


RESEARCH ARTICLE

The AU Free Movement Protocol: Challenges in Its Implementation

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Abstract

One of the major pillars of the African Union is the integration of peoples and the ability for them to move freely from one member country to another, with the right to reside and practise their trade or profession. This aspect of integration found full expression in the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment, adopted in 2018. Upon operationalization, it will remove obstacles to the movement of people, capital and resources in the region and give expression to aspiration 2 of the African Union Agenda 2063. However, significant challenges lie on the path of its implementation. This article doctrinally reviews the protocol, looking at its prospects for promoting African integration and development, and anticipates some of the problems that the protocol will face. It concludes with recommendations for achieving its lofty but desirable ends.

Keywords: African Union; free movement; treaty; protocol; integration; AfCFTA

Introduction

Movement of goods and persons across established national borders in Africa can be an ordeal. Trans-African movement is impeded by states' stringent migration policies, strict visa regulations, and unwelcoming and debilitating border experiences.¹ This challenge has been seen as a major impediment to the economic, cultural and social development of the region, and the integration of African economies through migration.² The transformation of the Organization of African Unity (OAU) into the African Union (AU) in 1999 was meant to break down some of these barriers and signal an intent to unite African states into a union similar to the European Union (EU).³ The African Economic Community, founded in 1991 under the Treaty Establishing the African

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1 "Study on the benefits and challenges of free movement of persons in Africa" (African Union and International Organisation for Migration), available at: <<https://ethiopia.iom.int/resources/study-benefits-and-challenges-free-movement-persons-africa>> (last accessed 1 November 2023).

2 Ibid.

3 A Adamu and AM Peter "Comparative analysis of African Union (AU) and European Union (EU): Challenges and prospects" (2016) 3/1 *International Journal of Peace and Conflict Studies* 46 at 47.

Economic Community (AEC Treaty), considers the liberalization of mobility an essential part of and prerequisite for compliance with the treaty.⁴ The AU's Agenda 2063, which sets out the vision for Africa's path to integration over the next 40 years, views free movement as a key element in the vision of "accelerating Africa's economic growth, trade and development as well as promoting [its] common identity by celebrating [its] history and [its] vibrant culture".⁵ The idea of continent-wide free movement dates back to the Lagos Plan of Action for Economic Development of Africa 1980–2000 (Lagos Plan of Action), which envisaged an African common market.⁶ Free movement is also central to the realization of the African Continental Free Trade Area (AfCFTA),⁷ because free trade will be hampered without free movement. The agreement establishing the AfCFTA generally covers trade in goods, trade in services, investment, intellectual property and competition policy.⁸ The age-long aspiration has found expression in several conventions and protocols, culminating in the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (the Protocol).⁹ Adoption of the Protocol is a manifest expression of the resolve of AU member states to realize economic, social and cultural development, and the integration of African economies through uninterrupted borders.

The Protocol is part of the wider plan to "turn the continent into one of 'seamless borders' with the introduction of a single passport allowing free movement between countries".¹⁰ Its objective is to facilitate the implementation of the AEC Treaty, by providing for progressive implementation of the free movement of persons, right of residence and right of establishment in Africa.¹¹ It aims to build on existing regional economic communities' (RECs)¹² free movement

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- 4 The African Economic Community is an organization of AU states that establishes grounds for mutual economic development among the majority of African states. The organization's stated goals include the creation of free trade areas, customs unions, a single market, a central bank and a common currency, thus establishing an economic and monetary union. See AEC Treaty, available at: <https://au.int/sites/default/files/treaties/37636-treaty-0016_-_treaty_establishing_the_african_economic_community_e.pdf> (last accessed 19 October 2023).
 - 5 Agenda 2063 was launched at the 50th Anniversary Solemn Declaration during the golden jubilee celebrations of the formation of the OAU /AU in May 2013. The declaration marked Africa's renewed commitment towards the attainment of the Pan-African Vision of an integrated, prosperous and peaceful Africa, driven by its own citizens, representing a dynamic force in the international arena. Agenda 2063 is the concrete manifestation of how the continent intends to achieve this vision within a 50-year period from 2013 to 2063. See "Flagship projects of Agenda 2063", available at: <<https://au.int/en/agenda2063/flagship-projects>> (last accessed 19 October 2023).
 - 6 The Lagos Plan of Action was an OAU-backed plan to increase Africa's self-sufficiency. The plan aimed to minimize Africa's links with western countries by maximizing Africa's own resources. See "Lagos Plan of Action for the Economic Development of Africa 1980–2000", available at: <<https://unesdoc.unesco.org/ark:/48223/pf0000045133>> (last accessed 29 October 2023).
 - 7 The AfCFTA is a free trade area that, as of August 2023, included 47 countries. It was created by an agreement between 54 of the 55 AU nations. The free trade area is the largest in the world in terms of the number of participating countries. See Agreement Establishing the African Continental Free Trade Area, available at: <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> (last accessed 19 October 2023).
 - 8 CC Ajibo "African Continental Free Trade Area Agreement: The euphoria, pitfalls and prospects" (2019) 53/5 *Journal of World Trade* 871.
 - 9 The Protocol is available at: <https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf> (last accessed 19 October 2023).
 - 10 E Henderson "African Union plans to introduce single passport to create EU-style 'continent without borders'" (20 June 2016) *Independent*, available at: <<http://www.independent.co.uk/news/world/africa/african-union-africa-single-passport-travel-easier-eu-schengen-area-style-continent-border-free-a7091551.html#gallery>> (last accessed 19 October 2023). The plan is fashioned after the EU Schengen arrangement, which removed many internal borders, ensuring free movement of persons across the region.
 - 11 The Protocol, art 1.
 - 12 The RECs are regional groupings of African states: Arab Maghreb Union (AMU); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States; East African Community; Economic Community of Central African States; Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); and Southern African Development Community. The RECs have developed individually

arrangements.¹³ Some of the regional efforts have achieved some success while also experiencing difficulties at the implementation level.¹⁴ The free movement of persons entails that citizens of any AU member state can migrate to, take up residence in and practise their trade in another member state on an equal footing with the nationals of that particular state. The Protocol defines free movement of persons as the rights 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.¹⁵

The potential benefits of the Protocol are substantial. The primary driver of free movement on the continent is economic. The Protocol is essential for the transfer of resources, labour, skills and technology. If fully realized, it could enhance international trade, investment and tourism. Free movement has a correlation with trade and investment, as studies have shown an increase in bilateral trade between countries of origin and recipient countries as a result of the presence of migrants in a country.¹⁶ For a region that is already characterized by the transboundary movement of workers, goods and services, the Protocol presents an opportunity to maximize the positive effects of migration, such as remittances, economies of scale, employment prospects and investment incentives. Secondly, improved movement of goods and persons relies on transportation infrastructure. Currently, inadequate infrastructure remains a major challenge to trans-African movement as well as for the realization of the region's full economic growth potential. Greater commitment by member states to the Protocol's objectives will translate into improvement of the hard and soft infrastructure required for improved trans-African mobility. Thirdly, the Protocol could lead to and deepen shared norms among member states for facilitating free movement, residence and establishment, as well as for the treatment of nationals of other states. Fourthly, it is expected to enhance African socio-cultural integration. Free movement and interaction will promote socio-cultural integration and pan-African identity.

Since the adoption of the Protocol, notable progress has been made towards achieving its overarching objectives. The AU Guidelines for the Design, Production and Issuance of the African Passport and the annexure adopted in February 2019, were a major success towards the implementation of the Protocol.¹⁷ Once produced and issued, the African passport will enable and facilitate the continental free movement of persons in Africa. However, the fact that there is little evidence of

and have different roles and structures. Generally, the purpose of the RECs is to facilitate regional economic integration between members of the individual regions and through the wider African Economic Community, which was established under the AEC Treaty (1991). The 1980 Lagos Plan of Action and the AEC Treaty proposed the creation of RECs as the basis for wider African integration, with a view to regional, and eventually continental, integration. See "Regional Economic Communities (RECs)", available at: <www.au.int/en/organs/recs> (last accessed 19 October 2023).

- 13 Out of the eight recognized RECs, five have frameworks for the free movement of persons. IGAD, the AMU and the Community of Sahel-Saharan States have no such framework. Only ECOWAS and the East African Community have made relative progress in terms of implementing regional frameworks. See B Fagbayibo "Challenges and prospect of the effective implementation of free movement of persons across African boundaries" (keynote address delivered at the annual general meeting of the Forum of Immigration Practitioners of South Africa on 26 October 2018, Johannesburg, South Africa), available at: <https://www.academia.edu/37719971/CHALLENGES_AND_PROSPECT_OF_THE_EFFECTIVE_IMPLEMENTATION_OF_FREE_MOVEMENT_OF_PERSONS_ACROSS_AFRICAN_BOUNDARIES> (last accessed 19 October 2023).
- 14 The *Africa Regional Integration Index Report 2019* (2020, AU and UN Economic Commission for Africa (UNECA)) provides a guide to the level of integration of the various RECs in Africa. See "Regional integration matters: Regional integration in Africa has made tremendous strides. But the work is not done" (AU), available at: <<https://www.integrate-africa.org/>> (last accessed 19 October 2023).
- 15 The Protocol, art 1.
- 16 OA Maunganidze "Free trade and mobility, crucial for Africa to prosper" (December 2022, Institute for Security Studies), available at: <<https://issafrica.org/iss-today/free-trade-and-mobility-crucial-for-africa-to-prosper:text=Regional%20integratio2n%20is%20key%20>> (last accessed 29 October 2023).
- 17 See "Revised draft: African Union Guidelines for the Design, Production and Issuance of the African Passport", available at: <https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-guidelinesfinal_copy_2_1-edited_final_version.pdf> (last accessed 19 October 2023).

functional regional migration regimes, particularly in the Global South¹⁸ is evidence of the daunting challenge ahead for the AU. The euphoria of signing the Protocol in 2018 is further punctured by the fact that, to date, only four countries have ratified it.¹⁹

Clearly, the vision of free movement of persons across the region cannot be realized by the mere signing of an agreement. This article examines the challenges faced in implementing the Protocol. It starts with the conceptual background to the Protocol, before sketching out its salient provisions. The article then examines some of the difficulties that need to be addressed to realize the Protocol's goal and offers some recommendations that will help ensure the realization of the Protocol's aims.

Conceptual background to the Protocol

The Protocol's objective is to facilitate the implementation of the AEC Treaty by providing for the progressive implementation of the free movement of persons, right of residence and right of establishment in Africa.²⁰ The Protocol followed the commitment of the parties under article 43(2) of the AEC Treaty, which was adopted in Abuja, Nigeria on 3 June 1991 and entered into force on 12 May 1994.²¹ It was also designed to promote the achievement of greater unity and solidarity between African countries and the people of Africa, as well as promoting economic, social and cultural development and the integration of African economies.²² The Protocol also reiterated the shared values of the parties to promote the protection of human and peoples' rights as provided in the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples' Rights, which guarantees the right of an individual to freedom of movement and residence.²³

The Protocol is also a restatement of the parties' commitment to pan-Africanism and African integration, with a common vision of creating an integrated, people-oriented and politically united continent, committed to the free movement of people, goods and services among member states.²⁴ Furthermore, the Protocol builds on the parties' commitment gradually to remove obstacles to the free movement of persons, goods, services and capital, and the right of residence and establishment among member states.²⁵ Some of the expected benefits of free movement include: the enhancement of science, trade, technology, education and research; fostering tourism; facilitating intra-African trade and investment; increasing remittances within Africa; promoting the mobility of labour, creating employment; improving the living standards of the people of Africa; and facilitating the mobilization and utilization of Africa's human and material resources, with a view to achieving self-reliance and development.²⁶ The Protocol also sees that the freedom of movement of persons will facilitate the establishment of the AfCFTA.²⁷

In addition, the Protocol acknowledges the potential challenges that might arise in aiming to achieve the free movement of persons and the rights of residence and establishment. It is also a

18 E Dick and B Schraven "Towards a borderless Africa? Regional organisations and free movement of persons in west and north-east Africa" (German Development Institute briefing paper 1/2019), available at: <https://www.die-gdi.de/uploads/media/BP_1.2019.pdf> (last accessed 19 October 2023).

19 UNECA "Momentum builds for free movement under AfCFTA" (January 2023, UNECA), available at: <<https://www.un.org/africarenewal/magazine/january-2023/momentum-builds-free-movement-under-afcfta>> (last accessed 29 October 2023).

20 The Protocol, art 2.

21 Id, preamble.

22 Ibid.

23 Ibid.

24 Ibid. This goal is also in line with aspiration 2 of the AU Agenda 2063, which aims to create "[a]n integrated continent; politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance".

25 Ibid. This aim is predicated in the commitment of the parties under the AEC Treaty, art 4(2)(1).

26 Ibid.

27 Ibid. The AU endorsed the AfCFTA at the 18th ordinary session of the Assembly of Heads of State and Government in Kigali.

prelude to instituting African citizenship.²⁸ It recognizes the need to ensure that effective measures are put in place to prevent the upholding of the freedom of movement leading to situations where the arrival and settlement of migrants in a given host country will create or exacerbate inequalities or constitute challenges to peace and security. Noting that there are real and potential security and economic challenges that may arise from implementing free movement under the Protocol, the AU Council acknowledged that the benefits of free movement outweigh the perceived or generated challenges.²⁹ The obligations under the Protocol are to be implemented in a phased approach, in consideration of the range of legitimate concerns among member states.

The Protocol's guiding principles

The Protocol stipulates a number of principles that guide its implementation. First, it adopts the principles of the Constitutive Act of the AU,³⁰ which cover a broad area most pertinent to the issue of freedom of movement. The principles also include: sovereign equality and interdependence among AU member states;³¹ respect for borders existing on achievement of independence;³² respect for democratic principles, human rights, the rule of law and good governance;³³ promotion of social justice to ensure balanced economic development;³⁴ respect for the sanctity of life;³⁵ and the condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.³⁶

Non-discrimination and transparency

The Protocol provides that state parties shall not discriminate against nationals of another member state from entering, residing in or establishing in their territory, on the basis of their nationality, race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status, as provided by article 2 of the African Charter on Human and Peoples' Rights.³⁷ The provision on non-discrimination does not prevent a state party, as a result of reciprocity or deeper integration, giving more favourable treatment to nationals of another state party or region, in addition to the rights provided for in the Protocol.³⁸ This provision makes tacit accommodation for deeper levels of rights given to citizens of some member states on the basis of regional arrangements³⁹ or other agreements between the parties. The Protocol also offers protection to a citizen of another state party, who enters, resides in or establishes in a state party in accordance with the Protocol. It demands that such citizen shall enjoy the protection of the law of the host state party, in accordance with the relevant national policies and laws of the host state party.⁴⁰

28 Ibid.

29 See "Report on the implementation of free movement of persons in Africa 2020–2021" (AU) at 14–19, available at: <https://au.int/sites/default/files/newsevents/reports/40515-rp-HHS62469_E_Original_REPORT_ON_THE_IMPLEMENTATION_OF_FREE_MOVEMENT_OF_PERSONS_IN_AFRICA.pdf> (last accessed 1 November 2023).

30 Adopted by the heads of state and government of member states of the then OAU on 11 July 2002 at Lomé, Togo, available at: <https://au.int/sites/default/files/treaties/7758-treaty-0021_-_constitutive_act_of_the_african_union_e.pdf> (last accessed 19 October 2023).

31 The Constitutive Act of the AU, art 4(a).

32 Id, art 4(b).

33 Id, art 4(m).

34 Id, art 4(n).

35 Id, art 4(o).

36 Ibid.

37 The Protocol, art 4(1).

38 Id, art 4(2).

39 The Protocol defines regional arrangements as agreements, measures or mechanisms on free movement of persons, developed and implemented by RECs.

40 The Protocol, art 4(3).

Progressive realization and the role of RECs

The Protocol's objective is intended to be realized progressively. The Protocol makes provision for its realization through three phases: phase one, during which state parties shall implement the right of entry and abolition of visa requirements;⁴¹ phase two, during which state parties shall implement the right of residence;⁴² and phase three, during which state parties shall implement the right of establishment.⁴³ The annexure to the Protocol provides a roadmap for the implementation of these phases.⁴⁴ Despite providing the roadmap and phases, the Protocol affords state parties the latitude to make more favourable provisions for the realization of its goals and to implement an accelerated implementation programme.⁴⁵ This accommodates the various levels of progress in free movement that different countries and sub-regions have made.

Regional integration as a plank to continental integration

The AU has recognized and acknowledged RECs (which have all achieved higher levels of integration) as pillars for continental integration and development. This is based on pragmatic considerations. The Protocol defines regional arrangements as "agreements, measures or mechanisms on free movement of persons developed and implemented by regional economic communities".⁴⁶ First, the RECs have established a history of cooperation on which the continental vision can build. Secondly, the RECs have few negotiation partners; Africa's largest REC, the Common Market for Eastern and Southern Africa (COMESA), only has 19 members⁴⁷ compared to the AU's 55 members.⁴⁸ The implication is that this promotes easier decision making, as the smaller number of members could reach a decision within their REC faster than all the 55 AU member states. Furthermore, the RECs have their own protocols on free movement of persons, goods and services, which are at different levels of implementation. For illustration, ECOWAS has abolished the requirement for visa and entry permits within the sub-region and the East African Community allows the free movement of people, goods and services within the region.⁴⁹ Also, section 1 of the treaty establishing the Community of Sahel-Saharan states (CEN-SAD) makes free movement of persons within the region a core objective and a number of its members have implemented policies to promote intra-regional mobility.⁵⁰ Similarly, section 7 of the treaty establishing IGAD provides for the free movement of persons and goods within its territory, although IGAD does not have a free movement protocol.⁵¹ Also, the treaty establishing the Economic Community of Central African States (ECCAS) provides for free movement within the territory; it has also adopted a freedom of movement protocol.⁵² Similarly, the treaty establishing the Southern African Development Community (SADC) removes all barriers to free movement within the region, although its Protocol on the

41 Id, art 5(1)(a).

42 Id, art 5(1)(b).

43 Id, art 5(1)(c).

44 Id, art 5(2).

45 Id, art 5(3).

46 Id, art 1.

47 "Regional economic communities", available at: <<https://au.int/en/organs/recs>> (last accessed 19 October 2023).

48 "Member states", available at <https://au.int/en/member_states/countryprofiles2> (last accessed 19 October 2023).

49 East African Community Protocol for the Establishment of the East African Community Common Market, arts 5, 10, 11, 12 and 16; "Immigration and labour" (East African Community), available at: <<https://www.eac.int/immigration>> (last accessed 19 October 2023).

50 "CEN-SAD: Free movement of persons" (UNECA), available at: <<https://archive.uneca.org/pages/cen-sad-free-movement-persons>> (last accessed 29 October 2023).

51 "IGAD: Free movement of persons" (UNECA), available at: <<https://archive.uneca.org/pages/igad-free-movement-persons>> (last accessed 29 October 2023).

52 "ECCAS: Free movement of persons" (UNECA), available at: <<https://archive.uneca.org/pages/eccas-free-movement-persons>> (last accessed 29 October 2023).

Facilitation of Movement of Persons is not yet in force due to inadequate ratification.⁵³ In the same vein, the Arab Maghreb Union (AMU) has adopted a Freedom of Movement Protocol, although it is yet to be fully implemented because only three of its members have ratified it, and only Tunisia allows all AMU citizens to access its territory.⁵⁴ Likewise, COMESA also adopted a free movement protocol in 1998, but only Burundi, Kenya, Rwanda and Zambia have signed it, with Burundi being the only country that has ratified it.⁵⁵

Key provisions of the Protocol

Right of entry

Right of entry is defined as the right of a national of a member state to enter and move freely in another member state in accordance with the laws of the host member state.⁵⁶ It obligates a member state to permit nationals of member states to enter their territory without the requirement for a visa, and to move freely and stay for a maximum period of 90 days from the date of entry, or such further period determined by member states or through bilateral or regional arrangements.⁵⁷ Where the national of a member state wishes to stay in the host member state beyond 90 days or such other further period granted by the host state, he shall seek an extension in accordance with the procedures established by the host member state. The right of entry under the Protocol is permitted for a person entering the member state through a designated point or official port of entry, with a recognized and valid travel document, and who is not prohibited from entering the member state by the laws of that member state.⁵⁸ The right of member states to deny entry is restricted to situations where such denial is predicated on the “protection of national security, public order or public health” or other conditions that are not inconsistent with the Protocol.⁵⁹ Since the right of entry is restricted to official points of entry, member states are required to designate and share with other member states information relating to their official entry and exit points or ports.⁶⁰ The points of entry shall be kept open to facilitate the free movement of persons, subject to reciprocity and the protection measures a member state may take.⁶¹

The Protocol makes an exception for residents of border communities, requiring state parties to identify and facilitate their free movement through bilateral and regional agreements. Such facilitation shall not compromise the security or public health of host member states.⁶² State parties are enjoined to resolve any legal, administrative, security, cultural or technical impediments likely to impede the free movement of border communities in an amicable manner.⁶³ In addition to encouraging exchange programmes for students and researchers, state parties shall also permit nationals of other member states to pursue academic or research interests in their countries, by providing any required permits and passes.⁶⁴ Nationals of state parties are entitled to seek and accept employment in another member state and to be accompanied by a spouse and dependants.⁶⁵

53 “SADC: Free movement of persons” (UNECA), available at: <<https://archive.uneca.org/pages/sadc-free-movement-persons>> (last accessed 29 October 2023).

54 “AMU: Free movement of persons” (UNECA), available at: <<https://archive.uneca.org/pages/amu-free-movement-persons>> (last accessed 29 October 2023).

55 “COMESA: Free movement of persons” (UNECA), available at: <<https://archive.uneca.org/pages/comesa-free-movement-persons>> (last accessed 29 October 2023).

56 The Protocol, art 1.

57 Id, art 6(4).

58 Id, art 7(1).

59 Id, art 7(1)(c) and (2).

60 Id, art 8(1).

61 Id, art 8(2).

62 Id, art 12(1).

63 Id, art 12(2).

64 Id, art 13.

65 Id, art 14.

The right of free entry and employment is regulated by national laws, under which state parties issue residence permits, work permits or other appropriate permits or passes to nationals of other member states seeking and taking up residence or work in the host member state. To guarantee the transparency and non-discrimination of these national laws and procedures, the foreign national shall have the right to appeal against a decision denying them a permit or pass.⁶⁶

Right of establishment

Right of establishment means the right of a national of a member state to take up and pursue economic activities, including the right to set up in the territory of the host member state a business, trade, profession, vocation or economic activity as a self-employed person in line with the laws and policies of the host member state.⁶⁷ Recognition of a migrant's qualifications facilitates the right of establishment. Hence, the AEC Treaty encourages state parties to seek ways to recognize academic, professional and technical qualifications of each other's nationals to promote the movement of persons among member states. Such efforts can be achieved through bilateral, multilateral or regional arrangements.⁶⁸ Beyond this, the AEC Treaty envisions the establishment of a continental qualifications framework to encourage and promote the free movement of persons by state parties.⁶⁹ The AEC Treaty leaves it to state parties to facilitate the portability of social security benefits to nationals of other member states residing or established in another member state.⁷⁰ This provision provides the groundwork for future arrangements for ensuring that a migrant's social benefits can be utilized in a member state to which the national has migrated.

Right of residence

Right of residence is the right of a national of one member state to reside and seek employment in another member state, in accordance with the national law of the host member state.⁷¹ Such national may be accompanied by a spouse and dependants.⁷² The AEC Treaty leaves it for state parties gradually to implement favourable policies and laws on residence for nationals of other member states.⁷³ On what grounds can the nationals of a member state be removed from their state of residence? The AEC Treaty addresses this thorny issue by prohibiting the mass expulsion of non-nationals.⁷⁴ It defines mass expulsion as that which is aimed at national, racial, ethnic or religious groups.⁷⁵ The AEC Treaty distinguishes between mass expulsion and the right of a host state to expel, deport or repatriate a national of a member state. State parties can expel, deport or repatriate a national of a member state, lawfully admitted into its territory, provided that the decision is taken in accordance with the law in force in the host member state.⁷⁶ In order to promote the transparency of the expulsion, deportation or repatriation process, the host state must notify the national of the other member state and their government of the decision to expel, deport or repatriate them from the territory of the host member state.⁷⁷ The expulsion or deportation expenses are borne by the host member state, while the person being repatriated or his country of origin bears the

66 Id, art 15.

67 Id, arts 1 and 17.

68 Id, art 18(1).

69 Id, art 18(2).

70 Id, art 19.

71 Id, art 1.

72 Id, art 16(2).

73 Id, art 16(3).

74 Id, art 20(1).

75 Id, art 20(2).

76 Id, art 21(1).

77 Id, art 21(2).

repatriation costs.⁷⁸ The AEC Treaty recognizes the right of a member state to refuse a national of another member state entry into its territory. It stipulates that the person responsible for the transportation of the national shall, at the request of competent border authorities, re-route the person denied entry back to the point of embarkation or, if this is not possible, to the member state that issued the citizen's travel documents or any other place where the admission of the citizen will be accepted.⁷⁹

An immigrant national has the right to acquire property in the host member state in accordance with the laws, policies and procedures of that state.⁸⁰ A host member state shall not nationalize, expropriate, confiscate or acquire property belonging to an immigrant national, except in accordance with the law and after paying fair compensation to that national.⁸¹ Expulsion, deportation or repatriation from a host member state shall not deprive a national of another member state of his or her property lawfully acquired by that national in the host member state, except in accordance with the laws and procedures of the host member state.⁸² Such lawfully acquired assets shall be protected by the host member state in the event of a dispute between the national's home state and host state.⁸³ Nationals of other member states working, residing or established in another state can remit their earnings and savings in line with bilateral, regional, continental or international agreements designed to facilitate such remittances.⁸⁴ State parties shall also establish specific procedures for the movement of specific vulnerable groups, such as refugees, asylum seekers, victims of human trafficking and pastoralists, in line and consistent with their obligations under international, regional and continental instruments for the protection of each group.⁸⁵ State parties are required to provide appropriate administrative and judicial remedies for nationals of other member states who are adversely affected by the implementation of the Protocol.⁸⁶ Having exhausted all legal remedies in the host member state without obtaining redress, a foreign national may refer a matter to the African Commission on Human and Peoples' Rights (AU Commission).⁸⁷

Member states coordinate their border management systems in order to facilitate the free and orderly movement of persons, in accordance with the AU Convention on Cross-Border Cooperation.⁸⁸ This entails keeping and exchanging aggregated migration data at the ports or points of entry and exit from their territory, in order to track the free movement of persons and the implementation of the Protocol.⁸⁹

Coordination and harmonization

The AEC Treaty obliges state parties and the RECs to harmonize and coordinate their laws, policies, systems and activities in line with the implementation roadmap annexed to the Protocol.⁹⁰ State parties shall be responsible for implementing the Protocol by adopting necessary legislative and administrative measures to implement and give effect to the Protocol by harmonizing all laws, policies, agreements and immigration procedures and other procedures to ensure compliance.⁹¹

78 *Id.*, art 21(3).

79 *Id.*, art 21(4).

80 *Id.*, art 22(1).

81 *Id.*, art 22(2).

82 *Id.*, art 22(4).

83 *Id.*, art 22(3).

84 *Id.*, art 23.

85 *Id.*, art 24.

86 *Id.*, art 30(1).

87 *Id.*, art 30(2).

88 *Id.*, art 25(1).

89 *Id.*, art 25(2)–(3).

90 *Id.*, art 26.

91 *Id.*, art 27.

Since some RECs have their own free movement initiatives, the Protocol makes them the focal points for promoting, following up and evaluating implementation, and reporting progress made towards the free movement of persons in their respective regions.⁹² The AU Commission has the role of evaluating, coordinating and reporting on the implementation status of the Protocol.⁹³ Any dispute arising between state parties shall be settled by mutual consent through peaceful means, including negotiation, mediation and conciliation. Where this fails, the parties can refer to arbitration in line with the provisions of the Protocol.⁹⁴ The Protocol will enter into force 30 days after the date of receipt of the 15th instrument of ratification.⁹⁵ A ratifying state party may do so with reservations, provided that those reservations are not incompatible with the Protocol's object and purpose.⁹⁶

Entry and exits points or ports

Article 8(10) of the Protocol requires member states to designate and share with other member states information relating to their official entry and exits points or ports. Member states are obliged to keep the designated official entry and exit points open in line with national or regional procedures, to facilitate the free movement of persons, subject to reciprocity and the protection measures a member state may take.

Issues of Implementation that will determine the success of the Protocol

The aim of the Protocol is a daunting task. Its attainment will depend on a number of factors, discussed below.⁹⁷

Sovereignty, ideological divergence and political will

One of the concerns with the African regionalization project is the lack of sustained political commitment to implement the agreements and protocols.⁹⁸ The integration landscape of the continent and its sub-regions is littered with well-intentioned treaties, initiatives and protocols, which have not been sufficiently ratified to enter into force. For instance, the AU Convention on Cyber Security and Personal Data Protection, Protocol on the Establishment of the African Monetary Fund and the AU Convention on Cross-Border Cooperation (Niamey Convention), all adopted in 2014, are yet to come into force because of a lack of the requisite ratification.⁹⁹ In addition, only about 33 of the 68 treaties, conventions, protocols and charters adopted by the AU have come into force.¹⁰⁰ The implementation of African integration treaties and protocols has lagged behind other continental integration projects, notably that of the EU. Several protocols and treaties have not been executed and ratified within a reasonable time. The AU Executive Council has called on members severally to ensure that they ratify treaties and conventions within one year of

92 *Id.*, art 28.

93 *Id.*, art 29.

94 *Id.*, art 31.

95 *Id.*, art 33(1).

96 *Id.*, art 34(1).

97 L Fawcett and A Hurrell *Regionalism in World Politics: Regional Organization and International Order* (1995, Oxford University Press).

98 M Qobo "The challenges of regional integration in Africa: In the context of globalization and the prospects for a United States of Africa" (ISS paper 145, June 2007) at 1, available at: <<https://issafrica.org/research/papers/the-challenges-of-regional-integration-in-africa-in-the-context-of-globalisation-and-the-prospects-for-a-united-states-of-africa>> (last accessed 19 October 2023); T Maluwa "Ratification of African Union treaties by member states: Law, policy and practice" (2013) 13 *Melbourne Journal of International Law* 1.

99 "OAU / AU treaties, conventions, protocols and charters", available at <<https://au.int/treaties>> (last accessed 19 October 2023).

100 *Ibid.*

adoption,¹⁰¹ unfortunately, as shown above, this is often not the case.¹⁰² As Chingogo and Nakana pointed out, “[s]ome of the signed protocols have not yet been ratified and tentative - if not hesitant - steps have been taken towards the successive stages of complete integration. Until economic union is achieved, collective policy formulation would be difficult to implement”.¹⁰³ This can be attributed to the lack of a shared vision on creating seamless borders. As Okunade and Ogunnubi pointed out, “while some see the border as an open area meant to facilitate trade and economic activities, many continue to see the border as a symbol of their sovereignty which should not be negotiated for no reason”.¹⁰⁴ This ideological divergence may be part of the reason some member states have not heartily followed up with implementing other regional free movement protocols.¹⁰⁵ Additionally, most states are unwilling to surrender a measure of their sovereignty in order to establish a stronger regional area of seamless movement, even though this does not abrogate the sovereignty of any state. The consensual process of signature and ratification ensures that any degree of control relinquished is “voluntarily and mutually agreed and, ultimately, able to be rescinded by any participating State”.¹⁰⁶ A good example of this lack of hearty execution can be seen in the lethargic progress in implementing other AU treaties and protocols, as well as other regional free movement agreements.¹⁰⁷ For example, the Niamey Convention, adopted in 2014, is yet to come into force because of the lack of requisite ratification.¹⁰⁸ Also, the AMU is yet to achieve regional free movement of persons and goods as only three of its members have implemented the freedom of movement protocol.¹⁰⁹

Social policy harmonization

Much work still needs to be done to define the extent of rights that migrants to other African countries can enjoy. Do they have unrestricted access to social assistance, social security and protection? Or are their rights restricted to accessing education and healthcare, and under what conditions and to what extent and at what costs? Do migrants have similar rights to nationals of host member states? If not, how long must a person stay to become entitled to the same rights as nationals of the host member state? The nutty issue in this social policy harmonization is that it is solely within the realm of each state’s sovereignty. Coupled with the economic straits of the states and a restive population, it is obvious that significant progress will not be made in this area without effective coordinated efforts. Progress in the unrestricted movement of Africans across the region will require the harmonization of national and regional migration policies in the areas of right of entry / visa regulations, resident permits and the right to settlement.

Vast national discretion

The Protocol specifies that migrants are subject to national laws and procedures. To ensure uniformity, such laws must be harmonized. This can be through model immigration laws and procedures that states can adapt or adopt. Furthermore, there needs to be a mechanism for challenging

101 See Decision on the Status of Signature and Ratification of OAU / AU Treaties and the Harmonisation of Ratification Procedures, EX CL Dec 459 (XIV), 14th session, agenda item 7, AU doc EX CL/458 (XIV) (30 January 2009); Decision on the Status of Signature and Ratification of OAU / AU Treaties EX CL Dec 571 (XVII), 17th session, agenda item 16, AU doc EX CL/605 (XVII) (25 July 2010), para 4.

102 Maluwa “Ratification of African Union treaties”, above at note 98 at 5.

103 M Chingono and S Nakana “The challenges of regional integration in southern Africa” (2009) 3/10 *African Journal of Political Science and International Relations* 396 at 399.

104 SK Okunade and O Ogunnubi “The African Union Protocol on Free Movement: A panacea to end border porosity?” (2019) 8/1 *Journal of African Union Studies* 73 at 86.

105 W Okumu “The African Union: Pitfalls and prospects for uniting Africa” (2009) 62/2 *Journal of International Affairs* 93.

106 “Study on the benefits”, above at note 1.

107 Maluwa “Ratification of African Union treaties”, above at note 98 at 6–8.

108 “OAU / AU treaties”, above at note 99.

109 “AMU: Free movement of persons”, above at note 54.

national laws and processes beyond the national judicial or adjudicatory processes. For instance, article 15(3) of the Protocol provides that a national of another member state denied a pass or permit shall have the right to appeal against that decision. The Protocol does not emphasize immigrants' right to challenge the decisions of national courts and national governments on the application of the Protocol at the regional level. This article contends that, to afford immigrants full protection and guarantee their access to justice, such appeals should lie to the African Court on Human and Peoples' Rights (African Court). Although the Protocol did not specifically provide for this, by virtue of article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights,¹¹⁰ the African Court has jurisdiction over all disputes relating to the interpretation and application of any human rights instrument ratified by the affected state. This will curtail the discretion of member states in determining the rights of immigrants in their states.

Bad governance, terrorism, internal conflicts and political instability

Several African nations are saddled with internal conflicts arising from bad governance, terrorism and political instability.¹¹¹ These have caused the leaders of most of these nations to focus on domestic matters and self-preservation at the expense of regional integration efforts.¹¹² For illustration, the initial hesitation by South Africa and some of its SADC counterparts in ratifying the Protocol is largely hinged on security concerns relating to civil registration, border management systems and law enforcement at national levels.¹¹³ Moreover, these conflicts pose an existential threat to the notion of the free movement of persons, as they are capable of unleashing streams of armed groups from these restive states. The hesitance of "stable" states to ratify the Protocol can be seen as a sign of responsibility to protect their citizens.¹¹⁴

Weak economies and economic imbalance

As in all regional blocs, the levels of development vary among member states.¹¹⁵ Thus, the more prosperous nations in the blocs will be the preferred destination of citizens from the poorer states. The fact that a significant number of African countries are mired in poverty and underdevelopment, with very little to inspire hope in their populace,¹¹⁶ means that a significant percentage of their population are eager to leave their countries. Africa is largely portrayed as a continent on the move due to desperation to flee poverty and conflicts; the majority of migration is within the continent, as citizens of poor African countries have less capacity to move, which increases their

110 All AU members, except Cape Verde, Eritrea and Morocco, have signed this protocol and 34 members have ratified it: "List of countries which have signed, ratified / acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights", available at: <https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf> (last accessed 19 October 2023).

111 For a list of conflicts in Africa, see "List of conflicts in Africa" *Wikipedia*, available at: <https://en.wikipedia.org/wiki/List_of_conflicts_in_Africa> (last accessed 19 October 2023).

112 Fagbayibo "Challenges and prospect", above at note 13 at 6.

113 *Ibid.*

114 "Study on the benefits", above at note 1.

115 For an economic overview of African economies, see: *African Economic Outlook 2018* (2018, African Development Bank), available at: <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African_Economic_Outlook_2018_-_EN.pdf> (last accessed 19 October 2023).

116 In Africa, there are 33 countries that are classified as "least developed" countries: "UN list of least developed countries" (UN Conference on Trade and Development), available at: <<https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx>> (last accessed 19 October 2023).

tendency to move within Africa.¹¹⁷ Thus, the more prosperous states are likely to be overwhelmed by immigration from other states. This explains the fact that the continental powers, such as Nigeria, South Africa and Egypt, have not signed the Protocol¹¹⁸ and have not shown full commitment to the implementation of the free movement agreements of their respective RECs.¹¹⁹ This has also militated against the progress of regional free movement agreements. In addition, it will make it challenging for member states to harmonize their social assistance structures, because of their differing levels of economic development. Furthermore, this has led to xenophobia and mass expulsions, when members of host states feel overwhelmed by the influx of foreigners. As Deacon and Nita point out, “access to social provisions by all cross-border movers within a region is the key to a real regional social integration. Without that, the right to move freely is merely formal”.¹²⁰ Yet, many African countries cannot afford such social infrastructure.

Poor border control

The Protocol focuses on migration through official entry and exit points. However, a vast amount of the migration that takes place in several parts of the continent is informal and does not take place through official channels.¹²¹ Accordingly, it is a challenge to have reliable migration data. Unless the incentives for using these unofficial channels are addressed, migrants will not use the designated exit and entry points. Furthermore, restricting migration to official entry and exit points will require member states to improve border controls to regularize this form of migration.

Civil society engagement and public enlightenment

Given that public have a major role to play in accommodating and promoting cross-border movement, it is important that member states take practical and effective steps to promote public acceptance of the Protocol's objectives. Many of the fears and negative attitudes that people have about immigrants stem from propaganda and misinformation.¹²² This poses a major challenge for controlling xenophobia as it desensitizes citizens to xenophobic attacks. Thus, beyond signing the Protocol, member states must provide their citizens with the persuasive benefits of free movement of labour, goods and services. Furthermore, public enlightenment will enable citizens to be aware of

117 ML Flahaux and HD Haas “African migration: Trends, patterns, drivers” (2016) 4/1 *Comparative and Migration Studies* at 2, 8, 16 and 17.

118 A 2019 report shows that four countries have now ratified and deposited the Protocol with the AU: Rwanda, Niger, Mali, and São Tomé and Príncipe. The Protocol requires 15 ratifications for it to enter into force. Signatures to the Protocol remain at 32: Angola, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Equatorial Guinea, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Mali, Malawi, Mozambique, Niger, Rwanda, Senegal, Sierra Leone, Somalia, South Sudan, São Tomé and Príncipe, Sudan, Tanzania, Togo, Uganda and Zimbabwe. Africa's regional economic powerhouses, as indicated by GDP, (Egypt, Nigeria and South Africa) are notable by their absence. See: “Progress report on the free movement of persons in Africa” (third meeting of the Specialized Technical Committee on Migration, Refugees and Internally Displaced Persons, 4–8 November 2019, Addis Ababa, Ethiopia), available at: <https://au.int/sites/default/files/newsevents/reports/37472-rp-pa25606_e_original_004_ff.pdf> (last accessed 19 October 2023).

119 “Free movement of persons” (UNECA), available at <<https://archive.uneca.org/oria/pages/free-movement-persons>> (last accessed 19 October 2023); S Kwarkye and M Matongbada “Nigeria's border closures haven't served their purpose” (22 March 2021) *ISS Today*, available at: <<https://issafrica.org/iss-today>> (last accessed 19 October 2023).

120 B Deacon and S Nita “Regional social integration and free movement across borders: The role of social policy in enabling and preventing access to social entitlements by cross-border movers: European Union and southern Africa compared” (2013) 3/1 *Regions & Cohesion* 32.

121 See P Fabricius “Can Africa's borders really become bridges?” (7 June 2018, Institute for Security Studies), available at: <<https://issafrica.org/iss-today/can-africas-borders-really-become-bridges>> (last accessed 19 October 2023).

122 A recent study in South Africa notes that “victim precipitation” (ie immigrants allegedly bringing their victimization upon themselves through their actions) is rampant: J Crush “Xenophobia denialism and the global compact for migration in South Africa” (2022) 14 *International Development Policy* 133 at 144–46.

their rights in the various states in the region. With proper awareness, migrants will be better able to stand up and avail themselves of the channels in their host states for the protection and promotion of their rights. To this end, non-governmental bodies and civil society groups have a key role in facilitating this enlightenment, as well as in monitoring and advancing implementation through promoting research, policies and national dialogue.¹²³

Formulation of comprehensive national implementation policies

Many countries in the region do not have comprehensive immigration policies.¹²⁴ Their absence undermines the implementation of any protocol that countries ratify. Inter-governmental committees would be necessary to monitor countries' progress in implementing measures under the AfCFTA. Facilitation is complex as it spans different sectors and government ministries.

Institutional capacity

The example of the extent of free movement in the RECs shows that the capacity of the regional bodies impacts the response of their members to continental initiatives on free movement and determines the extent of integration.¹²⁵ Accordingly, efforts should be made to provide capacity building assistance at the supranational (AU and REC secretariats) and national levels, in order to drive the process. This assistance could take the form of financial support and personnel development efforts.¹²⁶ Coordinated assistance will ensure that efforts made at the regional and continental levels are consistent and conform to the same guidelines. It will also ensure that the goals and targets of each implementation phase are clearly defined, to give direction to the overall process.¹²⁷ One major obstacle to the African regionalization programme has been the slow ratification of protocols and their disinclined implementation. The formulation of the treaties and protocols has not been the product of a shared vision in cooperation as a means to achieve mutually beneficial ends, as many countries see implementation as a domestic threat. For instance, economic disparity and a sharp difference in economic thrust could have a significant impact on free movement. This scenario played out between Nigeria and its neighbours Benin, Cameroon, Chad and Niger in 2019. While Nigeria banned the import of certain goods, like rice, to stimulate industrialization and local production, its neighbours (especially the Benin Republic) still showed a preference for importing rice. This made them favourable places from which to smuggle rice into Nigeria, which compelled the Nigerian government to shut its borders against goods from those countries.¹²⁸ Another potent

123 For example, the West African Observatory on Migrations coordinates a civil society campaign that is working to promote free movement within Africa. The observatory is a network of civil society organizations based in West Africa and from the West African diaspora that speak on the theme of migration. It was established on 11 February 2016 and aims to ensure that West African migrants' right to free movement is respected. See "West African Observatory on Migrations: Free movement for development", available at: <<http://www.obsmigration.org/en/about-us/>> (last accessed 19 October 2023).

124 C Le Coz and A Pietropolli "Africa deepens its approach to migration governance, but are policies translating to action?" (2 April 2020) *Migration Policy Institute Feature*, available at: <<https://www.migrationpolicy.org/article/africa-deepens-approach-migration-governance>> (last accessed 19 October 2023).

125 Dick and Schraven noted that: "Due to the more supranational nature of ECOWAS, the free movement protocol adopted in 1979 has established a functioning free movement regime, despite weaknesses in implementation. By contrast, as an intergovernmental organization, IGAD lacks the overarching decision-making authority on (migration) policy matters in member states and can only make non-binding recommendations": Dick and Schraven "Towards a borderless Africa?", above at note 18 at 3.

126 Ibid.

127 "Study on the benefits", above at note 1.

128 Kwarkye and Matongbada "Nigeria's border closures", above at note 119.

threat to implementing the Protocol is member states' lack of coordinated political will to monitor progress.¹²⁹

Stronger AU Commission

The role of the AU Commission, as a rule setting and rule enforcing entity, needs to be strengthened in the mould of the European Commission. To facilitate the realization of the Protocol's goals, the AU needs to develop a monitoring framework, but the AU has not developed a mechanism for enforcing the implementation of its protocols. Any hope of the free movement of persons materializing requires a means to monitor and enforce compliance with agreed measures. In addition to monitoring, appropriate procedures are required to provide remedies for affected parties, as well as appropriate sanctions for member states that fail to comply. The AU needs to strengthen its capacity to formulate, monitor and ensure implementation of its treaties and protocols. The AU Secretariat and various commissions should be empowered to act more decisively. The AU Commission has made efforts to encourage members to sign and ratify the Protocol so that it can come into force,¹³⁰ but there is great need for accurate data on migration in Africa, which is currently lacking.¹³¹ This knowledge gap can also be addressed through encouraging research on this information that would help policy makers in decision making.¹³² There is also the need to integrate and coordinate the fragmented regional protocols on freedom of movement. It will also help to set up flexible mechanism and minimum standards, as well as draft legislation that member states can adapt or adopt.¹³³

Conclusion

The idea of a united Africa has always loomed large and formed the *raison-d'être* for the formation of the OAU (now the AU). The challenges on the path of this initiative have disheartened many and prevented vigorous efforts to pursue the vision. It is in this context that the formulation and signing of the Protocol represents a major step forward, coming 55 years after the founding of the OAU / AU. The Protocol offers a great opportunity to accelerate the process of integrating African peoples and states. It is a veritable instrument in the AU vision. This article has examined some of the obstacles to translating the dream into reality. However, the economic and other benefits of actualizing this project far outweigh the cost of implementing and enforcing the Protocol. It is therefore desirable that Africa's states and peoples will mobilize the resources needed to realize the Protocol's ideals.

Competing interests. None

129 L. Abrego et al. "The African Continental Free Trade Agreement: Welfare gains estimates from a general equilibrium model" (International Monetary Fund working paper 2019/124), available at: <<https://www.imf.org/en/Publications/WP/Issues/2019/06/07/The-African-Continental-Free-Trade-Agreement-Welfare-Gains-Estimates-from-a-General-46881>> (last accessed 29 October 2023).

130 "AU member states urged to ratify the protocol on free movement to achieve free trade" (AU press release, 7 November 2019), available at: <<https://au.int/en/pressreleases/20191107/au-member-states-urged-ratify-protocol-free-movement-achieve-free-trade>> (last accessed 29 October 2023).

131 *Africa Migration Report: Challenging the Narrative* (2020, AU and International Organisation for Migration) at 27–28, available at: <<https://publications.iom.int/books/africa-migration-report-challenging-narrative>> (last accessed 19 October 2023).

132 L. Fioramonti "Round table report: Advancing regional social integration, social protection, and the free movement of people in southern Africa" (2013) 3/3 *Regions & Cohesion* 141 at 141–45.

133 Fagbayibo "Challenges and prospect", above at note 13.

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