

A strategic consideration of the African Union Free Movement of Persons Protocol and other initiatives towards the freer movement of people in Africa



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1. The Ambition: One Africa, defragmented

African integration is very much on the agenda with significant progress towards an African Continental Free Trade Agreement (ACFTA) and a range of related initiatives that entail lowering sovereign boundaries to allow deeper engagements and cooperation with neighbours on the African continent.² Most of these initiatives are driven by or through the African Union (AU). One of those initiatives, embodied in the African Union Protocol on the Free Movement of Persons (FMP Protocol), is to lower and ultimately remove the barriers to Africans moving across African borders to visit, to trade, to live, to work and to establish businesses in other African countries.³

The desire to lower African borders to allow the freer movement of people has an intellectual history stretching back at least to the emergence of pan-Africanism in the first half of the 20th century. Most modern African borders derive from the scramble for Africa era of colonialism when the European powers' lust for foreign land and resources resulted in African territorial borders drawn conveniently only for the colonial project. The needs and culture of Africa's indigenous people were seldom factored in, and the result was colonial boundaries that sliced through economic regions and ethnic groups. Another outcome was the fragmentation of the continent into many territories, most of them small and weak. The drive of pan-Africanism to reduce the negative impacts of colonial borders is hard to challenge. One of its key elements is the right of Africans to cross national borders within the continent without undue restrictions. [See e.g. Nkrumah1963]

The FMP Protocol explains that the rationale of the contemporary initiative is that:

'...the free movement of persons, capital goods and services will promote integration, Pan-Africanism, enhance science, technology, education, research and foster tourism, facilitate inter-African trade and investment, increase remittances within Africa, promote mobility of labour, create employment, improve the standards of living of the people of Africa and facilitate the mobilization and utilization of the human and material resources of Africa in order to achieve self-reliance and development...'.⁴

Nevertheless, the Protocol acknowledges the risk that:

'the arrival and settlement of migrants in a given host country will exacerbate inequalities or will constitute challenges to peace and security" and it notes the need to "ensure that effective measures are put in place to prevent (such) situations'.⁵

Though African regions and countries have made considerable progress in bringing barriers down through visa-free travel, visas on arrival and other simplifications for other African countries, the level of enthusiasm for the continental FMP Protocol as such remains low at present.

² Tralac, *African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents*, <https://www.tralac.org/resources/by-region/cfta.html>

³ African Union, *Protocol to the Treaty establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment* (Addis Ababa: AU, 2018).

⁴ AU, *Protocol to the Treaty*, 2018, 4.

⁵ AU, *Protocol to the Treaty*, 2018, 4.

Late in 2019 the AU Commission published a progress report on the implementation of the free movement Protocol.⁶ Here are some key elements:

- 33 countries had signed the FMP Protocol compared with 54 (out of 55) which had signed ACFTA—they were both introduced in January 2018.
- Missing among the signatories to the FMP were all the North African countries; nearly half of the SADC countries, including Namibia, Botswana, South Africa and Zambia; Ethiopia in the horn of Africa; Nigeria in West Africa; and Cameroon in Central Africa.
- For the Protocol to come into force 15 ratifications are required. Four countries had ratified the Protocol: Rwanda, Niger, Sao Tome and Principe, and Mali.

In the past year since the report was published, no further ratifications of the FMP Protocol have taken place. In contrast, 35 countries have ratified the ACFTA.⁷

The hesitance to commit to the FMP Protocol points to a range of concerns about giving up sovereign protections regarding the movement of people and about the implementation plan for the Protocol. There are concerns about the impact of higher levels of immigration on the domestic economic and security environments. In general terms, because of the design of the Protocol and its accompanying ‘Roadmap’, ratification of the treaty could be interpreted to entail the virtually immediate implementation of Phase One, ‘the right of entry and abolition of visa requirements’ in regard to all countries which have concluded the ratification process.⁸

The Roadmap is attached as a guideline for the implementation of the Protocol, but it is not unambiguously helpful in that respect. For example, it is not clear from the Protocol or the Roadmap whether, for example, improvements in national migration systems need to be completed in order for a country to become a part of the FMP community. This is because sequencing is not clearly set out in the Roadmap. Some members seem to fear that the FMP Protocol will allow relatively uncontrolled free movement in spite of several safeguard clauses such as Article 7(2) which states that ‘A host Member State may impose other conditions, which are not inconsistent with this Protocol, according to which a national of a Member State may be refused entry into the territory of the host Member State.’⁹

The issue of foreigners being given freer rights to enter and potentially immigrate has the potential to spark negative reactions against foreigners and against governments, especially, as we shall learn, in countries where unskilled local workers are poorly paid and where inequality is high. Frequently politicians exploit such tensions, and, also for political reasons, governments often do not intervene to reduce tensions. There are also security concerns—common criminals, terrorist movements and combinations thereof can exploit loose border controls.¹⁰ While there is a valid counterargument that regularising the movement of people

⁶ AU, *Progress Report on the Free Movement of Persons in Africa* presented to the Third Meeting of the Specialised Technical Committee on Migration, Refugees and Internally Displaced Persons 4-8 November 2019

⁷ See ‘Status of AfCFTA Ratification’, tralac, <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> updated to 20/01/2020.

⁸ AU, *Implementation Roadmap for the Draft Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment*, (Addis Ababa: AU, 2018).

⁹ AU, *Protocol to the Treaty*, 2018, Article 7(2).

¹⁰ Although Chapter 12 in *Africa Migration Report: Challenging the narrative* <https://au.int/sites/default/files/documents/39408-doc-africa-migration-report.pdf> argues that there is no clear correlation between free movement of persons and increasing insecurity.

would make it easier to track undesirable immigrants than a system where irregular migration is widespread, progress towards the finalisation of the FMP Protocol has stalled.

In contrast, it was widely understood that the ratification of the ACFTA treaty did not mean immediate implementation. Ratification and implementation meant entering into more detailed negotiations over the fine print of free trade, negotiations expected to take several years. If the African countries that signed onto ACFTA thought that this meant that trade barriers would fall immediately and irrevocably they would most likely have hesitated to ratify. Only in a few countries, such as Nigeria, was there a heated debate on accession to the ACFTA. Governments felt comfortable signing the ACFTA Protocol because signatories knew that years of preparation of detailed schedules and complex negotiations on issues like rules of origin and standards would precede the actual implementation of the Protocol.

In the case of the Free Movement of Persons (FMP) Protocol depending on how one reads the protocol and the Roadmap, it could appear that Phase One, visa-free visiting rights, would follow immediately on the treaty coming into force, that is, 30 days after only 15 countries have ratified the Protocol and delivered their instruments of ratification.¹¹ Some countries may have understood this to mean that they would then be obliged to allow all persons from member countries which had ratified, though a reading of the Protocol suggests this is not necessarily the case.¹² There may also have been a fear that it would be difficult to manage visitors who overstayed their three month visiting rights limit. Though many African countries have introduced e-visa or visa-free access for members of their regional community not many, especially middle-income countries, have opened their borders to all members of the African Union, as we shall see later in this paper.

In the Roadmap, on the expectation of the treaty coming into force within months of its signing, immediate actions slated for implementation by the end of 2018 were: 'a relaxed visa regime meaning simplifying the issuance of visas for certain categories (students, researchers...etc); the issuing visas on arrival to citizens of African Union member states'; and the use of 'simplified visa processing procedures and mechanisms including e-visas, online applications, multiple entry and multi-year visas relax and visa fees' for citizens of AU countries'.¹³ Reading the Roadmap, it is not clear how the implementation process would accommodate domestic concerns about the impact of the implementation of the new regime on inequalities and security, concerns which the Protocol acknowledged, would be accommodated. While the Protocol clearly indicates that the Roadmap is meant to be guidance rather than prescriptive,¹⁴ the way the Roadmap was drafted, with a very optimistic implementation schedule, may have given the impression that the Protocol was going to be implemented before the migration management systems of all members were sufficiently ready to participate.

This could help to explain why the ratification the Free Movement of People Protocol has remained stuck at four countries out of 55 since July 2019.¹⁵ In a report on the progress of the FMP Protocol it is implied that the treaty and Roadmap are not fully understood and that education around the continent could encourage greater participation, but it may be helpful to reinterpret the protocol in an implementation plan that allows less confusion or misinterpretation.

¹¹ AU, *Protocol to the Treaty*, 2018; AU, *Implementation Roadmap*, 2018.

¹² See AU, *Protocol to the Treaty*, 2018, Article 7(2)

¹³ AU, *Implementation Roadmap*, 2018, 3-4.

¹⁴ AU, *Implementation Roadmap*, 2018, Article 5(2).

¹⁵ As of December 2020, nearly three years after adoption of the FMP Protocol at the AU Summit, no additional countries had ratified the Protocol beyond the first four.

This paper will explore these issues, and the context of the policy, and will attempt to make constructive observations and proposals that may help in the effort to encourage participation in the ambitious and critically important project of both regularising and freeing the movement of citizens of African countries across African national borders.

Despite apparent ambivalence in regard to the FMP Protocol, the momentum towards integration in Africa remains positive, and quite extraordinary by current global standards.

2. The global context—an era of deglobalisation

Since the worldwide economic crisis that matured in 2008, globalisation has been reversing. Global integration, which tends to come and go in cycles in world history, had come very far by 2008. Trade barriers were at record lows, money in general and investment capital in particular was flowing freely through most global markets, and in some important regions the mobility of employees and business proprietors had been freed up to levels resembling the 19th century era of mass migration.¹⁶

From the onset of the global financial crisis the brakes were sharply applied to globalisation. Investment in general and particularly capital flows to emerging markets slowed very sharply, aid flows dwindled, trade protectionism grew, and countries looked inward. Later, as populist pressure grew, some countries rewrote or retreated from multilateral economic agreements, reversing the long-term trend towards multilateralism that began at the end of World War Two. While the mobility of labour had never reached the same degree of liberalisation as capital and goods, attitudes and policies towards population migration tightened further.

The global response to the 2008 crisis saw the transformation of the G20, which till then was a meeting of finance ministers, into a summit meeting. One of the early G20 Summits' key concerns was that countries would be inclined to respond defensively to the crisis through finding ways to close their borders to imports, risking a significant reversal of global economic integration.

In light of the lessons of the Great Depression of the 1930s¹⁷, many world leaders feared that what started as a financial crisis, an investment bubble which burst, would be compounded by rising protectionism. Perhaps the first and most obvious symptom of creeping protectionism was the failure of the Doha Round of multilateral trade negotiations which had been labelled 'The Development Round'. To the anger and despair of many developing countries, Doha was virtually abandoned.¹⁸

Beyond this, further protectionist trends were detectable. Before each G20 summit, the WTO made a presentation to the Sherpa meetings, identifying areas of rising protectionism in the global trading system. This monitoring function was institutionalised in the Global Trade Alert.¹⁹ Similarly, the retreat of major commercial banks from global markets perceived to be risky was noted with great concern by the IMF and the World Bank in their reports to the G20. Though neither the trade nor the bank retreats were as radical as in the collapse of the world economy in the 1930s, they were significant.

¹⁶ Timothy J. Hatton and Jeffrey G. Williamson, *The Age of Mass Migration: Causes and Economic Impact* (New York and Oxford: Oxford University Press. 1998).

¹⁷ Charles P. Kindleberger, *The World in Depression, 1929-1939* (London: Allen Lane, 1973)

¹⁸ William F Keating, *The Doha Round and Globalization: A Failure of World Economic Development?* 2015, https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1008&context=hc_sas_etds

¹⁹ <https://www.globaltradealert.org/>

The rise of powerful technology companies that dominate key global spaces of work and human interaction—companies such as Google, Facebook and Amazon—has contributed to tensions about equity in the current era. These companies have successfully exploited the immaterial nature of their business activities and the complexity of their transnational operations to minimise their tax obligations. This has compounded the difficulties virtually all governments worldwide have since the global economic crisis in raising enough revenue to maintain the quality of social and other services, let alone to improve them. The deterioration of living standards for some of the middle classes and the poor due to the withering of government services is one of the underlying causes for popular and populist reactions against globalisation. The contemporary fiscal challenge has also led to new thinking about wealth and taxation, including a UN treaty and a major OECD initiative to find new ways to raise taxes.²⁰

In the wake of the global financial crisis, perspectives on world trends began to change. Increasingly, the two or three decades preceding the global crisis were retrospectively labelled as an era of ‘hyper-globalisation’. Some now use the phrase ‘deglobalisation’ to describe the period since 2008.²¹

One of the prominent characteristics of the recent period of globalisation was the increased movement of people across national borders. The number of international migrants reached 244 million in 2015, 41% higher than in 2000. Of them, 34 million (only 14%) were of African origin. The growing number of people moving has been compounded by massive involuntary displacements of people. In recent years, the number of displaced people globally reached more than 70 million, more than at any time since the end of World War II.²²

Viewed through a historical lens it should be noted, other than the exceptional events of 2015 when the war in Syria led to mass emigration, there is nothing exceptional about recent global migration patterns in recent times. In fact, the percentage of international migrants in the global population has not deviated greatly from the average rate of between 2.7% and 3.3% since 1950. By some estimates the rate of international migration may have been still greater in the period between 1846 and 1924.²³ However, the current trend towards a rising number of migrants globally continues: ‘The number of international migrants is estimated to be almost 272 million globally, with nearly two-thirds being labour migrants.’ This is 3.5% of the world’s population.²⁴

Opposition to immigrants has been central to anti-globalisation movements in many countries. It should be noted however that at least since the 1970s there have been biases against allowing visiting or migration rights to Africans in Europe and the attacks on the World Trade Centre in 2001 fuelled already growing xenophobic sentiments.²⁵ In 2015, some in Europe reacted with fear to the sudden influx of refugees, but in truth this was the culmination of anti-immigrant sentiments which had been growing for several years. The kind of populism that grew in recent times, especially in Europe and the US, has tended to be

²⁰ OECD (2020), <https://www.oecd.org/g20/topics/international-taxation/> accessed 17/07/20

²¹ Kevin Hjortshoj O’Rourke, ‘Economic History and Contemporary Challenges to Globalization’, *Journal of Economic History*, Vol 72, Issue 2, 2019.

²² UNHCR data according to the BBC, <https://www.bbc.co.uk/news/world-48682783>

²³ Hein de Haas, Mathias Czaika, Marie-Laurence Flahaux, Edo Mahendra, Katharina Natter, Simona Vezzoli, María Villares-Varela ‘International Migration: Trends, Determinants and Policy Effects’, *Population and Development Review*, Volume 45, Issue 4, December 2019, 885-922, 1-38: 4-5

²⁴ International Organisation for Migration, *World Migration Report 2020*, 2020, 2.

²⁵ C Beauchemin, ML Flahaux & B Schoumaker, ‘Three sub-Saharan migration systems in times of policy restriction’ *Comparative Migration Studies* 8, 19 (2020) Figure 1, <https://doi.org/10.1186/s40878-020-0174-y>

right-wing populism focused on identity rather than left-wing populism focused on economic inequality.²⁶

Some politicians were openly xenophobic, especially towards immigrants of African and of Muslim origin, fuelled by the reaction to 9/11 in 2001. In 2016 in the US, Trump rode a wave of racism and xenophobia to the American presidency. In the same year, Britain narrowly voted to leave the EU, with xenophobia fuelling anxiety about loss of sovereignty. Politicians like Nigel Farage, Geert Wilders, Matteo Salvini, Marie Le Pen, Viktor Orban and Jorg Haider (for example) built their political support around European xenophobia, some with more success than others.

These powerful contemporary deglobalisation trends and sentiments make it more remarkable that the movement towards African integration continues to have such momentum.

3. Migration and its impact in recent historical perspective

The 19th century was a period of mass migration. By the end of the 19th century, more than one million Europeans were leaving the continent every year, and there were substantial outflows from China and India too.²⁷ Some of those Europeans, Indians and Chinese were coming to Africa, and especially to South Africa to work on the mines, the railroads and plantations. The extended period of global migration and the quality of measurable data from that era makes it an observable laboratory of immigration and its impact. The United States of America was the biggest single recipient of immigration of that era. In recent years economic historians have uncovered some important effects and implications of those waves of immigration that have a bearing on considerations for policy implementation in Africa.

It is widely understood that immigration generally has a positive effect on growth, technology diffusion and development—this is not the focus of this paper. (For a recent discussion regarding the economic impact of migration on developing countries see Gelb and Krishnan, 2018²⁸.) What is less widely understood is the political impact of immigration. What was it, for example, that contributed to populist anti-immigration sentiment and xenophobia that sometimes accompanied large-scale immigration in the US, such as in the Native American Party also known as the Know-Nothing Party which emerged in New York in the 1850s? In short, how did immigration distribute gains and losses; who were the winners and losers, and could these outcomes help to explain populist reaction to immigration?²⁹

The evidence on the impact of immigration on the wages of native workers is ambivalent. Some researchers feel that much or all of the apparent impact of immigration on wages can be explained by racial discrimination, with a rising immigration of people of a different race or colour leading to a decline in wage rates, not because the new employees are immigrants but because they are of a different race.³⁰ Clemens and Hunt in a recent paper conclude that 'the evidence from refugee waves reinforces the existing consensus that the impact of

²⁶ Dani Rodrik, 'Populism and the economics of globalization', *Journal of International Business Policy* 1:1 https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/populism_and_the_economics_of_globalization.pdf

²⁷ Hatton and Williamson, *The Age of Mass Migration*.

²⁸ Stephen Gelb and Aarti Krishnan, 'Technology, migration and the 2030 Agenda for Sustainable Development', ODI Briefing Note, 2018.

²⁹ Kevin Hjortshoj O'Rourke, 'Economic History and Contemporary Challenges to Globalization', *Journal of Economic History*, Vol 72, Issue 2, 2019.

³⁰ Michael A Clemens and Jennifer Hunt, 'The Labor Market Effects of Refugee Waves: Reconciling Conflicting Results' NBER Working Paper 23433, May 2017 (revised July 2017) <https://www.nber.org/papers/w23433>

immigration on average native-born workers is small'.³¹ The results of economic history studies are similar. Small, but not insignificant.

One study by O'Rourke and Williamson found that the 24% increase in the US labour force between 1870 and 1910, largely a result of immigration, led to a fall in US wages of about 8%.³² Hatton and Williamson found that cities with higher rates of immigration correlated with out-migration by native-born citizens.³³ Claudia Goldin found in American cities that a 1% increase in foreign-born inhabitants lowered wages between 1% and 1.5%, which is quite a powerful impact.³⁴

The ability of immigration to create winners and losers among the existing inhabitants is influenced by pre-existing circumstances. For example, where local wages were relatively high for unskilled workers or where they were rising, the loss of the incumbents would be smaller.³⁵ In more equal communities and in communities where conditions of employment at the lower end of the wage market are relatively good, an anti-immigration political reaction was significantly less likely.³⁶

The impact was significant but small in most of these cases—not significant enough to negate the generally positive macroeconomic impacts of immigration that is widely found. But in unequal societies the small impact and perceptions of impact, factual or deluded, can have negative social impacts if integration is poorly managed. These perceptions are susceptible to manipulation by politicians.

There is ample evidence from economic history that globalisation has the capacity and perhaps even the tendency eventually to undermine itself. Rapid immigration in unequal societies can lead to those who believe they are losing out supporting political opposition to immigration in various violent and non-violent forms. Take trade barriers down too fast and the same could happen. Equally, investment flows can provoke powerful reactions as we have seen in some African countries where South African companies have become powerful relatively quickly, or in Western countries in reaction to Chinese or Japanese investments. But immigration is the most immediately emotive of these issues because it is so visible, and the threats can be personalised.

These are reasons why migration must be well-managed, and why governments need to be seen to be managing immigration well. This requires the education and preparation of the receiving and the immigrating populations, and it entails trusted, transparent immigration systems.

4. African migration trends

Africa is a continent on the move. In 2015 there were 21 million migrants in Africa, 18 million from Africa and the rest largely from Europe, Asia and North America. Though most public attention has been on African migration flows to Europe, more than 80% of migration takes place in Africa, within African regions and between African regions. According to the

³¹ Clemens and Hunt, 'The Labor Market Effects of Refugee Waves' 3.

³² Kevin H. O'Rourke and Jeffrey G. Williamson, *Globalization and History: The Evolution of a Nineteenth Century Atlantic Economy*, by, (Cambridge, Massachusetts: MIT Press, 1999).

³³ Hatton and Williamson, *The Age of Mass Migration*.

³⁴ Claudia Goldin, 'The Political Economy of Immigration Restriction in the United States, 1890-1921', in *The Regulated Economy: A Historical Approach to Political Economy*, eds Claudia Goldin and Gary D. Libecap (Chicago, University of Chicago Press, 1994), 223-258,

³⁵ Goldin 'The Political Economy of Immigration Restriction' 223-258.

³⁶ Ashley S Timmer, and Jeffrey G. Williamson, 'Immigration Policy Prior to the 1930s: Labor Markets, Policy Interactions and Globalization Backlash', *Population and Development Review*, 24 no 4, 739-771.

Migration Policy Framework of the African Union, over the last 15 years, migration has increased in all of Africa's regions and is characterised by a largely young migrant population, under the age of 30.³⁷

'These flows include increasing numbers of migrant women, rural to urban migration, migration for seasonal work and labour migration, and a rise in search of decent work and educational opportunities as well as irregular migration and large numbers of refugees, asylum seekers and internally displaced persons.'³⁸

Most of the intra-regional migration is within West, Southern and East Africa, while much of the inter-regional movement is from Central Africa to Southern and West Africa, from the Horn of Africa and East Africa to Southern Africa, and from West Africa to Southern Africa. According to an AU report, migration on the northern route (towards Europe) is small 'especially in comparison to the southern route from East/Horn of Africa to southern Africa'. Nonetheless resources, such as the EU Trust Fund, are mostly channelled towards migration management on the northern route. This is, no doubt, due to the 'political attention that migration has received in Europe in recent years' 'There is less data on irregular migration in the southern route, an issue that needs to be addressed if countries in the southern Africa region are to manage migration effectively.'³⁹

TABLE 3 MIGRATION WITHIN SUB-SAHARAN AFRICA, 2017

Origin 2017 estimates	Destination (%)			
	East Africa	Central Africa	Southern Africa	West Africa
East Africa	82.00	15.10	59.96	0.07
Central Africa	17.00	66.39	8.30	2.59
Southern Africa	1.00	1.87	29.65	0.03
West Africa	0.21	16.63	2.10	97.32

Source: UNDESA, *World Population Prospects: 2017 Revision*, 2017, https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf, accessed 29 March 2018

Kihato (2019), drawing on UN statistics, has shown that out of the top 20 destinations for African migrants in 2017, 16 were in Africa, four were in Europe (the UK, France, Italy and Portugal), and the top three were South Africa, Cote d'Ivoire and Uganda.⁴⁰

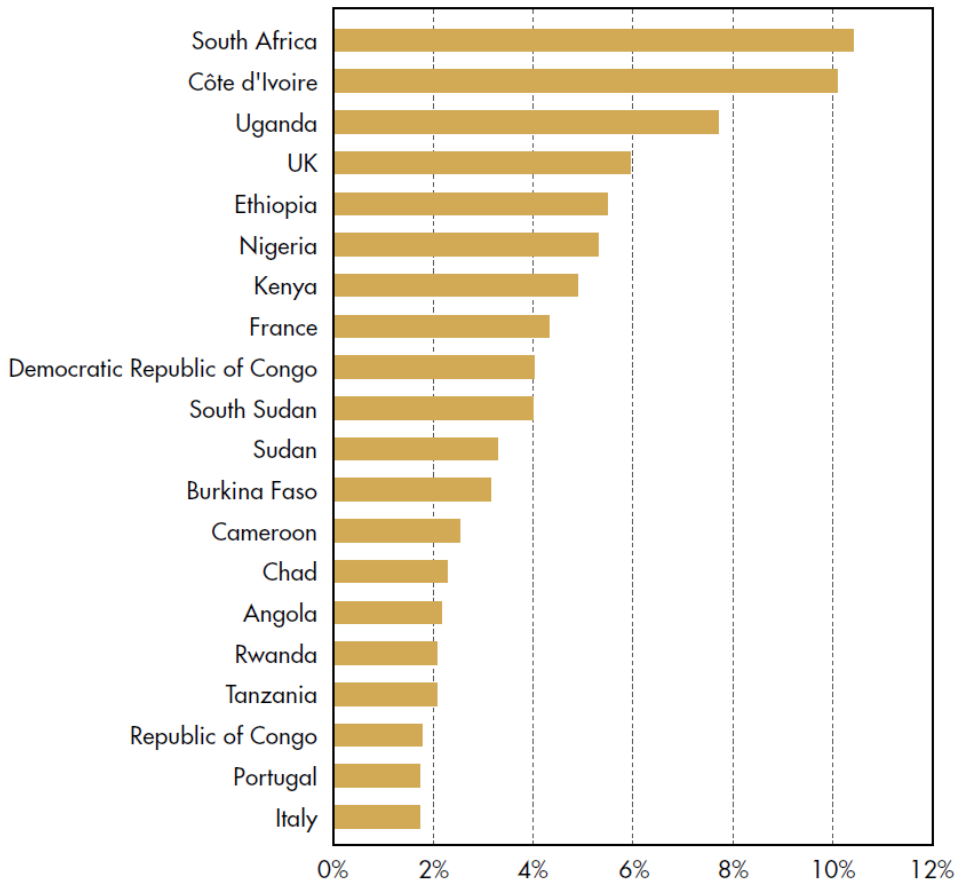
³⁷ AU, *Migration Policy Framework for Africa and Plan of Action (2018-2030)*(AU: Addis Ababa, May 2018), 19.

³⁸ AU, *Migration Policy Framework*, 19.

³⁹ AU, *Migration Policy Framework*, 20.

⁴⁰ Caroline W Kihato, 'The Containment Compact: the EU Migration 'Crisis' and African Complicity in Migration Management' (Occasional Paper 288, South African Institute of International Affairs, Johannesburg, 2019).

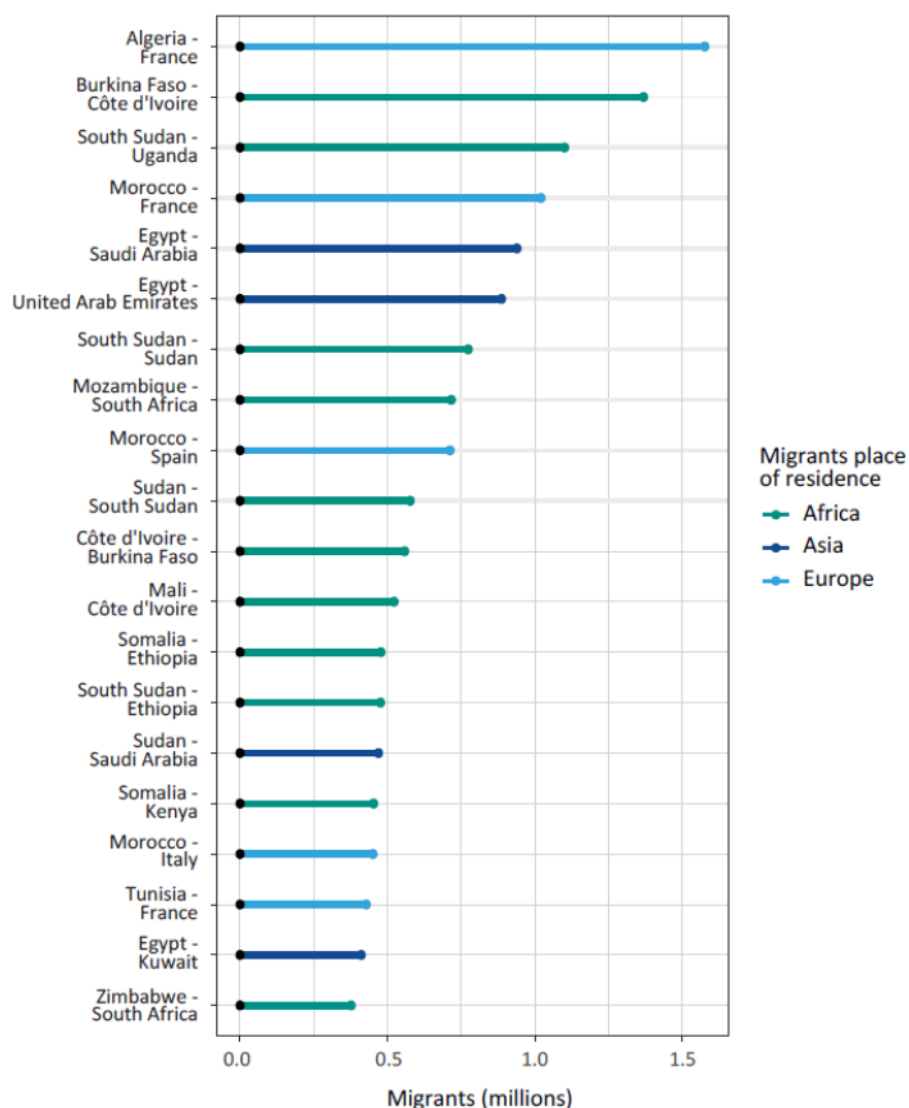
FIGURE 2 MAJOR DESTINATIONS FOR AFRICAN EMIGRANTS, PER CENT OF 2017 TOTAL



Source: UNDESA, *World Population Prospects: 2017 Revision*, 2017, https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf, accessed 29 March 2018

Source: IOM (2020b) Figure 4 p.58

Figure 4. Top 20 migration corridors involving African countries, 2019



Source: IOM *World Migration Report 2020*, Figure 4 p.58

While intra-African emigration has increased in recent years, the proportion of continental emigrants to the total population of Africa is currently one of the lowest in the world.⁴¹ In recent decades, the proportion of global emigrants who are from the Asia Pacific region has grown far faster than the growth rate of African intercontinental migration. Indeed, magnitude of immigration and emigration in relation to population out of sub-Saharan Africa has decreased rather than increased since World War Two.⁴² It is now widely agreed⁴³ that emigration rises with national income, to a certain point, after which it declines, resulting in

⁴¹ AU, *Migration Policy Framework*, 21.

⁴² De Haas, Hein, et al, 'International Migration' 6.

⁴³ David Benček and Claas Schneiderhanze recently presented arguments against the inverted-U-shaped emigration curve, but this is currently a minority position: see 'More development, less emigration to OECD countries: Identifying inconsistencies between cross-sectional and time-series estimates of the migration hump 2019', Kiel Working Paper No. 2145.

an inverted-U-shaped association between development and emigration.⁴⁴ For this reason, and because of rapid population growth, African continental emigration is likely to rise in coming years.

For now, intercontinental emigration currently accounts for less than 20% of African emigration, the vast majority of which occurs within continental boundaries.

5. The context and goals of the UN Compact on Migration, the Sustainable Development Goals and other initiatives on migration

The issue of migration is frequently part of global multilateral and regional processes, especially in recent years. Since the adoption of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families in by the United Nations General Assembly in 1990⁴⁵ there have been several further international agreements, but most were largely consultative and advisory in orientation.

Recent multilateral processes were driven more strongly because of tensions arising from new patterns of migration, and a growing focus on the links between migration and development.⁴⁶ The Sustainable Development Goals which are the focus of the United Nations' Agenda 2030, finalised in 2015, includes as Target 107 'the facilitation of safe, regular and responsible migration and mobility, through the implementation of planned and well-managed migration policies'.⁴⁷ In the same year, the International Organisation for Migration member states adopted the Migration Governance Framework which set out some of the essential elements for facilitating orderly, safe, regular and responsible migration and mobility of people.⁴⁸

In 2016, the new urgency to manage migration was signified by the designation of the International Organisation for Migration (IOM) as an affiliated international organisation in terms of the 'Agreement Concerning the Relationship between the UN and the International Organisation for Migration'.⁴⁹

On December 10, 2018, in Marrakesh, Morocco, the UN adopted the United Nations Global Compact for Safe, Orderly and Regular Migration. The director-general of the International Organisation for Migration (IOM) was tasked with coordinating a network of 38 UN Agencies in the implementation of the compact. A week later in December 2018, a "Compact on Refugees" was endorsed by the United Nations General Assembly, building on previous UN conventions. An executive committee of eight UN agencies including the IOM and the United

⁴⁴ De Haas, Hein, et al, 'International Migration' 10.

⁴⁵ Adopted by UN General Assembly Resolution 45/158 of 18 December 1990.

⁴⁶ Global Forum on Migration and Development, Background Paper for GFMD Roundtable 3.2 'Principles, institutions and processes for safe, orderly and regular migration', 2016.

⁴⁷ The commitment in the 2030 Agenda for Sustainable Development to 'cooperate internationally to ensure safe, orderly and regular migration' (paragraph 29) and to 'facilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies' (target 10.7) pointed to the relevance of including discussions on the governance of migration a forum dedicated to migration and development.

⁴⁸ Global Commission on International Migration, *Migration in an inter-connected world: New directions for action*, Report of the Global Commission on International Migration, 2005, 65.

⁴⁹ Institute for Pan-African Thought and Conversation (IPATC), *Implementing the United Nations Global Compact on Migration: Conflict, Governance and Human Mobility in Africa/European Union Relations*, (University of Johannesburg, 2019),4.

Nations High Commission for Refugees, provides strategic oversight over the Migration Compact and is its principal decision-making body.⁵⁰

In May 2015, in response to what the European Union described as ‘an exceptional challenge when two million people arrived at its shores in the space of two years’, migration policy took a new turn when the European Commission presented a Comprehensive European Agenda on Migration.⁵¹ This was intended ‘to address immediate challenges and to equip the EU with the tools to better manage migration in the medium and long term in the areas of irregular migration, borders, asylum, and legal migration’. The EU moved swiftly and decisively, supporting member states ‘under pressure’ of immigration, including allocating spending internally on migration management and, at the borders, establishing a new European Border and Coast Guard Agency. The EU also created a well-funded EU Regional Trust Fund in Response to the Syrian Crisis and an EU Trust Fund for Africa.⁵²

None of these multilateral processes have been without controversy. The EU initiatives are criticised for defensiveness and making the problem of refugees and other displaced persons the problem of non-EU countries such as Turkey and Libya. The EU Trust Fund for Africa has been criticised for focusing on migration management in ‘the northern route’, towards Europe, for focusing on North Africa, West Africa and the Horn of Africa regions and neglecting the impact of migration on other parts of Africa.

The UN Compact on Migration though widely praised was not universally supported. When, following negotiations, it was signed in July 2018 the United States refused to sign. When formal adoption was proposed in December 2018 only 163 out of 193 UN members adopted the resolution. Among those who refused to adopt the deal - in addition to the United States - were Hungary, Austria, Italy, Poland, Slovakia, Chile and Australia. This was after a compromise was reached between the EU and Africa over the repatriation regime for irregular immigrants. The EU wanted a compulsory return regime, Africa preferred voluntary repatriation and the compromise was that the repatriation regime would be subject to a bilateral agreement between the countries concerned.

In Africa, the impetus behind multilateral processes is the common desire to deepen African economic integration. Africa’s Agenda 2063, adopted in 2013, has ‘The African Passport and the free movement of people’ as one of its 11 flagship projects:

‘Remove restrictions on Africans ability to travel, work and live within their own continent. The initiative aims at transforming Africa’s laws, which remain generally restrictive on movement of people despite political commitments to bring down borders with the view to promoting the issuance of visas by Member States to enhance free movement of all African citizens in all African countries by 2018’.⁵³

As we have already seen, there was not much commitment to the very ambitious African Protocol for the Free Movement of Persons in 2018. Only 32 countries out of 55 have signed it and only four countries had ratified the Protocol three years on.

⁵⁰ IPATC, *Implementing the United Nations Global Compact on Migration*, 5.

⁵¹ European Commission (EC), ‘Progress report on the Implementation of the European Agenda on Migration’ (Brussels: EU, 2019), 1 <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/>

⁵² EC, ‘Progress report on the Implementation of the European Agenda on Migration’ 1-2.

⁵³ AU, *Africa Agenda 2063: The Africa we want: Framework Document* (Addis Ababa: AU, 2015), 107.

6. The African 'free movement of persons' agenda

The formal history of the free movement of persons (FMP) initiative in Africa goes back nearly four decades. In 1991 in Abuja, the commitment of African countries to the establishment of an African Economic Community included specific reference to the free movement of persons, the right of residence and the right of establishment. The African Economic Community Treaty, commonly known as the Abuja Treaty, officially came into force in 1994. The free movement of persons, rights of residence and rights of establishment by Africans across the borders of AU member states are included in article 4(2)(i). The Constitutive Act of the African Union in 2001 carried over the mandate, and in 2006 in Bangui, a Migration Policy Framework for Africa was endorsed by AU members—this framework also included the right to gainful employment across African borders.⁵⁴

In 2016 in Kigali, Rwanda, the African Passport was launched.⁵⁵ This is meant to be one of the instruments to facilitate the free movement of people, though the take-up of the African passport is slow. In 2017 the Peace and Security Council of the AU acknowledged that the benefits of free movement of Africans across African borders outweighed the real and imagined economic and security challenges that such a reform might pose.⁵⁶

Finally, in January 2018, the Free Movement of Persons Protocol to the AEC treaty was signed by a majority of AU heads of state at the AU summit⁵⁷, alongside the ACFTA Protocol and a further Protocol designed to promote intra-African air travel. The FMP Protocol has a very ambitious implementation Roadmap attached as an addendum.⁵⁸ In addition, a revised version of the Migration Policy Framework for Africa was issued by the AU Commission in May 2018. It too had an implementation plan calibrated against a timeframe.

The implementation of the FMP Protocol is divided into three phases. Phase one entails the implementation of the right of entry of citizens of other member states of the AU for up to 90 days and requires countries to abolish visa requirements for such people. Phase one would seem to include the right for people to move across African borders to obtain employment, depending on the domestic laws of the host country.⁵⁹ Phase one could be implemented in phases, according to the Roadmap, but it is expected to follow immediately on the coming into force of the Protocol. Phase one does place obligations on member countries to improve their migration management systems, for example improving the quality and integrity of their civil registration systems, but the sequencing of events is not entirely clear in the Roadmap. So, it is not obvious, reading the Roadmap, that a country would be entitled to restrict visa free entry in regard to countries with poor civil registry systems, for example.

Phase two entails the extension of the right of residence to Africans from other African countries. This would include rights for the AU member state national's spouse and children. The Roadmap suggests that this would come into force in 2023, though Article 5 of the Protocol allows the more rapid implementation of the Protocol. The Roadmap allows for the

⁵⁴ AU, *Migration Policy Framework*.

⁵⁵ AU, 'African Union Passport Launched during Opening of 27th AU Summit in Kigali' (Addis Ababa: AU, 2017) <https://au.int/fr/node/31182> accessed 22/07/20

⁵⁶ AU, 'Communique of 661st PSC meeting on Free Movement of People and Goods and its Implications on Peace and Security in Africa' (Addis Ababa: AU, 2017) <https://www.peaceau.org/en/article/communique-of-661st-meeting-on-free-movement-of-people-and-goods-and-its-implications-on-peace-and-security-in-africa> accessed 22/07/20

⁵⁷ AU, *Protocol on Free Movement*.

⁵⁸ AU, *Implementation Roadmap* 6.

⁵⁹ AU, *Implementation Roadmap*, 6.

progressive implementation of the rights of residence⁶⁰ and appears to allow for differential policies in relation to other member states.⁶¹

Phase three allows for the right of establishment. This includes the right of citizens of other member states to set up a business, trade or profession, or to engage in economic activity as a self-employed person. According to the Roadmap, phase three will be implemented after a review by the AU Commission of the implementation of phases one and two, subject to the decision of the AU Council.⁶²

7. National and regional initiatives towards the freer movement of people in Africa

7.1 National initiatives

African countries have been moving steadily forward in recent years towards more liberal travel regimes for citizens of other African countries and often too for citizens from other parts of the world. In 2019, 47 out of 55 African countries either improved their openness to travel or maintained their status. The average visa openness score for all African countries towards all countries improved from 0.425 in 2016 to 0.459 in 2019. While in 2008, 88% of the world population needed to obtain visas before travelling to Africa, by 2018 this number had fallen to 45% of global travellers.⁶³

There is a range of mechanisms for opening up freer movement for Africans. Visa-openness solutions include: visa on arrival for Africans; visa-free regional blocs; regional bloc visas; multi-year visas (on a case-by-case basis); promoting positive reciprocity between African countries relaxing visa requirements; opening up on visas unilaterally; simplifying visa processes, such as visas online; and improving access to information on line in different languages. Travel document solutions include regional travel using regional passports or national identity cards; African Passport options; and special arrangements for people living in border areas.

While some African countries are moving forward only by virtue of their participation in the reforms led by regional blocs, there are many taking the initiative to reform on an individual country basis. According to the 2019 Visa Openness Index of the African Development Bank, the two most liberal African countries towards fellow Africans are Benin and the Seychelles which offer visa-free access to all African visitors with appropriate travel documents. Following them, two African countries have a combination of visa-free access and visa on arrival policies for all Africans—Senegal and Rwanda. Comoros, Madagascar and Somalia offer visa on arrival policies for all Africans, and another 12 countries offer a combination of visa-free and visa on arrival policies for a majority of other African countries. Twenty-one African countries provided eVisa facilities in 2019, up from nine in 2016.⁶⁴

However, there are patterns whose implications need to be considered. Of the top 20 African countries by visa-openness, 18 are low or lower middle-income countries and the other two are middle or upper-middle income islands. In contrast, seven out of eight of Africa's upper-

⁶⁰ AU, *Implementation Roadmap*, 6-7.

⁶¹ AU, *Implementation Roadmap*, 14.

⁶² AU, *Implementation Roadmap*, 16.

⁶³ African Development Bank and African Union (AfDB-AU), *African Visa Openness Report 2019*, (Addis Ababa and Abidjan: AfDB and AU, 2019)

⁶⁴ AfDB-AU, *African Visa Openness Report 2019*, 10-11.

middle income countries have low visa openness scores.⁶⁵ What this suggests is that upper-middle income countries tend to be considerably more cautious about opening up their borders for travel than poorer countries. One possible reason is that they are afraid of creating spaces that could be exploited by irregular economic migrants from other African countries and elsewhere.

The regional integration index of the Economic Commission for Africa has a slightly different finding: Somalia, Djibouti, Comoros, Mauritania and Mozambique score the highest on this index.⁶⁶ In this index Libya, Eritrea, Ethiopia, Algeria and Burundi are the worst scoring countries for free movement of people. But the overall pattern is the same. Of the 20 best performing countries on the ECA index, only three are middle-income countries and of those two are small islands. And, as in the other index, the richer and more powerful countries such as Egypt, Ethiopia, Algeria, South Africa, Morocco, Tunisia and Nigeria all fell among the poorest performers regarding openness.

In the 2020 Visa-Openness Index, one significant change to this pattern was the improvement in Nigeria's position, moving up 22 places to 8th most open of African countries.⁶⁷ The same report noted that all six of Africa's upper-middle income countries continued remain low in the visa-openness index.⁶⁸ Ironically, apparently to reduce smuggling of food, Nigeria closed its land borders late in 2019. A partial re-opening of land borders was announced on December 16th, 2020⁶⁹

7.2 Regional initiatives

Regional initiatives in Africa towards the freer movement of people began before the continental initiatives. Some regional initiatives have been around from a long time; some, not necessarily the oldest ones, are quite advanced. An examination of the regional experience of migration management is important both because these regional initiatives are the building blocks of a potential continental initiative, but also because we can learn more about opportunities and obstacles from the regional experiences. In this section I summarise some of the more interesting or revealing African regional experiences in migration policy and practice.

ECOWAS

The Economic Community of West African States (ECOWAS) adopted a Protocol on the Free Movement of People and the Right of Residence and Establishment in 1979.⁷⁰ ECOWAS was only 4 years old in 1979, having been established through the Treaty of

⁶⁵ AfDB-AU, *African Visa Openness Report 2019*, 10-11

⁶⁶ United Nations Economic Commission for Africa (UNECA), *Africa Regional Integration Report 2019* (Addis Ababa: UNECA, 2019).

⁶⁷ AfDB-AU, *African Visa Openness Report 2020*, 24.

⁶⁸ AfDB-AU *African Visa Openness Report 2020*, 18.

⁶⁹ See, 'UPDATE 1-Nigeria ready to reopen its land borders to trade - Finance minister', *Reuters*, November 2020, <https://www.reuters.com/article/nigeria-trade/update-1-nigeria-ready-to-reopen-its-land-borders-to-trade-finance-minister-idUSL1N2IB1JE> ; and 'Border closure, effects and curbing recurrence,' *The Guardian (Nigeria)*, 32 December, 2020, <https://guardian.ng/news/nigeria/border-closure-effects-and-curbing-recurrence/>

⁷⁰ Victor T Amadi, 'Facilitating Interregional Trade through the Movement of People in the Southern African Development Community' (LLD Thesis, University of the Western Cape, 2019), 76.

Lagos in 1975. The 15 founding member countries crossed the, until then, rigid Anglophone-Francophone economic, political and cultural divide in West Africa.⁷¹

From the start in 1975, in its founding Treaty, ECOWAS set out a long-term goal of 'freedom of movement and residence within the community'.⁷² In the 1979 Protocol, ratified in 1980, ECOWAS members committed themselves to ultimately achieve a 'common market' through, in part, the right of citizens to enter, reside, work and establish businesses in the territory of member states.

The Protocol provides for a three-phased process of implementation that was intended to last fifteen years. Phase I was the right of entry, which meant visa free entry for a period of least ninety days, after which the person would need to apply for an extension of stay. However, member states had the right to refuse admission to 'inadmissible immigrants under its laws'.⁷³

Though the Protocol came into force in 1980, in 1983 Nigeria expelled illegal 'unskilled workers' when recession hit after an oil boom fizzled out, and later Nigeria revoked two articles of the 1979 Protocol.⁷⁴

Nevertheless, Phase II of the Protocol, the right to residence, was adopted. This right included the right to carry out income-earning employment and such migrants had equal treatment with nationals of the host member state.⁷⁵ In 1990 Phase III, the right to establishment, was adopted by the ECOWAS states through a supplementary Protocol. This gave ECOWAS citizens the right to set up and manage enterprises under the same conditions as nationals of the host member state.

The Protocols would appear to offer a 'solid basis for establishing free movement and are widely recognised as a best practice for international cooperation on labour migration'. However, 40 years later only Phase I has actually been implemented.⁷⁶ This is an important achievement—entry visas have been abolished, effectively, for ECOWAS citizens, a regional travel document has been issued in at least seven ECOWAS countries, and ECOWAS passports, modelled on EU passports have been issued in some ECOWAS countries too.

Reasons for the failure to progress significantly beyond Phase I include 'the absence of adequate mechanisms to control the infiltration of criminals, perverse corruption of border officials, [and] diverse and incompatible national laws and policies on migration and labour'.⁷⁷ Little further progress has been made despite a further attempt to agree on a common regional position on migration in 2008 which decided on:

'ensuring the free movement of people within the ECOWAS zone; the promotion of legal or regular migration as part of the development process; combatting human trafficking; the protection of the rights of migrants, asylum seekers and refugees and lastly, the recognition of the gender dimension of migration.'⁷⁸

⁷¹ The original 15 were Cote d'Ivoire, Dahomey (now Benin), the Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Upper Volta (now Burkina Faso).

⁷² Amadi, 'Facilitating Interregional Trade', 78.

⁷³ Amadi, 'Facilitating Interregional Trade', 80-81.

⁷⁴ J.E Okolo 'Free Movement of Persons in ECOWAS and Nigeria's Expulsion of Illegal Aliens', *The World Today*, 40, 428-436.

⁷⁵ Amadi, 'Facilitating Interregional Trade' 83.

⁷⁶ Amadi 'Facilitating Interregional Trade', 84.

⁷⁷ Amadi, 'Facilitating Interregional Trade', 86.

⁷⁸ ECOWAS, 'Ecowas Common Approach on Migration', (ECOWAS, 2008), accessed at <https://www.unhcr.org/49e47c8f11.pdf> accessed 23 June 2020.

EAC

The East African Community was first formed in 1919 as a colonial system for Kenya, Tanganyika, and Uganda. It was re-established in 1967 as a post-colonial trade and cooperation structure but collapsed in 1977 due to unresolved economic and political differences. In 1993 an East African Commission was established. It was upgraded into a treaty for an East African Community in 1999 and ratified in 2000. The EAC currently has six members, having added Burundi, Rwanda and South Sudan, and is headquartered in Arusha, Tanzania.

Article 76 of the EAC treaty provides for a common market 'to provide for free movement of labour, goods, services, capital and the right of establishment'.⁷⁹ This is elaborated in Article 104 of the treaty, which includes the commitment to 'harmonising and maintaining common employment/labour policies, programmes and legislation' but fails to mention the harmonisation of migration laws.⁸⁰ An East African Passport was launched in 1999, and by 2019 four East African countries were issuing a new microchip embedded East African e-passport, similar to information-technology-enabled EU passports.⁸¹

In 2010 the Common Market Protocol came into force and it includes the commitment to 'the free movement of people, the free movement of labour, the right of establishment and the right of residence' but requires the partner states to implement these commitments. These commitments are further elaborated to protect the rights of EAC citizens in partner states, but these rights are limited on grounds of public policy, public security, or public health.⁸²

The Common Market Protocol provides for free movement of labour in the region under equal treatment with nationals of the partner East African state, but a cross-border worker is required to obtain a 30-day work permit and then is required to present a travel document and a contract of employment of more than 90 days at an appropriate point of entry. These systems are not standardised; Kenya, for example, imposes charges of about 10,000 Kenyan shillings for processing and 200,000 Ksh per year for issuance, and application procedures can take three months. Nevertheless, this system is an advance on other regional labour mobility systems in Africa. The free movement of labour provision also has a commitment to the mutual recognition of various types of qualification and includes a commitment to harmonise labour policies and laws.

Similarly to the right to the free movement of labour, the right of residence entails a somewhat standardised system of application for a permit, and is also limited on public policy, public health and public security grounds, subject to mutual notification. It does not apply to all citizens of the Community, but only to those who have been granted work permits, whether as employees or as self-employed people.⁸³

The system of free movement is by no means perfect in East Africa. It is limited by the impact of regional economic inequalities and by variations in domestic laws and attitudes. The subjection of residence rights to work permits makes it inferior to EU law, for example.⁸⁴

⁷⁹ Amadi, 'Facilitating Interregional Trade', 89.

⁸⁰ Amadi, 'Facilitating Interregional Trade', 90.

⁸¹ Ivan R. Mugisha, 'Rwanda launches EAC e-passport', East African News, June 28, 2019, <https://www.theeastafrican.co.ke/news/ea/Rwanda-launches-eac-epassport/4552908-5175624-11e3gdz/index.html> accessed 23/06/20.

⁸² Amadi, 'Facilitating Interregional Trade', 92.

⁸³ Amadi, 'Facilitating Interregional Trade', 97.

⁸⁴ Amadi, 'Facilitating Interregional Trade', 102.

Yet, it does represent a significant advance towards the free movement of Africans within a region, especially when compared with other African economic regions.

IGAD

The Inter-governmental Authority for Development (IGAD) was first established as the Intergovernmental Authority on Drought and Development (IGADD) after the drought in the Horn of Africa in the early 1980s. It consists of seven member states including Djibouti, Ethiopia, Kenya, Somalia, South Sudan, Sudan, and Uganda. The total population of the region was 230 million in 2018, close to half of whom live in Ethiopia. Drought sparked its establishment, but international pressure and expected developmental aid were also key motives.⁸⁵

In 1996 IGAD took its current organisational shape and form, with an emphasis on peace and security. Two years later, however, it became a Regional Economic Community (REC) too, though security matters have made considerably more progress than economic development cooperation in IGAD. Migration became an IGAD programme in 2010, also covering forced displacement.⁸⁶ Until 2019, the last ordinary, elective regional heads of state summit of IGAD had taken place in 2008 and Ethiopia chaired the authority for 11 years without a regular regional summit, though several extraordinary summits took place.⁸⁷ In November 2019, at the next elective summit, the chair was taken over by the Prime Minister of Sudan, and a former Ethiopian foreign minister, Workneh Gebeyehu, took over as the executive secretary of IGAD replacing the long-time Kenyan executive secretary, Mahboub Maalim. This suggests cooperative leadership of IGAD by the region's two leading states through a period of regional turmoil.

Regional instability has led to a high rate of migration and forced displacement in the IGAD region. While Ethiopia is fifth and Kenya seventh among refugee hosting nations worldwide, Sudan is fifth among countries of origin of refugees.⁸⁸ There is a wide variety of forms of migration from nomadic pastoralists through voluntary migrants and forced displacement, within and beyond the region. Emigration from the region follows four routes—the eastern route to Yemen and beyond, the southern route towards South Africa, the northern route through Egypt and Israel/Palestine and the western route through Sudan and Libya towards Europe. The first two routes are the busiest.⁸⁹

While the 1996 agreement establishing IGAD included the ambition for the management of migration within the region, there was little progress until 2012 when IGAD heads of state adopted the Minimum Integration Plan and a Regional Migration Policy Framework which promoted capacity development for migration management and migration policy development in the member states. This was followed by the IGAD Migration Action Plan (2015-2020) adopted in 2015.⁹⁰ In February 2020, on schedule, ministers in charge of internal affairs and those in charge of labour of member states of IGAD convened in

⁸⁵ Bruce Byiers, *The political economy of regional integration in Africa: The Intergovernmental Authority on Development (IGAD)*, (Maastricht: European Centre for Development Policy Management, Maastricht, 2016), 6-7.

⁸⁶ Eva Dick & Benjamin Schraven, *Regional Migration Governance in Africa and Beyond: A Framework of Analysis*, (Discussion Paper, DIE/German Development Institute, Bonn, 2018), 9.

⁸⁷ Byiers, *The political economy of regional integration*, 14-15.

⁸⁸ Dick & Schraven, *Regional Migration Governance*, 10.

⁸⁹ Dick & Schraven, *Regional Migration Governance*, 12.

⁹⁰ Clare Castillejo, *The influence of EU migration policy on regional free movement in the IGAD and ECOWAS regions* (Discussion Paper, DIE/German Development Institute, Bonn, 2019), 10.

Khartoum and endorsed the Protocol on Free Movement of Persons in the IGAD Region. The announcement of a Protocol was followed by an expert meeting to consider the draft roadmap for the implementation of the Protocol.⁹¹ On July 1 IGAD announced the establishment of a Technical Working Group on the harmonisation between member states of the production and utilisation of migration data.⁹²

IGAD's experience is unusual and atypical of African RECs. Its origins are in a drought emergency and it was strengthened to address major security issues which had resulted in a range of challenges and the migration of many people (among other issues). It was led through a critical developmental period by two strong regional powers with a strong incentive for regional stability—Ethiopia and Kenya—and heavily underwritten by funds from the European Union and other European sources whose objectives aligned sufficiently with the African leadership of IGAD. EU support for migration management in IGAD has been generous: the EU has directed its EU Trust Fund resources to the three regions which can influence the flow of migrants towards Europe, IGAD, ECOWAS and North Africa.⁹³ The result was steady progress in the development of regional institutions and systems in spite of instability in the region.

Castillejo argues that the IGAD secretariat not being a 'commission' lacks authority and that its limited resources and the reservations of some of the powerful countries in the region might inhibit the finalisation and implementation of the Protocol.⁹⁴ However, the recent opening of politics in several of the countries in the region and the improved relationship of Ethiopia and Eritrea seemed to help move the Protocol forward.

As the Protocol is not yet in the public arena and as the roadmap and agreements on information standards and exchange are still to be finalised and agreed, nothing is decided. But there is no question that the pressing security issues, the leadership of IGAD and the support of the EU have resulted in surprising progress in a regional structure built in response to crisis.

SADC

After the liberation of Namibia and anticipating South Africa's first democratic elections, the Southern African Development Community was formed in 1992. The formation of SADC marked a shift from what began as an anticolonial alliance of decolonised Southern African states in 1980, known as the Southern African Development Coordinating Conference (SADCC), towards becoming a regional structure predicated on developmental cooperation.

⁹¹ IGAD, Protocol On Free Movement Of Persons Endorsed At Ministerial Meeting, February 26, 2020 <https://igad.int/divisions/health-and-social-development/2016-05-24-03-16-37/2373-Protocol-on-free-movement-of-persons-endorse-at-ministerial-meeting> with attached communique, accessed 16/07/20

⁹² IGAD, IGAD Launched Consultations With Member States On The Harmonization Of Production And Utilization Of Migration Data, 2020, <https://igad.int/divisions/health-and-social-development/2016-05-24-03-16-37/2452-igad-launched-consultations-with-member-states-on-the-harmonization-of-production-and-utilization-of-migration-data> accessed 16/07/20.

⁹³ Castillejo, *The influence of EU migration*, 17; Interview GIZ/BMM Brussels 2019; European Commission, 'Progress report on the Implementation of the European Agenda on Migration', 1-2.

⁹⁴ Castillejo, *The influence of EU migration*, 13-15.

After South Africa joined in July 1994 SADC continued to grow. SADC currently has 16 members.⁹⁵

In 1995 SADC adopted a Draft Protocol on the Free Movement of people, but due to resistance to the formulation of the Protocol from South Africa, Namibia and Botswana (the richest countries per capita in the region) the Protocol was never implemented.⁹⁶ South Africa's position was crudely stated by its then minister of Home Affairs Mangosuthu Buthelezi:

'South Africa is faced with another threat and that is the SADC ideology of free movement of people, free trade and freedom to choose where you live or work. Free movement of people spells disaster for our country.'⁹⁷

As Oucho and Crush pointed out, the irony of South Africa's position was that its wealth had been built in significant part on the shoulders of migrant workers from surrounding countries who had never been allowed to settle.⁹⁸ In this respect it appeared that the democratic South African government would not depart from the policies of the apartheid era. As in the apartheid period in many respects, South Africa has continued to rely on a series of bilateral treaties with its neighbours rather than subjugating itself to a regional treaty.⁹⁹

In 2005 the 1995 Draft Protocol was superseded by a Protocol on the Facilitation of the Movement of People which was signed by 13 states but only ratified by six states. The Facilitation Protocol was ratified by six countries—Botswana, Lesotho, Mozambique, South Africa and Swaziland.

The Facilitation Protocol addressed 'facilitation of movement' in contrast to the 'free movement of persons' approach. Unlike the earlier SADC Free Movement Protocol, the Facilitation Protocol makes visa-free travel, residence and establishment rights subject to domestic legislation, and it encourages member-states to develop bilateral agreements to ensure the free movement of persons. It promotes the prevalence of sovereignty and indicates a preference for security management through bilateral agreements and national laws.¹⁰⁰ It could be argued that South Africa as the regional powerhouse exercises its hegemony in resisting multilateral freer movement Protocols¹⁰¹, supported by two other relatively well-off countries, Botswana and Namibia, and other neighbouring states that are relatively dependent on South Africa.

South Africa indeed dominates the region with nearly 60% of regional GDP. Only one of the remaining 14 SADC countries makes up more than 5% of SADC's GDP—Angola at around 18%.¹⁰² Botswana, Namibia and especially Lesotho and Eswatini are heavily dependent on revenue from the Southern African Customs Union collected by the South African Revenue

⁹⁵ Angola, Botswana, Comoros, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

⁹⁶ Chris C Nshimbi and L Fioramonti L, 'The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region', *African Development Review*, 26, (2014): 56.

⁹⁷ Amadi, 'Facilitating Interregional Trade', 111.

⁹⁸ John Oucho and Jonathan Crush, 'Contra Free Movement: South Africa and the SADC Migration Protocols', *Africa Today*, Volume 48, no 3, 2001, pp.139-158.

⁹⁹ Nshimbi and Fioramonti, 'The Will to Integrate', 60.

¹⁰⁰ Amadi, 'Facilitating Interregional Trade', 142.

¹⁰¹ Oucho and Crush, 'Contra Free Movement', 149.

¹⁰² African Development Bank, *Southern Africa Economic Outlook 2019*, (Abidjan: AfDB, 2019), 4.

Service and providing a subsidy to the other members of the customs union.¹⁰³ As a result the South African agenda is able to dominate the region to a significant extent.

A South African Department of Home Affairs memorandum, which was found on the internet though it was probably not meant to be a public document, sets out the South African position very frankly. The Home Affairs memorandum indicates that the common SADC position is that the AU FMP Protocol can only be implemented when certain conditions are met.

'...Implementation of the free movement of persons and the Africa Passport are complex and should be informed by the following preconditions:

- (a) existence of Peace, security and stability in the continent;*
- (b) convergence amongst countries with a view to reduce economic imbalances between Member States;*
- (c) phased approach to free movement of persons;*
- (d) effective civil registration systems;*
- (e) reliable movement control systems;*
- (f) machine readable passports compliant to international standards;*
- (g) bilateral return agreements;*
- (h) African Union legal instruments on extradition;*
- (i) African Union legal instrument on legal mutual assistance;*
- (j) African Union framework on African Passport and its relationship with free movement of persons;*
- (k) interface of Movement Control systems with INTERPOL (red notice system) and individual Member States prohibition/undesirable person's lists and the UN warning lists; and*
- (l) compatibility of ICT systems at Ports of Entries to facilitate exchange of information. (Home Affairs 2017)'*

*'considering the prevailing identified challenges and preconditions, the implementation of free movement of persons in Africa and the African Passport should be implemented through a phased approach in concord with a principle that safeguard [sic] the sovereignty of Member States.'*¹⁰⁴

The document also notes that Cabinet adopted the 'SADC Common Position'. While a) and b) above are unrealistic ideals and c) is already the case in the Protocol, the remaining 'preconditions' articulate the concern for suitable migration management systems that have preoccupied other regional FMP initiatives in Africa.

¹⁰³ Talkmore Chidede, Revenue sharing in the Southern African Customs Union (SACU) TralacBlog, 2018, accessed at <https://www.tralac.org/blog/article/13808-revenue-sharing-in-the-southern-african-customs-union-sacu.html> on 15/07/20.

¹⁰⁴ South Africa, 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, https://pmg.org.za/files/171128BREFING_NOTES.docx accessed 23/06/20

The memorandum reports that in an AU member states meeting in Accra there was broader discomfort about the AU Commission view that both the Protocol and the Implementation Roadmap were to be adopted at the January 2018 summit of the AU. South Africa was supported in opposing the simultaneous endorsement of the Roadmap 'which would come into effect immediately in member states after adoption' by Egypt, Tunisia, Algeria, Kenya, and Uganda.¹⁰⁵

South Africa had submitted through its embassy in Accra a *Note Verbale* proposing the inclusion of 'enablers or preconditions' in phase one of the implementation plan. The memo claims that South Africa was supported by Egypt and Algeria in arguing that 'it was imperative to enhance civil registration, establish integrated border management systems, enter into bilateral return agreements and strengthen law enforcement at a national level before the right of entry and abolition of visas could be implemented'.¹⁰⁶ South Africa also argued that wording 'coming into immediate effect in member states' abrogated the sovereignty of member states, skipped the convention of ratification in parliament, and was contrary to the South African constitution.

8. Conclusions

8.1 Some observed patterns

1. Smaller groupings may be able to move forward more easily, especially when their interests are aligned: We saw in the EAC how it was able to move forward relatively rapidly with only six members. Its ability to quickly agree to arrangements about migration in the just over 20 years since its (re)formation and its ability to agree to cross-border Protocols to deal with the Covid-19 crisis appear to show that it is relatively nimble.¹⁰⁷ The somewhat rapid progress in IGAD also is in part an outcome of the relatively small size of the grouping. What this may also imply is that it could be easier for smaller subset groups of countries to agree to advancing the movement of people agenda around specific arrangements and protocols even in regard to the continental process, except when the interests of members of the small group regarding migration are in conflict.

2. It is easier to move forward on a regional basis: Even if the grouping is larger, it seems that it is easier to move forward on a regional basis than on a continental basis. This is likely an outcome of familiarity and trust within regions, though it could also be an outcome of the judicious exercise of power by some of the more powerful countries in the region.

3. Injection of resources into regional and national capacity development has an impact: Progress in IGAD, aside from reflecting the influence of Ethiopia and Kenya, appears to be in some respects an outcome of the considerable resources poured into the region by the EU in particular to build up migration management capabilities. In contrast, a region like Southern Africa which has received little if any external resources to build up migration management capabilities, has made relatively slow progress, especially in the weaker countries.

¹⁰⁵ South Africa, Department of Home Affairs, 'South African Position', 6.

¹⁰⁶ South Africa, Department of Home Affairs, 'South African Position', 7.

¹⁰⁷ East African Commission, 'East African Community Administrative Guidelines to Facilitate Movement of Goods and Services during the Covid-19 Pandemic', 2020, <https://www.tralac.org/documents/resources/covid-19/regional/3405-eac-administrative-guidelines-to-facilitate-movement-of-goods-and-services-during-covid-19-april-2020/file.html> accessed 23/07/20.

4. In some cases agreements have moved way ahead of implementation. The case of ECOWAS in regard to right of residence and establishment shows that the adoption of protocols is not always observed in practice. It would be unfortunate if this example were followed in the case of the African continental Protocol on the Free Movement of People. It would be preferable to revisit the not yet ratified or implemented agreement and recast it or at least its implementation plan ('Roadmap') addressing the necessary preconditions for implementation and the logic of sequencing explicitly in order to enable incremental progress.

5. Upper middle-income countries are clearly more reluctant to liberalise: Those countries which are more inclined to liberalise their immigration systems tend to be low-income countries and small islands. A list of countries which has moved fastest on unilateral opening and/or on signing and ratifying the continental treaty will largely be populated by relatively poor countries and islands, and will include no upper middle-income country, except for islands (to which it is difficult to migrate irregularly). This shows that the fear of uncontrolled economic migration or the fear of popular reaction to such migration in richer countries is a major inhibitor to liberalising migration laws. As we learned from the historical studies, in countries with high levels of existing inequality where lower skilled workers are not well-paid immigration can lead to antagonism towards immigrants easily stoked by populist politicians. In Africa, the legacy of the racist politics and practices of colonialism are also factors. The repeated episodes of xenophobia in South Africa are the best-known instances, but not the only examples in Africa.¹⁰⁸

6. Larger countries can impact on regional outcomes: Nigeria has been influential in the development of ECOWAS, Kenya and Ethiopia have carried IGAD forward, and South Africa has played a dampening role on progress towards freer movement in and beyond SADC. Regional hegemonies tend to be critically important, but some smaller countries such as Rwanda and Benin can be pacesetters in the right environment. To move forward, migration reformers need to win the trust of regional hegemonies.

7. The way the continental Free Movement of People Protocol's Roadmap is written enables those who wish to delay the continental free movement of persons agenda. Some countries appear to or choose to see ratification as setting into motion an automatic, irrevocable process over which they have too little control. It may be that they cite the ambiguous wording of the roadmap as a pretext for tardiness in moving forward on immigration policy. It is not sufficiently clear where in the process of integration key prerequisites for free movement from the perspective of larger and richer countries (discussed in 8.2 below) will be addressed. While the Protocol notes: 'the arrival and settlement of migrants in a given host country will exacerbate inequalities or will constitute challenges to peace and security' and it notes the need to 'ensure that effective measures are put in place to prevent (such) situations',¹⁰⁹ there is no clarity in the Protocol or the Roadmap how these concerns will be addressed. This has helped to delay the implementation process. As previously stated, a careful redrafting of the Roadmap or draft of an interpretive guide to the Roadmap could make it more difficult for countries to use its wording as a reason for holding back on ratification and implementation.

¹⁰⁸ Adeoye O. Akinola, ed., *The Political Economy of Xenophobia in Africa* (Cham: Springer International Publishing, 2018).

¹⁰⁹ AU, *Protocol on Free Movement*, 4.

8.2 Key Issues

We have also learned that there are some institutional and procedural concerns that inhibit the commitment of some of the richer countries in Africa to migration liberalisation. These include:

1. **Civil registration/ID documentation:** Many countries in Africa have inadequate or non-existent systems of civil registration and many countries have inadequate identity documentation systems.¹¹⁰ This makes it difficult or impossible for home countries of migrants to vouch for their citizens to the satisfaction of host countries. Regional efforts to build civil registration and identity document systems to a common standard could reduce the current lack of trust between countries. Achieving adequate systems will involve a considerable investment by government and aid partners both in the development of the systems and the development of the capacity to maintain and update such systems. These processes should be led by a competent technical committee of member states and experts at regional and continental levels and should be controlled within Africa to help prevent the exploitation or misuse of information.

2. **Exchange of civil and criminal data and data standards:** As a result of poor civil registration systems, countries are sometimes unable to gather suitable data to enable the home country to provide the host country with sufficient information about migrants. This problem is also present in the criminal justice systems of countries with weak administrative systems and this could result in the untracked migration of criminals. Support for the improvement of such systems and the capabilities for their maintenance would help to engender greater trust, with similar safeguards against the use and misuse of information to those already mentioned.

3. **Border management systems:** Many countries still do not have sufficiently reliable border management systems. The EU for its own reasons has given considerable support to this function in West and North Africa and in the Horn of Africa, which has seen positive outcomes that seem not only serve the EU's interests but regional interests too. Though it will be a long time before comprehensive border management is ubiquitous it is possible to strengthen these systems in poorer countries with significant support.

4. **Security and exchange of information:** There are contagious security issues in many African countries under the influence, for example, of EI Shabab, Boko Haram and ISIS that influence the consideration of border management.¹¹¹ Many of these are hybrid banditry/political incursions and are fed by inequality and the impact of climate change, among many factors. Not all African states have strong security monitoring systems and it is not always possible to ensure sufficient cooperation in the exchange of security information. This is another key area for improvement in weaker countries to improve levels of trust.

5. **Repatriation agreements:** Regional or continental Protocols do not generally include repatriation processes. Countries need to be empowered and supported in a process of developing, finalising and implementing agreements.

8.3 Possible paths forward

¹¹⁰ *The Economist*, 'African countries are struggling to build robust identity systems', December 5, 2019, <https://www.economist.com/middle-east-and-africa/2019/12/05/african-countries-are-struggling-to-build-robust-identity-systems> accessed 23/07/20.

¹¹¹ Samuel Kehinde Okunade and Olusola Ogunnubi, 'The African Union Protocol on Free Movement: A Panacea to End Border Porosity?' *Journal of African Union Studies* 8 no. 1 (2020): 16.

The continental Free Movement of Persons Protocol has not achieved its objectives. Conversations with those mandated to ensure the implementation of the Protocol suggest that, at least until recently, most agreed with the approach suggested in the African Union progress report.¹¹² The report proposed that implementation of the existing Protocol and roadmap should be promoted through the Pan African Parliament, through the ECOWAS Parliament, media and communication entities, youth researchers and civil society organisations, and other media. In addition, a continental strategy on the right of entry was proposed for drafting by the AU and the RECs covering the implementation of the right of entry.¹¹³ This paper is not yet in the public arena.

The challenges to the implementation of the strategy identified by the report were not the issues mentioned in section 8.2 above; according to the AU, key issues were: the slow pace of ratification processes through legislatures; certain current national laws and policies; and insufficient resources devoted to promoting the Protocol on the continent. In conclusion, the progress report recommended that the AU Commission 'intensify advocacy of the Protocol and African Passport' and that a free movement champion should promote and be the voice of free movement. The International Organization for Migration appears to support this approach.¹¹⁴

The notion that the problem can be addressed by popularising the notion of free movement and by speeding up parliamentary processes would not appear to hold up when the ratification pattern for the Free Movement Protocol is contrasted with the rapid ratification of the African Continental Free Trade Agreement which was first presented to the same summit of African leaders early in 2018. The development of a 'continental strategy on the right of entry' might be a step forward if it recognises the limitations of the implementation roadmap and attempts to rewrite it or to prepare an interpretive guide to it to enable a more incremental process following an accepted sequencing path. The 'right of entry strategy' is not yet in the public arena so it cannot be assessed against these criteria.

Alternatively, the Roadmap should be revised to incorporate incremental strategies for moving forward and the preconditions for implementation should be built into the Roadmap. Or, the implementation strategies could be developed in the form of guidelines for the implementation of the Roadmap. This could formalise continental and regional technical committees of senior officials of the member states and experts from the region to finalise the guidelines and monitor implementation.

These proposals are put forward in a spirit of experimentation to enable members of the AU to break the free movement deadlock collectively, but not necessarily simultaneously and to the same extent: asynchronicity. Members of the AU should be allowed to move forward along the path to free movement in an asynchronous way. When pairs or groups of countries agree to move forward together within the framework of the Protocol, this could be allowed. This means that countries would be expected to mutually open their borders when the preconditions indicated. Reasonable preconditions could be specified in a revised roadmap or implementation guide.

It is most important to plan for a deliberate process which would allow the poorer countries on the continent to progressively meet the preconditions for higher levels of integration at

¹¹² AU, *Progress Report on the Free Movement of Persons in Africa* presented to the Third Meeting of the Specialised Technical Committee on Migration, Refugees and Internally Displaced Persons 4-8 November 2019.

¹¹³ AU, *Progress Report on the Free*, 6.

¹¹⁴ IOM, 'IOM to Support Popularization of Free Movement of People in Africa' <https://ethiopia.iom.int/iom-support-popularization-free-movement-people-africa> and Interview IOM Addis Ababa, September 2019. Link accessed 23/07/20

appropriate standards. This would entail the establishment of technical committees at the regional and continental levels and would set out and support a process whereby poorer countries would be supported in achieving these preconditions. There are already several initiatives around civil registration and identity documents, the foundational prerequisites, such as the World Bank's 'Identification for Development' for example, that could be harnessed. The EU's work on migration management in Africa could be extended beyond its preoccupation with emigration to Europe, as another example. However, for this to be a part of a credible continental strategy, the programmes should be led and indeed owned by African countries and regional institutions.

Working paper