The African Union Protocol on Free Movement of Persons in Africa: development, provisions and implementation challenges

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ABSTRACT: In 2016, the African Union launched a Common African passport to enhance free movement of persons. The essence of the free movement arrangement of the African Union is to create a united Africa while promoting continental integration in the spirit of pan-Africanism. Continental free movement of persons was also conceived as a migratory solution and as an important step towards promoting seamless borders in view of the African Union Agenda 2063. In 2018, African leaders formally adopted the Protocol on Free Movement of Persons geared towards fostering intra-continental mobility and improving the wellbeing of all African persons. This article examines the normative framework and strategies for the furtherance of free movement of persons in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le Protocole de l'Union africaine relatif à la libre circulation des personnes en Afrique: évolution, normes et défis de mise en œuvre

RÉSUMÉ: En 2016, l'Union africaine a établi un passeport africain commun pour accroître la libre circulation des personnes. Le leitmotiv du nouveau régime juridique de l'Union africaine sur la libre circulation est de promouvoir une Afrique unie et favoriser l'intégration continentale dans l'esprit du panafricanisme. La libre circulation des personnes au niveau continental a également été conçue comme une solution migratoire et une étape importante dans l'ouverture des frontières africaines dans le cadre de l'Agenda 2063 de l'Union africaine. En 2018, les dirigeants africains ont officiellement adopté le Protocole relatif à la libre circulation des personnes visant à encourager la mobilité et à améliorer le bien-être de tous les Africains. Cet article examine le cadre normatif et les stratégies pour la promotion de la libre circulation des personnes en Afrique.

KEY WORDS: African Union, free movement, integration, Protocol on the Free Movement of Persons, mobility

CONTENT:

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1 INTRODUCTION

Article 12 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to free movement of persons.[1] This right is explicit in the Constitutions of all 55 African states' Constitutions. Through norms and jurisprudential provisions, the African Commission on Human and Peoples' Rights (African Commission) has emphasised the significance of this right as integral to the furtherance of other human rights. In *Sudan Human Rights Organisation and Another v Sudan*, the African Commission recognised freedom of movement and residence as 'two sides of the same coin', observing that it is imperative for states to 'ensure that the exercise of these rights is not subjected to restrictions'.[2] Notably, in 2019, the African Commission adopted a General Comment on article 12(1) of the African Charter in which it focused on the right to move freely and choose residence within the borders of a state.[3] The significance of this General Comment primarily resonates from the fact that it is usually assumed that movements within state borders are without impediments. The General Comment provides guidance on the protection of this right and its content in relation to different categories of persons including refugees and internally displaced persons (IDPs).

The intellectual history of the right to free movement of persons dates back to ancient philosophy, and the practice of free movement in Africa precedes colonial times. Globally, there is a consensus that mobility, being as old as human history, is a part of the DNA of all humans as migratory species.[4] Mobility was an opportunity for seizing on new opportunities. Historically, people moved in search of basic needs such as food and shelter. In the colonial era, movement was mostly centred around colonial capitals and motioned along artificially imposed borders. Shortly after independence, mobility in Africa became a function of independent states' regulation curated through immigration controls with limited pathways for access. However, one of the consequences of these limited pathways has been that migration has become a much-contested issue and increasingly has become a growing concern for policymakers within and outside the continent.

With the rise in the migrant population crossing the Mediterranean Sea into Europe, policy-makers have increasingly become aware of the need to proffer lasting solutions to migration. In Africa, this realisation

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1   African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981) (the African Charter) art 12.

2   Communication 279/03-295/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009), para 188.

3   African Commission General Comment No 5 on the African Charter on Human and Peoples' Rights: the right to freedom of movement and residence (art 12(1)) (2019).

4   F Crépeau 'Governing migration under the Global Compacts: towards an agenda for facilitating human mobility' presented at the 2017 Annual Conference of the McGill Institute for the Study of International Development on 'Questioning crisis: rethinking forced migration in theory and practice' (15-16 March 2017).

has prompted a different approach by the African Union (AU) linked to the knowledge that an effective management of the movement of people can create beneficial opportunities for the growth and advancement of trade and development on the continent. Given that migration is an integral part of societal formations in Africa, states are increasingly becoming aware of the essence of mobility. The need to respect the human rights of migrants has led to the development of the Global Compact for Safe, Orderly and Regular Migration at the UN level,[5] and increasingly led to calls for the facilitation of mobility.[6] In Africa, one of the proposed migratory solutions has been the creation of a continental citizenship. Continental citizenship aims at fostering a unified identity among African states. In the AU Constitutive Act, AU member states committed to achieving continental unity, solidarity among peoples, and the promotion of the human rights of all persons on the continent.[7] The need to coordinate and harmonise the policies of existing regional economic communities was also affirmed together with ensuring the inter-dependency of member states. In reflecting the desire for a continental citizenship, the AU Assembly proposed a continental legal structure.

At the post-Valetta Consultative Meeting on Migration held in Kenya in December 2015, AU member states emphasised the need to foster an African free movement regime partly in view of the fact that migration was a right that must be protected.[8] However, this realisation dates back to the early 1990s when member states of the Organisation of African Unity (OAU) decided to establish a protocol for the free movement of peoples on the African continent.[9] The aim of the Protocol was 'to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment' of African peoples within the continent.[10]

While a continental framework on free movement of people has been a distant dream for the last two decades, at the regional level, AU member states have developed frameworks to foster migration at the level of the regional economic communities (RECs). Recognising the imperative of advancing continental movement not only of goods and services but also of the African people, the AU at its 50th anniversary

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5   New York Declaration for Refugees and Migrants, adopted by the UN General Assembly Resolution 71/1, UN Doc A/RES/71/1 (19 September 2016); Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, Note by the Secretariat, UN Doc A/HRC/35/25 (28 April 2017).

6   'Evidence-based approach crucial to migrants and migration – top UN official' *UN News* (21 February 2018).

7   African Union Constitutive Act, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/23.15 (11 July 2000).

8   Report of the African Consultations on Migration factoring in outcomes of the Valetta Summit on Migration, held in Nairobi, Kenya (14-15 December 2015).

9   Treaty Establishing the African Economic Community 1991, art 43(2) (AEC Treaty).

10   AEC Treaty, art 43(1).

committed to hastening the integration of a united Africa.[11] In accelerating this vision, the AU Assembly resolved to 'facilitate African citizenship to allow free movement of people'.[12] In facilitating African citizenship, a key strategy emphasised in the Agenda 2063 policy document is the introduction of an African passport and 'abolishment of visa requirements for all African citizens in all African countries by 2018.'[13] This key strategy was further emphasised by the AU Assembly at the 25th Summit held in Johannesburg, South Africa.[14] At this Summit, the Assembly stressed a commitment to '[e]xpedite the operationalization of the African passport',[15] and called on the AU Commission to set up a meeting of the AU Executive Council for the purpose of developing the Protocol on Free Movement of Peoples in Africa (African Free Movement Protocol).[16]

Between 2016 and 2017, the AU Commission drafted the instrument which the AU Assembly eventually adopted in January 2018. In March 2018, the AU also adopted the Agreement Establishing the African Continental Free Trade Area (ACFTA) in Kigali, Rwanda. Integral to the process of advancing free trade is the furtherance of free movement.[17] Unlike the ACFTA, ratification of the Free Movement Protocol has been slow-paced.[18] But while time will tell if it will enjoy broad-based support, it is a crucial continental instrument.

This article examines the continental Free Movement Protocol as a continental response to migration. In advancing the discussion, this article begins with a discussion on the regional integration processes. The relevance of this is to demonstrate what already exists in the furtherance of free movement of persons in Africa and what challenges need to be addressed given that the Free Movement Protocol seeks to create a common African identity and has enormous potential for fostering continental mobility.

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11   50th Anniversary Solemn Declaration adopted by the 21st Ordinary Session of the AU Assembly, Addis Ababa Ethiopia (26 May 2013), art C.

12   As above.

13   African Union *Agenda 2063: The Africa we want* (African Union Commission 2013), para 67(k).

14   Declaration on Migration, adopted at the 25th Ordinary Session of the AU Assembly held in Johannesburg, South Africa (14-15 June 2015), AU Doc Assembly/AU/18(XXV).

15   As above.

16   As above.

17   Agreement Establishing the African Continental Free Trade Area (2018), art 3.

18   As at October 2019, 28 states had ratified the ACFTA while 54 states had signed; as at 16 July 2019, 32 states had signed up to the Free Movement Protocol while 4 states had ratified the instrument. See List of countries which have signed, ratified/acceded to the Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment (16 July 2019); List of countries which have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Agreement (8 October 2019).

2   THE REGIONAL INTEGRATION PROCESSES

In understanding the continental free movement initiative, it is relevant to discuss its building blocks – the RECs. In advancing the continental drive towards free movement of persons, the 1991 Abuja Treaty underscores the formation of RECs. Over the next two decades, RECs emerged with some form of free movement arrangements. Eight of these RECs are the building blocks of AU integration, namely, Economic Community of West African States (ECOWAS); East African Community (EAC); Common Market on Eastern and Central Africa (COMESA); Southern African Development Community (SADC); Economic Community of Central African States (ECCAS), Arab Maghreb Union (UMA); Community of Sahel Sub-Saharan Africa (CEN-SAD); and the Inter-Governmental Authority on Development (IGAD).

Through a 1975 Protocol Relating to the Free Movement of Persons, Residence and Establishment, ECOWAS states affirmed free movement of people.[19] Earlier in 1975 following the establishment of the regional bloc, states committed to regarding ECOWAS member state citizens as citizens of ECOWAS and as such decided to 'abolish all obstacles to their freedom of movement and residence within the Community'.[20] The rights of entry, residence and establishment were provided in the treaty and it was agreed that the ECOWAS Free Movement Protocol will be implemented within a 15-year period. Although the rights of entry and residence have been operationalised, the right of establishment is yet to fully materialise. However, ECOWAS member states have developed a common passport and significantly facilitated cross-border mobility setting a significant standard for other regional blocs.

As with ECOWAS, the EAC has also developed a free movement Protocol that recognises the rights of residence and establishment.[21] As with the treaty establishing ECOWAS, the EAC Treaty requires states to 'adopt measures to achieve the free movement of persons, labour and services'.[22] The EAC Free Movement Protocol requires member states

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19   ECOWAS states are: Benin, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Burkina Faso. Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, adopted by the Authority of Heads of State and Government of Economic Community of West African States in Dakar, Senegal (29 May 1979) (ECOWAS Free Movement Protocol); Supplementary Protocol A/SP.2/5/90 on the Implementation of the third phase (right of establishment) of the protocol on free movement of persons, right of residence and establishment, 1990; A Adedeji 'ECOWAS: a retrospective journey' in A Adebajo and IOD Rashid (eds) *West Africa's security challenges: building peace in a troubled region* (2004) 21, 28.

20   Treaty of the Economic Community of West African States, adopted by the Heads of State and Government in West Africa (28 May 1975) (ECOWAS Treaty), art 27.

21   Protocol on the Establishment of the East African Community Common Market (EAC Free Movement Protocol) was adopted in 2009 in Tanzania, entering into force in July 2010.

22   Treaty Establishing the East African Community Treaty (1999) (EAC Treaty).

of the EAC to 'ensure non-discrimination of the citizens' and guarantees the entry, stay and movement of citizens.[23] Unlike ECOWAS, a common EAC passport has not been rolled out in all EAC member states. While Burundi, Kenya, Rwanda, Tanzania and Uganda have are issuing a common EAC passport, South Sudan is yet to embark on this process.

As with these RECs, the Treaty establishing COMESA provides for the free movement of persons.[24] Article 4(6)(e) of the COMESA Treaty require states to 'remove obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market'.[25] A free movement protocol was subsequently adopted. It articulates the commitment of COMESA member states to allow free entry of citizens of member states 'as a first step towards the gradual relaxation and eventual elimination of visa requirements within the Common Market'.[26] Only four states have ratified the Protocol[27] and free entry is yet to be achieved in all COMESA member states. As at 2015, free entry was allowed COMESA nationals in three states: Seychelles, Rwanda and Mauritius.[28] Zambia has also waived visas for COMESA nationals on business visits.[29] Unlike ECOWAS, the COMESA Free Movement Protocol does not provide for an implementation time-frame.[30]

In 2005, SADC developed a free movement protocol, following resistance to an initial progressive protocol. The resistance, launched by South Africa, Botswana and Namibia was due in part to the socio-economic disparity in the region.[31] Following a revision of the initially proposed instrument, SADC member states agreed on a regional protocol geared towards facilitating free movement of persons in the region.[32] Unlike the EAC and ECOWAS instruments, the SADC Free Movement Facilitation Protocol refrains from the language of rights in contextualising residence and establishment. While free entry in the region, as with ECOWAS, is guaranteed for 90-days, states do not

23   EAC Free Movement Protocol (n 21), art 7(2).
24   Common Market for Eastern and Southern Africa Treaty (1993) (COMESA Treaty).
25   As above, art 4(6)(e).
26   Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, adopted in Kinshasa, Democratic Republic of Congo (1998) (COMESA Free Movement Protocol).
27   G Mwaura 'Why more states should ratify the COMESA Protocol' *The New Times* 11 June 2016.
28   A Odhiambo 'More COMESA members scrap visa requirement for travellers' *The East African* 4 March 2015.
29   'Zambia drops visa requirement for all COMESA citizens' *Lusaka Times* 5 March 2015.
30   Odhiambo (n 28).
31   See JO Oucho and J Crush 'Contra free movement: South Africa and the SADC Migration Protocols' (2001) 48(3) *Africa Today* 138.
32   Protocol on the Facilitation of Movement of Persons, adopted by the Heads of State and Government of the Southern African Development Community (18 August 2005) (SADC Free Movement Facilitation Protocol).

comply with this provision in practice.[33] The SADC Free Movement Facilitation Protocol does not provide a time-frame for implementation. Rather, it defers this decision to an implementation framework to be determined by each SADC Member state.[34]

As with the three regions, a free movement protocol also exists in the ECCAS region,[35] annexed to the ECCAS Treaty.[36] Article 2(1) of the ECCAS Free Movement Protocol allows nationals of ECCAS member states to 'freely enter the territory of any Member State, travel there, establish residence there and leave at any time'.[37] As with the ECOWAS Free Movement Protocol, the ECCAS Free Movement Protocol establishes a time-frame for the realisation of the free movement phases with the right to establishment becoming effective 12 years after the entry into force of the instrument.[38] However, the implementation of free movement in the region has been slow-paced largely due to the political instabilities in the region.[39]

As with ECCAS, free movement in the UMA region has also been slow-paced. In 1989, was founded with the objective of fostering regional integration, reinforcing the bonds of fraternity and progressively achieving free movement of persons.[40] But only three states in the region have an appearance of free movement.[41] Between Morocco and Algeria, land borders have been effectively closed since 1994.[42] Tunisia is the only state in the region that allows for the free movement of citizens of member states of the UMA.[43] Unlike the other RECs, there is no regional free movement protocol in the UMA region.

CEN-SAD does not also have a free movement protocol. While its formation treaty requires states to promote the free movement of persons,[44] free movement among member state has been slow-paced.

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33   For instance, Mozambicans are allowed free entry into South Africa for 30-days.

34   SADC Free Movement Facilitation Protocol (n 32) art 4.

35   Treaty for the Establishment of the Economic Community of Central African States (1983) (ECCAS Treaty), art 4(1).

36   Protocol Relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States, adopted by the Heads of State and Government of the Economic Community of Central African States (1983) (ECCAS Free Movement Protocol).

37   ECCAS Free Movement Protocol (n 36), art 2(1).

38   As above, art 5(1).

39   SI Sánchez 'Free movement of persons and regional international organizations' in R Plender (ed) *Issues in international migration law* (2015) 223 at 247.

40   Treaty Establishing the Arab Maghreb Union (1989), art 2.

41   These states include: Libya, Tunisia and Morocco.

42   D Zisenwine 'Mohammed VI and Moroccan foreign policy' in B Maddy-Weitzman and D Zisenwine (eds) *Contemporary Morocco: state, politics and society under Mohammed VI* (2013) 70, 74; MH de Larramendi 'Intra-Maghrebi relations: unitary myth and national interests' in YH Zoubir and H Amirah-Fernández (eds) *North Africa: politics, region, and the limits of transformation* (2008) 179, 184.

43   'Algeria's closed border syndrome' *The North Africa Post* 5 August 2017.

44   Treaty establishing the Community of Sahel-Saharan States (1998); UN General Assembly *Request for the inclusion of a supplementary item in the agenda of the fifty-sixth session, Observer status of the Community of Sahelo-Saharan States in the General Assembly*, UN Doc A/56/191 (30 July 2001), para 6.

Aside from the regional diversity of its members, free movement in the region has also been affected by issues of terrorism and conflict.[45] As the largest REC, CEN-SAD comprises 29 African states across the north, west and eastern region. Although a Selective Visa Dispensation Programme was introduced to ease the free movement in the region, this programme applies to holders of diplomatic documents and special envoys.[46] However, most CEN-SAD member states belong to free movement arrangements.

As with UMA and CEN-SAD, IGAD does not also have a free movement protocol. However, the reason for this is different from UMA. IGAD was originally formed in 1986 as an Inter-Governmental Authority on Drought and Desertification (IGADD) with the aim of addressing issues of ecological concerns in the Horn of Africa.[47] In 1996, it was transformed into IGAD when it became clear that there were other political issues requiring attention of the community. With the expansive mandate, the need for an articulation of guidance on free movement became an imperative. In 2017, IGAD began developing a free movement protocol.[48] The process, which began with national consultations among IGAD member states, has enjoyed significant support from members of the community[49] who also belong to two other RECs with free movement arrangements: EAC and COMESA.

The different understanding of free movement among the various RECs illustrates a pertinent issue that must be addressed in the furtherance of free movement in Africa – and that is the absence of unanimity on how migration should be governed among AU member states. In the SADC region, for instance, free movement is still highly restricted due to the variable economic advancement of states within the region. While movement between South Africa and Namibia is mostly free,[50] overland movement between South Africa and Zimbabwe at the Beit Bridge border, for instance, is a significant challenge.[51] The absence of a regional protocol on free movement in the UMA region as well as the persistent differences between Morocco and Algeria, creates a challenge for the actualisation of free movement. In the ECCAS region, movement is constricted due, in part, to conflict in the region. However, in the ECOWAS and EAC region, states have significantly advanced in their knowledge and practice of free

45   I Salami *Financial regulation in Africa: an assessment of financial integration arrangements in African emerging and frontier markets* (2012) 33.

46   NEPAD Agency for the African Union Capacity Development Division *Strengthening the institutional capacity of the Communauté des Sahélo-Sahariens (CEN-SAD)* (2015) 4.

47   R Bereketeab 'Inter-Governmental Authority (IGAD): a critical analysis' in K Mengisteab and R Bereketeab (eds) *Regional integration, identity and citizenship in the Greater Horn of Africa* (2012) 173.

48   'IGAD launches negotiations on Protocol on Free Movement of Persons' *Inter-Governmental Authority on Development (News)* 3 July 2017.

49   'IGAD continues consulting on free movement of persons with MS' *Inter-Governmental Authority on Development (News)* 13 November 2017.

50   M Peries 'Border crossing: South Africa to Namibia' *Maggie in Africa* 1 July 2016.

51   See 'This is how badly Zimbabweans are treated at Beit bridge border' *IOL* 14 March 2018.

movement. In practice, travelling overland in these regions is mostly hassle-free with commitments also being translated into practice through infrastructural development.[52]

Seemingly in light of these different conceptions of free movement, the African Free Movement Protocol emphasises a graduated approach to the realisation of free movement in Africa. Moreover, the African Free Movement Protocol mandate RECs to work towards harmonising their protocols on free movement – which if done, has the potential of addressing the normative discrepancies in line with the African Free Movement Protocol.

However, a relevant question that flows from this relates to the significance of the African Free Movement Protocol in relation to other existing instruments on free movement at the level of the RECs. Arguably, a notable contribution of the African Free Movement Protocol is its emphasis on the formation of a common continental identity through the notion of a common African citizenship. Before considering the provisions, it is relevant to consider the development process of the African Free Movement Protocol. The next section engages in this discussion.

3   THE PROTOCOL DEVELOPMENT PROCESS

At the 50th anniversary of the AU in May 2013, the AU Assembly emphasised the need for a common African citizenship declaring an 'unflinching belief in our common destiny, our shared values and the affirmation of the African identity; the celebration of unity in diversity and the institution of the African citizenship'.[53] The AU Assembly called for speedy implementation of continental integration and the facilitation of the 'African citizenship to allow free movement of people through the gradual removal of visa requirements'.[54] This need was mooted in the Agenda 2063 document.

In December 2015, a joint meeting was held by the AU, the International Labour Organisation and the Centre for Citizens Participation in the African Union at the Pan-African Parliament in Midrand, South Africa. The purpose of the meeting was to assess and analyse the progress made towards free movement on the continent; to identify the legal, structural, political and operational gaps; to highlight lessons learnt and good practices from the RECs; and to provide concrete solutions and identify opportunities for the advancement of the continental free movement of persons' campaign.[55] During this meeting, it was emphasised that it is important to find ways to stimulate the implementation of free movement within the RECs. Setting up an

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52   See 'Nigeria and Benin make a new break for the border' *News24* 29 October 2018.

53   50th Anniversary Solemn Declaration (n 11) art A(ii).

54   As above, art C(i).

55   Meeting on validation of the study on free movement of persons in Africa (Concept Note), Midrand, South Africa (7-9 December 2015).

information exchange system was essential for pairing countries with good practices and combatting negative perceptions on free movement of persons. Overall, having a continental free movement protocol was regarded as desirable. Between 2016 and 2017, a draft Protocol was prepared, discussed and debated by AU member states, the RECs and relevant stakeholders. In February 2017, the AU Peace and Security Council adopted a resolution emphasising the desirability of continental free movement over perceived security and economic challenges and called on the AU Commission to 'expedite the finalization of the Protocol on Free Movement of Persons'.[56]

At the first meeting of experts in the Seychelles, the draft Protocol was examined with the objective of providing independent experts with the opportunity to consider the instrument and advance critical perspectives that will improve on the document.[57] Participants at the meeting included migration experts, academics, civil society representatives, legal experts and international organisations including the International Organization for Migration. Some of the critical issues raised for consideration in improving the draft protocol was the need to: build capacity for prompt facilitation of free movement and replicate lessons on easing free movement from RECs such as ECOWAS and EAC. The need to create predictable standard systems and processes to ease mobility was also emphasised as with the creation of humane conditions that facilitate mobility. Five key imperatives for the free movement of persons that were identified include: deepening integration, human rights, visa openness, pioneering the role of RECs and the establishment of a common travel document. Some of the benefits of free movement that were emphasised include tourism, greater intra-continental trade, facilitation of regular mobility, increased remittances flow and facilitation of regular and documented labour migration. Although there were challenges that could arise from this process, it was emphasised that the benefits of free movement outweigh the negative perceptions. Seven African states were recognised for the adoption of progressive policies: Benin, Ghana, Mauritius, Namibia, Rwanda, Senegal and the Seychelles.

At the meeting of RECs in the Seychelles, it was acknowledged that the continental protocol would benefit from comparable lessons from the various RECs in the facilitation of free movement.[58] The three-phased approach on the right to entry, establishment and residence was proposed. The RECs emphasised that it was imperative to address issues of border management which is critical in the facilitation of free movement. It was further proposed that an implementation plan be developed and that there was a need for civic engagement to foster an appreciation of the free movement benefits and counter xenophobia.

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56   Peace and Security Council Communique, 661st Meeting, Addis Ababa, Ethiopia (23 February 2017), para 14.

57   Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Independent Experts Meeting, Rapporteurs' Report, Victoria, Seychelles (28 February – 1 March 2017).

58   Draft Protocol on Free Movement of Persons in Africa, Victoria, Seychelles (2-3 March 2017).

At the meeting of member states in Ghana, the need for states to adopt coherent migration frameworks was emphasised.[59] It was further emphasised that there was a need to address deep political misconceptions on the facilitation of free movement including concerns of national security, public health and economic disparities among states. It was expressed, however, that it was risky to delay the continental agenda to address these challenges. Rather, a differentiated integration approach should be countenanced as an integration strategy. However, member states sought clarity on whether the decision of the AU Assembly on free movement required an immediate entry into force of the continental protocol. It was agreed that free movement should be graduated in phases given that not all member states were at the same level in terms of integration.

At the meeting of member states in Rwanda, the draft protocol was reviewed.[60] It was agreed that certain definitions should be added to the protocol including the right of entry, establishment and territory. It was agreed that the continental protocol should be implemented in accordance with the road map for implementation which would be decided by the AU Assembly as an annexure to the instrument. Member states requested the AU Commission to draft a new article on remittances to the effect that transfers of earning and savings be facilitated though bilateral, regional, continental and international agreements. The meeting further called for a harmonisation of national laws and policies in accordance with the proposed implementation road map. In a subsequent meeting of the RECs, held in Ethiopia, it was agreed that the road map for Implementation should have indicative time frames by which member states had to comply with their obligations under the instrument.[61] Further, the meeting noted that there was a need to ensure harmonisation of the provisions of the Free Movement Protocol with the Continental Free Trade Area processes.[62]

In September 2017, a meeting was held in Mauritius to examine and validate the draft Implementation Plan.[63] The issue of monitoring and evaluation of the continental protocol was deliberated and it was agreed that rather than establishing a new mechanism, the role of the AUC should be retained. It was agreed that the draft Protocol should be submitted to the AU Specialized Technical Committees (STC) on Migration, Refugees and Returnees and on the STC on Justice and

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59   Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Rapporteurs' Report, Accra, Ghana (20-24 March 2017).

60   Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Rapporteurs' Report, Kigali, Rwanda (23-26 May 2017).

61   Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Regional Economic Communities and Member States Experts' Meeting, Rapporteurs' Report, Addis Ababa, Ethiopia (17-19 July 2017).

62   Agreement Establishing the African Continental Free Trade Area, adopted by the AU Assembly in Kigali, Rwanda (March 2018).

63   Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Outcome Statement, Flic En Flac, Mauritius (4-6 September 2017).

Legal Matters ahead of the planned adoption by the AU Assembly in January 2018. At the Ministerial Meeting in October 2017, it was agreed that there was a need to harness the benefits of intra-continental migration and also address the root causes of irregular migration. The Ministers approved the instrument for transmission to the STC on Justice and Legal Affairs and to the AU organs leading up to adoption.[64] In January 2018, the free movement protocol was eventually adopted.[65]

4 THE PROVISIONS OF THE AFRICAN FREE MOVEMENT PROTOCOL

There are 39 articles in the African Free Movement Protocol, divided into seven parts. In the first part, key terms are defined, including the concept of 'free movement of persons'. Under article 1, free movement of persons 'means the right of nationals of a member state to enter, move freely and, reside in another member state in accordance with the laws of the host member state and to exit the host member state in accordance with the laws and procedures for exiting that member state'.[66] While incorporating the rights of entry and residence, this definition does not include the right of establishment which is an integral phase of the free movement of persons. However, the definition of terms provides for the meaning of the right of establishment similar to the provision of the ECOWAS Free Movement Protocol. Under this provision, the right of establishment means 'the right of a national of a member state to take up and pursue the economic activities specified in article 17(2), in the territory of another member state'. These activities include: 'business, trade, profession, vocation', 'economic activity as a self-employed person'.[67] Similar definitions are echoed in the EAC Free Movement Protocol and in the COMESA Free Movement Protocol.[68]

The second section articulates core principles of the African Free Movement Protocol including non-discrimination on the basis of 'nationality, race, ethnic group, colour, sex, language, religion, political

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64 Specialized Technical Committee on Migration, Refugees and Internally Displaced Persons, 2nd Ordinary Session Ministerial Meeting, Kigali, Rwanda (20-21 October 2017) AU Doc AU/STC/MRIDP/Dec. (II), para 1(A)(i).

65 Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, adopted by the AU Heads of States and Government Thirtieth Ordinary Session in Addis Ababa, Ethiopia (January 2018) (African Free Movement Protocol); Decision on the Legal Instruments, adopted by the AU Assembly at the 30th Ordinary Session, held in Addis Ababa, Ethiopia (28-29 January 2018), AU Doc Assembly/AU/Dc.676(XXX), para 2(e).

66 African Free Movement Protocol (n 65), art 1.

67 African Free Movement Protocol (n 65), art 17(2).

68 Also, the SADC Free Movement Facilitation Protocol recognises economic activity, profession either as an employee or a self-employed person as with establishing and managing a trade, profession, business or calling. See SADC Free Movement Facilitation Protocol (n 32) art 18.

or any other opinion, national and social origin, fortune, birth or other status as provided by article 2 of the African Charter.'[69] It also articulates the progressive realisation of free movement along the three phases: entry, residence and establishment. For implementation, the African Free Movement Protocol makes reference to the Roadmap as guiding standard. However, it articulates that the African Free Movement Protocol should not be interpreted to 'affect more favourable provisions for the realisation of the free movement of persons, right of residence and right of establishment' which may be contained in other regional and continental instruments.[70] Moreover, the progressive realisation of the African Free Movement Protocol should not be interpreted to prevent an accelerated implementation of the treaty by any of the RECs, or state before the time stipulated for implementation in the Roadmap.[71]

The third section addresses the content of the right to entry, the African common passport, border communities, students, researchers and workers. Significantly, this provision requires states to 'implement the right of entry by permitting nationals of Member States to enter into their territory without the requirement of a visa.'[72] This provision aims at fostering visa-free entry which is still a challenge for African nationals in many African states. This provision further requires states to allow entry into their territories for a period of 90-days. As such, echoing similar allowances under the ECOWAS Free Movement Protocol and SADC Free Movement Facilitation Protocol. The African Free Movement Protocol further mandate states to adopt an African passport and with the support of the AU Commission facilitate its issuance. This provision serves as a legal basis for the common African passport which the AU Assembly launched in Kigali, Rwanda, in July 2016. On the free movement of residents of border communities, states are mandated to facilitate mobility through bilateral or regional agreements.[73] On the movement of students and researchers, states are mandated to develop programmes to facilitate exchange of students and researchers.[74] This is imperative in building an inter-continental knowledge base and for the portability of qualification and skills.

The fourth section relates to the rights of residence and establishment. Although the provisions in these sections recognise the rights of nationals of member states to residence and establishment in host member states, it subjects the realisation of the rights to the laws and policies of host member states.[75] The interpretation of this claw-back will be useful in clearly articulating what it implies with respect to a states' obligation to promote international human rights commitments. The fifth section relates to mutual recognition of

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69   African Human Rights Charter (n 1) art 2; African Free Movement Protocol (n 65), art 4(1).
70   African Free Movement Protocol (n 65), art 5(3)(a).
71   African Free Movement Protocol (n 65), art 5(3)(b).
72   African Free Movement Protocol (n 65), art 6.
73   African Free Movement Protocol (n 65), art 12.
74   African Free Movement Protocol (n 65), art 13.
75   African Free Movement Protocol (n 65), arts 16 and 17.

qualification, social security, mass expulsion and the issue of expulsion generally. The prohibition of mass expulsion of non-nationals draws coherence from the African Charter which requires states to prevent mass expulsion and avoid expelling persons on account of race, nationality, ethnicity or religion.[76] This section further require states to promote agreements for the facilitation of remittances, protect properties acquired in host member states and protect specific groups such as refugees.

While the sixth section relates to the realisation of the African Free Movement Protocol, the seventh section discusses issues of dispute settlement among states, signature, ratification and accession and entry into force of the African Free Movement Protocol. While primary implementation of the Protocol is the duty of member states, the RECs are also tasked with the duty of promoting, monitoring and evaluating the implementation of the Protocol.

Moreover, the AU Commission is mandated to follow up on the implementation of the African Free Movement Protocol. In coordination with state parties, the AU Commission is required to initiate a continental follow-up arrangement for assessing the implementation status of the African Free Movement Protocol. Upon 15 ratifications, the treaty enters into force. However, if it is to be effective, there are pertinent issues that need to be addressed. The next section considers pertinent implementation challenges.

5 IMPLEMENTATION CHALLENGES

One of the central challenges that need to be addressed, as was earlier noted, is the disparate understanding among states on what free movement entails. This will, among others, impact on a plethora of issues including treaty ratification and domestication. If the African Free Movement Protocol is to be realised, there has to be unanimity among states in the furtherance of the continental vision. It is imperative to emphasise that in advancing this unanimity, states, individually and acting as a collective, need to leverage on shared values of 'solidarity of states' and 'care for the weakest'[77] significantly, in areas of peace and security, combatting human smuggling, addressing irregular migration and in issues of refugee protection.

Another challenge that must be addressed is the issue of populism which often finds expression in xenophobic actions. Not only does this threaten the notion of unity, it runs contrary to the ideals of continental integration. In addressing this challenge, the notion of a common African citizenship emphasised in the formative documents must be translated into tangible deliverables significantly through research,

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76 African Charter (n 1) art 12; see F Viljoen *International human rights law in Africa* (2012).

77 Towards greater unity and integration through shared values (Discussion Paper, 23 November 2010) 14 http://www.iag-agi.org/IMG/pdf/Discussion-paper-towards-greater-unity-and-integration-through-shared-values.pdf (accessed 12 November 2018).

awareness-raising and sensitisation programmes. This should leverage on values such as Pan-Africanism which are at the root of African solutions to African problems. While it would be needful for the RECs to lead this process given that they are saddled with the responsibility of promoting implementation, there needs to be an effective synergy with the AU Commission and AU member states.

Further, existing border disputes between AU member states must be resolved. It is crucial for disputes such as those between Djibouti and Eritrea over the Doumeira island, and between Cameroon and Equatorial Guinea over the River Ntem to be decisively resolved. This will be crucial for cooperative border management and for the furtherance of the free movement of border communities. Moreover, given that these disputes hardly reflect commitment towards seamless borders, states must engage in negotiations on resolving these disputes with the involvement of the RECs and the AU Commission.[78]

Also, the issue of security, which is partly responsible for the resistance of some states must be addressed. Addressing such security concerns will require collective efforts towards combatting the root causes, for example, terrorism and transnational organised criminal activities. In a 2018 Communique, the PSC emphasised the need for states to 'make use of their respective security services to undertake joint border tactical and operational measures with their respective neighbouring countries, to curb illegal migration and transnational organized criminal activities'.[79] However, it is also important that such efforts do not result in human rights abuses of groups such as refugees.

Moreover, if free movement is to become a reality, there has to be greater visa openness. Although Africans do not need visas to access 25 percent of other African countries and can also get visas on arrival in 24 percent of other African countries,[80] progress is still required to achieve continental free movement. This progress should leverage on the practices of the Seychelles and Benin that have visa-free policies.

Another issue that needs to be addressed is infrastructure. The infrastructural deficit on the continent affects the economic progression of states and wellbeing of populations. Sub-Saharan Africa is considered the 'only region [in the world] where road density has declined over the past 20 years.'[81] With only 34 percent of rural Africa having access to roads,[82] free movement of persons may be a challenge. In the furtherance of the continental agenda, there must be concerted efforts on states in addressing the challenge of intra and inter-state infrastructure. There must be significant investments in road networks,

78 See G Oduntan 'Africa's border disputes are set to rise – but there are ways to stop them' *The Conversation* 14 July 2015.

79 AU Peace and Security Council *Communique of the 771st meeting of the AU Peace and Security Council on the African migrants crisis: imperative for expediting free movement policy in Africa* (2018).

80 African Development Bank Group *Visa openness report* (2018) 10.

81 World Bank Group *Africa's pulse: an analysis of issues shaping Africa's economic future* (2017) 39.

82 Z Campos 'The economic cost of poor infrastructure' *African Finance & Tech* 28 February 2018.

rail services and air transport that adequately connects the continent. Moreover, it is important that government officials, particularly in immigration and border management, are trained on the content of the African Free Movement Protocol, so as to ensure efficiency in service delivery towards achieving the free movement of persons in Africa.

6   CONCLUSION

The overarching objective of the African Free Movement Protocol is to facilitate continental mobility for the purpose of advancing trade, promoting socio-economic development and enhancing political integration. However, much of these will essentially be a function of implementation. As a first step towards implementation, it is important for states to ratify the instrument and where necessary, ensure domestication. Moreover, implementation must be a function of enhancing institutional support and in this regard, it is crucial for states to ensure that local capacity is built in enhancing compliance. Infrastructural deficit, border disputes, and issues of peace and security must also be collectively addressed. Hence, it is imperative for states to collectively promote continental peace and security through existing regional and continental frameworks and in line with existing standards including the African Charter and the African Charter on Democracy, Elections and Governance.