

Southern African Migration Project

**The Draft Protocol on the Facilitation of Movement of Persons in SADC:
Implications for State Parties**

Migration Policy Brief No. 18

2006

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1.0 Introduction

- 1.1 The migration of persons across international boundaries in search of better opportunities or as a result of war, conflict and political instability has risen substantially over the years. The UN Population Division estimates that there are currently 175 million people living outside of their country of origin which is more than twice the number a generation ago (United Nations Population Division 2002). As communications and transport infrastructure become more sophisticated and cheaper, this trend is likely to continue in the foreseeable future.
- 1.2 This movement of persons from their own countries of nationality or citizenship, to another country where they take up temporary or permanent residence and may even become citizens, significantly challenges the notions of individual, group or national identity associated with nation-states. Even in multicultural and diverse societies such as those found in most Southern African countries, nationality and citizenship are over-riding features that define those who belong and those who do not belong.
- 1.3 There is an emerging consensus that if migration is properly managed by both countries of origin and countries of destination, that it can have a positive developmental impact. What is often referred to as the 'nexus between migration and development' is becoming a familiar refrain in the global debates about migration with the essence of this approach being that, rather than viewing and responding to migration as a problem that challenges states economically, politically, socially and culturally, that it should be channeled and managed in a manner that maximises its positive impact, particularly in the economic sphere (IOM 2005).
- 1.4 This debate often takes place in conjunction with the globalisation debate - the idea that the countries of the world are becoming more inter-dependant and that higher levels of co-operation are required if all countries, developed and developing, are to benefit. Implicit in this debate is the recognition that migration is inevitable, but at the same time there is an expressed need for it to be managed, rather than just allowing it to increase as a result of globalisation (IOM 2005).
- 1.5 But, the argument that migration should be managed as part of a developmental framework is often seen to be at odds with predominant notions within nation-states about who the beneficiaries of such development ought to be. It is at this intersection of migration, citizenship and national identity and development that the concepts related to the free movement of persons become complex, and sometimes controversial.
- 1.6 The importance of migration in the context of development in African states is clearly recognised by the African Union in its *Strategic Framework for a policy on migration in Africa*, which was drafted in the wake of a series of resolutions and recommendations that were adopted by various meetings of African Heads of State and other political leaders.

- 1.7 The AU Framework takes as one of its key imperatives, the New Partnership for Africa's Development (NEPAD) strategy that is aimed at promoting the development of the African continent. While acknowledging that NEPAD does not consider migration as a 'sectoral priority', it nevertheless makes the point that NEPAD has the potential to contribute to the solution of many of the root causes of migration by promoting socio-economic and political development (African Union [no date], p. 6).
- 1.8 In framing the need for a comprehensive continental set of migration policies, the AU document states the following:

... [W]ell-managed migration has the potential to yield significant benefits to origin and destination States... However, mismanaged or unmanaged migration can have serious consequences for States' and migrants' well-being, including potential destabilising effects on national and regional security, and jeopardising inter-State relations. Mismanaged migration can also lead to tensions between host communities and migrants, and give rise to xenophobia, discrimination and other social pathologies.

This AU statement, while emphasising the developmental potential of migration, clearly recognises the complexities of managing migration in relation to notions of 'insiders' and 'outsiders' and citizen opinions about those who belong and who should benefit from development and those who do not belong and should not benefit.

2.0 The Southern African Context

- 2.1 In April 1980, the governments of nine Southern African states — Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe (known as the Frontline States) — established the Southern African Development Co-ordination Conference (SADCC) to: ⁱ
- reduce their dependence on particularly, though not only, apartheid South Africa;
 - implement programmes and projects that would impact nationally and regionally; and
 - use their resources to achieve self-reliance.

Broadly, the formation of SADCC represented an alliance of states that bore the brunt of apartheid South Africa's destabilisation policies and while it stated objectives were largely economic in nature, it was a *de facto* political alliance.

- 2.2 In August 1992, following the start of the process of transition in South Africa, the Conference (SADCC) was transformed into the Southern African Development Community (SADC) and established as its objectives:
- the achievement of development and economic growth and the alleviation of poverty to enhance the standard and quality of life of the people of Southern Africa;
 - the evolution of common political values, systems and institutions;
 - the strengthening and consolidating of the historical, social and cultural affinities amongst the people of the region; and
 - the achievement of collective self-reliance with a high degree of harmonisation and rationalisation between member states.
- 2.3 Currently, the SADC consists of fifteen member states as follows: Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe (though the Seychelles is in the process of withdrawing its SADC membership).
- 2.4 As with the Conference, the objectives of the Community are primarily economic in nature and fundamental to the achievement of these objectives is the recognition of the need for a greater degree of consistency between, and even the harmonisation of domestic policies and legislation, as well as the need for regional protocols and mechanisms to govern the joint affairs of member states.
- 2.5 Since its inception, SADC member states have formulated, ratified and signed a number of protocols. Several of these (Tourism, Trade, Transport, Education and Training and so on) recognise the desirability of increased economic co-operation and specifically, for the increased movement of capital and goods between member states. In this context of regional economic development and integration it has been accepted that regional cross-border migration is a key issue, but that it cannot be adequately managed and regulated on the basis of the domestic legislation of individual member states. Therefore, countries in the region need to co-operate to develop appropriate policies, legislation and mechanisms to govern a regional migration regime.
- 2.6 As the SADC region is moving closer towards free trade — the free movement of capital and goods — and ultimately economic integration, the issue of migration and more broadly, the free movement of persons, has repeatedly come into prominence (Williams 1999).

But the free movement of persons continues to be balanced against the political and economic interests of individual member states. National policies, legislative instruments and institutions and mechanisms designed to manage cross-border migration are inevitably couched in protectionist language and this is unlikely to change unless:

- a greater degree of economic parity has been achieved between member states; or
- a regional migration regime involving all SADC member states, that promotes the achievement of greater economic parity can be conceptualised, designed and implemented.

2.7 The achievement of either one or both of the above are relatively long-term projects. The table below shows the extent of the unevenness of the economic situation in SADC member states. If economic parity is a prerequisite for free movement, it is clear that free movement is unlikely to be a feature in Southern Africa for some time to come. However, even without these achievements in place, migration is, has been and will continue to be a reality in Southern Africa.

| Table 1: Key indicators for SADC member states | | | | | | | | | |
|---|---------------------|--------------------------------|--------------------------------|---------------------------|------------------------------|------------------------|------------------------------------|---------------------------|-----------------------------------|
| Country | Pop. (mill.) | Life Expectancy (years) | HIV/Aids Prevalence (%) | Literacy - 15+ (%) | GDP per capita (\$US) | Unemp. Rate (%) | Pop. below poverty line (%) | Inflation Rate (%) | External Debt (\$US bill.) |
| Angola | 11,190 | 36 | 3,9 | 42 | 2,100 | -- | 70 | 43,8 | 10,45 |
| Botswana | 1,640 | 33 | 37,3 | 79,8 | 9,200 | 23,8 | 47 | 7 | ,531 |
| DRC | 60,085 | 49 | 4,2 | 65,5 | 700 | -- | -- | 14 | 11,6 |
| Lesotho | 1,867 | 36 | 28,9 | 84,8 | 3,200 | 45 | 49 | 5,3 | ,735 |
| Madagascar | 18,040 | 56 | 1,7 | 68,9 | 800 | -- | 50 | 7,5 | 4,6 |
| Malawi | 12,158 | 36 | 14,2 | 62,7 | 600 | -- | 55 | 12 | 3,129 |
| Mauritius | 1,230 | 72 | 0,1 | 85,6 | 12,800 | 10,8 | 10 | 4,5 | 1,78 |
| Mozambique | 19,406 | 40 | 12,2 | 47,8 | 1,200 | 21 | 70 | 12,8 | ,966 |
| Namibia | 2,030 | 43 | 21,3 | 84 | 7,300 | 35 | 50 | 4,2 | 1,136 |
| SA | 44,344 | 43 | 21,5 | 86,4 | 11,100 | 26,2 | 50 | 4,5 | 27,01 |
| Swaziland | 1,173 | 35 | 38,8 | 81,6 | 5,100 | 34 | 40 | 5,4 | ,320 |
| Tanzania | 36,766 | 45 | 8,8 | 78,2 | 700 | -- | 36 | 5,4 | 7,321 |
| Zambia | 11,261 | 39 | 16,5 | 80,6 | 900 | 50 | 86 | 18,3 | 5,353 |
| Zimbabwe | 12,746 | 36 | 24,6 | 90,7 | 1,900 | 70 | 70 | 133 | 4,086 |
| <i>Source: CIA World FactBookⁱⁱ</i> | | | | | | | | | |

3.0 Towards the Free Movement of Persons

3.1 As early as July 1993, a SADC workshop on the free movement of people was held in Harare and following the SADC Council of Ministers meeting in Swaziland in

July of 1994, a team of consultants was appointed to prepare a SADC protocol on free movement (Williams 1999).

- 3.2 In March 1996, the *Draft Protocol on the Free Movement of Persons in the Southern African Development Community* (hereafter the "free movement protocol") was completed and subsequently submitted to SADC member states for their comment. The objective of this protocol was to phase in, over a period of ten years, the free movement of citizens of SADC member states, between and within countries in the region, and to regulate the movement of citizens of non-SADC countries into and within the region.
- 3.3 After much back and forth, the protocol was dropped, mainly on the insistence of South Africa, Botswana and Namibia. The argument was that the region was not ready for the free movement of people yet, given the economic disparities between the various member states. Some argued that the free movement protocol amounted to an "open border policy" which did not take into account the potentially negative consequences of such a policy (Oucho and Crush 2001).
- 3.4 In response, and as an alternative to the free movement protocol, the *Draft Protocol on the Facilitation of Movement of Persons in SADC* (hereafter the "facilitation protocol") emerged. This protocol was more readily accepted and approved in principle at the SADC Summit of August 1997. It was agreed at the Summit that every member state would have the opportunity to review and make amendments to the protocol and submit amendments to it at the Summit that was scheduled for September 1998. However, the Summit of September 1998 effectively put all discussions related to the Protocol on hold indefinitely on the basis that the provisions of the Protocol, and particularly those related to 'establishment' went beyond the mandate that was given to its drafters.
- 3.5 Discussion on the Protocol was revived in 2003 when questions related to the movement of persons repeatedly surfaced during the deliberations of the SADC Organ on Politics, Defence and Security Co-operation. The Organ set in motion a plan to work towards the adoption of the Protocol that consisted of national consultations in each member state, a joint workshop at which member states were to submit their amendments and proposals, after which a redrafted Protocol would be submitted to the SADC Summit for adoption and subsequent ratification by member states. However, this plan was not implemented as outlined, partly because of the unevenness of national consultative processes in member states.
- 3.6 In July 2005, the Ministerial Committee of the Organ met in South Africa where they considered and approved the Draft Protocol on the Facilitation of Movement of Persons. The draft Protocol was subsequently tabled at the SADC Summit that was held in August 2005 where it was approved and signed by six member states. In their official communiques, both the Organ and the Summit refer to the Protocol as a means to give effect to the SADC Treaty that calls for the promotion of sustainable economic growth and development and the elimination of the obstacles

to the free movement of capital and labour, goods and services, and of people generally among member states.ⁱⁱⁱ

- 3.7 The overall objective of the Protocol, as described in the communique issued by the Organ, is to facilitate the movement of persons, and its specific objective is to facilitate entry into Member States without the need for a visa for a maximum period of ninety days. The official communique issued at the end of the Summit also makes reference to the provisions pertaining to 'residence' and 'establishment' as described below.
- 3.8 In terms of its current status, therefore, the Movement Protocol has been formally adopted at the Summit of the Heads of States and it has been signed by six member states. However, for the Protocol to come into effect, at least nine member states must have both signed and ratified it- a process which may yet take some time. Once the Protocol has been ratified by nine member states (and, therefore comes into effect), time-frames for its implementation will be developed. It appears, however, that steps are already being taken to give effect to some of the provisions of the Protocol. For example, a proposed meeting to be held in Namibia will consider the harmonisation of immigration policies and laws of SADC member states.
- 3.9 Ultimately, the success or otherwise of the Facilitation of Movement Protocol will be determined by a whole range of factors, as discussed below. But first, it is useful to look at where and how the facilitation protocol is located within the overall framework of SADC and what it specifically provides for in terms of its content.^{iv}

4.0 Context and Objectives of the Movement Protocol

- 4.1 Article 10.3 of the *Treaty Establishing SADC* authorises the Summit to adopt legal instruments for the implementation of the provisions of the Treaty. The facilitation protocol is one such legal instrument which, in its preamble, expresses commitment to various provisions of the Treaty, including the following:
- the duty to promote the inter-dependence and integration of our national economies for the harmonious, balanced and equitable development of the region;
- the necessity to adopt a flexible approach in order to accommodate disparities in the levels of economic development among member states;
- the need to redress imbalances in large scale population movement within SADC;
- to support, assist and promote the efforts of the OAU which is encouraging free movement of persons... [within regions]...as a stepping stone towards free movement of persons in an eventual African Economic Community.
- 4.2 The protocol then refers specifically to Article 5.2(d) of the SADC Treaty which... *requires SADC to develop policies aimed at the progressive elimination of*

obstacles to the free movement of capital and labour, goods and services, and of the people of the region generally, among member states...

- 4.3 The ultimate objective of the protocol is "...to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties" and it aims to do this by **facilitating**:^v

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

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

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

- 4.4 In terms of the timeframe for implementation, the Protocol specifies that an Implementation Framework will be agreed upon within six months from the date on which at least nine member states have signed.

- 4.5 The protocol defines three types of "movement" by people as follows:

4.5.1 Visa-free entry

In terms of this, a citizen of a State Party may enter the territory of another State Party without the requirement of a visa. However, the person must enter through an official border post, possess valid travel documents and produce evidence of sufficient means of support for the duration of the visit. Furthermore, it is specified that this is limited to 90 days per year, though the visitor may apply for an extension of this period.

With regard to what the person may do during these three months, the protocol is completely silent. There is no specification as to whether the person may take up short-term employment, engage in trade or business of any sort, or attend an educational institution. Given the absence of such provisions related to visa-free entry, it can be assumed that such visits are intended to be for reasons not provided for by the other categories of movement as discussed below.

The protocol also provides for an exemption in terms of which any member state may apply in writing and for *good reason* to re-impose visa requirements, provided that such visas will be issued at a port of entry at no cost.

4.5.2 Residence

The second type of movement envisaged by the protocol is referred to as **Residence** and is defined as:

"...permission or authority, to live in the territory of a State Party in accordance with the legislative and administrative provisions of that State Party."

The protocol also encourages member states that have signed the protocol to facilitate the issuing of residence permits so as not to cause undue delays.

4.5.3 Establishment

The third category of movement, known as **Establishment** is defined as "permission or authority granted by a State Party in terms of its national laws, to a citizen of another State Party, for..."

- exercise of economic activity and profession either as an employee or a self-employed person;
- establishing and managing a profession, trade, business or calling.

4.5.4 It is not entirely clear from a reading of the text of the Protocol, what the difference is between 'residence' and 'establishment', though the notion of establishment has within it, the possibility that persons who have relocated permanently will have the option of applying for and being granted citizenship in the country of destination.

4.6 Articles 20 – 25 of the protocol focuses on the rights of individuals not to be removed from the territory of a member state unless there are legitimate and valid reasons for doing so. However, a very clear set of principles and procedural guidelines are specified in the event of such removal. Furthermore, the protocol clearly states that no-one may be subjected to collective or group removals- in other words, no state has the right to remove an entire family or all the citizens of a particular country unless each case has been considered and determined on its own merits.

4.7 Article 28 is a re-affirmation of the obligations of member states towards asylum-seekers and refugees, but stipulates that the management of refugees shall be regulated by a specific MOU between State Parties.

4.8 Article 29 specifies that the institutions responsible for the implementation of the protocol shall be the Committee of Ministers responsible for Public Security and any other committee established by the Ministerial Committee of the Organ.

5.0 Implications of the Protocol for State Parties

5.1 The Facilitation Protocol has quite significant implications in terms of the policies/legislation of state parties that ratify it, and also in terms of logistics and the costs of implementation. However, prior to looking at these implications in more detail, it is useful to review some of the more general considerations as they pertain to the Protocol.

5.2 GENERAL CONSIDERATIONS

- 5.2.1 *Security:* In earlier versions of the Protocol, it was envisaged that a special Ministerial Committee would be created to be responsible for the overall implementation of the Protocol and the monitoring thereof. In the document under discussion here, it is specified that the Committee of Ministers responsible for Public Security, and any other committee established by the Ministerial Committee of the Organ on Defense, Politics and Security shall be the custodian of the Protocol. By implication, and when read in conjunction with Article 11 that calls for the exchange of security, crime and intelligence information amongst member states, it appears that there is substantial concern about the security risks associated with migration. While it is indeed true that migration potentially does pose some security risks, placing the management of the Protocol in the hands of the security establishment suggests that security is an over-riding consideration. It is possible that this could be counter-productive to the facilitation of movement, despite intentions to the contrary.
- 5.2.2 *Facilitation vs Control:* In general terms, the Protocol calls for an increase in infrastructure and personnel to manage the movement of persons. This appears to be counter-intuitive – if the intention is to facilitate movement, then does it not make logical sense that it would lead to a reduction in infrastructural and personnel requirements? Why then, does it appear as if one of the outcomes of implementing the Protocol would be an increase in the bureaucracy associated with migration management? This would suggest that the Protocol is not about *facilitating* movement, but that it is rather about *controlling* movement, even if the mechanisms of control may make it easier for people to move. Stated more positively, it can also be argued that the Protocol emphasises the need for *managing* migration better. However, as discussed below, it differs very significantly from the concept of free movement as initially envisaged.
- 5.2.3 *Implementation* While most of the provisions of the Protocol are relatively clear, what remains unclear is how it will be implemented. The Protocol specifies in Article 4 that an Implementation Framework will be agreed to within 6 months from the date of ratification by at least 9 member states. The problem here is of course the fact that member states may be reluctant to ratify the Protocol unless they know how it will be implemented and it makes sense to at least prepare a draft Implementation Framework that member states can consider during the process of ratification.
- 5.2.4 *Signature and Ratification:* Ratification of the Protocol requires two steps (though they can happen simultaneously). Firstly, the Head of State has to sign the text of the Protocol signifying the intent of the member state to consider ratification. Secondly, the Protocol has to be submitted to, and adopted by the Parliament of the member state concerned and subsequently deposited with the SADC Secretariat. This process necessarily involves that prior to ratification, member states consider very carefully, what the implications of the Protocol are. At the SADC Summit at which the Protocol was adopted, six out of fourteen member states appended their signatures. If this show of commitment and priority

(or lack thereof) is anything to go by, it will take some time before nine member states ratify the Protocol.

- 5.2.5 *Significance:* The adoption of the Protocol has been described as a major step towards the free movement of persons in SADC. Indeed, it is quite significant that after nearly ten years, a sufficient number of Heads of State were able to reach consensus and make a decision to adopt the Protocol. However, in terms of content, much of the Protocol merely affirms what is already happening in the region based on either the domestic legislation of SADC member states and/or bilateral and multilateral agreements that have been signed between member states. In this sense, the Protocol does not represent any 'radical departure' from the status quo, but largely elevates to a regional level, what is already a reality in the region. This is not to undermine the importance of having such a Protocol, but to underscore the fact that in policy and legislative terms, we are unlikely to see anything substantially different in the short to medium term. Perhaps the biggest and most visible impact that the Protocol will have once it comes into effect would be in terms of the logistical mechanisms it puts in place (as discussed below).
- 5.2.6 *Obligations and Enforcement:* While the Protocol makes provision for a range of policy, legislative and logistical adjustments on the part of State Parties, the extent to which (a) State Parties are obliged to comply and (b) the Protocol can be enforced, remains unclear. While it is not always clearly stated, it is implicit in the phrasing of particularly the provisions related to residence and establishment, that these provisions are subject to the domestic/national legislation of State Parties. In other words, even if a member state has ratified the Protocol, it does not mean that its national policies and legislation will be amended to comply with the provisions of the Protocol. It is certainly the intention and State Parties are 'encouraged' to amend their national legislation, but there are no mechanisms to ensure that state parties will indeed amend their legislation to give effect to the provisions of the Protocol. In essence, any and all the provisions of the Protocol are ultimately subject to domestic legislation.
- 5.2.7 *Resource and Capacity Requirements and Constraints:* The Protocol calls for various logistical mechanisms to be put in place; ranging from increased border infrastructure and personnel, to the introduction of machine-readable passports and other appropriate technology. The resource and capacity implications of these provisions in the Protocol are substantial. While some SADC member states already have some of these mechanisms in place, and while it is possible for some other member states to put these mechanisms in place, it is also very obvious that a significant number of member states simply do not have either the resources or the capacity to comply with these requirements. The potential outcome of this problem is two-fold. Firstly, member states may be unwilling to sign and ratify the Protocol because they are aware that they will be unable to implement it as required. Secondly, even if member states do sign and ratify the Protocol, it is apparent that many will not be able to comply with its provisions.

6.0 Main Provisions of the Protocol

6.1 Table 2 provides a comparative summary of the similarities and differences between the original Free Movement Protocol of 1996 and the Facilitation of Movement Protocol that was adopted in August 2005. As will be noted, while the provisions regarding visa-free entry, residence and establishment have minor technical differences, they are largely the same. However, it is in three significant respects that the Facilitation Protocol differs from the Free Movement Protocol. Firstly, the Free Movement Protocol conferred upon citizens of a SADC member states the *right* to employment, residence and establishment and virtually all the same rights as the citizens of the state in which they have taken up residence and established themselves. In the Facilitation Protocol, all these rights are subject to domestic legislation and there is no mention of the rights akin to citizenship. Secondly, as referred to above, the Facilitation Protocol institutionalises the management and custodianship of the Protocol within the regional security establishment, as opposed to the immigration establishment. Thirdly, whereas the Free Movement Protocol envisaged complete free movement within a period of ten years from the date on which it would have come into effect, the Facilitation Protocol does not either implicitly or explicitly endorse the concept of free movement. It is in this respect that it would be correct to argue that the Protocol adopted in Gaborone, while it may contribute to the facilitating the movement of persons in SADC, actually has very little to do with the *free movement* of persons.

| Proposed Elements | Free Movement Protocol | Facilitation of Movement Protocol |
|--|--|--|
| <p><u>Visa-free entry</u>-citizen of a SADC member state may enter the territory of another member state without the requirement of a visa</p> | <p>Limited to a period <u>not exceeding 6 months</u>, but may be renewed</p> <p>Entry is sought through an official border post</p> <p>Visitor must possess a valid travel document</p> <p>Visitor has or can obtain sufficient means of self-support for the duration of the visit, but <u>shall be presumed to have such support</u></p> <p>Visitor is not an <u>inadmissible immigrant</u> under the laws of the host country</p> <p>Member states may apply for an exemption of this provision, but visas shall be issued free of charge at the port of entry</p> <p>Exemptions will be valid for a period not exceeding 12 months</p> | <p>Limited to a period <u>not exceeding 3 months</u>, a year but may be renewed</p> <p>Entry is sought through an official border post</p> <p>Visitor must possess a valid travel document</p> <p>Visitor <u>must produce evidence of sufficient support</u> for the duration of the visit</p> <p>Visitor is not a <u>prohibited person</u> under the laws of the host country</p> <p>Member states may enter into <u>bilateral agreements</u> with other member states regarding the reciprocal handling of travellers arriving without travel documents</p> <p>Member states may apply for an exemption of this provision but visas shall be issued free</p> |

| | | |
|---|---|--|
| | | of charge at the port of entry Exemptions will be valid for a period not exceeding 12 months, but <u>a state may apply for an extension thereof</u> |
| <u>Residence-</u> authorisation granted to a citizen of a SADC member state to temporarily reside in the territory of another state | <ul style="list-style-type: none"> - Issued for a maximum period of 3 years, but can be renewed - Applicant has the right to apply for and accept offers of employment <p>enter freely the territory of a member state for the purpose of seeking employment</p> <p>take up employment subject to the labour laws of the host state</p> <p>reside in the territory of a member state as a student or trainee</p> <ul style="list-style-type: none"> - Right of residence shall be granted by all member states to citizens of other member states within a period of 3 years from the entry into force of the protocol <p>Laws and regulations shall be harmonised and a uniform SADC residence permit shall be established within 2 years of the entry into force of the protocol</p> | <p>Issued for a maximum period of 3 years, but can be renewed</p> <p>Shall be granted for the purposes of</p> <ul style="list-style-type: none"> • recreation, business or medical treatment • taking up employment • education or other training • other authorised pursuits <p>member states shall review and where necessary, relax the criteria for granting residence and shall ensure that their laws and regulations governing the granting of residence permits are harmonised</p> |
| <u>Establishment-</u> citizens of SADC member states may establish themselves (take up permanent residence) in the territory of another member state | <p>Establishment shall include the right</p> <p>of access to economic activities as self-employed person</p> <p>to establish and manage a profession, trade or business</p> <p>to practice one's profession, business or calling and to provide services related thereto</p> <p>to participate in all such human activities as citizens of the host state (subject to a later clause- see below)</p> <p>the right of establishment shall be granted to citizens of other member states and the progressive abolishment of all restrictions shall take</p> | <p>Establishment shall mean permission or authority for access to economic activities as self-employed persons</p> <p>establishing and managing a profession, trade or business</p> <p>practising one's profession, trade, business or calling and providing services related thereto</p> |

| | | |
|---|---|---|
| | place within a period of 5 years from the entry into force of the protocol | |
| Proposed Elements | Free Movement Protocol | Facilitation of Movement Protocol |
| Controls only at external borders (between SADC member states and non-member states, also referred to as third states). | <p>Within a period of 10 years shall take steps to <u>abolish</u> controls on the movement of citizens of SADC member states within the Community (SADC)</p> <p>Citizens of member states shall not be subject to the carrying out of any checks or controls</p> <p>Abolition of checks on citizens shall not affect any rights or obligations of citizens of third states</p> <p>Member states shall be free to exercise police and other powers and to require persons to hold, carry and produce permits and documents</p> <p>May be suspended for a period not exceeding one month</p> <p>Shall enter into force on a date to be determined by the Summit</p> | |
| Institutional Structure: | <p>Regional Standing Committee composed of the Minister responsible for Immigration and the Minister responsible for Police in each member state</p> <p>Regional Cross Border Security Committee</p> <p>Regional Committee on Refugees</p> | Committee of Ministers responsible for Public Security or Committee appointed by the Organ Refugee matters to be managed through bilateral MOU's. |

6.2 The following table sets out the main provisions of the Protocol, grouped according to three headings; namely, Policy and Legislative Obligations, Practical and Logistical Requirements and International and Domestic Co-operation.

| Table 3: Main Provisions of the SADC Protocol on the Facilitation of Movement of Persons | | |
|---|---|--|
| Policy and Legislative Obligations (Policy) | *State Parties shall promote legislative, administrative, and other measures necessary for cooperation in the achievement | *Future policy and legislation must seek to reflect the objectives of the protocol |

| | | |
|--|--|---|
| | of the protocol's objectives | |
| | <p>*State Parties agree to take steps to achieve the following:</p> <ol style="list-style-type: none"> 1. harmonization of their laws such that citizens of State Parties are able to enter another State Party for a maximum period of 90 days per year 2. abolition of visa requirements, provided that where visas are regarded as necessary they will be issued gratis at port of entry | <p>*Requires state parties to relinquish some internal control over the immigration of citizens of other member states into their national territory</p> |
| | <p>*Applications for residence permits and permit renewals shall be issued in accordance with the national laws of the State Party concerned</p> | <p>*Does not dictate the content of national laws regarding residence</p> <p>*Are laws regarding Residence Permits subject to the harmonization provisions of the protocol?</p> |
| | <p>*State Parties shall, in terms of its national laws, grant permission for the establishment to citizens of other State Parties</p> | <p>*Does not dictate the content of national establishment laws</p> <p>*Are national laws regarding establishment subject to harmonization?</p> |
| | <p>*No citizen of a State Party who has been granted residence or establishment in the territory of another State Party may be expelled from the host state except where:</p> <ol style="list-style-type: none"> 1. reasons of national security, public order or public health so dictate 2. an essential condition of the validity of such person's residence or establishment permit has ceased to exist or cannot be complied with any longer 3. a citizen of another State Party acts in conflict with the purposes for which such permit was issued or fails to comply with any conditions subject to which it was issued 4. the person refuses to comply with a lawful order of a public health authority, assuming that the consequences of such refusal | <p>*The requirements governing expulsion necessitate an oversight body in each member state to guarantee that the limitations to expulsion of citizens of other member states are respected and that the appropriate rights are guaranteed to the affected parties in the case of expulsion</p> |

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| | <p>have been explained</p> <p>*The diplomatic or consular authorities of the State Party of which the affected party is a citizen shall be informed of the decision to expel the affected person and such person shall be afforded an opportunity to consult with said diplomatic or consular authorities</p> <p>*Any person who has acquired residence or establishment in the territory of a State Party shall not be subject to collective or group indiscriminate expulsion</p> <p>*Each case of expulsion shall be considered on its own merits</p> <p>*Each State Party shall ensure that its laws, regulations, or administrative mechanisms for the expulsion of citizens of other State Parties, except where Article 22 applies, incorporate the following principles:</p> <ol style="list-style-type: none"> 1. giving of adequate notice 2. affording to the affected person the opportunity to have recourse in the appropriate domestic courts or tribunals of the host state 3. suspension of any order of expulsion upon notice of appeal 4. giving of reasonable time to affected parties to settle their personal affairs 5. expulsion of any individual may not affect the residence or establishment permits of any independent member of that person's family 6. the expenses involved in repatriation of the affected party to their home state shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion | |
| <p>Practical and Logistical</p> | <p>*State Parties shall promote legislative, judicial,</p> | <p>*Necessitates establishment of an oversight body in each member state</p> |

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| Requirements (Logistics) | administrative, and other measures necessary for co-operation in the achievement of the protocol's objectives | specifically charged with monitoring SADC-related issues |
| | *State Parties shall establish and maintain a population register from which the status of its citizens and permanent residents can be determined accurately | *Requires the creation of a nationally accessible database containing information on all citizens and permanent residents |
| | <p>*State parties must take steps to achieve:</p> <ol style="list-style-type: none"> 1. regional standardization of immigration forms 2. establishment of a separate SADC desk at each major port of entry between State Parties 3. bilateral agreements to establish a sufficient number of border crossing points with identical opening hours on each side of the border and at least one such post which remains opens 24 hours every day 4. bilateral agreements to provide uniform border passes to citizens of State Parties who reside in border areas 5. co-operation with SADC secretariat to provide senior immigration, customs, and security officials as necessary to facilitate the movement of person within SADC | <p>*Establishment of SADC desk requires allocation of funding to staff desks, however this provision may facilitate the movement of persons by reducing customs activity among citizens of member states</p> <p>* Creating a "sufficient" number of border crossing sites with identical opening hours on both sides and at least one post that is open 24 hours requires legislative coordination to establish new sites and funding to build the facilities and provide staff</p> <p>*Issuance of uniform border passes requires a centralized database of all citizens of member states who are entitled to such a pass</p> <p>*Requires funding for expanded immigration, customs, and security staff</p> |
| | <p>*State Parties agree to make travel documents readily available to their citizens and to increase and improve travel facilities especially between their mutual borders</p> <p>*State Parties undertake to introduce machine readable passports as soon as possible and technologically sensitive passports and other related facilities as circumstances allow</p> | <p>*Requires funding for:</p> <ol style="list-style-type: none"> 1. Physical improvements and renovations to travel facilities (e.g. airports, train/bus depots) 2. Upgrades in elements of infrastructure to facilitate travel (e.g. roads, railroads, etc.) 3. Coordinated technological system to allow for machine readable and technologically sensitive passports |
| | State Parties agree to increase co-operation and mutual | *Requires funding to provide for training of officials and community education |

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| | <p>assistance in:</p> <ol style="list-style-type: none"> 1. improving mechanisms for co-operation in safeguarding security by exchanging information among relevant authorities on security, crime, and intelligence 2. training competent authorities and educating communities on the protocol 3. providing sufficient and adequately equipped ports of entry | <p>initiatives regarding protocol</p> <p>* "...sufficient and adequately equipped ports of entry..." involves additional funding to update technology at ports of entry, as well as employ a sufficient staff of customs officers to move persons through efficiently</p> <p>*Exchange of security and intelligence information among member states requires a centralized computer database accessible to all member states to facilitate sharing of information between countries</p> |
| | <p>*State Parties must afford to an expelled person the opportunity to have recourse in the appropriate domestic courts or tribunals of the host state</p> <p>* The expenses involved in repatriation of an expelled party to their home state shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion</p> | <p>*Requires funding for:</p> <ol style="list-style-type: none"> 1. the establishment of an appropriate judicial mechanism through which an expelled person may pursue the appeal process 2. costs incurred in repatriating expelled individuals |
| | <p>*In order to assist in the enforcement of this protocol, State Parties shall put in place such immigration, police, or other security co-operation arrangements as deemed necessary</p> | <p>*Requires funding for additional immigration and security services</p> |
| International and Domestic Co-operation (Co-operation) | <p>*State Parties shall promote legislative, judicial, administrative, and other measures necessary for co-operation in the achievement of the protocol's objectives</p> | <p>*Requires domestic co-operation to promote the objectives of the protocol in all aspects of government</p> |
| | <p>*Implementation framework will be agreed upon by State Parties 6 months from the date of signature of the protocol by at least 9 member states</p> | <p>*Requires co-operation amongst signatories to develop an implementation plan, including an appropriate time frame</p> |
| | <p>*State Parties shall ensure that all relevant national laws, statutory rules and regulations are in harmony with and promotive of the objectives of this</p> | <p>*Requires significant international legislative co-operation and communication regarding immigration policies and the movement of persons</p> |

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| | <p>protocol</p> <p>*State Parties undertake to co-operate and assist the other state parties to facilitate the movement of persons in the Community as a vehicle for achieving economic integration</p> | |
| | <p>* State parties shall take steps to achieve:</p> <ol style="list-style-type: none"> 1. bilateral agreements to establish a sufficient number of border crossing points with identical opening hours on each side of the border and at least one such post which remains opens 24 hours every day 2. bilateral agreements to provide uniform border passes to citizens of State Parties who reside in border areas 3. co-operation with SADC secretariat to provide senior immigration, customs, and security officials as necessary to facilitate the movement of person within SADC | <p>*Requires co-operation between member state governing bodies, between each member state and the SADC secretariat, and amongst domestic legislative entities in order to:</p> <ol style="list-style-type: none"> 1. reach agreements regarding border crossing sites and border passes 2. provide the proper immigration, customs, and security staff |
| | <p>*State Parties agree to increase co-operation and mutual assistance in the following fields:</p> <ol style="list-style-type: none"> 1. formulating policies and awareness programmes on the implementation of this protocol 2. improving mechanisms for co-operation in safeguarding security by exchanging information among relevant authorities on security, crime, and intelligence 3. training competent authorities and educating communities on the protocol 4. providing sufficient and adequately equipped ports of entry 5. preventing illegal movement of persons into and within the region | <p>*Requires international co-operation in achieving logistical requirements regarding the regulation of movement of persons</p> |

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| | <p>*The expenses involved in repatriation of an expelled member state citizen to their home state shall be shared, as per bilateral agreements, by the receiving State Party and the State Party ordering expulsion</p> | <p>*Requires international co-operation to share costs incurred in repatriation</p> |
| | <p>*State Parties agree to cooperate in harmonizing travel between member states whether by air, land or water</p> | <p>*Requires international co-operation to coordinate travel between SADC states</p> |

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Notes

ⁱ Background information about the history and development of the Southern African Development Community (SADC) obtained from <http://www.sadc.int>

ⁱⁱ Available at <http://www.cia.gov/cia/publications/factbook/index.html>

ⁱⁱⁱ SADC Communique available at www.sadc.int

^{iv} All references to the SADC Protocol are based on the version dated August 2005. See the document at the Institute of Security Studies:

http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/protocolmoveaug05.pdf

^v The term ‘state party’ is used to refer to a SADC member state that has signed and ratified the Protocol. Previous versions of the Protocol referred to ‘member states’ as opposed to ‘state parties’.