>5</sup> State sovereignty presumes that every state, being equal, has the independence, authority and competence to govern its own territory and conduct its own domestic affairs without the interference of another state.<sup>6</sup>

The AU has recognised the principles of territorial integrity and state sovereignty. The Constitutive Act of the African Union<sup>7</sup> states that the objectives of the AU are to 'defend the sovereignty, territorial integrity and independence of its Member States'.<sup>8</sup> The principles of the AU include the recognition of 'sovereign equality and the interdependence among Member States of the Union'<sup>9</sup> and the 'non-interference by any Member State in the internal affairs of another'.<sup>10</sup>

## 3. Obligations on states arising from international law

### 3.1 Customary international law

According to the Statute of the International Court of Justice,<sup>11</sup> international custom is listed as one of the sources of international law.<sup>12</sup> Customary international law refers to obligations arising from the established and consistent practice and behaviour of states which have been accepted as binding owing to their 'aura of historical legitimacy'<sup>13</sup> and can be proven by showing state practice and *opinion juris*.

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<sup>4</sup> 1648.

<sup>5</sup> J Tsheola & M Segage "Governance, 'sovereignty-state-territory triad', human population migration and xenophobia in (South) Africa" (2014) 11(4) *The Journal for Transdisciplinary Research in Southern Africa* 33.

<sup>6</sup> A Tesfaye 'African Union, state sovereignty, and the responsibility to protect civilians' (2012) 1(2&3) *Journal of African Union Studies* 49.

<sup>7</sup> Constitutive Act of the African Union 7 November 2000.

<sup>8</sup> Constitutive Act of the African Union art 3(b).

<sup>9</sup> Constitutive Act of the African Union art 4(a).

<sup>10</sup> Constitutive Act of the African Union art 4(g).

<sup>11</sup> United Nations, Statute of the International Court of Justice, 18 April 1946, available at: <http://www.refworld.org/docid/3deb4b9c0.html> (accessed 19 October 2018).

<sup>12</sup> Art 38(1)(b).

<sup>13</sup> n 2 above, 72.

The concluding of treaties that are binding in nature by the international community is in accordance with the customary international law principle of *pacta sunt servanda*. The Vienna Convention on the Law of Treaties, 1969<sup>14</sup> is one such treaty, and it will be discussed in detail below.

South Africa recognises and adheres to customary international law. In terms of section 232 of the Constitution of the Republic of South Africa, 1996, customary international law is law within the Republic unless it is inconsistent with the constitution or with an Act of Parliament.<sup>15</sup>

### **3.2 Treaty Law: Vienna Convention on the law of Treaties, 1969**

The Vienna Convention on the Law of Treaties (VCLT) in part, has codified customary international law with regards to treaties.<sup>16</sup> The VCLT governs written treaties concluded between states.<sup>17</sup> The Preamble of the VCLT states that the treaty recognises the international law principles of sovereign equality, the independence of states and non-interference in the internal affairs of states.<sup>18</sup> The VCLT goes on to state that treaties in force are binding upon the parties thereto and that the obligations thereof must be performed in good faith.<sup>19</sup> In other words, agreements (treaties) entered into by states must be honoured. The VCLT also stipulates that a treaty will be binding throughout the territory of the state unless that is not the intention of the treaty.<sup>20</sup>

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<sup>14</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> (accessed 19 October 2018).

<sup>15</sup> Sec 232.

<sup>16</sup> Shaw (n 2 above) 903.

<sup>17</sup> Art 1 of the VCLT.

<sup>18</sup> Preamble of the VCLT.

<sup>19</sup> Art 26 of the VCLT.

<sup>20</sup> Art 29 of the VCLT.

## **4. Treaty establishing the African Economic Community, 1994**

### **4.1 Preamble**

The Preamble of the Abuja Treaty identifies the necessity of continental economic, social and cultural integration through the establishment of African Economic Community (AEC) in order to realise the objectives of the Organisation of African Community (OAU) and also that the advantages of integration should be shared in an equitable and just manner promoting development that is balanced.

### **4.2 Article 4: Objectives**

The objectives of the Abuja Treaty are the promotion of economic, social and cultural development and the integration of African economies,<sup>21</sup> as well as the achievement of self-reliant development<sup>22</sup> within the AU in order to further the overall social and economic development of the member States.<sup>23</sup>

### **4.3 Article 6: Modalities for establishment of the community**

Article 6 of the Abuja Treaty is entitled 'the modalities for establishment of the community' and it outlines the different stages (six in total) and time frames (34 years) allocated for the achievement of the objectives of the Abuja Treaty. Stages one through to four provide for the strengthening of existing regional economic communities and the establishment of Regional Economic Communities (RECs) where there are none, sector integration at the regional and continental levels,<sup>24</sup> harmonisation of activities among existing RECs,<sup>25</sup> and the establishment of a Free Trade Area and a Customs Union.<sup>26</sup> Stages one through to four have been allocated a 25-year timeframe limit for their achievement.

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<sup>21</sup> Art 4(1) of the Abuja Treaty.

<sup>22</sup> Art 4(2) of the Abuja Treaty.

<sup>23</sup> United Nations Economic Commission for Africa report on regional strategy for rational location of industries in the context of the Abuja Treaty, ICE/1995/6 (a) 2 June 1996 1.

<sup>24</sup> Art 6(2)(b)(ii) of the Abuja Treaty.

<sup>25</sup> Art 6(2)(b)(iii) of the Abuja Treaty.

<sup>26</sup> Art 6(2)(c) of the Abuja Treaty.



The stages relevant to the free movement of persons are found at stages five and six. The fifth stage consists of the establishment of an African Common Market<sup>27</sup> by adopting common policies,<sup>28</sup> harmonising monetary, fiscal and financial policies,<sup>29</sup> applying the free movement of persons and the rights of residence, and establishment.<sup>30</sup> Stage five has been allocated a four-year timeframe limit for its achievement. The sixth and final stage consists of the consolidation and strengthening of the structure of the African Common Market by including the free movement of people, goods, capital and services.<sup>31</sup> Article 6 echoes the preamble in stating that the envisioned integration and development should be balanced and harmonious,<sup>32</sup> that the implementation of the six stages should adhere to the stipulated timeframes and that the transition from one stage to the next will be pronounced by the Assembly of Heads of State and Government of the OAU.<sup>33</sup> Stage six has been allocated a five-year timeframe limit for its achievement.

#### **4.4 Article 43: Free movement of persons, right to residence and establishment**

The Abuja Treaty requires member states to adopt the necessary measures to achieve, gradually, the free movement of persons and the enjoyment of the right of residence and establishment within the AEC.<sup>34</sup> One such necessary measure is the conclusion, by member states, of the Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment<sup>35</sup> and other policies which will assist the AU in realising its objectives.

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<sup>27</sup> Art 6(2)(e) of the Abuja Treaty.

<sup>28</sup> Art 6(2)(e)(i) of the Abuja Treaty.

<sup>29</sup> Art 6(2)(e)(ii) of the Abuja Treaty.

<sup>30</sup> Art 6(2)(e)(iii) of the Abuja Treaty.

<sup>31</sup> Art 6(2)(f)(i) of the Abuja Treaty.

<sup>32</sup> Art 6(3) of the Abuja Treaty.

<sup>33</sup> Art 6(4) of the Abuja Treaty.

<sup>34</sup> Art 43(1) of the Abuja Treaty.

<sup>35</sup> Art 43(2) of the Abuja Treaty.

## 5. Other relevant AU and SADC documents

### 5.1 Treaty of the Southern African Development Community

Aside from the Abuja Treaty, there are numerous agreements within the RECs which address the facilitation and promotion of regional integration and the realisation of a common market. South Africa is party to the Treaty of the Southern African Development Community (SADC Treaty). The SADC Treaty's objectives include the fostering of development and economic growth<sup>36</sup> and the promoting of self-sustainable development and self-reliance.<sup>37</sup> The SADC drafted the Protocol on the Free Movement of Persons in the Southern African Development Community (Free Movement Protocol) as a way of placing specific focus on article 43 of the Abuja Treaty. The Free Movement Protocol was met with objections by Botswana, South Africa and Namibia owing to its stance of the free movement of persons which would see the complete eradication of border management controls for member states who are party to the Free Movement Protocol.<sup>38</sup> The Free Movement protocol was abandoned by the SADC and a second attempt was drafted. This came to be the Protocol on the Facilitation of Movement of Persons in the Southern African Development Community<sup>39</sup> (Facilitation Protocol).

### 5.2 Protocol on the Facilitation of Movement of Persons in the Southern African Development Community

The Facilitation Protocol seeks to remove all obstacles impeding the free movement of persons within the SADC<sup>40</sup> by introducing a visa-free entry into another SADC state for a 90-day period,<sup>41</sup> permanent or temporary residence<sup>42</sup> and the establishment of oneself in another state's territory.<sup>43</sup> The Facilitation Protocol

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<sup>36</sup> Art 5(1)(a) of the SADC Treaty.

<sup>37</sup> Art 5(1)(d) of the SADC Treaty.

<sup>38</sup> CC Nshimbi & L Fioramonti 'The will to integrate: South Africa's responses to regional migration from the SADC region' (2014) 26(1) *African Development Review* 56.

<sup>39</sup> Protocol on the Free Movement of Persons in the Southern African Development Community, 18 August 2005.

<sup>40</sup> Art 2 of the Facilitation Protocol.

<sup>41</sup> Art 3(a) of the Facilitation Protocol.

<sup>42</sup> Art 3(b) of the Facilitation Protocol.

<sup>43</sup> Art 3(c) of the Facilitation Protocol.

indicates that the visa-free entry into another state's territory must be in line with the laws of that state. In achieving the objectives of the SADC Treaty, member states are required to act together in implementing the Facilitation Protocol,<sup>44</sup> to ensure the harmonisation of laws and policies<sup>45</sup> and to co-operate with and provide mutual assistance in achieving the objectives.<sup>46</sup>

The Facilitation Protocol elaborates on article 43<sup>47</sup> of the Abuja Treaty by providing for a visa-free entry. It allocates time frames (90 days) in terms of visa-free entry into the territory of another state and indicates that such entry is subject to the laws of the host state.<sup>48</sup> Furthermore, it elaborates on the concepts of residence<sup>49</sup> and establishment<sup>50</sup> and also indicates that the enjoyment of those rights is subject to the laws of the host state. In addition, the Facilitation Protocol provides for the rights and obligations for citizens of state parties granted residence or establishment in a host state,<sup>51</sup> protection of existing rights,<sup>52</sup> reasons for expulsion,<sup>53</sup> protection against expulsion of individuals,<sup>54</sup> protection against indiscriminate expulsion<sup>55</sup> and the principles governing expulsion.<sup>56</sup> Article 31 of the Facilitation Protocol requires member states to coordinate, co-operate and harmonise practices of the SADC with those of the RECs in accordance with article 28 of the Abuja Treaty.

### **5.3 The Migration Policy Framework for Africa**

It is prudent to note that the Migration Policy Framework for Africa (MPFA)<sup>57</sup> is classified as a reference document and that, therefore, it is not binding in nature but

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<sup>44</sup> Art 6 of the Facilitation Protocol.

<sup>45</sup> Art 7 of the Facilitation Protocol.

<sup>46</sup> Art 11 of the Facilitation Protocol.

<sup>47</sup> Free movement of persons, right to residence and establishment.

<sup>48</sup> Art 14 of the Facilitation Protocol.

<sup>49</sup> Arts 16 & 17 of the Facilitation Protocol.

<sup>50</sup> Arts 18 & 19 of the Facilitation Protocol.

<sup>51</sup> Art 20 of the Facilitation Protocol.

<sup>52</sup> Art 21 of the Facilitation Protocol.

<sup>53</sup> Art 22 of the Facilitation Protocol.

<sup>54</sup> Art 23 of the Facilitation Protocol.

<sup>55</sup> Art 24 of the Facilitation Protocol.

<sup>56</sup> Art 25 of the Facilitation Protocol.

<sup>57</sup> 29 June 2006.

does propose guidelines and direction to the AU member states on how to formulate and implement policies in accordance with their own capabilities. The MPFA examines many factors which may influence migration in Africa, such as globalisation, better health care, political and social instability, employment opportunities, etc. Some objectives of the MPFA are to improve the free movement of persons and regional cooperation within the AU through the development of a pan-African framework with specific focus on the free movement of persons.

#### **5.4 African Union Agenda 2063**

The AU Agenda 2063 (Agenda) is a strategic framework that aims to build further on the provisions of the Abuja Treaty with a focus on the importance of free movement within the continent as a means of promoting integration and development.<sup>58</sup> The Agenda identifies seven aspirations that the AU must achieve by cooperation including an 'integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance'<sup>59</sup> and an 'Africa as a strong, united and influential global player and partner'<sup>60</sup>. These two aspirations, along five others, aim to advance continental integration where continental unity will be achieved fully by speeding the regional integration process which includes, amongst other sectors, the free movement of persons.<sup>61</sup>

Other agreements which aim to improve and facilitate the free movement of persons within the regions and, ultimately, within the continent are the African Common Position on Migration and Development<sup>62</sup> which aims to facilitate migration in line with the provisions of the Abuja Treaty, 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

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<sup>58</sup> Paras 23 & 24.

<sup>59</sup> Para 8, aspiration 2.

<sup>60</sup> Para 8, aspiration 7.

<sup>61</sup> Para 73.

<sup>62</sup> 29 June 2006.

Community better known as the COMESA-EAC-SADC Tripartite Free Trade Area<sup>63</sup> which speaks to the facilitation of free movement of business persons and the first action plan for the implementation of the minimum integration programme (MIP).<sup>64</sup> The MIP identifies the facilitation of free movement of persons and a priority for regional and continental projects.

## 6. Closing remarks

The primary aim of the Abuja Treaty is to create an African continent that is self-reliant, self-sufficient and harmonised in its operations and interactions within the RECs. The six stages of article 6 provide for guidelines on what achievements need to be met by the AU member states in order to realise integrated development. The AU also adopted a number of agreements which aim to foster harmonisation and continental integration by creating an AEC, such as the Action Plan for Boosting Intra-African Trade,<sup>65</sup> New Partnership for Africa's Development,<sup>66</sup> Protocol on Relations between the AEC and the RECs,<sup>67</sup> Moratorium on the Recognition of New RECs,<sup>68</sup> Constitutive Act of the African Union, The Protocol on Relations between the AU and the RECs<sup>69</sup> and the Accra Declaration on the Union Government of Africa.<sup>70</sup> The adoption of these numerous agreements indicates the commitment by the AU to achieve the goal and objectives of the Abuja Treaty. The proper operation of the AEC is supposed to see the successful implementation of the six stages set out in article 6 of the Abuja Treaty which means that the free movement of persons will be realised.

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<sup>63</sup> 10 June 2015.

<sup>64</sup> 8 May 2009.

<sup>65</sup> 30 January 2012.

<sup>66</sup> 23 October 2001.

<sup>67</sup> 25 February 1998.

<sup>68</sup> African Union assembly of the African Union seventh ordinary session doc. EX.CL/278 (IX), 2 June 2006.

<sup>69</sup> 18 June 2007.

<sup>70</sup> 3 July 2007.

The final product, should the objectives of the Abuja Treaty be successfully implemented, is a thriving African Common Market which would result in the AEC.<sup>71</sup> The envisioned regional and continental integration means, in effect, that South Africa and all member states have to adopt measures which will implement the obligations set out by the Abuja Treaty.

This, then, requires one to consider territorial integrity and state sovereignty when entering agreements which bring about obligations on member states which may have an impact on domestic affairs and the ability to govern a territory without external influence. Mudungwe observes that the interpretation and implementation of the free movement of persons may have an impact on the sovereignty of states<sup>72</sup> and, therefore, cause some member states to be hesitant. Ibrahim *et al* echo similar sentiments to those of Mudungwe in stating that regional integration may lead to partial or complete loss of state sovereignty.<sup>73</sup> Internal affairs aside, South Africa and the SADC states ratified the Abuja Treaty without any reservations. There is, therefore, an obligation to honour the provisions of the Abuja Treaty. Chigudu disagrees with Mudungwe's view by stating that the power to determine who may enter the territory of a state still remains with the state and, therefore, state sovereignty is maintained.<sup>74</sup> The ratification of the Abuja Treaty signifies that the content is acceptable and the obligations therein will be honoured. Tesfaye asserts that states cannot invoke sovereignty in order to evade honouring the obligations of the treaty.<sup>75</sup> To a small extent, therefore, member states have to surrender their sovereignty and territorial integrity when faced with the implementation of the obligations required by article 43 of the Abuja Treaty.

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<sup>71</sup> Preamble to the Lagos Plan of Action for the economic development of Africa 1980-2000, 29 April 1980.

<sup>72</sup> P Mudungwe 'Promoting a free movement of people in Southern Africa: A case for ratification of the Protocol on the Facilitation of Movement of Persons in the SADC region' African Diaspora Policy Centre Research Report No. 2016/03 22.

<sup>73</sup> SG Ibrahim *et al* 'An intergovernmentalist approach to regional integration in Africa: The efficacy of the African Union (AU)' (2015) 1(1) *International Journal of Multidisciplinary Research and Modern Education* 461.

<sup>74</sup> D Chigudu 'International migration: The state-sovereignty-migration nexus' (2015) 11(4) *The Journal for Transdisciplinary Research in Southern Africa* 2.

<sup>75</sup> A Tesfaye (n 6 above).

Klavert argues that the free movement of people is a 'key element of regional integration' which is envisioned to bring about continental economic prosperity and poverty reduction.<sup>76</sup> It is evident that the issue of free movement of persons poses many challenges to the AU. The concept of free movement does not mean the abandonment of border controls but rather a means to better manage the movement of persons across borders. Control measures such as a continental passport will still be in place to manage the cross-border movement of persons. A balance must be struck between the concept of the free movement of persons and the international law principles of sovereignty and territorial integrity.

Other factors affecting individual developing member states are issues such as civil unrest, under-developed infrastructure and poor socio-economic conditions. Such factors will have a significant impact relative to the choice of countries where people will choose to exercise their right to free movement within the AU. Moreover, the different and disproportionate stages of development of the member states of the AU may result in the 'more' developed states facing a greater influx of migrants. Of the 31 least developed countries in the world, Africa is home to 20 of these least developed countries<sup>77</sup> and South Africa houses the highest number of foreign nationals within its borders.<sup>78</sup> These statistics must be taken into consideration in this case. Questions arise: Will the implementation of free movement of persons truly have the desired effect? The six-stage implementation plan contained in the Abuja Treaty lays down foundations that should theoretically see the successful implementation of free movement of persons. One is, however, not convinced about its successful practical implementation, at least not in the SADC or South Africa.

The following chapter, then, examines the implementation plan contained in the Abuja Treaty more closely.

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<sup>76</sup> H Klavert 'African Union frameworks for migration: Current issues and questions for the future' (2011) 108 *European Centre for Development Policy Management* 1.

<sup>77</sup> Para 6 of the Lagos plan of action for the economic development of Africa 1980-2000.

<sup>78</sup> International Organisation for Migration: Regional strategy for Southern Africa 2014-2016 7.

## Chapter 3

### The impact on South Africa of implementing chapter 6 of the Abuja Treaty

#### 1. Introduction

This chapter examines the impact that South Africa may possibly experience when implementing article 43 of the Abuja Treaty. South Africa, as part of the Southern African Development Community (SADC), envisioned that certain conditions would be met before the implementation of the free movement of persons could be realised.<sup>1</sup> These conditions have as yet not been met. These conditions include, but are not limited to, peace, security and stability within the continent,<sup>2</sup> the reduction of economic disparities between member states,<sup>3</sup> effective civil registration systems<sup>4</sup> and reliable movement control systems.<sup>5</sup>

Considering that South Africa has the largest number of migrants in the SADC region,<sup>6</sup> one has to wonder how the free movement of persons will affect the country as a whole. Furthermore, how will the implementation of article 43 of the Abuja Treaty affect relations between South Africa and the African Union (AU)? In the next paragraphs I examine possible answers to these questions.

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<sup>1</sup> Draft Common Position of the SADC region on movement of persons in Africa and implementation of the African passport, SADC/PSSC/2017/3.

<sup>2</sup> Para 5 of the Draft Common Position of the SADC region on movement of persons in Africa and implementation of the African passport, SADC/PSSC/2017/3.

<sup>3</sup> As above.

<sup>4</sup> As above.

<sup>5</sup> As above.

<sup>6</sup> The International Organization for Migration 'Regional strategy for Southern Africa' (2014-2016) 7.



## 2. Benefits of implementing chapter 6 of the Abuja treaty for South Africa

The ultimate goal of the Abuja Treaty is continental integration. The freedom of movement of persons has been identified as an integral part of achieving continental integration.<sup>7</sup> One may argue that the free movement of goods, services and capital requires the participation of people and, therefore, the free movement of persons also needs to follow - it in fact goes without saying. In my view, the free movement of persons should be in support of the free movement of goods, services and capital as alluded to by the COMESA-EAC-SADC Tripartite Free Trade Area<sup>8</sup> and, therefore, partially accelerate continental integration.

It could be argued that the free movement of persons could bring about benefits which could improve and, even, achieve regional and continental integration. The free movement of persons, it is argued, would see the increase and improvement of trade and economic growth<sup>9</sup> resulting in a boost for economies within the AU.<sup>10</sup> Some of the economic benefits worth mentioning are the improvement of labour markets by reducing shortages in labour demands, addressing skills gaps,<sup>11</sup> diversifying the labour force,<sup>12</sup> and increasing intra-regional trade.<sup>13</sup> Moreover, free movement of persons would improve economic development in the continent by enhancing wealth redistribution<sup>14</sup> and income distribution,<sup>15</sup> while creating new

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<sup>7</sup> African Development Bank 'African visa openness report' (2016) 4. See also P Sané in foreword in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007).

<sup>8</sup> Art 4(b) COMESA-EAC-SADC Tripartite Free Trade Area.

<sup>9</sup> African Development Bank *African visa openness report* (2016) 4.

<sup>10</sup> <http://theconversation.com/how-the-free-movement-of-people-could-benefit-africa-92057> (accessed on 30 May 2018).

<sup>11</sup> P Mudungwe 'Promoting a free movement of people in Southern Africa: A case for ratification of the Protocol on the Facilitation of Movement of Persons in the SADC region' *African Diaspora Policy Centre Research Report 2016/03* 12.

<sup>12</sup> CC Nshimbi & L Fioramonti 'A region without borders? Policy frameworks for regional labour migration towards South Africa' (2013) 17.

<sup>13</sup> H Klavert 'African Union frameworks for migration: Current issues and questions for the future' (2011) 108 *European Centre for Development Policy Management* 1.

<sup>14</sup> P Sané "Foreword" in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007).

<sup>15</sup> African Union Executive council ninth ordinary session 'African common position on migration and development' (2006) 4.

opportunities for employment<sup>16</sup> and lowering the rate of unemployment and, therefore, reducing poverty.<sup>17</sup> The free movement of persons could also have the effect of reducing shadow economies and so propelling more revenue into the country.<sup>18</sup>

The benefits of the free movement of persons will be felt not only by the receiving countries<sup>19</sup> which will have the benefit of gaining a younger workforce,<sup>20</sup> but sending countries<sup>21</sup> would also benefit from the money/remittance payments sent to their home country in support of the families of migrant workers.<sup>22</sup> These remittance payments mean that the sending countries receive more revenue and to a certain extent, poverty is alleviated.

The free movement of persons could, furthermore, increase tourism within the continent resulting in increased revenue for member states<sup>23</sup> and the redistribution of wealth. The free movement of persons has also been identified as assisting in the accessibility of vital services, such as education and health care. A person in desperate need of medical services will be able to access such services by being able to cross borders effortlessly should the need arise. Easier access to much-needed health care services could have a positive impact on the continental efforts of combating communicable diseases, such as Human Immunodeficiency Virus / Acquired Immune Deficiency Syndrome (HIV and AIDS), Malaria, and Tuberculosis<sup>24</sup> to name but a few.

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<sup>16</sup> P Sané (n 14 above).

<sup>17</sup> As above.

<sup>18</sup> A Pécoud & P de Guchteneire 'Introduction: the migration without borders scenario' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 17.

<sup>19</sup> Receiving country refers to a country whose citizens migrate to other countries.

<sup>20</sup> P Sané (n 14 above).

<sup>21</sup> Sending country refers to a country of destination for migrants from other countries.

<sup>22</sup> P Sané (n 14 above).

<sup>23</sup> n 9 above, 23.

<sup>24</sup> n 15 above.

As stated above, one of the preconditions that must exist before the implementation of the free movement of persons can be achieved according to the SADC is the existence of peace, security and stability in the continent.<sup>25</sup> Some of the countries on the African continent have been plagued by civil unrest, poor governance, insecurity, droughts and famine, a high population growth and unemployment. These conditions lead to instability and affect the movement of persons. The implementation of the free movement of persons, it is thought, would improve and strengthen development among African countries.<sup>26</sup> The free movement of persons might lead to open borders which, it is argued, could create transparency and reliability amongst member states.<sup>27</sup> Furthermore, the free movement of persons might unify the continent through the increased interaction<sup>28</sup> of people, creating a common identity which could foster strong ties.<sup>29</sup> Moreover, the benefit of unity or integration may result in continental cooperation in matters related to security so improving the creation of a peaceful continent.<sup>30</sup> Mwasha argues that the increase in cooperation makes conflict more costly<sup>31</sup> and, therefore, member states would be more vigilant in ensuring the maintenance of peace, security and stability within their individual countries and, therefore, the continent.

The implementation of the free movement of persons and, by implication, the opening up of borders might also have a positive impact on crime that is associated with the movement of persons. The closing of borders owing to security concerns has had adverse effects on the infringement of human rights<sup>32</sup> by way of human

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<sup>25</sup> The South African Department of Home Affairs 'South African position on the implementation of the African Union (AU) Agenda 2063 as it relates to migration, regional integration and Africa passport' (2017) 5.

<sup>26</sup> MS Kimenyi & J Smith 'Intraregional trade and restrictions on the movement of people' in *Accelerating growth through improved intra-African trade* (2012) 15.

<sup>27</sup> Stiftung Entwicklung und Frieden Study 'Regional migration governance in the African continent. Current state of affairs and the way forward' (2016) 36.

<sup>28</sup> ON Mwasha 'The benefits of regional economic integration for developing countries in Africa: A case of East African Community (EAC)' (2011) *Korea Review of International Studies* 88 <https://gis.korea.ac.kr/wp-content/uploads/2015/04.11-1-05-Ombeni-N.-Mwasha.pdf> (accessed on 30 May 2018).

<sup>29</sup> n 9 above, 23.

<sup>30</sup> ON Mwasha (n 28 above) 88.

<sup>31</sup> As above.

<sup>32</sup> CW de Wenden 'The frontiers of mobility' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 61.

trafficking, prostitution, labour sub-contracting and undocumented employment.<sup>33</sup> To this end, the argument could be made that the opening up of borders would decrease and possibly even eliminate such crimes as there is no longer an incentive because people are able to move freely.

### **3. Disadvantages of implementing chapter 6 of the Abuja treaty**

The implementation of chapter 6 of the Abuja treaty in South Africa would have an impact on the national security of the country. In terms of the National Strategic Intelligence Act, 1994 (Act 39 of 1994), as amended by the General Intelligence Laws Amendment Act, 2013 (Act 11 of 2013), national security requires that the people of South Africa and their territorial integrity are protected against acts directed at undermining the Republic of South Africa. Any activity or occurrence that destabilizes the country could be seen to be affecting national security. One of the drawbacks of implementing the free movement of persons may be the increase in crime within the receiving country. It is argued that the free movement of persons may alleviate the criminal activities undertaken in order to enter a country, but the challenges are slightly more complex than the production of fraudulent documentation in order to enter a country.

#### **3.1 Xenophobia**

In past years, South Africa has seen the rise of xenophobic attacks against foreign nationals. On the surface it appears that their cause is frustration owing to the lack of service delivery and limited resources. The free movement of persons may overburden the resources and services available to the locals which will cause tensions to rise,<sup>34</sup> so threatening the economic growth,<sup>35</sup> peace, security and stability of a country. Tensions may also rise owing to unskilled migrants competing with the

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<sup>33</sup> As above, 57.

<sup>34</sup> B Ghosh 'Managing migration: Towards the missing regime?' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007)101.

<sup>35</sup> As above, 101.

local labour force. For a majority of South Africans living below the poverty line, the influx of foreigners may result in a struggle over resources such as housing and jobs,<sup>36</sup> which may exacerbate xenophobic attitudes.

### 3.2 Terrorism

Many associate open borders with the increase in terrorist related activities and crime.<sup>37</sup> The United Nations Security Council Counter-Terrorism Committee Executive Directorate found that states needed to have effective ways for detecting and identifying terrorists.<sup>38</sup> The current poor civil registration system within the African continent means that, to a large extent, movement within the continent is unaccounted for which makes the commission of crimes difficult to detect and survey. In his Open Briefing to United Nations Security Council Counter-Terrorism Committee, Türk, the Assistant High Commissioner for Protection, states that an effective and functional registration system is imperative for the combating of terrorism and terrorism-related activities.<sup>39</sup> South Africa has been identified as an attractive terrorist haven<sup>40</sup> owing to the fact that it has been used as a base and a transit country accommodating terror financing, safe houses, the illegal acquisition of South African identity documentation and paramilitary training.<sup>41</sup> The South African government has admitted to forged South African passports being exploited by terrorists<sup>42</sup> which reveal a weakness in the systems of the country. How will the free movement of persons have an impact on terrorist-related activities currently taking place in the country? The current measures in place have not deterred this type of crime. I am unconvinced that implementing the free movement of persons will improve the situation.

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<sup>36</sup> M Steinbrink 'Focus migration: Country profile South Africa' 31 (2015) 8.

<sup>37</sup> CW de Wenden (n 32 above) 56.

<sup>38</sup> Counter-Terrorism Committee Executive Directorate 'Denying safe haven to those who finance, plan, support or commit terrorist acts, or provide safe havens, and preventing terrorists from abusing the asylum system, in conformity with international law' (5 April 2017) 3.

<sup>39</sup> V Türk 'Open briefing to United Nations Security Council Counter-Terrorism Committee' 5 April 2017 3.

<sup>40</sup> H Solomon 'Playing ostrich: Lessons learned from South Africa's response to terrorism' (2011) The Africa Center for Strategic Studies 1.

<sup>41</sup> As above.

<sup>42</sup> H Solomon 'Researching terrorism in South Africa: More questions than answers' (2012) 40(2) *Scientia Militaria, South African Journal of Military Studies* 147.

### 3.3 Economic implications

It has been argued that the free movement of persons would have a positive effect on the receiving country. How will the sending countries be affected? The free movement of persons in relation to labour migration means that the receiving country will benefit to a greater extent than the sending country. South Africa receives a high volume of low-skilled labour migrants from the rest of the continent. Ghosh holds that the free movement of persons will not amount to economic convergence<sup>43</sup> and rectify the economic disparities in the AU, but rather create further polarization within the AU.<sup>44</sup> Gosh further argues that whatever economic benefits may arise will not be enjoyed or shared equally by all AU member states.<sup>45</sup> Sending countries may experience a brain-drain and a deficit in low-skilled labour which may compromise their economic development. The free movement of persons contributes to the reinforcement of poverty<sup>46</sup> especially for the sending countries. Black and Crush *et al* both propose that the most effective way for member states to promote economic development is through achieving economic stability and growth internally instead of seeking that elsewhere (in another country).<sup>47</sup> Moreover, the benefits of remittance payments for a sending country, as stated above, can be countered by the depletion of skilled and unskilled labour.<sup>48</sup> There is a strong possibility that sending countries will be at a disadvantage in terms of economic development and stability should the free movement of persons be implemented within the AU.

### 3.4 Infrastructure

The receiving country, in this case South Africa, will have to meet the demands and needs not only of its citizens but also of all persons who are within its borders. It is clear from the numerous service delivery protests that are occurring that the demand for services, such as health care, sanitation, power supply, housing, and education, is much higher than their supply. The free movement of persons will obviously place

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<sup>43</sup> n 34 above 100.

<sup>44</sup> As above, 101.

<sup>45</sup> As above.

<sup>46</sup> R Black *et al* 'Migration and development in Africa: An overview' (2006) 9.

<sup>47</sup> As above, 9 and Crush J *et al* 'Migration in southern Africa: A paper prepared for the policy analysis and research programme of the global commission on international migration' (2005) 9.

<sup>48</sup> R Black *et al* (n 46 above) 126.

an additional undesirable strain on the demand for welfare services.<sup>49</sup> The influx of people into the country may also see the physical infrastructure being threatened. South Africa will have to ensure that there is adequate housing, an improved and larger transport system, and a better-equipped health care system in order to accommodate the growing population. Furthermore, Black notes that population growth arising from migration tends to place a greater burden on the already over-populated urban areas.<sup>50</sup>

### 3.5 Abuse of domestic laws

South Africa is lauded for its progressive Constitution and respect for human rights. This, however, has come at a cost to the country with regard to matters relating to the protection of non-South African children when they are in the country, and the legal documentation and poor civil registration system within the African continent.

The AU is home to only four countries whose civil registration systems meet international standards<sup>51</sup> set by the United Nations (UN), and South Africa is one such country. The effective and efficient functioning of civil registration systems is pivotal to any country as it is central to the development process<sup>52</sup> because it provides a basis for national identity,<sup>53</sup> helps track development goals, and promotes equitable development and fosters International Corporation.<sup>54</sup> Civil registration systems further provide vital documentation related to identity, civil rights and nationality,<sup>55</sup> thereby enabling persons to access essential social services and travel documentation. The lack of an effective and efficient civil registration system throughout the continent means that it is impossible to keep accurate track of the

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<sup>49</sup> A Pécoud & P de Guchteneire (n 18 above) 17.

<sup>50</sup> R Black *et al* (n 46 above).

<sup>51</sup> Africa programme on accelerated improvement of civil registration and vital statistics 'Report on the status of civil registration and vital statistics in Africa: Outcome of the Africa programme on accelerated improvement of civil registration and vital statistics systems monitoring framework' (2016) 3.

<sup>52</sup> United Nations Economic Commission for Africa 'Making everyone visible: Why improving civil registration and vital statistics systems in Africa is important' (2014) 1.

<sup>53</sup> As above, 4.

<sup>54</sup> As above.

<sup>55</sup> n 51 above.

movement of people. This creates opportunities for people to travel without the relevant documentation making them illegal migrants. South Africa has struggled for years with undocumented migrants within its borders. When an undocumented migrant is found in the country, the Department of International Relations and Cooperation contacts the relevant embassy to inform it that one of its nationals has been detained and must be deported back home. The lack of an effective and efficient civil registration system means that African countries do not have to claim any person as their national. It is, therefore, left to the receiving country to deal with the person, and this adds to the problem of the statelessness of people within the African continent which is contrary to international laws.<sup>56</sup> Furthermore, children born to stateless persons are also undocumented. This situation is further aggravated by the discriminatory practice found in some African countries of assigning nationality to a child based on the nationality of the father and not the mother.<sup>57</sup> The free movement of people in South Africa may further perpetuate this problem rather than assist in resolving it.

### 3.6 Human trafficking

The effect of the illegal movement of person has allowed the scourge of human trafficking to grow at an alarming rate. It has been implied that South Africa's current struggle to manage human trafficking within its territory is as a result of strict border-control measures.<sup>58</sup> Studies have indicated that South Africa is a major destination for trafficked persons.<sup>59</sup> Human trafficking has also encouraged drug and arms trafficking and the trafficking of women and girls for prostitution.<sup>60</sup> Another dire consequence of human trafficking is the increasing number of deaths<sup>61</sup> of trafficked

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<sup>56</sup> Universal Declaration on Human Rights (10 December 1948), the Convention relating to the Status of Stateless Persons (28 September 1954), the Convention on the Reduction of Statelessness (30 August 1961) and the Convention on the Rights of the Child (20 November 1989) to mention a few.

<sup>57</sup> B Manby 'Briefing paper for UNHCR regional conference on statelessness in Southern Africa' (2011) 8. See also *Unity Dow v Attorney-General of Botswana* (1991) *Journal of African Law* 36(1):91-2 (1992).

<sup>58</sup> C Horwood 'Sub-Saharan Africa' in F Laczko *et al* (eds) (2017) *Fatal journeys volume 3 part 2: improving data on missing migrants* (2017) 24.

<sup>59</sup> P Mudungwe 'Migration and development in the Southern Africa Development Community region: The case for a coherent approach' (2014) 18.

<sup>60</sup> B Ghosh (n 34 above) 98.

<sup>61</sup> CW de Wenden (n 32 above) 56.



persons which go unreported and undocumented. The conditions in which people are treated is a violation of human rights and these go undetected because of poor border management and countries that are too weak to enforce laws.

#### **4. Impact on relations between South Africa and the AU**

The goal of the Abuja treaty is to integrate the African continent by placing the continent in a better position to compete economically and have a more profound influence within the international community. It is the realisation of the African renaissance. The ratification of the Abuja Treaty by South Africa can be seen as confirmation of South Africa's stance in terms of the free movement of persons. In fact, the South African government has stated that it 'fully supports the vision of an Africa where its citizens can move more freely across national borders'.<sup>62</sup> South Africa has also raised a number of concerns and has insisted on certain preconditions before the implementation of the free movement of persons can be realized. Pécoud and de Guchteneire warn that the free movement of persons can create inequalities between people (rich and poor) and between countries,<sup>63</sup> such as the security issues between member states which in the past have resulted in tighter border-control measures.<sup>64</sup> The African continent has had its share of civil unrest (Arab Spring, war in Darfur, unrest in Libya, and so on) and health security crises (East African food crisis, Ebola outbreak, HIV/AIDS, droughts, and so on)<sup>65</sup> which had a significant impact on migratory patterns.

The Regional Economic Communities (RECs) are supposed to assist in achieving the goals of the Abuja Treaty. This, however, has been difficult owing to the fact that progress with regards to integration at the RECs level has been

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<sup>62</sup> n 25 above, 3.

<sup>63</sup> n 18 above, 9.

<sup>64</sup> n 18 above, 4.

<sup>65</sup> Available from <http://www.globalissues.org/article/792/mideast-north-africa-unrest> (accessed on 30 May 2018).

uneven<sup>66</sup> because member states have to be willing to resign sovereignty to a certain extent.<sup>67</sup> The obvious disparities among member states also compound the challenges of integration. The divide of the AU is also worsened by the history of colonisation which divided the continent into anglophone, lusophone and francophone regions. The continent has not completely shed the divide caused by colonisation. An example of this divide was evident in the ECOWAS during the Liberian civil war. The member states who were colonised by France insisted that the civil war was an internal matter and did not require intervention while the anglophone member states insisted on military intervention.<sup>68</sup> The mere fact that member states appear to share similar ideologies and goals based on former colonial legacies indicates a lack of vision with regards to the continental integration. The RECs will find it very challenging to achieve uniform goals when colonial legacies still linger within the continent.

Another stumbling block for an integrated AU is the fact some of the AU member states are part of more than one regional community or agreement. Decisions that are taken at regional levels are not aligned and create challenges with regards to implementation.<sup>69</sup> Nshimbi and Fioramonti have further discovered that there is very little cooperation and engagement amongst the regional bodies within the continent.<sup>70</sup> Nita *et al* argue that this disjointed approach of regional bodies results in policies which lack commitment by member states and lead to poor and incoherent implementation.<sup>71</sup> Adepouju found that the existing regional bodies will have different goals, political systems and levels of development<sup>72</sup> making it very difficult for a cohesive continental approach to development. Belonging to regional bodies also

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<sup>66</sup> T Corrigan 'Puzzling over the pieces: Regional integration and the African Peer Review Mechanism' (2015) 16.

<sup>67</sup> ON Mwashia (n 28 above) 74.

<sup>68</sup> TA Adekola 'Free movement of persons, residence and right of establishment in Economic Community of West African State' (2016) <https://www.researchgate.net/publication/321365347> (accessed on 1 August 2018).

<sup>69</sup> African Union Commission, Department of economic affairs 'Status of integration in Africa' (SIA IV) (2013) 86.

<sup>70</sup> n 12 above, 41.

<sup>71</sup> S Nita *et al* in Introduction in S Nita *et al* (eds) *Migration, free movement and regional integration* (2017) xv.

<sup>72</sup> A Adepouju 'Creating a borderless West Africa' in Pécoud, A & de Guchteneire, P (eds) *Migration without borders: Essays on the free movement of people* (2007) 165.

has financial obligations for the member states which can be burdensome in instances where a country is a member state to multiple regional bodies.<sup>73</sup> The financial obligations can be worsened by conflicting ideologies of the regional bodies because finances have to be focused on the implementation of multiple decisions. It is evident that the implementation of the free movement of persons by member states can be overshadowed by other decisions taken by regional bodies. The lack of cooperation and coherent strategies in the AU means that the implementation of the free movement of persons by South Africa may not lead to a successful and coherent implementation throughout the continent and therefore the projected benefits will not be realised.

The free movement of persons will see more migrants coming to the SADC and to South Africa in search of better opportunities. These opportunities are not limited to economic benefits but also include better infrastructure and access to health care. What in turn can South Africa expect to gain? More importantly, will the gains exceed the disadvantages? The AU needs to ensure that all member states have met certain requirements before requiring the implementation of the free movement of persons. Should these requirements not be met, mutual cooperation within the AU will be strained, especially for a receiving country like South Africa. Should South Africa not wish to implement the free movement of persons, for whatever reason, it will be seen as xenophobic that is unwilling to participate in growing a better Africa. Which, might I emphasise, is not South Africa's stance.

## **5. Closing remarks**

The possible effects of implementing the free movement of persons are complex and inter-related. What could be a potential benefit to the economy of a receiving state could also potentially have adverse effects. It also appears that the disadvantages of introducing the free movement of person may greatly outweigh the benefits at this

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<sup>73</sup> JU Eke & KJ Ani 'Africa and the challenges of regional integration' (2017) 6(1) *Journal of African Union Studies* 75.

point in time. South Africa was an active participant in the conversion of the Organisation for African Unity (OAU) to the AU and also with regards to the establishment of the New Partnership for Africa's Development (Nepad). Furthermore, South Africa has stated its support for strengthening cooperation and integration and for promoting continental development and achieving peace and security.<sup>74</sup> Hesitation with regard to the implementation of the free movement of persons is largely due to the disparities amongst the AU member states. Uniformity of certain conditions, therefore, needs to be achieved as a starting point to continental integration.

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<sup>74</sup> n 25 above, 4.

## Chapter 4

### A comparative look at the freedom of movement of persons in other regional communities

#### 1. Introduction

This chapter examines the way in which other regional communities, comprising of developed and developing countries, have implemented and regulated the free movement of persons. The African Union (AU) has the challenge of implementing the free movement of person at both a regional and a continental level. In order to achieve the implementation of the free movement of persons, it is prudent that the AU observes how other regional communities have implemented the free movement of persons. Some factors to observe are the functioning of the different regional communities, the purpose behind their establishment, the extent of cooperation and harmonization of policies and whether there is a willingness to surrender, to a certain extent, state sovereignty to a supranational body.

#### 2. Developed countries

##### 2.1. The European Union

After World War II, the United States (US) assisted in creating the European Union<sup>1</sup> (EU) because the US wanted a strong market economy with which it could engage.<sup>2</sup> That started the process of the formation of the European Community in 1967 and this consisted of the merger of the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community.<sup>3</sup> The

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<sup>1</sup> EU member states include Croatia, Italy, Greece, France, Germany, Austria, Belgium, Romania, Spain, Sweden, Denmark, Estonia, Finland, Hungary, Ireland, Cyprus, Latvia, Poland, Czech Republic, Lithuania, Malta, Netherlands, Slovakia, Slovenia, United Kingdom, Bulgaria and Luxembourg.

<sup>2</sup> B Simura & LE Asuelime 'BREXIT from the European Union: What lessons for the African Union integration?' (2017) 6(1) *Journal of African Union Studies* 30.

<sup>3</sup> Unpublished Master's dissertation MR Madyo 'The importance of regional economic integration in Africa' 81.

Treaty of Rome,<sup>4</sup> which established the European Economic Community, made provision for the free movement of workers and freedom of establishment. The Treaty of Rome was followed by the Single European Act of 1986 which established a single market and ensured, amongst others, the free movement of persons.<sup>5</sup> The Treaty on European Union (Maastricht Treaty)<sup>6</sup> followed after and made provision for the abolition of obstacles to the free movement of persons.<sup>7</sup> The Maastricht Treaty also states that, to achieve the objectives of the treaty, the member states will regard border management and immigration policies as being of common interest.<sup>8</sup> Both treaties were amended by the conclusion of the Treaty of Lisbon<sup>9</sup> which placed the achievement of the free movement of persons as a shared competence of the EU and the member states.

According to the Maastricht Treaty, all persons who are nationals of a member state of the EU are automatically citizens of the EU. The EU recognises the free movement of persons who are seeking to improve their economic situation and those who are not active economically.<sup>10</sup> Unlike the situation in the US, the EU has attempted to tackle the issue of free movement of persons uniformly and not in relation to separate countries. An example of this effort is the abolition of internal border controls for citizens of the Schengen countries.<sup>11</sup> Furthermore, the EU has harmonised policies on immigration and labour migration to allow EU countries to achieve shared goals effectively.<sup>12</sup> In 2002, the EU issued a Communication on

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<sup>4</sup> Treaty on the Functioning of the European Union, 25 March 1957.

<sup>5</sup> J Kunz & M Leinonen 'Europe without borders: rhetoric, reality or utopia?' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 138.

<sup>6</sup> Treaty on European Union (Consolidated version), Treaty of Maastricht, 7 February 1992.

<sup>7</sup> Art 3(c) of the Maastricht Treaty.

<sup>8</sup> Art KI of the Maastricht Treaty.

<sup>9</sup> Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007.

<sup>10</sup> M Menghi & J Quéré 'Free movement of Europeans: Taking stock of a misunderstood right' (2016) 14.

<sup>11</sup> C Boswell 'Migration in Europe: A paper prepared for the policy analysis and research programme of the Global Commission on International Migration' (2005) 11. Members of the Schengen area are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden, and Switzerland.

<sup>12</sup> As above.

Migration in order to further address concerns of treatment of foreign nationals, brain drain and other factors impacted by migration.<sup>13</sup>

At this point, it is prudent to highlight the fact that EU law supersedes national law<sup>14</sup> resulting in a uniform application of policy with regard to the movement of persons. The nationals of all 28 member states of the EU can exercise free movement of persons within Europe. The EU also permits Lichtenstein, Iceland, Norway and Switzerland to enjoy the free movement of persons within Europe.<sup>15</sup> Measures, such as the ban on the free movement of migrant labourers that each member state may enforce for a period not exceeding seven years, have been put in place to prevent the influx of labour migrants.<sup>16</sup> The free movement of persons within the EU has been categorised into four categories: for employment; students; all other persons who have adequate resources; and relatives of EU citizens.<sup>17</sup> The free movement of persons can be sought for a period of less than three months, a period of more than three months and for permanent residence.<sup>18</sup> The EU has harmonised policies with regard to social security and the mutual recognition of qualifications in order to achieve the free movement of persons successfully.<sup>19</sup> Two restrictions with regard to the free movement of persons exist, viz. workers may not work in the public service<sup>20</sup> and the free movement of persons can be restricted for reasons relative to public policy, security and health.<sup>21</sup>

The implementation of the EU integration has resulted in challenges amongst which is the implementation of the free movement of persons which lead to the 2016

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<sup>13</sup> C Boswell (n 11 above) 22.

<sup>14</sup> D Acosta 'Free movement in South America: The emergence of an alternative model?' (2016) <https://www.migrationpolicy.org/article/free-movement-south-america-emergence-alternative-model> (accessed on 12 July 2018).

<sup>15</sup> Based on agreements within the EU.

<sup>16</sup> C Boswell (n 11 above) 24.

<sup>17</sup> P de Bruycker 'The European Union: From freedom of movement in the internal market to the abolition of internal borders in the area of freedom, security and justice' in S Nita *et al* (eds) *Migration, free movement and regional integration* (2017) 293-294.

<sup>18</sup> As above.

<sup>19</sup> As above, 298.

<sup>20</sup> As above.

<sup>21</sup> As above, 299.

referendum held by Britain on whether to remain or exit the EU.<sup>22</sup> There have been cases of discrimination towards non-EU members once they have entered and settled in the EU on grounds of nationality.<sup>23</sup> The EU policies regarding migration have also been implemented differently by member states causing confusion and frustration for those wanting to move across borders.<sup>24</sup> The migrant crisis of 2015 also put additional pressure on the free movement of persons within the EU and how member states were to handle the influx of people crossing borders. Some member states<sup>25</sup> chose to go against the EU policy of open borders during this time. Simura and Asuelime are of the view that the poor handling of migration to the EU contributed to the migrant crisis of 2015 and cases of Islamophobia.<sup>26</sup>

## 2.2 North America

In 1988, the United States and Canada entered into the Canada–United States Free Trade Agreement<sup>27</sup> (CUSFTA). This was to eliminate tariffs and trade barriers between the two countries. The agreement was then extended to include Mexico and, in 1992, the North American Free Trade Agreement<sup>28</sup> (NAFTA) came into being. The NAFTA aims to create freer movement of capital, goods and services.<sup>29</sup> The NAFTA does not seek to cater for the free movement of persons as a stand-alone objective. Chapter 16 of the NAFTA does, however, make provision for the facilitation of the temporary movement of certain categories of persons, such as business persons, investors and seconded staff.<sup>30</sup> Chapter 12 of the NAFTA plainly states that the agreement does not create any immigration obligations for the parties thereto.<sup>31</sup>

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<sup>22</sup> B Simura & LE Asuelime (n 2 above) 26.

<sup>23</sup> Policy Department for Citizens' Rights and Constitutional Affairs 'Obstacles to the right of free movement and residence for EU citizens and their families: Comparative analysis' (2016) 13.

<sup>24</sup> As above, 12.

<sup>25</sup> Italy, Greece, Hungary, Czech Republic and Slovakia.

<sup>26</sup> B Simura & LE Asuelime (n 2 above) 27.

<sup>27</sup> Canada–United States Free Trade Agreement, 2 January 1988.

<sup>28</sup> North American Free Trade Agreement, 17 December 1992.

<sup>29</sup> EC Viano 'An American dilemma: The flow of trade versus the flow of people in NAFTA' (2010) 22 *Denning Law Journal* 87.

<sup>30</sup> F Alba *et al* 'Migration policies in a free trade area: The issue of convergence with the economic integration process' in Organisation for Economic Co-Operation and Development *Migration, free trade and regional integration in North America* (1998) 267.

<sup>31</sup> EC Viano (n 29 above) 100.



The fact that the NAFTA does not specifically cater for the free movement of persons had not deterred or hindered migration.<sup>32</sup> Both the CUSFTA and the NAFTA are clearly focused on economic growth and integration. Each of the member states to the NAFTA caters for the movement of persons in their own national legislation with the US and Canada both catering for the migration of skilled workers. The NAFTA introduced visas which enable professionals from any of the member states to engage in temporary work in the NAFTA countries.<sup>33</sup> The NAFTA visas make provision for four categories of professional workers, viz. business visitors, merchants and investors, intra-company transferees and professionals.<sup>34</sup>

The NAFTA creates an imbalance for the members states in that the US does not place a limit on Canadian migrants but there is a 5,500 limit placed on Mexican migrants<sup>35</sup> which creates a less favourable status for Mexico. Migration between the three countries is not harmonised and different measures apply. Furthermore, the NAFTA does not acknowledge the right to residence and establishment once a person has entered a third state.<sup>36</sup> Vianco argues that the NAFTA could take lessons from the EU model of integration. This is true if the NAFTA member states wanted to achieve integration, but this is clearly not their aim. De Bruycker, like many, has noted that the free movement of persons is fundamentally associated with the establishment of a common market<sup>37</sup> which is yet another aspect of integration with which the NAFTA is not concerned.

The 2004 Central America–Dominican Republic Free Trade Agreement (CAFTA-DR)<sup>38</sup> expanded the NAFTA by including other developing countries such as Nicaragua, Costa Rica, El Salvador, Guatemala, the Dominican Republic and Honduras in a free trade agreement. Once again, the main focus of this agreement

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<sup>32</sup> F Alba *et al* (n 30 above) 268.

<sup>33</sup> R Alarcón 'The free circulation of skilled migrants in North America' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 252.

<sup>34</sup> As above, 253.

<sup>35</sup> EC Viano (n 29 above) 101.

<sup>36</sup> As above, 106.

<sup>37</sup> P de Bruycker (n 17 above) 287.

<sup>38</sup> Central America–Dominican Republic Free Trade Agreement, 5 August 2004.

was on the economic benefits (removal of tariffs) to the member states and not on the free movement of persons. The member states to the CAFTA-DR cater for the free movement of persons in national legislation which does not indicate any integration or harmonization of policies specifically surrounding issues of migration.

### **3. Developing countries**

#### **3.1 South America**

The Treaty of Asunción<sup>39</sup> established a common market known as the Mercosur (Mercado Común del Sur/Mercado Comum do Sul or Southern Common Market) which consisted of Argentina, Brazil, Paraguay, Uruguay, and, later, included Bolivia and Venezuela.<sup>40</sup> The Treaty of Asunción also caters for associate member states which include Chile, Peru, Suriname, Colombia, Ecuador and Guyana. In the preamble, the Treaty of Asunción states that its aim is to create a common market with the 'free movement of goods, services and factors of production between countries'.<sup>41</sup> Much like the NAFTA, there is no mention of the free movement of persons. This lead to certain member states struggling to deal with the influx of migrants. In an attempt to further deepen integration and find a solution to irregular migration within the region,<sup>42</sup> the Mercosur member states introduced the Mercosur Residence Agreement (MRA) in 2002. However, the MRA is currently not in force as it is not ratified by all countries.

The MRA not only provided for the free movement of persons within the region, but also provided the right to residence<sup>43</sup> and work to nationals of the Mercosur member states. The nationals of member states and associate member states may reside and work in another member state for a two-year period save for a few

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<sup>39</sup> The Treaty of Asunción, 26 March 1991.

<sup>40</sup> Venezuela has been suspended from the Mercosur since 1 December 2016.

<sup>41</sup> Preamble to the Treaty of Asunción, 26 March 1991.

<sup>42</sup> D Acosta (n 14 above).

<sup>43</sup> A Maguid 'Migration policies and socioeconomic boundaries in the South American Cone' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 269.

prerequisites, e.g. persons must provide proof of citizenship and a clean criminal record.<sup>44</sup> The nationals of member states and associate member states may also apply for permanent residence after a period of two years in a third country by proving that they have sufficient resources to sustain themselves in the third country.<sup>45</sup> The benefits to migrants provided for by the MRA include the right to equal working conditions, access to education and reuniting with family members.<sup>46</sup> Children born to migrants in a third state within the region also have the right to have their birth registered in that third state.<sup>47</sup> The MRA has put the free movement of persons into the forefront of integration for the Mercosur member states. This has resulted in the improvement and alignment of border controls within the region.<sup>48</sup>

The Mercosur member states have to contend with the fact that they are at different stages of development especially with regard to their economies and social security much like the countries of the AU.<sup>49</sup> The disparity is further aggravated by the attraction that different countries pose for people from the rest of the continent. Furthermore, it is up to the individual member states to implement the Mercosur Residence Agreement nationally as they see fit,<sup>50</sup> and this results in a disjointed application of the agreement. The free movement of person in the Mercosur region is also not identified as being a fundamental right but rather a benefit emanating from a treaty.<sup>51</sup> There are, however, proposals by the Mercosur member states to extend the free movement of persons to nationals belonging to countries outside of the region to cement the human right to migration by not criminalizing irregular migration.<sup>52</sup>

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<sup>44</sup> D Acosta (n 14 above).

<sup>45</sup> As above.

<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> A Maguid (n 43 above) 269.

<sup>49</sup> As above, 260.

<sup>50</sup> D Acosta (n 14 above).

<sup>51</sup> Diego Acosta Arcarazo 'Is free movement in Europe an anomaly? The new open borders policy in South America' (2014) <https://policybristol.blogs.bris.ac.uk/2014/11/25/is-free-movement-in-europe-an-anomaly-the-new-open-borders-policy-in-south-america/> (accessed on 12 July 2018).

<sup>52</sup> As above.

It is noteworthy to highlight the influence that Argentina has had on the migration policies on the Mercosur member states. Argentina has taken a leadership position with regards to the free movement of persons the in the Mercosur bloc and thus was able to exercise her influence in the bloc. The Argentine Patria Grande Program of 2004 which aimed to regulate and document undocumented immigrants was introduced to the bloc. The Mercosur member states signed the Declaration of Patria Grande in order to regulate immigrants.<sup>53</sup> Argentina took the initiative to present ideas and practical steps to successfully implement the free movement of persons within the bloc. Argentine proposed the need to create consultative forums in order to harmonise migration, harmonised standards for border controls and Information Exchange Network of Mercosur which created a platform for information sharing amongst member states migration authorities.<sup>54</sup>

### **3.2 West Africa**

The Economic Community of West African States (ECOWAS) was established by the Treaty of the Economic Community of West African States,<sup>55</sup> and it is made up of Ghana, Liberia, Benin, Liberia, Mali, Cape Verde, Togo, Gambia, Guinea-Bissau, Guinea, Ivory Coast, Niger, Senegal, Nigeria and Sierra Leone. The ECOWAS adopted a common approach towards migration in the 1979 Protocol a/p.1/5/79 relating to the free movement of persons, residence and establishment (ECOWAS Protocol).<sup>56</sup> The ECOWAS Protocol provides for the free movement of persons along with the right to residence and establishment within the community. Much like the Abuja Treaty, the goals of the ECOWAS Protocol are captured in phases<sup>57</sup> with an allocated time period for the fulfilment of the goals.

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<sup>53</sup> L Culpi & AE Pereira 'The Argentine role in the promotion of migration policy in Mercosur (1991–2014)' (2016) 16 *Fédéralisme Régionalisme*.

<sup>54</sup> As above.

<sup>55</sup> 28 May 1975.

<sup>56</sup> 29 May 1979.

<sup>57</sup> Art 2(3) of the ECOWAS Protocol.

Phase one addresses the abolition of visas and the right to entry<sup>58</sup> which must be achieved within a period of five years after the ECOWAS Protocol has entered into force. Phase one provides that persons who wish to enter another state for a period not exceeding 90 days must produce a valid passport and an international health certificate. There is no requirement for a visa, although the receiving country may deny entry to the country in line with national law.<sup>59</sup> Nationals of member states may enter, reside and establish themselves within the community.

Phase two addresses the right of residence, and phase three addresses the right of establishment which is presently not enforced. The three phases have been granted a 15-year period for achievement. It is the responsibility of each member state to ensure that the provisions of the ECOWAS Protocol are incorporated into national legislation and enforced accordingly.

The ECOWAS Protocol does not provide categories of persons who may enter and have the rights to residence and establishment within the regional community. What exists appears to be a blanket provision for all nationals of member states to the ECOWAS Protocol. This approach indicates that the free movement of persons is considered to be fundamental to achieving regional integration.<sup>60</sup> The progressive approach to the free movement of persons in the ECOWAS is further enhanced by the region's shared history of colonisation and close social and cultural ties.<sup>61</sup>

The free movement of person has not been effectively implemented in the ECOWAS. Some member states have not implemented the necessary measures to allow for free movement of persons across their borders while others, such as Nigeria have actively closed their borders to Cameroon, Chad and Benin at different

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<sup>58</sup> Art 2 of the ECOWAS Protocol.

<sup>59</sup> Art 2(2) of the ECOWAS Protocol.

<sup>60</sup> A Adepoju 'Migration management in West Africa within the context of ECOWAS Protocol on Free Movement of Persons and the Common Approach on Migration: Challenges and prospects' in M Trémolières (ed) *Regional challenges of West African migration: African and European perspectives* (2009) 19.

<sup>61</sup> As above, 23.

times.<sup>62</sup> The lack of economic and political stability in the ECOWAS has impacted on the direction free movement of persons has taken. In 1983 and 1985, Nigeria contradicted articles 4 and 27 of the ECOWAS Protocol by expelling over 2 million non-citizens who were predominantly Ghanaians from the country<sup>63</sup> owing to an economic slump. The majority of ECOWAS member states have been ranked at the bottom of the Human Development Index (index identifying the life expectancy, level of education and standard of living in a country) resulting in the better performing economies receiving a higher rate of migration.<sup>64</sup>

Civil conflict, in some member states has stalled the free movement of person within the region like the political crisis which lead to violence in Cote d'Ivoire.<sup>65</sup> Crossing borders has also proved challenging as some reports indicate that security personnel at the borders, like in Senegal and Gambia torture and kill persons trying to cross borders.<sup>66</sup> In 2005, 44 Ghanaians were killed by the Gambian security agencies.<sup>67</sup> The lack of proper documentation has also made the implementation of the free movement of persons difficult. Notwithstanding the above, the ECOWAS has been the most successful REC in Africa in terms of its implementation of the free movement of persons.

#### 4. Closing remarks

It is evident that the intention of regional agreements has a bearing on how each regional community caters for the free movement of persons. The ECOWAS, Mercosur and the EU all intended to create regional integration. The EU has

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<sup>62</sup> JU Eke & KJ Ani 'Africa and the Challenges of Regional Integration' (2017) 6(1) *Journal of African Union Studies* 70.

<sup>63</sup> TA Adekola 'Free movement of persons, residence and right of establishment in Economic Community of West African State' (2016) <https://www.researchgate.net/publication/321365347> (accessed on 1 August 2018).

<sup>64</sup> J Agyei & E Clotey 'Operationalizing ECOWAS Protocol on Free Movement of People among the member states: Issues of convergence, divergence and prospects for sub-regional integration' (2007) <http://www.imi.ox.ac.uk/pdfs/research-projects-pdfs/african-migrations-workshops-pdfs/ghana-workshop-2007/CLOTTEY%20and%20AGYEI.pdf> (accessed on 12 July 2018).

<sup>65</sup> TA Adekola (n 63 above).

<sup>66</sup> J Agyei & E Clotey (n 64 above).

<sup>67</sup> As above.

achieved greater integration than the others owing to the fact that the member states were willing to be subject to a supranational community body which supersedes national laws. Furthermore, the wealthier states in the EU provided development assistance to the other less wealthy countries in order to promote rapid economic growth.<sup>68</sup> The NAFTA, ECOWAS and Mercosur have not attempted to provide any assistance with regards to improving conditions for successful integration.

Although the free movement of persons was not identified as being an integral part of integration for the Mercosur member states, its inclusion provided the means to deal with irregular migration within the region. The promotion of free goods and services *sans* the free movement of persons, as is the case with the NAFTA, may lead to human right abuses which include the lack of access to education, health services, and participation in civil and economic society.<sup>69</sup> It could also further encourage the growth of disparities between the countries in the regional community. It is clear with reference to the NAFTA that the countries involved do not derive the same or even similar benefits from the agreement.

Maybe a more practical approach would be to include the free movement of persons as an integral part of regional integration. This approach might eliminate some challenges, but it will also create others. Argentina is currently the main destination for migration<sup>70</sup> in the Mercosur. The Argentine government managed to effect considerable amendments to its legislation which managed the free movement of persons rather than creating more stringent restrictions for border crossing. The approach to regional migration by Argentina could serve as a good model for South Africa owing to the fact that South Africa also receives a large number of migrants amongst the member states of the AU. The harmonisation of policies and goals with regards to the free movement of persons appears to be integral if the AU is to succeed in achieving integration.

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<sup>68</sup> EC Viano (n 29 above) 106.

<sup>69</sup> As above, 99.

<sup>70</sup> A Maguid (n 43 above) 262.

## **Chapter 5**

### **Recommendations on the way forward for South Africa**

#### **1. Introduction**

The free movement of persons has been implemented by many countries and regional communities worldwide. South Africa is in a fortunate position that it is able to study and learn from the failures and successes that other regional bodies and countries have had with regards to effectively implementing the free movement of persons.

This chapter, therefore, aims to provide recommendations on how South Africa can implement the free movement of persons as stated in article 43 of the Abuja Treaty, incorporating the lessons it has learnt from failures and successes of members of other regional bodies.

#### **2. Lessons from the international community**

It is prudent to note that, as is shown in chapter 2, the free movement of persons does not necessarily amount to the complete opening up of national or regional borders. Neither does it imply that regional bodies and countries may not create measures that must be met prior to entry into their region or territory as indicated in chapter 4. South Africa has to consider what it would mean for the country, practically, economically and in other terms, to implement the free movement of persons. The implementation of the free movement of persons by South Africa will also be felt by other countries in the Southern African Development Community (SADC) and the African Union (AU). Kimunguyi argues that African countries have



more pressing domestic challenges to deal with rather than their focusing on regional integration<sup>1</sup> which would see the implementation of the free movement of persons.

## 2.1 Regional agreements

In chapter 4, an overview was presented of other regional arrangements in order to examine the way in which other regional communities, comprising of developed and developing countries have implemented and regulated the free movement of persons. The regional communities arrangements considered in chapter 4 were from the European Union, South America, North America and West Africa. The regional agreement examined from North America is the North American Free Trade Agreement<sup>2</sup> (NAFTA). The aim of the NAFTA was never the achievement of economic or any other form of integration, but rather simply the facilitation and control of low-skilled labour migrating from Mexico into the US. After signing the NAFTA, the United States actually tightened border controls with Mexico and introduced new legislation to give effect to the restriction of borders.<sup>3</sup> If South Africa was focused on the control of labour migration alone, then the NAFTA can provide an ideal model to reproduce. However, considering that the aim of the Abuja Treaty is continental integration, it would be best for South Africa to observe agreements which aim to achieve some form of integration if not complete continental integration.

Mudungwe argues that regional integration is able to decrease the socio-economic disparities amongst countries which is evident in the European Union (EU), as was indicated in chapter 3. One must consider that the EU has 18 wealthy countries and only 10 countries which are economically less well-off. Financial assistance to member states with struggling economies by the wealthier countries is possible in the EU and may not be an option in the AU. Furthermore, the EU is a

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<sup>1</sup> P Kimunguyi 'Regional integration in Africa: Prospects and challenges for the European Union' Refereed paper presented to the Australasian Political Studies Association conference, University of Newcastle, Australia (2006) 12.

<sup>2</sup> North American Free Trade Agreement, 17 December 1992.

<sup>3</sup> H Solomon 'Towards the free movement of people in Southern Africa?' (1997) Institute for Security Studies Occasional Paper 18.

supranational body that is independent of the governments of its member states.<sup>4</sup> This is not the case with the AU. The AU, unlike the EU, is made up of developing countries. In this regard Kimunguyi holds that the EU model indicates that regional economic integration creates better convergence with regards regional development.<sup>5</sup> Eke and Ani assert that one of the biggest challenges to regional integration in the AU is the lack of funding.<sup>6</sup> However, the situation in the EU where there was assistance from wealthier countries to poorer ones is not an option for the AU. Alba *et al* hold that the lack of free movement of persons in a region should not hinder regional economic integration.<sup>7</sup> What is not clear is whether the lack of free movement of persons will hinder continental integration. One might also argue that the lack of free movement of persons will not impact on continental integration as the goals of continental integration are not primarily based on achieving greater migration, but rather economic enhancement.

The establishment of the EU arose from the goal of economic integration. In chapter 4, one notes that EU initially made provision for the free movement of workers and not people in general. Over time, there has been a need evolve and numerous treaties were drafted and ratified in order to cater to changing migration patterns influenced by globalisation. The AU makes provision for the free movement of persons in the Abuja Treaty. Numerous protocols have been drafted at the RECs level in order to carry out the free movement of persons as envisioned by the Abuja Treaty. The AU might benefit from the manner in which the EU eventually effected the free movement of persons. A treaty that binds member states at a continental level may prove more effective than different protocols at RECs level.

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<sup>4</sup> ON Mwashu 'The Benefits of Regional Economic Integration for Developing Countries in Africa: A Case of East African Community (EAC)' (2011) *Korea Review of International Studies* 77 <https://gsis.korea.ac.kr/wp-content/uploads/2015/04.11-1-05-Ombeni-N.-Mwashu.pdf> (accessed on 30 May 2018).

<sup>5</sup> P Kimunguyi (n 1 above) 17.

<sup>6</sup> JU Eke & KJ Ani 'Africa and the Challenges of Regional Integration' (2017) 6(1) *Journal of African Union Studies* 67.

<sup>7</sup> F Alba *et al* 'Migration policies in a Free Trade Area: The issue of convergence with the economic integration process' in *OECD Proceedings: Migration, Free Trade and Regional Integration in North America* (1998) 270.

South African legislation caters for entry into the country only after meeting certain requirements. The South African government has facilitated the free movement of people and goods as well as the exchange of skills by selecting categories of person (business people, investors, academics and scholars) for whom free movement is facilitated.<sup>8</sup> For the South African government, then, the free movement of persons is not synonymous with the abandoning of existing border controls, but is rather forms part of the final stages of integration.<sup>9</sup>

In this regard Ugur proposes that rather than placing controls on migration, countries should look at managing migration.<sup>10</sup> Ghosh agrees with this view and further elucidates that managing migration entails a system that ensures that the free movement of persons is productive, predictable and orderly.<sup>11</sup>

The Economic Community of West African States (ECOWAS) have indicated the difficulty in implementing the free movement of persons successfully when the member states to the regional agreement are at different levels of development. One may assume that regional integration may be easier in the ECOWAS owing to the fact that the REC consists of a smaller number of member states but that has not been the case. However, the ECOWAS member states have managed to implement an ECOWAS travel certificate which is supposed to make the movement of persons across borders in the region freer than before.<sup>12</sup>

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<sup>8</sup> CC Nshimbi & L Fioramonti 'A region without borders? Policy frameworks for regional labour migration towards South Africa' (2013) *Migrating for Work Research Consortium Report No 1* 60.

<sup>9</sup> F Alba *et al* (n 7 above) 267.

<sup>10</sup> M Ugur 'Ethics, economics and governance of free movement' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 84.

<sup>11</sup> B Ghosh 'Managing migration: Towards the missing regime?' in A Pécoud & P de Guchteneire (eds) *Migration without Borders Essays on the Free Movement of People* (2007) 107.

<sup>12</sup> African Union Commission, Department of economic affairs: Status of integration in Africa (SIA IV) (2013) 79-80.

## 2.2 Policy considerations

The AU currently is made up of eight regional economic communities (RECs).<sup>13</sup> The Abuja treaty envisions that these regional economic communities would play a role in continental integration. It therefore stands to reason that integration needs to be successfully achieved at the regional level before it may be achieved at a continental level. Within the RECs, the implementation of the free movement of persons has met with many challenges, including poor infrastructure, internal conflicts and poor security.

At present, the Common Market for Eastern and Southern Africa, the SADC and the Community of Sahel-Saharan States all have policies promoting the free movement of persons; however, these are not yet in force owing to a hesitation by some member states to embrace the implementation of the free movement of person across borders.<sup>14</sup>

As was pointed out in chapter 3, another challenge within the AU is the fact that some countries in the Union are part of more than one regional community or agreement. Swaziland, for example, belongs to the SADC, COMESA and the Southern African Customs Union.<sup>15</sup> The resultant lack of harmonisation of policies applicable to states which are part of more than one regional community may result in the free movement of person differing between the AEC and the different RECs. This is further compounded by the fact that the RECs are not party to the Abuja Treaty but the individual member states who are party to the treaties establishing the individual RECS.<sup>16</sup> The policies affecting the free movement of persons at the RECs level therefore, may not align to objects and goals of the Abuja Treaty.

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<sup>13</sup> Arab Maghreb Union, Common Market for Eastern and Southern Africa, Community of Sahel–Saharan States, East African Community, Economic Community of Central African States, Economic Community of West African States, Intergovernmental Authority on Development and the Southern African Development Community.

<sup>14</sup> n 12 above, 85-86.

<sup>15</sup> P Kimunguyi (n 1 above) 14.

<sup>16</sup> n 12 above, 86.

### **3. Obligations arising from the Abuja Treaty**

As stated in chapter 2 of this dissertation, South Africa has the obligation to adopt the necessary measures gradually to achieve the free movement of persons within the African Economic Community.<sup>17</sup> This obligation is further cemented by customary international law which is incorporated into the Vienna Convention on the Law of Treaties<sup>18</sup> and by way of the Constitution of the Republic of South Africa, 1996. The Abuja Treaty aims to promote the mutual coordination of policies and activities by the regional economic communities (RECs) and to enhance regional and continental economic integration.

South Africa is obliged to implement the provisions of the Abuja Treaty. Its implementation, however, should not be to the disadvantage of the country which will impact on the SADC regionally and on the rest of the AU. The preamble of the Abuja Treaty highlights the fact that the member states of the Union must share, in an equitable and just manner, the advantages of cooperation for the balanced development for all member states.<sup>19</sup> The implementation of the free movement of persons in South Africa, therefore should not contradict the goals of the Abuja Treaty outlined in its preamble.

### **4. Recommendations**

#### **4.1 Grass-roots-level consultations**

Currently, the AU's model of integration closely resembles that of the EU. The challenges arise when AU countries are expected to integrate in a manner similar to that of the EU countries. Instead, the AU needs to modify the integration process in Africa to suit the African continent. The integration of the AU is carried out at the political level. The successful enforcement and implementation of this integration will

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<sup>17</sup> Art 43(1) of the Abuja Treaty.

<sup>18</sup> 23 May 1969.

<sup>19</sup> Preamble of the Abuja Treaty.

require the support of the people represented by the politicians.<sup>20</sup> It would not make sense for South Africa to implement the free movement of persons while xenophobia is rife. The South African government should undertake consultations with its citizens which will highlight the benefits, especially economic gains, of implementing the free movement of persons in the country.<sup>21</sup> These consultations may have a positive effect on lessening the feelings of anti-foreign sentiments in the country. The AU Commission has also pointed out the need for consultation at a national level.<sup>22</sup> Consultation is vital. It is all good and well to have political backing but the lack of support from the citizens of each member state could stop the integration process even before it has begun.

#### **4.2 Harmonisation of policies**

The Abuja Treaty has placed great emphasis on harmony, and it has stipulated that member states are to harmonise policies for the fulfilment of continental integration. Unfortunately, the majority of the RECs have not implemented the free movement of persons. The lack of harmonisation in this area means that the AU cannot achieve continental integration. Greater emphasis needs to be placed on the successful implementation of the free movement of persons at a regional level before it can be realised at a continental level. The AU must consider that, in order to achieve integration, the historical division of the continent into anglophone, lusophone and francophone regions which still exists<sup>23</sup> requires deliberation as outlined in chapter 3. The regional communities and member states must improve co-operation at both a national and a regional level.<sup>24</sup>

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<sup>20</sup> B Simura & LE Asuelime 'BREXIT from the European Union: What lessons for the African Union integration?' (2017) 6(1) *Journal of African Union Studies* 33.

<sup>21</sup> A Kitimbo 'Is it time for open borders in Southern Africa? The case for free labour movement in SADC' (2014) The Brenthurst Foundation, Discussion Paper 4 12.

<sup>22</sup> n 12 above, 86.

<sup>23</sup> B Simura & LE Asuelime (n 20 above) 31.

<sup>24</sup> F Alba *et al* (n 7 above) 270.

### **4.3 South Africa's preconditions**

As discussed in chapter 5, the achievement of the twelve preconditions that have been identified by South Africa<sup>25</sup> will place the AU in a better position to achieve continental integration. Some of the preconditions include the member states implementing effective and efficient civil registration systems, reliable movement control systems, return agreements, peace, security and stability. South Africa itself has not met all the preconditions as the country still grapples with poor service delivery and xenophobic attacks on foreign nationals. These result in the security of all people in the country being compromised. The fight against human trafficking, drug trafficking and terrorism further requires strengthening at a national, regional and continental level.<sup>26</sup> South Africa cannot place itself in a position to bear the weight of migration within the AU. The desired continental integration cannot rest only on one or several countries; this effort needs to be made by the entire continent.

In a way, the preconditions set out by South Africa will have a positive impact on the development of the AU member states therefore making the implementation of the free movement of persons more beneficial for South Africa and the AU member states.

## **5. Conclusion**

The ambitions of the AU to have an integrated continent are overshadowed by the fact that regional integration has not been fully realised. Regional communities are supposed to be the springboard which will catapult the continental integration of the AU. The poor integration in the RECs indicates poor cooperation amongst member states which is hampering efforts to achieve the provisions of the Abuja Treaty. Pécoud and Guchteneire hold that cooperation among countries is vital when implementing the free movement of persons which means that no country 'can be

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<sup>25</sup> The South African Department of Home Affairs 'South African position on the implementation of the African Union (AU) Agenda 2063 as it relates to migration, regional integration and Africa passport' (2017) 5.

<sup>26</sup> n 12 above, 87.

expected to progress towards free movement if even some other states do not follow the same path'.<sup>27</sup>

The EU offers South Africa and the AU an example of how political willingness is able to positively influence the implementation of the free movement of persons.<sup>28</sup> In the South African context, cooperation needs to be at both regional and continental levels. South Africa has made reasonable strides to remove barriers to the free movement of persons as it has been obliged to do by the Abuja Treaty. The full realization of this obligation, however, requires that all member states are able to implement the free movement of persons and not simply a few member states.

The freedom of movement of persons does not mean the abandonment of border controls and procedures. It simply means that there should be harmonization of policies and practices with regards to border management. The complete free movement of person across borders will cause chaos and, in effect, contradict the objectives of the Abuja Treaty. For South Africa, the implementation of free movement of persons has little to do with her territorial integrity and sovereignty but more to do with the economic and social stability of the country and the continent at large.

Until such a time that uniformity with regard to certain conditions is achieved, continental integration of the AU will be premature, and it may even be to the detriment of the AU. It is evident that there exist both advantages and disadvantages to implementing the free movement of persons. I am of the opinion that currently the disadvantages for South Africa may far outweigh the advantages of implementing the free movement of persons.

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<sup>27</sup> A Pécoud & P de Guchteneire 'Introduction: the migration without borders scenario' in A Pécoud & P de Guchteneire (eds) *Migration without borders: Essays on the free movement of people* (2007) 21.

<sup>28</sup> F Alba *et al* (n 7 above) 267.



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