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The free movement of people in Africa as a human right and as an economic right: From the African Charter to the African Economic Community Protocol of 2018

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Summary: *The right to freedom of movement of persons in a state is recognised by article 12 of the African Charter on Human and Peoples' Rights as a fundamental human right but, more generally, freedom of movement is also exercised in the context of continental economic integration, a crucial norm in economic integration projects. Not long after the entry into force of the African Charter in 1986, the first steps towards economic integration were taken, and the freedom of movement was enshrined in the Treaty Establishing the African Economic Community. As the AEC lost steam, the African Commission*

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on Human and Peoples' Rights upheld the right to unhindered trans-border freedom of human mobility and curtailed attempts by states to interfere with it. In 2018 the adoption of the Protocol to the AEC Treaty on the free movement of persons manifested in an unambiguous manner the economic aspects of this human right. This article reviews the relevant African Union instruments on the free movement of persons and examines the relevant decisions issued by the African Commission. It also explains how the human rights aspects of the freedom of movement closely interact with its economic features and the importance that an expansive and properly drafted prohibition of discrimination has in securing that human mobility on the continent will not be compromised.

Key words: *freedom of movement of persons; article 12 of the African Charter on Human and Peoples' Rights; regional economic integration; Protocol to the African Economic Community Treaty on Free Movement; African Continental Free Trade Area*

1 Introduction

Generally speaking, the freedom of movement of persons, over and above being a fundamental but qualified human right, also entails an aspect of personal economic freedom and development. This has usually been applied in the context of the economic integration pursued by regional international organisations.¹ The amalgamation of the freedom of movement as both a human right and a protected economic freedom finds explicit expression in article 45 of the Charter of Fundamental Rights of the European Union (EU).² In the context of Africa, a right to freedom of movement has been set out in article 12 of the African Charter on Human and Peoples' Rights (African Charter) as the liberty to move within the territory of state parties and as the right of residence therein, which can also be construed as economic freedoms attached to individuals. To that

¹ Specifically for Africa, see African Commission on Human and Peoples' Rights General Comment 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (article 12(1)), adopted 10 November 2019, para 61 (General Comment 5) referring to an expansive interpretation of the freedom of movement, which promotes regional integration and trade, while advancing the Agenda 2063 aspirations, to which reference is made later.

² See also the third paragraph of the Preamble, Official Journal of the European Union (OJ), C 326, 26 October 2012 391. See further Caribbean Court of Justice, *Advisory Opinion of the Caribbean Court of Justice in Response to a Request from the Caribbean Community* [2020] CCJ 1 (OJ) (AO), (2020) 59 ILM 708, confirming that the free movement of member states' nationals within the Caribbean Community is both a 'fundamental Community goal' and 'a fundamental principle', a conclusion first reached by the Court of Justice in *Myrie v State of Barbados* [2013] CCJ 3 (OJ) (2013) 83 WIR 1.

extent, they arguably constitute ‘personal economic freedoms’, which in the process intertwine with the principles of regional economic integration.³ These rights were expanded further in the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted in 2018 (2018 Protocol), to expressly include the associated right of establishment.⁴ The rights guaranteed in the two instruments are similar but not identical with the latter addressing issues such as mutual recognition of qualifications and social security benefits.

As will be explained, this development is in line with Agenda 2063, which advocates the free movement of people as part of the continental integration agenda. The right to free movement of persons, which could at the same time be regarded as a human right and as a fundamental economic right, will be safeguarded when the 2018 Protocol enters into force in either or both of these manifestations, depending on the circumstances. Moreover, were the 2018 Protocol to be considered, broadly speaking, as a human rights instrument, it could fall within the competence of the African Court on Human and Peoples’ Rights (African Court).⁵ Consequently, pending the operationalisation of the African Court of Justice and Human Rights, in cases of disputes regarding its interpretation, application and implementation, the African Court should have separate and original jurisdiction to hear interstate disputes and also to give advisory opinions.⁶ However, importantly, article 30(2) of the 2018 Protocol stipulates that the nationals of the African Economic Community (AEC) member states, who claim to have been denied their rights under it, are entitled to complain to the African Commission on Human and Peoples’ Rights (African Commission).

3 Signed 27 June 1981, entered into force 21 October 1986, 1520 UNTS 217; all AU member states except Morocco are parties.

4 Adopted 29 January 2018, not yet in force. The 2018 Protocol requires 15 ratifications to enter into force, art 31(1). The Treaty Establishing the African Economic Community was signed 3 June 1991, entered into force 12 May 1994 (1991) 30 ILM 1241.

5 See arts 3 & 7 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, signed 10 June 1998, entered into force 25 January 2004. In *Actions pour la Protection des Droit de l’Homme (APDH) v Côte d’Ivoire* App 1/2014 (2016) para 57 the African Court laid down a test in order to answer the question of whether a treaty constituted a human rights instrument; it was necessary to consider the purpose of the instrument, reflected either by an express enunciation of rights or by binding obligations on states for the enjoyment of those rights. It would appear that the 2018 Protocol meets this test.

6 Art 4 African Court Protocol (n 5). See art 31(2)(b) 2018 Protocol.

This article is concerned with the right to the free movement of persons and not with the process of migration across Africa.⁷ Even though they share many common characteristics, the former is wider than the latter. In the beginning, the article analyses the right to free movement as was enshrined in the African Charter and clarified/applied through the decisions of the African Commission, while bearing in mind the relevant provisions in the 2018 Protocol. It then explains why, as an economic freedom, the right to the free movement of people is part and parcel of any multilateral economic integration institution. This of course is the case with the AEC, which was established 10 years after the adoption of the African Charter. Thus, the article argues that the freedom of people to move, as described above, could be perceived as a fundamental human right but also as an economic right to be enjoyed by the population of those states partaking in an economic integration project. After observing that the AEC was left to flounder, presumably because African states were not ready to implement its goals and meet the deadlines set, the article examines the main features and provisions of the 2018 Protocol. Thirty-five years after African states decided to embark on economic integration, they finally took the first decisive step to ensure that economically-active Africans will, without discrimination, be guaranteed the right to seek and accept employment in any other AEC state. In that respect, the objective of an African Common Market has started to take shape.

Finally, taking stock from the fact that over time it has become apparent that certain issues in the African Charter require clarification and elaboration, the article addresses the more general question of its amendment, and perhaps revision. When a multilateral instrument covering a subject as topical as human rights was first negotiated and concluded more than 40 years ago, it seems appropriate that its contents and its contemporary relevance are reviewed both from a substantive point of view (namely, the envisaged rights and fundamental freedoms and the extent of the protection offered) and from an institutional point of view (namely, the relationship between the African Commission and the African Court, the ability of alleged victims to petition the African Court without obstacles as a personal right not subject to the discretion of states parties, and so forth). Finally, the question of codification of the African Charter to incorporate the provisions of the three additional Protocols to it (reference to these instruments is made later in the article) is touched upon.

⁷ Therefore, continental instruments such as the AU Revised Migration Policy Framework for Africa and Plan of Action (2018–2030), which was adopted in 2018 (replacing the previous one from 2006) will not be examined.

2 An examination of article 12 of the African Charter in light of the 2018 Protocol and its interpretation by the African Commission

The African Charter is the first continental-wide treaty to address free movement. Article 12 thereof secures various aspects of this right, described by the African Commission as ‘a fundamental human right to all individuals within states’.⁸ It is important to stress this point because the African Charter, unlike the 2018 Protocol, is not designed to secure a general right of migration or to promote cross-border mobility; its principal purpose is to guarantee rights for individuals within the territory of individual state parties. The African Charter, unlike article 6 of the 2018 Protocol, does not guarantee a right of entry and state parties continue to retain the right to regulate the issue of third country nationals entering and leaving their territory as a matter of state sovereignty.⁹ This remains the case under the 2018 Protocol which, it should be observed, as opposed to article 12(2) of the African Charter, makes no explicit provision for a right of exit for participating states’ own nationals. However, such a right must per force be implied because otherwise the freedom of movement would be negated. In particular, the freedom of movement is comprised of several elements, among others, the right of participating states’ nationals to enter, reside and move freely through the host state, as well as their right to exit their home state to exercise their (economic) right of free movement. In its General Comment 5 the African Commission has acknowledged the wider socio-economic dimension of this right.

To what category of persons does the right of free movement apply? Article 12(1) refers to ‘every individual’ (of course, the rights guaranteed by the African Charter, with certain exceptions such as the right to vote, apply equally to non-nationals). In keeping with other international instruments and with international jurisprudence, the right extends to individuals of whatever nationality, and not only a state’s own nationals or nationals of other African countries.¹⁰ According to the African Commission’s General Comment 5, the

8 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 187.

9 As above.

10 According to the African Commission states are obliged to secure the rights protected by the African Charter to all persons within their jurisdiction, nationals and non-nationals alike; *Rencontre Africaine pour la Defense des Droits de l’Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 22. The victim in *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) was an US citizen, while in *Kenneth Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) the applicant was an Australian citizen.

definition of 'every individual' extends to those who are in the state irregularly, including 'asylum seekers' and 'undocumented migrants'. The African Commission has held that persons with an irregular status are not without rights and, while it accepts the right of state parties to bring legal action against illegal migrants and to deport them if justified, it asserts that they are entitled to due process of law and the full protection of their fundamental rights, for example, the right to life and the prohibition of torture and degrading behaviour.¹¹ This stance reflects international human rights law according to which states are under an obligation to guarantee, ensure and protect the human rights of all persons within their jurisdiction, regardless of nationality, including migrants and, by necessary implication, those who have exercised their right to free movement to third countries.¹² Interestingly, under article 24(1) of the 2018 Protocol, contracting parties may additionally adopt targeted measures for the movement of 'specific vulnerable groups', including refugees, asylum seekers, victims of trafficking and smuggled migrants. Under the African Charter, the right of free movement, therefore, applies to a broader category of persons than under the 2018 Protocol, since the former is applicable to all individuals, regardless of nationality or economic status, while the latter is essentially limited to nationals of contracting parties that are economically active.

However, it is not merely just a case of nationality: The African Commission has stated in General Comment 5 that the scope of article 12 extends to categories of persons including those classed by, among others, gender, age and health. Older persons, that is, those aged 60 years or above, are thus entitled to this right. The 2018 Protocol does not specifically address the question of age in relation to economic activities. Thus, the non-discrimination clause contained in article 4(1) thereof does not include 'age' as a prohibited ground, neither does article 2 of the African Charter; both provisions are worded identically in all essential respects, unless it can be read into the term 'any status'.¹³ However, the Protocol on

11 *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10) para 31.

12 See, eg, *Judicial Condition and Rights of Undocumented Migrants* Advisory Opinion IACHR (17 September 2003) Ser A 18.

13 The African Commission has stated that the list of specified grounds is neither 'absolute nor comprehensive'; *Open Society Justice Initiative v Côte d'Ivoire* Communication 318/06 African Commission on Human and Peoples' Rights (2015) para 145. It has further stated that the aim of this provision is 'to ensure equality of treatment for individuals irrespective' of the specified grounds; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) para 169. Age discrimination is a prohibited ground under art 21 of the EU Charter of Fundamental Rights. See further Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 2 December 2000; *C-144/04 Werner Mangold v Rüdiger Helm* [2005] ECR 9981 which held that non-discrimination in respect of age is a general principle of EU law.

Older Persons calls for the elimination of discrimination against older persons, including in the workplace.¹⁴ There is no reason why older persons should not be economically active and may wish to exercise their right to work or the right of establishment. For those who are not, article 14(2) of the 2018 Protocol states that a worker may be accompanied by dependents, which may include ageing parents. There is as yet no definition of 'dependents' in Africa Union (AU) law. It bears repetition to stress that much work remains to be done in legislating on the scope and content of free movement rights, but an examination of EU law is interesting as article 2 of Directive 2004/38 refers to 'dependent direct relatives in the ascending line' and not just in the descending line.¹⁵ Some may argue that this right should be limited to the descending line only in keeping with the right to found a family, the protection of which is laid down in articles 18(1) to (2) of the African Charter, and that it would be undesirable to accept both lines as this would multiply the number of protected persons, something to which the drafters of the 2018 Protocol might not have consented. On the other hand, the argument could be made that under articles 27(1) and 29(1) of the African Charter an individual has duties towards his or her family and specifically towards parents so that the latter may per force have to be added to the category of dependents given that their protection is a duty enshrined in it.¹⁶

What other relevant categories are there under article 12 of the African Charter? According to General Comment 5, migrant workers and family members, in keeping with the International Convention on the Protection of the Rights of All Migrant Workers,¹⁷ have the right to move freely within the state of employment. Many of these workers will no doubt be African nationals and thus able to rely on the 2018 Protocol, provided of course that the country of origin and the host country would have ratified it. General Comment 5 calls for domestic laws that restrict the right of free movement of migrant workers to be reviewed. This is also the case with persons living with HIV since there should be no discrimination on grounds of health. Indeed, the African Commission calls for restrictions on the freedom of movement and residence and discriminatory practices relating to such persons to be prohibited. Also, another group identified by

14 Arts 3 and 6 Protocol to the African Charter on Human and Peoples' Rights of Older Persons in Africa, signed 31 January 2016, not yet in force.

15 Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of member states, OJ L 158/78, 30 April 2004.

16 K Quashigah 'Scope of individual duties in the African Charter' in M Ssenyonjo (ed) *The African regional human rights system* (2012) 119.

17 Adopted 18 December 1990, entered into force 1 July 2003, 2220 UNTS 3.

the African Commission as enjoying the freedom of movement and residence are persons with disabilities.¹⁸ The African Commission does not mention a right of entry in this context, and it is therefore unclear whether these two categories are able to enjoy cross-border mobility. In principle they should come within the scope of the 2018 Protocol, but the question arises as to whether some contracting parties will seek to invoke the public health exception in article 7(1)(c) thereof to refuse entry to those with health issues and the disabled. The question again arises as to the scope of the 'any status' category in the non-discrimination clauses of the 2018 Protocol and the African Charter.¹⁹ There appears to be no reason why 'any status' should not extend to health or physical attributes as long as there is no threat to public health (pandemics). This is an issue which may have to be clarified in a future amendment of the African Charter and will be analysed further later in the article.

It is interesting to note that all the protocols to the African Charter, on Women,²⁰ Older Persons and Persons with Disabilities, are silent on the issue of freedom of movement. The question arises as to whether this is a deliberate omission or an oversight. Whatever the reason may be, it is true to say that many of the individuals, who are the focus of these treaties, can be economically active and, at any rate, their very status necessitates guaranteeing their freedom of movement. Especially now that the 2018 Protocol has been adopted and with the prospect of the creation of the African Common Market, which fosters and does not thwart human mobility, this is an issue meriting discussion and suitable regulation.

Under article 12 of the African Charter, the individual's right to freedom of movement and residence is guaranteed provided the person 'abides by the law'. This suggests that the continued presence of the individual which, as has been demonstrated, includes both third country nationals and those of other state parties, is contingent on observing domestic laws, a requirement that seems to be wholly legitimate, so that expulsions and deportations may

¹⁸ Persons with disabilities have a right to work under art 19 of the Protocol on the Rights of Persons with Disabilities in Africa, signed 29 January 2018, not yet in force, which, however, is silent on a right to freedom of movement. Art 18 of the UN Convention on the Rights of Persons with Disabilities, adopted 13 December 2006, entered into force 3 May 2008, 2515 UNTS 3, obliges state parties to recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence, and to leave any country, including their own.

¹⁹ Discrimination is prohibited under art 5 of the Protocol on Persons with Disabilities. See also art 4. Discrimination on grounds of disability is prohibited under art 21 of the EU Charter of Fundamental Rights and Directive 2000/78/EC.

²⁰ Signed 1 July 2003, entered into force 25 November 2005.

be appropriate and proportionate responses to those found guilty of serious criminal offences. However, both the African Commission and the African Court have rightly observed that such state measures must be compatible with international human rights standards.²¹ The due process of law, including the elements of the right to a fair trial,²² must be adhered to as required by article 12(4) of the African Charter. Arbitrary expulsions therefore are prohibited under this provision. This is also the position adopted by article 21(1) of the 2018 Protocol.

Article 12(1) of the African Charter diverges from the International Covenant on Civil and Political Rights (ICCPR)²³ in an important respect. Article 12(1) of ICCPR states that '[e]veryone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement'.²⁴ The implication of ICCPR is that non-nationals must be lawfully residing within the territory, having complied with immigration requirements. According to the United Nations (UN) Human Rights Committee (HRC), 'the question whether an alien is "lawfully" within the territory of a state is a matter governed by domestic law, which may subject the entry of an alien to the territory of a state to restrictions, provided they are in compliance with the state's international obligations'.²⁵ However, the corresponding provision in the African Charter is worded differently and the phrase 'lawfully within the territory' is omitted. Consequently, as has been indicated above, the African Commission is of the view that the freedom of movement extends to those who are in the state irregularly, including 'undocumented migrants'. This stance is unlikely to be popular with certain African states hosting large numbers of such persons, such as South Africa.²⁶ From the perspective of national authorities it would seem reasonable to impose limits on

21 *Kenneth Good* (n 10) paras 203-204; *Zimbabwe Lawyers for Human Rights* (n 10) para 114; *Union Inter africaine des Droits de l'Homme v Angola* (2000) AHRLR 18 (ACHPR 1997) para 23; *Anudo Ochieng Anudo v Tanzania* (Merits) (2018) 2 AfCLR 248 para 100.

22 *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) paras 63-65; *Organisation Mondiale contre la Torture v Rwanda* (2000) AHRLR 282 (ACHPR 1996) para 30; *Union Inter africaine des Droits de l'Homme* (n 21) paras 19-20; *Zimbabwe Lawyers for Human Rights* (n 11) para 116. The Inter-American Court of Human Rights has stated that '[d]ue process of law is a right that must be ensured to all persons, irrespective of their migratory status'; *Judicial Condition and Rights of Undocumented Migrants* (n 12) para 121.

23 Adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171. Most African states are parties to ICCPR.

24 Art 2(1) of Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed 16 September 1963, entered into force 2 May 1968, CETS 046, is similarly worded (our emphasis).

25 CCPR General Comment 27: Article 12 (Freedom of Movement) para 4.

26 According to the International Organisation for Migration *World Migration Report 2020* (2019) 56, the share of international migrants as a proportion of the population in South Africa has risen from 2,8% in 2005 to 7% in 2019, while in Equatorial Guinea from less than 1% to nearly 17% during the same period.

their freedom of movement. However, for the African Commission restrictions must be the exception.²⁷ Nonetheless, both the African Commission and the HRC are agreed that an alien who has entered the state illegally, but whose status has been regularised, must be considered to be lawfully within the territory for the purposes of article 12.²⁸

Article 12(2) grants the individual the right to leave and return to a state subject to restrictions imposed by law for the protection of national security, law and order, public health or morality.²⁹ In principle, therefore, a person serving a lawful prison sentence would not have this right breached. In General Comment 5 the African Commission has stated that limitations must serve a legitimate aim, must be proportionate with and absolutely necessary for the advantages to be obtained in a free and democratic society.³⁰ This outlook corresponds with the position in other jurisdictions. Moreover, the restrictions must be compatible with the right to equality and non-discrimination; it must not be imposed indiscriminately nor targeted at stigmatising particular groups. This last point is important in relation to those living with HIV, for instance. In *Amnesty International v Zambia* the African Commission held that the respondent state must prove that it is justified in invoking these conditions and that the rules of natural justice must apply.³¹ With specific reference to the limitation on the ground of law and order, the African Commission also stated that the respondent state had to prove that the individuals indeed were a danger to law and order; that they posed a 'likely' danger was too vague.³²

Article 12(4) protects a non-national who is legally within another state from summary expulsion as such sanction can only be legitimate by virtue of a decision taken in accordance with the law. While this provision is broadly worded and fails to stipulate any procedural guarantees, the jurisprudence of the African Commission requires that the provision must be interpreted to prevent arbitrary expulsions.³³ Consequently, expulsions must be consistent with the due process of law;³⁴ states must have laws in place to regulate this area which

27 General Comment 5 para 10.

28 General Comment 5 para 9; CCPR General Comment 27 para 4.

29 *Mouvement Burkinabé des Droits de l'Homme et des Peuples v Burkina Faso* (2001) AHRLR 51 (ACHPR 2001) para 47.

30 General Comment 5 para 14.

31 (2000) AHRLR 325 (ACHPR 1999) para 42.

32 As above.

33 *Organisation Mondiale contre la Torture* (n 22) para 30.

34 *Institute for Human Rights and Development* (n 22) paras 63–65; *Zimbabwe Lawyers for Human Rights* (n 10) paras 114–115.

must meet international human rights standards.³⁵ Furthermore, if the procedure for expulsion entails arrest, the safeguards relating to deprivation of liberty are applicable, as is the right to have the case reviewed.³⁶

Finally, article 12(5) prohibits the mass expulsion of non-nationals aimed at national, racial, ethnic or religious groups. An identical provision is to be found in article 20 of the 2018 Protocol. Therefore, expulsion based purely on nationality is forbidden.³⁷ A link thus exists between article 12(5) and article 2 of the African Charter which, as has been mentioned, enshrines the principle of non-discrimination.³⁸ The rationale for the proscription contained in article 12(5) was that 'the drafters of the Charter believed that mass expulsions presented a special threat to human rights'.³⁹ In *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, which concerned the expulsion of over 500 illegal foreign residents, the African Commission stated that, while the African Charter did not prohibit deportations as such, Zambia's right to deport people did not justify the manner in which it had done so.⁴⁰ Again, the African Commission requires that due process be observed.⁴¹

Given the fundamental role played by the principle of non-discrimination in the context of freedom of movement, some brief words on this principle appear necessary.⁴² Article 2 of the African Charter has been described as a 'non-derogable' provision that must be respected in all circumstances.⁴³ The rights guaranteed therein 'provide the foundation for the enjoyment of all human rights'.⁴⁴ Consequently, article 2 is often considered in conjunction with other provisions of the African Charter, such as article 12.⁴⁵ In substantive terms it 'guarantees that those in the same circumstances are dealt

35 *Kenneth Good* (n 10) paras 203-204.

36 *Kenneth Good* para 205; *Organisation Mondiale contre la Torture* (n 22) para 34.

37 *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10); *Organisation Mondiale contre la Torture* (n 22); *African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004).

38 On art 2, see *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10) para 21; *Organisation Mondiale contre la Torture* (n 22) para 32; *African Institute for Human Rights and Development* (n 37) para 69.

39 *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10) para 20; *Institute for Human Rights and Development* (n 22) para 68.

40 *Rencontre Africaine pour la Defense des Droits de l'Homme* (n 10) para 23. See also *African Institute for Human Rights and Development* (n 37).

41 *Institute for Human Rights and Development* (n 22) para 70.

42 See eg arts 18(1) and 45(2) of the Treaty on the Functioning of the European Union, signed 13 December 2007, entered into force 1 December 2009, OJ C 83/47, 30 March 2010; art 24 Directive 2004/38/EC, OJ L 158/77, 29 April 2004.

43 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49.

44 *Zimbabwe Human Rights NGO Forum* (n 13) para 169.

45 See n 38.

with equally in law and practice'.⁴⁶ Its essential aim is 'to ensure equality of treatment for individuals irrespective' of the specified grounds.⁴⁷ However, it 'does not stipulate a general banning of discrimination; it only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter'.⁴⁸

In relation to remedies, it is well known that individuals subject to the jurisdiction of state parties may lodge a complaint with the African Commission if he or she considers that their rights have been violated. In appropriate circumstances, including if the respondent state has accepted the right of individual petition, the case may be referred to the African Court. Until today this has not happened with any communication directly complaining of an article 12 violation. Interestingly, article 30(2) of the 2018 Protocol specifically states that nationals of contracting parties denied his or her rights may lodge a complaint with the African Commission following the exhaustion of domestic remedies. However, there is no mention of the African Court. This should not be understood as an attempt to oust its jurisdiction. On the contrary, it reflects the reality that individuals do not have direct access to the African Court as they do before the African Commission.

3 Right to freedom of movement in the context of the African Economic Community

3.1 Interaction between the freedom of movement as a fundamental human right and as an economic right to be enjoyed in a common market

The AEC Treaty adopted in 1991 constituted the first step towards creating an economically-integrated continent. The AEC was established as a regional economic integration organisation (REIO) and followed the parameters of the prototype REIO, namely, the European Economic Community (now the EU). Invariably, economic integration projects have led to substantial benefits for the respective regions, and there is nothing to suggest that this will not be the case with Africa. However, there are strings attached. Thus, REIOs expect and demand that all participating states faithfully observe

⁴⁶ *Kenneth Good* (n 10) para 218.

⁴⁷ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 63; *Zimbabwe Human Rights NGO Forum* (n 13) para 169.

⁴⁸ *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006) para 69. However, see *Malawi African Association v Mauritania* (2000) 295 AHRLR 149 (ACHPR 2000) para 131.

several fundamental freedoms. This is of paramount importance because REIOs create common markets among their membership, which must operate without obstacles, without restrictions and, very relevant to our discussion, with the absence of discrimination. One constitutive element of common markets is the free movement of people, which takes the form of the unhindered movement of economically-active persons, that is, employed and self-employed persons, entrepreneurs, investors, and so forth. To achieve this freedom, both the member state of origin and the member state where the freedom is exercised ('host country') must fulfil certain obligations, these being mandatory and not discretionary. In particular, the former must allow the persons in question to leave its territory but also to return when they so wish, while the latter must not only admit them but also permit them, without attaching any conditions, to reside and move freely in order to seek or to take up employment, to offer their services, and so forth. Moreover, host countries are obliged not to expel these persons as long as they observe the applicable domestic laws, administrative regulations, and so forth.

It follows that the right of persons to free movement, as a manifestation of a personal economic freedom exercised within and guaranteed by a REIO, has many similarities to the provisions of article 12 of the African Charter. However, the former affords a much wider and intense protection, as explained in the first part of the article. Even though article 12 is more general in scope and in application compared to the right to freedom of movement as will be applied in the African Common Market, they both demand that the states coming under their respective purview observe the fundamental principle of non-discrimination. Based on these considerations, it could be argued that in the specific context of regional economic integration the right to freedom of movement has a content analogous to article 12. However, the former, instead of being exercised and protected within the borders of a single state, as is the case under article 12, will be applied and safeguarded within the territory of the African Common Market. On the other hand, the restrictions to which article 12 is subjected (which derive from the need to protect national security, law and order, public health, and public morality) will also find application to the free movement of persons within the African Common Market. These are areas of regulation coming under the exclusive domain of the participating states and, therefore, should not be regarded as unwarranted intervention in the freedom of movement, provided, of course, that they do not deliberately obstruct its exercise.

At this point a brief reference to the EU should be made. As already mentioned, the amalgamation of the freedom of movement as both a human right and as a protected economic freedom has been expressed in article 45 of the Charter of Fundamental Freedoms. However, even in this very progressive REIO, the content of the freedom of movement has been articulated in a rather restrictive fashion. Indeed, this provision guarantees that EU citizens have the right to move and reside freely within the territory of member states and not within the entire territory of the EU itself. The latter would have been only appropriate considering that all EU member states' citizens are, at the same time, EU citizens as well.⁴⁹ Indeed, article 3(2) of TEU stipulates that the EU shall offer its citizens an area without internal frontiers, in which the free movement of persons shall be ensured.

3.2 Right to free movement of persons under the AEC Treaty; the issue of reciprocity; the principle of non-discrimination and article 12 of the African Charter

Article 4(1) of the AEC Treaty sets out the objectives of the Community. More specifically, it stipulates the formation of a common market, which will require the gradual removal among member states of obstacles relating, among others, to the free movement of persons, the right of residence and the right of establishment. As has been explained, these are considered to be fundamental rights in economic integration projects. According to the timetable for establishing the AEC, which was never followed, the creation of the African Common Market was envisaged in article 6(e) thereof as the fifth stage in the evolutionary process and this stage was meant to take place within a period not exceeding four years. One of the goals to be achieved was the full application of the principle of free movement of persons, which goes hand-in-hand with the right of residence and the right of establishment. Thus, article 43(1) thereof recorded the agreement of member states to approve at three different levels, namely, individually, bilaterally or regionally, the necessary measures, which would have ensured the materialisation of the right to free movement of persons. The adoption of the appropriate action would have allowed the nationals of member states to enjoy the associated rights of residence and establishment throughout the African

⁴⁹ Cf art 9 of the Treaty on European Union (TEU), signed 13 December 2007, entered into force 1 December 2009, OJ C 83/13, 30 March 2010, which states, among others, that '[e]very national of a Member State shall be a citizen of the Union'.

Common Market, which for all purposes and intents coincides with the territory of the individual member states.

As far as regional action is concerned, this was to be pursued through the various African regional economic communities (RECs), some of which had already adopted provisions facilitating the movement of their citizens across borders. Even though the role of the RECs is not considered in this article, suffice to note their considerable contribution for having cemented the principle of free movement of people at the sub-regional level and to mention the following six relevant instruments (in chronological order of adoption).⁵⁰ First, Protocol VII on Free Movement and Rights of Establishment of Nationals of Member States attached to the Treaty establishing the Economic Community of Central African States (ECCAS).⁵¹ Second, the Economic Community of West African States (ECOWAS) Protocol Relating to Free Movement of Persons, Residence and Establishment attached to the ECOWAS Treaty of 1975,⁵² which was revised in 1993.⁵³ Third, the Common Market for Eastern and Southern Africa (COMESA) Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence.⁵⁴ Fourth, the Southern African Development Community

50 Generally, see African Union Guidelines for implementing actors on the AU free movement protocol, 28 March 2019, AU/STC/MRIDP/4(II), <https://www.giz.de/de/downloads/2019%20AU%20Guidelines%20on%20Free%20Movement%20Protocol%20ENG.pdf> (accessed 4 May 2022).

51 Signed 18 October 1983, entered into force 18 December 1984.

52 Signed 29 May 1975, entered into force 20 June 1975, 1010 UNTS 17. At the time the Protocol, the legal basis of which was arts 2(2)(d) and 27(1) of the ECOWAS Treaty, was a very progressive instrument; compare art 27(1) conferring the status of Community citizen on member states' nationals and art 11(1) stipulating that decisions expelling any Community citizen from a member state must be notified to the citizen concerned, to the member state government of which he is a national and to the ECOWAS Secretary-General. Given that the Protocol was concluded before the adoption of the African Charter, art 11 thereof offered member states the right to exercise the so-called diplomatic protection, which can be of immense importance when there is no regional human rights system to protect persons alleging a violation of their fundamental freedoms.

53 See art 4(g) of the revised ECOWAS Treaty, signed 24 July 1993, entered into force 23 August 1995, 2373 UNTS 233, which stipulates that the recognition, promotion, and protection of human and peoples' rights in accordance with the African Charter is a fundamental ECOWAS principle. Therefore, the revised Treaty provisions relating to the free movement of persons, their residence and establishment should be applied together with art 12 of the African Charter. Finally, the Articles of Association for the establishment of an Economic Community of West Africa, adopted 4 May 1967, entered into force on the same day, 595 UNTS 287, contains no provisions on the movement of people.

54 Adopted in 2001, not yet in force. The plan that by 2025 COMESA would become a single economic area with no impediments to the movement of people appears to be unrealistic. Several benefits have been identified as resulting from the implementation of the Protocol, including advancing the cause of pan-Africanism; addressing labour market shortages in the destination countries and labour market surpluses in the countries of origin; supporting the income of individuals and households; and strengthening regional economic

(SADC) Protocol on the Facilitation of Movement of Persons, of which the Preamble expresses member states' eagerness to support and promote AU efforts encouraging free movement of persons in RECs as a 'stepping stone' towards freedom of movement in an eventual AEC.⁵⁵ Fifth, the Protocol on the Establishment of the Common Market of the East African Community (EAC).⁵⁶ Sixth, the Protocol on Free Movement of Persons in the IGAD region attached to the Agreement Establishing the Intergovernmental Authority on Development (IGAD).⁵⁷ Finally, it should be noted that three of these RECs, namely, COMESA, EAC and SADC, have moved forward to create their own free trade area.⁵⁸ While they pledged to 'facilitate the movement of business persons', they did not lay down any rock-solid provisions but only guaranteed temporary entry to business visitors and professionals.⁵⁹ Arguably, this was deliberate and reveals the difficulties associated with states' acceptance of the obligation to allow their population to exercise the unhindered right of movement and establishment in any of the 26 participating states.

To return to the AEC Treaty, under article 43(2) member states had promised to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment. Without laying down the modalities for implementing this freedom, the AEC Treaty left it to be determined at some undefined future point by concluding a protocol. One can certainly realise that, at the time, African states were not ready to commit themselves to permitting nationals of other states to take up employment freely or to offer their services or to establish undertakings in their territory. It is well known that state sovereignty is highly valued in Africa.⁶⁰ On the other hand, any economic integration project necessitates the creation of a common market, where freedom of movement is one of the constituent rights and the unhindered ability to practise it a *conditio sine qua non*. Moreover, within a common market it is

integration. See M Olivier *Free movement of persons in the common market for Eastern and Southern Africa – Trainers' manual* (2017) 75.

- 55 The Protocol of which the legal basis is arts 5(2)(d) and 10(3) of the SADC Treaty, was signed on 18 August 2005, not yet in force.
- 56 Signed 20 November 2009, entered into force 1 July 2010; under art 5(2) thereof, state parties promised to, *inter alia*, remove restrictions on the right of establishment and residence of other parties' nationals in their territory. See K Gastorn & W Masinde 'The EAC common market' in E Ugirashebuja et al (eds) *East African Community law: Institutional, substantive and comparative EU aspects* (2017) 285.
- 57 Signed 24 June 2021, not yet in force.
- 58 See Agreement Establishing a Tripartite Free Trade Area among COMESA, EAC and SADC, signed 10 June 2015, not yet in force.
- 59 Agreement (n 58) art 29 and Annex 10, Annex on Movement of Businesspersons, <https://www.eac.int/documents/category/comesa-eac-sadc-tripartite> (accessed 4 May 2022).
- 60 See W Brown 'Sovereignty matters: Africa, donors, and the aid relationship' (2013) 112 *African Affairs* 262.

imperative that all participating states apply the exact same rules and treat one another's nationals in the same way as their own citizens. To put it otherwise, the basic rule of the law of human rights, which prescribes that all rights and all freedoms must be enjoyed by all without discrimination on any ground (*in casu*, on the ground of nationality) also finds application in relation to the economic right embodying the freedom of movement.

Over the years the case for the revision of the African Charter has been made, for instance, to fully reflect its interpretation by the African Commission,⁶¹ or in light of other regional human rights conventions' practice and experience,⁶² or to expand its normative content.⁶³ Based on the above observations and comments, it will be submitted that in any future amendment the content of the African Charter's clause prohibiting discrimination should be extended to include specifically the economic rights of African peoples, as to be derived from the African Common Market. Thus, the reference to 'any status' in the wording of article 2 thereof should no longer be regarded as adequate, especially given the development of the African Common Market. For this reason it should be augmented, if not re-drafted, to encompass evolving economic rights. Two considerations should be mentioned here. The first is that a contemporarily-worded article 2 would be in line with the emerging legal system of the AU, human rights being a constituent part of it.⁶⁴ The second relates to the risks associated with attempting to amend or revise the African Charter. The late Professor Heyns warned about these risks 20 years ago:⁶⁵

Any attempt to amend the [African] Charter and Protocol [on the African Court of Human and Peoples' Rights] depends on political will. If the political will of a substantial number of states is not available, it might be better to struggle on with a flawed system and engage in *ad hoc* reform, than to have the whole system fall apart, no matter how appealing some of the pieces might be.

No doubt he was right. Often, it is better not to stir a situation even if you are aware of its problems and limitations than try to mend it and

61 See C Heyns 'The African regional human rights system: The African Charter' (2004) 108 *Dickinson Law Review* 691.

62 W Benedek 'The African Charter and Commission on Human and Peoples' Rights: How to make it more effective' (1993) 11 *Netherlands Quarterly of Human Rights* 25.

63 VO Nmehielle 'Development of the African human rights system in the last decade' (2004) 11 *Human Rights Brief* 7.

64 G Naldi 'The contribution of AU human rights agreements to an emergent AU law' in F Amao, M Olivier & K Magliveras (eds) *The emergent African Union law: Conceptualisation, delimitation, and application* (2021) 319.

65 C Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-173.

cause even bigger troubles in the process. Similar arguments can be adduced in relation to the UN human rights system.⁶⁶ Notwithstanding this argument, there would be clear advantages in overhauling the African human rights system. However, the initiative should originate from the AU and its member states, and not be superimposed by other states and/or third international organisations. Unlike 20 years ago, today the AU has an organ of which the mandate, among others, is the progressive development and codification of African treaties, namely, the African Union Commission on International Law.⁶⁷ Therefore, any future process of revising the African Charter should be elaborated within this Commission which, it will be also argued, should incorporate the dimension of the emerging African Common Market.

As explained, in the AEC the regulation of the free movement of people was left to be regulated in a future protocol. This had certain advantages (for instance, no pressure on states to agree on binding rules there and then) but also a serious disadvantage: Even if the protocol were concluded and signed, one would have to wait for it to enter into force. Consistent practice from other OAU/AU treaties and protocols shows that it could be a very long time before the required number of ratifications is attained, and by then their provisions may need revision. However, even if the 2018 Protocol were promptly to come into force,⁶⁸ unless and until all AEC states have ratified it, it would not be possible for the African Common Market to function properly, always in relation to the free movement of persons. This because, as explained, economic integration projects are not piecemeal schemes, where participating states choose in which areas or activities to participate and from which to desist. On the contrary, they operate on the strict principle of reciprocity which, in turn, is closely associated to the prohibition of discrimination *vis-à-vis* protected rights and freedoms. Thus, if member state A has ratified the 2018 Protocol, but member state B has not, the former would hardly be prepared to allow the latter's nationals to exercise the right of movement, the right of establishment, and so forth, since its own nationals could be discriminated against by member state B, given that it is not a contracting party to the Protocol and has not assumed the corresponding obligations.

66 Generally, see K Magliveras 'The case for a comprehensive global human rights treaty under UN auspices' in J Wouters et al (eds) *Can we still afford human rights? Critical reflections on universality, costs and proliferation* (2020) 47.

67 See art 4 of the Statute, EX.CL/478 (XIV) a (2009); K Magliveras & G Naldi *The African Union* (2018) 215 ff.

68 It requires 15 ratifications, which is the standard number required for AU treaties to enter into force.

In this scenario, were nationals of member state A residing in member state B to regard that it had breached article 12 of the African Charter and provided that the conditions for complaining before the African Commission or the African Court were met, one cannot be certain that these two organs would apply it in the context of the unhindered exercise of the economic right of free movement of people, as mandated under the AEC Treaty as well as under the 2018 Protocol. Article 12 certainly is associated with state sovereignty: When its fourth paragraph refers to ‘a non-national legally admitted in a territory of a state party to the present Charter’, what in essence it means are ‘foreigners who have been allowed by a state party to the African Charter to reside in its territory’. However, if this provision is projected to the African Common Market, it would not be a question of ‘non-nationals’ being admitted because the host state party has approved it. On the contrary, it would be the result because of these ‘non-nationals’ having exercised their right to move to another state party and to reside and/or to establish themselves in its territory.

4 Resurrection of the AEC and the 2018 Protocol

As argued above, African states were rather unprepared to engage in the very demanding process of creating a REIO and operationalising a continental common market, even though in the beginning they appeared to have been enthusiastic. Indeed, the AEC Treaty was signed by all (except two) OAU members on the same day (3 June 1991) and came into force in just under three years, rather promptly by OAU standards.⁶⁹ However, it is one thing to agree to establish a REIO and a completely different thing to get it operationalised. The AU’s advent in the early 2000s could have added much needed impetus,⁷⁰ but at the time the emphasis was on a modern political organisation with a strong peace and security dimension, the economic integration project being relegated to secondary status. However, in the process there was a degree of amalgamation between the AEC and the AU.⁷¹ Suffice to give the example of the Protocol on the Pan-African Parliament (PAP), of which the conclusion was

69 Presently 50 AU states are AEC members; the remaining five (Djibouti, Eritrea, Madagascar, Somalia and South Sudan) are probably prevented from joining it due to domestic politico-economic problems.

70 Compare also the Algiers Declaration of 14 July 1999 where the OAU Declaration reaffirmed its faith in the AEC, AHG/Decl1 (XXXV).

71 The exact legal relationship between the two organisations is not absolutely clear: While the AEC Treaty said that it was an integral part of the OAU, and art 33(1) of the AU Constitutive Act stipulated that the OAU/AEC will ‘devolve its assets and liabilities to the Union’, it appears that the AEC still exists as a legal entity separate from the AU.

stipulated in article 17(2) of the Constitutive Act, but in reality it was adopted as a Protocol to the AEC Treaty.⁷² This is a matter of significance for three reasons: first, because articles 7 and 14 of the AEC Treaty had already established PAP; second, because article 3(2) of the PAP Protocol stipulates that the promotion of human rights and democracy is one of its core objectives, allowing an important link to be developed between the goal of economic integration and the need to safeguard fundamental freedoms; third, because under the revised PAP Protocol, which regrettably has no chances of coming into force any time soon, it can submit or recommend draft model laws on its own to the AU Assembly for approval.⁷³ It follows that the impact of PAP on the fundamental freedoms' aspects of economic integration can potentially be high or even very high.⁷⁴

In the early 2010s the AEC was an inactive continental organisation, which continued to exist *de jure* as it was never officially abolished.⁷⁵ At a policy level, the economic integration project re-surfaced in the Solemn Declaration on the 50th Anniversary of the OAU/AU adopted in 2013, where it was agreed to speed up attaining the AEC objectives without, however, setting any specific dates.⁷⁶ The free movement of people was mentioned, but only in the context, on the one hand, of an African citizenship, a rather vague notion lacking substance, and, on the other, the gradual removal of visa requirements. The goals of the Solemn Declaration were to be articulated in the Continental Agenda 2063, which was approved the following year. In a nutshell, it (a) promised a continental union and integration under a federal/confederate United Africa; (b) guaranteed, *inter alia*, the free movement of people; and (c) created a continental free trade area.⁷⁷ As regards the latter, from the second half of the 2010s onwards, developments have been overwhelming but principally outside the context of the AEC. The principal achievement has been the conclusion of the Agreement Establishing the African Continental Free Trade Area (AfCFTA) where human rights

72 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, adopted 2 March 2001, entered into force 14 December 2003. It is instructive to recall that the Constitutive Act was adopted on 7 November 2000 and entered into force on 26 May 2001, 2158 UNTS 3.

73 See art 8(1)(b) of the Protocol to the Constitutive Act of the African Union relating to the Pan-African Parliament, adopted 27 June 2014, not yet in force.

74 Generally, see KG Adar et al (eds) *Building regionalism from below: The role of parliaments and civil society in regional integration in Africa* (2018).

75 See art 105 of the AEC Treaty on dissolution.

76 Adopted by the 21st ordinary session of the AU Assembly, Addis Ababa, Ethiopia, 25 May 2013.

77 See AU Agenda 2063, Aspiration 2 titled 'An integrated continent, politically united and based on the ideals of pan-Africanism and the vision of Africa's Renaissance'.

are recognised as important for the advancement of international trade and for economic cooperation.⁷⁸ Regarding the movement of people, article 3 of the Agreement says that among AfCFTA's objectives is the creation of a single market for goods, services, and movement of persons and the contribution to the movement of natural persons. This is a rather meaningless provision because it is stating the obvious while staying silent *vis-à-vis* the existence of a right to free movement. This is strange considering the adoption two months earlier of the 2018 Protocol, a fact seemingly ignored in the AfCFTA Agreement. As the latter came into force within 14 months of its adoption, whereas the 2018 Protocol has still not secured the necessary number of ratifications to become operative, it could be argued that, despite the AU's attempts to eliminate restrictions on Africans' ability to travel, work and reside in countries other than their own, African states are not following suit.

However, at the end of the day it may not be what African states (or leaders for that matter) want because, as stated in the 2018 Protocol's Preamble, the right of individuals to freedom of movement and residence is guaranteed by the Universal Declaration of Human Rights as well as by the African Charter. This confirms the argument made earlier, namely, that free movement in Africa has economic dimensions and that it is a fundamental freedom simultaneously applied as a right of those individuals partaking in economic integration and those who choose to exercise it. In this specific context, the strong nexus between the 2018 Protocol and the African Charter is revealed in the mutual prohibition of discrimination: Article 4(1) of the 2018 Protocol stipulates that parties are barred from discriminating against nationals of another party entering, residing or establishing themselves in their territory on the basis of any status, a prohibition deriving from article 2 of the African Charter.

Even though it took almost 35 years to adopt the 2018 Protocol, African states were still not ready to accept an accelerated materialisation of the unhindered movement of persons, opting instead for a three-phase progressive realisation, which is detailed in article 5 thereof. This should be contrasted to the far more progressive nature of the AfCFTA Agreement which, after all, promotes another economic right, that of the free movement of goods. While the 2018 Protocol lingers unratified, the AfCFTA Agreement's implementation has been swift and continental free trading officially commenced on

⁷⁸ Adopted 21 March 2018, entered into force 30 May 2019 (2019) 58 ILM 1028, Preamble para 6.

1 January 2021. For our purposes, the central provision in the 2018 Protocol is article 14, the clause regulating the free movement of workers. It stipulates that nationals of AU member states shall have the right to seek and accept employment without discrimination in any other state and that they may be accompanied by spouses and dependents when accepting and taking up employment in the host country. Article 14 contains a worrisome provision: While in other regional integration projects (for example, in the EU) the rules and procedures for effecting this right are common to all participating states, here it is made subject to the laws and policies of the host country. It follows that the 2018 Protocol does not preclude the possibility of divergent national legislations. The obvious risk is that member states may use their domestic laws to place obstacles to free movement.

Given the preference to domestic over uniform regulation, the importance to be attached to the prohibition of discrimination in exercising the right to free movement is immense. Host countries are barred not only from discriminating in favour of their own nationals and against the nationals coming from other member states, but also from discriminating among the nationals of third member states. This dual application of the principle of non-discrimination is characteristic of economic integration projects and augments the scope of article 2 of the African Charter.

5 Conclusion

Human mobility has always been a multi-faceted phenomenon and its regulation not only as a general right but also as a human right is a very important development. The protection of the freedom of movement of persons has been addressed in the African Charter coherently and in some detail. Regional realities, such as mass expulsions, have also been considered. This article has dealt especially with the economic aspects of this freedom, as manifested with the creation of the AEC. It was argued that African states have not been very forthcoming with continental economic integration, of which the free movement of people is one of its cornerstones. While there has been considerable enthusiasm for the AfCFTA, it should be remembered that (a) free trade is only one aspect of economic integration, *in casu* the African Common Market; and (b) that presently one-fourth of the AU membership does not participate in it.⁷⁹

⁷⁹ See Tralac Status of AfCFTA Ratification, 22 April 2022, <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (accessed 8 May

The affinity between human rights, fundamental freedoms and economic rights can also be manifested in the context of the right to development. The African Charter was, globally, the first human rights treaty to stipulate it in rather express terms. Indeed, as the right to development is formulated in article 22(2) thereof, African countries are under the duty to ensure that it is exercised individually or collectively. Since a tested way to achieve development is through participation in economic integration projects, it is submitted that, in order to observe the article 22(2) duty, African states should actively and consistently participate in institutional vehicles leading to continental integration, in our case the AEC. Moreover, for those African states partaking in the League of Arab States, the rights of people to freely pursue their economic development has been laid down in article 2(1) of the Arab Charter on Human Rights,⁸⁰ and for those participating in the Organisation of Islamic Cooperation (OIC) an identically-worded clause has been inserted in article 9(a) of the revised Cairo Declaration on Human Rights, which was approved in November 2020.⁸¹

After decades of inactivity, the adoption of the 2018 Protocol no doubt has rejuvenated the AEC and brought to the fore the ever-crucial question of human mobility in Africa. When the 2018 Protocol enters into force, in conjunction with article 12 of the African Charter, it will offer a protective environment to those exercising the freedom of movement. If the African Charter were amended as suggested in this article, the protection would be further reinforced. However, the AU has chosen to advance the freedom of movement of persons in a piecemeal fashion, which is regrettable. Lessons could have been learnt from the experience of the EU and a more coherent, integrated approach would no doubt have strengthened this very important freedom and its human rights ramifications. In the months to come, an extraordinary AU Assembly meeting dedicated to AfCFTA is expected.⁸² This is a unique opportunity to advance the interrelation between economic rights and fundamental human rights and freedoms as well as to adopt commitments promoting a continental freedom of movement of persons.

2022).

80 Adopted 15 September 1994, entered into force 15 March 2008.

81 OIC Council of Foreign Ministers, 47th session, Resolution 63/47-POL, https://www.oic-oci.org/upload/pages/conventions/en/CDHRI_2021_ENG.pdf (accessed 8 May 2022).

82 It was approved under Assembly, Decision on the African Continental Free Trade Area (AfCFTA), Assembly/AU/Dec. 831(XXXV), 6 February 2022.