

**AU FREE MOVEMENT PROTOCOL: A REQUIEM TO  
AFROPHOBIA & MASS EXPULSION?\***

**Abstract**

Africa has experienced several cases of Afrophobic attacks and mass African migrants' expulsion. These African-migrants attacks and expulsions have occurred despite the existence of sub regional free movement agreements. This paper seeks to examine whether the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment (AUFMP/the Protocol), presages the end of Afrophobia and mass African migrants' expulsion. If these regional agreements were unable to prevent these unsavoury occurrences, what does the Protocol offer differently that will offer basis of hopeful end to these incidents? The paper analyses relevant portions the AU Free Movement Protocol, with the aim of finding whether similar provisions existed in regions that have experienced notable Afrophobic attacks and expulsions. Drawing from the experience of these regional free movement agreements, it examines some of the problems and prospects that the Protocol faces. It concludes that whereas the Protocol is a major pillar in the African integration project, the same fundamental issues hampered regional free movement will also prevent the Protocol from exorcising Afrophobia and mass expulsion.

**Keywords:** African Union, Free Movement, Afrophobia, Mass Expulsion, Regional Integration, Regional Agreement

**1. Introduction**

Media narrative on African migration focuses on inter-continental migration, usually to Europe. Portrayals of Africans in hazardous boat migrating to Italy and Spain dominates the focus of emigration from the

continent.<sup>1</sup> These feed into the description of Africa as a poverty and crisis-ridden region, whose inhabitants are desperate to escape hardship at home. The dominant belief that African migrations to Europe arise largely from irregular migration persists, despite data that most migrants to Europe migrate legally, usually for educational purposes and family reunification<sup>2</sup>. Lessault & Beauchemin concluded that characterizing African migration as “exodus from Africa or an invasion of Europe and other destination countries” is highly misleading.<sup>3</sup> As Flahaux and Haas surmised, “the levels of extra-continental migration are still below those of migration within Africa and remain low for international standards”<sup>4</sup>. More importantly, the focus on migration of Africans to Europe, out of desperation or in search of greener pasture, fails to account for the level of intra-continental movement that takes place.

The African Union seeks to promote intra-continental free movement and migration. This objective finds firm expression in the passage of the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right

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<sup>1</sup> Efam Awo Dovi, ‘Migration: Taking Rickety Boats to Europe - Poverty and Lack of Opportunities Force African Youth to Risk All in Search of Jobs Abroad’ (2017) <<https://www.un.org/africarenewal/magazine/special-edition-youth-2017/migration-taking-rickety-boats-europe>> accessed 7 April 2023.

<sup>2</sup> B Schoumaker, and others, ‘Changing patterns of African Migration: A Comparative Analysis’ in C Beauchemin (ed), *Migration between Africa and Europe* (New York: Springer, 2018).

<sup>3</sup> David Lessault and Cris Beauchemin, ‘Neither Invasion nor Exodus: A Statistical Overview of Migration from Sub-Saharan Africa’ [2009] 25 (1) *Revue Européenne des Migrations Internationales* 163.

<sup>4</sup> ML Flahaux, H De Haas, ‘African Migration: Trends, Patterns, Drivers’, *CMS* (2016) 4 (1) <<https://doi.org/10.1186/s40878-015-0015-6>> accessed 7 April 2023.

of Establishment (AUFMP/the Protocol).<sup>5</sup> The free movement of persons under the Protocol entails that citizens of any Member State of the African Union can migrate, take up residence, and practice his/her trade in another Member State on equal footing as the nationals of that Member State. The AUFMP 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.<sup>6</sup>

However, the fact that there is little evidence of functional regional migration regimes, particularly in the Global South is evidence of the daunting challenge ahead of the AUFMP.<sup>7</sup> Furthermore, the Protocol comes against the backdrop of several cases of Afrophobic attacks and mass expulsion on the Continent.<sup>8</sup> These attacks have taken place against nationals that, in some cases, belong to the same subregional free movement regimes. If the earlier regional free movement agreements could not stop the expulsion, it becomes pertinent to wonder how the AUFMP can realistically end Afrophobic dispositions and mass expulsion by states. Thus, the question that arises is whether the Protocol constitutes a death nail on Afrophobia and mass expulsion in Africa by

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<sup>5</sup> Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment (AUFMP) 2018.

<sup>6</sup> Ibid, art 2.

<sup>7</sup> Eva Dick and Benjamin Schraven, 'Towards a Borderless Africa? Regional Organisations and Free Movement of Persons in West and North-East Africa' (2019) <<https://doi.org/10.23661/bp1.2019>> accessed 27 May 2020.

<sup>8</sup> D Addae & KP Quan-Baffour, 'Afrophobia, "Black on Black" Violence and the new Racism in South Africa: The Nexus between Adult Education and Mutual Co-existence' (2022) 8 (1) *Cogent Social Sciences* <<http://doi.org/10.1080/23311886.2022.2130458>> accessed 2 February 2023.

offering something different from the various regional free movement agreements.

This paper examines the challenges that lie on the path of implementing the Protocol. Part 2 provides a conceptual background and reviews relevant literature. Part 3 provides an overview of cases of Afrophobia and mass expulsion of Africans on the Continent. Part 4 identifies and analyses salient provisions of the AUFMP and corresponding provisions in existing subregional free movement protocols in the selected countries.

## 2. Conceptual and Theoretical Framework

Migration is the movement of people from one geographical area to another, or from one administrative region to another, or leaving their homeland permanently or temporarily for an overseas country or territory. Shinn identifies some of the push and pull factors that make immigrants adapt to their new contexts. The push factors, which are non-voluntary, are situations that force people out of their country such as poor working condition, harsh government and political policies, social instabilities and security challenges and substandard living conditions. The pull factors, which are voluntary, arise when favourable conditions in the destination countries draw people away from the departure countries and include considerations like better working conditions, high living standard, better economic conditions, guarantee of political and security stability etc.<sup>9</sup> Whatever the cause, the members of one country who moved from their country of origin to the destination country whether for temporary or permanent purpose are variously described as migrant workers, asylum seekers, aliens, displaced persons or even

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<sup>9</sup> DH Shinn, 'African Migration and Brain Drain' (Institute for African Studies and Slovenia Global Action, Ljubljana, 20 June 2008) <<http://sites.google.com/site/davidhshinn/Home/african-migration-and-the-brain-drain>> accessed 23 February 2022.

stateless persons. Nomenclature is immaterial. The end point is that such persons become foreigners in the destination country.

Migration requires reorientation and acculturation on the part of the migrants. Sonn highlighted the ability of migrants adapt to cultural boundaries and identities, as part of the process of meeting the demands and challenges of the new environment.<sup>10</sup> However, that adaptation may not be enough for them to gain acceptance in the destination country and sometimes breeds hatred, fear and other negative attitudes towards the immigrants. Xenophobia refers to hatred or dislike resulting from fear of foreigners/strangers. Etymologically, xenophobia owes its origin to two Greek words, 'xeno' and 'phobia' which themselves mean 'stranger or foreigner' and 'fear' respectively. Fourchard defined xenophobia as "the systematic construction of strangers as a threat to the society justifying their exclusion and at times suppression and often refers to discourse and practice that are discriminating towards foreign nationals."<sup>11</sup> Azindow defined it as discrimination towards foreigners or strangers".<sup>12</sup> By and large, xenophobia encompasses the obnoxious and harsh decisions and actions undertaken and executed against strangers and aliens by individuals or collectively by the nationals and government of the destination country premised on deep hatred of and displeasure for the foreigners. Some manifestations of xenophobia include prejudices, negative attitudinal orientations or behaviours against foreigners.

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<sup>10</sup> CC Sonn, 'Immigrant Adaptation: Understanding the Process Through Sense of Community' in AT Fisher, CC Sonn, & BB Bishop (eds), *Sense of Community Research, Applications and Implications* (New York: Kluwer, 2002) 2.

<sup>11</sup> Laurent Fourchard and Aurelia Segatti, 'Xenophobic Violence and the Manufacture of Difference in Africa: Introduction to the Focus Section' [2015] (9) (1) *International Journal of Computer Vision* 4.

<sup>12</sup> Azindow Y, 'Insiders and Outsiders: Citizenship and xenophobia' [2007] (50) (1) *African Studies Review* 175.

South Africa has had several cases of attacks on foreigners since independence of the country.<sup>13</sup> Consequently, two theories have been used to explicate the cause of Xenophobia in South Africa to wit: scapegoating theory and the isolation theory.<sup>14</sup> The former holds that foreigners are seen among the nationals as scapegoats that are responsible for the predicaments and hardship that exist in their country.<sup>15</sup> The latter theory is to the effect that foreigners and aliens are naturally avoided and segregated by the citizens.<sup>16</sup> The nationals exhibit their frustration through by incessant harassment and physical assaults of foreigners<sup>17</sup>, as part of a social struggle about who has the right to be cared for by the state and society and a fight for the collective balance of rights and economic resource allocation by the modern state. As a distinct form of xenophobia, Afrophobia, or anti-African sentiment, is a perceived fear and hatred of the cultures and peoples of Africa, as well as the African diaspora.

Expulsion, on the other hand, is a formal act or conduct attributable to a state by which a non-national is compelled to leave the territory of the state. Mass expulsion involves the removal of a large number of persons based on discriminatory factors such as race or country of origin. While expulsion of one or more individual may not attract much concern, it is mass expulsion that raises dust of criticisms and counter-criticism in

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<sup>13</sup> H Adam and K Moodley (eds), *Imagined Liberation: Xenophobia, Citizenship and Identity in South Africa, Germany and Canada* (2nd edn, African Sun Media 2013) 37.

<sup>14</sup> Josephine Azuka Onyido, 'Impacts of Xenophobia Attack on Nigerian Students in South Africa' [2018] 6 (8) *British Journal of Education* 72.

<sup>15</sup> *Ibid* 76.

<sup>16</sup> *Ibid*.

<sup>17</sup> M Buthelezi, 'An Investigation of the Experiences and Meaning of Xenophobia at the University of Zululand by International Students' (PhD Thesis, University of Zululand 2009).

international law and indeed, is condemned especially where the destination country does not comply with the law on expulsion. In most cases, the relationship between xenophobia and mass expulsion is that the latter is one of the manifestations of the former. It is when there is fear and deep dislike that the destination country embarks on the mission of expelling aliens and strangers in the country. To express the concepts in the cause-and-effect index; it can be said that xenophobia is the cause of mass expulsion while mass expulsion is the effect or result of xenophobia.

Several studies have attributed the failure of Africa's subregional free movement agreements to achieve their objectives, and prevent Afrophobic attacks and mass expulsion to political factors. Maluwa regards the lethargic progress in implementing African Union treaties and Protocols as well as other regional free movement agreements as proof of lack of hearty commitment by Member States.<sup>18</sup> Drawing from the experience of countries in Southern Africa, Chingogo and Nakana concluded that the hesitance of African States in ratifying free movement agreements is a sign of lack of political will to fully implement their free movement obligations under the subregional agreements.<sup>19</sup> Furthermore, Okunade and Ogunnubi regard the insistence of Member States in their sovereignty as a hindrance to regional integration and free movement. Since integration and free movement cannot be achieved without relinquishment of sovereignty, the stance of these countries will continue

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<sup>18</sup>Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' [2009] 3 (10) *African Journal of Political Science and International Relations* 396.

<sup>19</sup>Mark Chingono and Steve Nakana, 'The Challenges of Regional Integration in Southern Africa' [2009] 3 (10) *African Journal of Political Science and International Relations* 399.

to undermine any commitment they make.<sup>20</sup> In addition, Okumu observed that ideological divergence has resulted in a situation whereby the Member States have not heartily followed up with implementation of other regional free movement protocols. As a result of the ideological differences, these nations lack shared vision on creating seamless borders, and real progress will not be made without genuine alignment of visions policies and immigration standards of Member States.<sup>21</sup>

Migration is driven by push and pull factors and tend to flow to countries with stronger economic capacity. Internal conflicts arising from bad governance, terrorism and political instability will exacerbate the push factors.<sup>22</sup> As in all regional blocs, the levels of development among the Member States vary.<sup>23</sup> Thus, the more prosperous nations in regional blocs will be the preferred destination of citizens from the poorer states. The fact that a significant number of several African countries are mired in poverty and underdevelopment, with very little to inspire hope in their populace, means that a significant percentage of their population are eager to leave their countries.<sup>24</sup> Other studies highlight economic

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<sup>20</sup> Samuel Kehinde Okunade and Olusola Ogunnubi, 'The African Union Protocol on Free Movement: A Panacea to End Border Porosity?' [2019] 8 (1) *Journal of African Union Studies* 86.

<sup>21</sup> W Okumu, 'The African Union: 'Pitfalls and Prospects for Uniting Africa' [2009] 62 (2) *Journal of International Affairs* 93.

<sup>22</sup> For a list of conflicts in Africa, see 'List of conflicts in Africa' (Wikipedia) <[https://en.wikipedia.org/wiki/List\\_of\\_conflicts\\_in\\_Africa](https://en.wikipedia.org/wiki/List_of_conflicts_in_Africa)> accessed 27 May 2020.

<sup>23</sup> For the economic overview of African economies, see African Development Bank, 'African Economic Outlook' (2018), <[https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African Economic Outlook\\_2018\\_-\\_EN.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/African_Economic_Outlook_2018_-_EN.pdf)> accessed 27 May 2020.

<sup>24</sup> In Africa, there are 33 countries that are classified as least developed countries. See United Nations Conference on Trade and Development, 'UN List of Least Developed Countries' (October 2022)



considerations. Chingogo and Nakana contend that implementing free movement will be difficult without the achievement of economic union.<sup>25</sup> 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’.<sup>26</sup> Yet, many of the countries cannot economically afford such social infrastructure.

Also, Fioramonti identified paucity of immigration data and knowledge gap as a major constraint in African policymakers’ free movement implementation efforts.<sup>27</sup> Most regional free movement agreements focus on migration through official entry and exit points while vast number of the migration that takes place in several parts of the continent is informal and do not take place through official channels.<sup>28</sup> Hence, Solomon identified the inability of members states in Southern Africa to effectively guard their national borders, as the Achilles Heel of the region’s integration and free movement project.<sup>29</sup> Without strong and effective border control, Member states will be deprived invaluable immigration data for planning purposes.

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<https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> accessed 27 February 2023.

<sup>25</sup> Azuka (n 14) 76.

<sup>26</sup> Bob Deacon and Sonia Nita, ‘Regional Social Integration and Free Movement across Borders’ [2013] 3 (1) *Regions & Cohesion* 32.

<sup>27</sup> Lorenzo 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.

<sup>28</sup> D Gary-Toukara, ‘A Reappraisal of the Expulsion of Illegal Immigrants from Nigeria in 1983’ [2015] 9 (1) *International Journal of Conflict and Violence* 25.

<sup>29</sup> Hussein Solomon, ‘Towards the Free Movement of People in Southern Africa?’ (1997) Institute for Security Studies Occasional Paper 18 <[http://www.africaportal.org/documents/4555/paper\\_18.pdf](http://www.africaportal.org/documents/4555/paper_18.pdf)> accessed 27 February 2023.

Additionally, a lot of the fears and negative attitude that people have about immigrants stem from propaganda and misinformation. Gordon's study in South Africa observed that despite little empirical evidence that immigrants are responsible for crime and unemployment, a substantial portion of south African population hold anti-immigrant views and blame foreign nationals for many of the socio-economic challenges facing South African society.<sup>30</sup> Given that public have a great role to play in accommodating and promoting cross-border movement, the importance of practical and effective promotion of the benefits of free movement cannot be overemphasized. South African study observed that xenophobia numbs the hearts and mind of citizens to xenophobic attacks.<sup>31</sup> Thus, beyond the signing of regional free movement agreement, Member States must provide their citizens with persuasive benefits of free movement of labour, goods and services. To this end, WAOM sees a vital role for non-governmental bodies and civil society groups in facilitating enlightenment as well as monitoring and advancing free movement agreement implementation through promoting research, policies and national dialogues.<sup>32</sup>

The importance of supranational institutional capacity that drives and coordinates regional integration cannot be overemphasized. Dick and

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<sup>30</sup> Steven Gordon, 'What Research Reveals about Drivers of Anti-immigrant Hate Crime in South Africa' (The Conversation) <<http://theconversation.com/what-research-reveals-about-drivers-of-anti-immigrant-hate-crime-in-south-africa-123097>> accessed 27 February 2023.

<sup>31</sup> R Mattes and others, 'Still Waiting for the Barbarians: SA Attitudes to Immigrants and Immigration' (1999) <[https://www.researchgate.net/publication/247649346\\_Still\\_waiting\\_for\\_the\\_Barbarians\\_SA\\_Attitudes\\_to\\_Immigrants\\_and\\_Immigration](https://www.researchgate.net/publication/247649346_Still_waiting_for_the_Barbarians_SA_Attitudes_to_Immigrants_and_Immigration)> accessed 28 January 2022.

<sup>32</sup> The West African Observatory on Migrations coordinates a civil society campaign that is working to promote free movement within Africa. See West African Observatory on Migrations, 'Free Movement for Development' <<http://www.obsmigration.org/en/about-us/>> accessed 4 May 2020.

Schraven consider the existence of relatively strong institutional capacity at the Economic Community of West African States (ECOWAS), as a factor in the relatively greater level of integration experienced in the subregion.<sup>33</sup> Such supranational bodies are essential for formulating and harmonizing comprehensive policies on immigration.

### **3. History of Afrophobia and Mass Expulsion in Africa**

Afrophobia and mass expulsion of Africans has occurred in several African countries. At its height in the 1960s, Ghana's booming economy attracted an influx of migrants. In response to pressure by Ghanaians, the government enacted indigenization policy and laws, especially the 'Aliens Compliance Order' of 18 November 1969.<sup>34</sup> The proclaimed aim of the Order was to restore the Ghanaian economy, purify the country and curbing lawlessness and crime. Its implementation led to the expulsion of 900,000 to 1,200,000 people, mostly Africans from Nigeria, Burkina, Togo, and Cote d'Ivoire.<sup>35</sup> In the same vein, Nigeria's buoyant economy and status as the 'Giant of Africa' attracted foreigners from within and outside the African continent. As a result of economic problems and political considerations, African immigrants were ordered to leave the country by 31st January 1983. Following the order, an

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<sup>33</sup> Dick and Schraven (n 7). The authors 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 organisation, IGAD lacks the overarching decision-making authority on (migration) policy matters in member states and can only make non-binding recommendations'.

<sup>34</sup> Adjei Adjepong, 'The Origins, Implementation and Effects of Ghana's 1969 Aliens Compliance Order' (M.Phil thesis, University of Cape Coast 2009).

<sup>35</sup> Ibid.

estimated three million foreigners, mostly West Africans, were expelled from Nigeria in January 1983.<sup>36</sup>

Another round of expulsion saw the denial of residence rights to 300 000 Ghanaians in 1985, allegedly, in retaliation for the mass expulsion of Nigerians by Ghana earlier.<sup>37</sup> Furthermore, as the seat of the French colonial government, Cote D'Ivoire had a high population of foreigners. In 1990, the government initiated the *Ivoirite policy*, which sought to promote Ivorian identity and give nationals privileged treatments and preferences over foreigners. This soured relationship between nationals and foreigners and increased resentment and tension in the country, especially between nationals and Burkinabes (foreigners from Burkina Faso). In 1999, 8000 to 12000 Burkinabes were expelled from Cote d'Ivoire following the persisted clash caused by the *Ivoirite* policy.<sup>38</sup> These mass expulsions, particularly the Nigerian and Cote d'Ivoire cases, happened despite the existence of the West African 1979 Protocol relating to Free Movement of Persons, Residence and Establishment (ECOWAS Free Movement Protocol). ECOWAS Free Movement Protocol recognizes the right of Community citizens to enter, reside and establish in territory of member states.<sup>39</sup>

In Central Africa, Afrophobic attack and mass expulsion in Equatorial Guinea was first recorded in 2004 following the attempted coup d'état against President Mbasogo, which was allegedly spearheaded by

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<sup>36</sup> Olajide Aluko, 'The Expulsion of Illegal Aliens from Nigeria: A Study in Nigeria's Decision-Making' [1985] 84 (337) *African Affairs* 539.

<sup>37</sup> Samuel Fury Childs Daly, 'Ghana Must Go: Nativism and the Politics of Expulsion in West Africa, 1969–1985' [2022] 259 (1) *Past & Present* 229.

<sup>38</sup> DA Daniel & DU Enweremadu, 'Identity Politics, Citizenship and the 2010 Post-Election Conflict in Côte d'Ivoire' (2020) 10 (2) *Open Journal of Political Science* <10.4236/ojps.2020.102015> accessed 27 February 2023.

<sup>39</sup> ECOWAS Protocol Relating to Free Movement of Persons, Residence and Establishment (ECOWAS FMP) 1979, art 2 (1).

foreigners. Although the coup failed, the views expressed by many was that the foreigners masterminded it and this embittered Equatorian minds against foreigners leading to intimidation, detention and expulsion of foreigners. The allegation and suspicion was said to have been instituted by the government of Equatorial Guinea when it warned its citizens against foreigners. UN report placed the total number expulsion of foreigners from 2004 incidence to 2009 at 1000.<sup>40</sup> In Gabon, personal clash between the presidents of the Gabon and Benin in the 1970s led to the expulsion of about 9000 Beninese residents in Gabon the same year. In the wake of economic hardship in 1990 in Gabon, series of Afrophobic campaigns reached its peak in 1995 when the government tightened enforcement resident permit requirements and by the middle of February of the same year, about 55,000 Africans were expelled from the country.<sup>41</sup> These incidents occurred in spite of the existence and adoption of the Economic Community of Central African States Protocol on Freedom of Movement and Rights of Establishment of Nationals of Members States in 1983.

Afrophobia in the 21<sup>st</sup> century has been most pronounced in South Africa. Awosu and Fatinyobi observe that South Africa is today described as the hub xenophobic attacks in Africa, worsened by the fact that it degenerated into killings and humiliations against the foreigners, mostly fellow Africans.<sup>42</sup> Between 1996 to 2017, it was estimated that about 200 persons were killed because of Afrophobic attack in South Africa, in addition to the countless number of people from Southern Africa that fled the attacks.<sup>43</sup> These attacks happened despite the existence of the 1998

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<sup>40</sup> UN *International Migration Report 2011* (New York: UN, 2011).

<sup>41</sup> *Ibid.*

<sup>42</sup> OE Awosu and FO Fatoyinbo, 'Xenophobic Prejudice in Africa: Cultural Diplomacy as a Panacea to the Deteriorating Inter-African Relations' [2019] (40) (1) *International Journal of Research Publications* 1.

<sup>43</sup> Onyido (n 14).

Draft Protocol on the Free Movement of Persons in the Southern African Development Community (SADC), which was replaced by the Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community in 1997.<sup>44</sup> The 1997 Protocol was further replaced by the SADC Protocol on Facilitation of the Movement of Persons of 2005.

#### **4. A Critical Review of the Protocol to the Treaty Establishing the African Economic Community Relating to the Free Movement of Persons, Right of Residence and Right of Establishment**

The idea of African continent-wide free movement dates to the Lagos Plan of Action for Economic Development of Africa 1980-2000, which envisaged an African common market.<sup>45</sup> Although connected by land, movement of goods and persons across established national borders in Africa can be an ordeal, impeded by stringent migration policies in Member States, strict visa regulations, and unwelcoming and out-rightly debilitating border experiences.<sup>46</sup> 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.<sup>47</sup> The transformation of Organization of African Unity (OAU) to African Union (AU) in 1999 was meant to breakdown some of these barriers and signal

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<sup>44</sup> Solomon (n 29).

<sup>45</sup>The Lagos Plan of Action (officially the Lagos Plan of Action for the Economic Development of Africa, 1980–2000) was an Organisation of African Unity-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; Organization of African Unity, *Lagos Plan of Action for the Economic Development of Africa 1980-2000* (IILS 1982).

<sup>46</sup>‘Study on the Benefits and Challenges of Free Movement of Persons in Africa’ (AU, 27 July 2018) <<https://au.int/en/documents/20180726/study-benefits-and-challenges-free-movement-persons-africa-study-commissioned-auc>> accessed 24 May 2020.

<sup>47</sup>Ibid.

intent to unite African States into a union similar to the European Union.<sup>48</sup> The African Economic Community (AEC), founded in 1991 as part of the Abuja Treaty, considers the liberalisation of mobility an essential part of and prerequisite for complying with the Treaty.<sup>49</sup> The AU's Agenda 2063, which sets out the vision for Africa's integration, views free movement as a key programme in the vision of 'accelerating Africa's economic growth, trade and development as well as promoting our common identity by celebrating our history and our vibrant culture'.<sup>50</sup> Free movement is also central to the realization of the African Continental Free Trade Area (AfCFTA)<sup>51</sup> because free trade will be hampered without free movement. AfCFTA is a culmination of efforts at

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<sup>48</sup>Abdulrahman Adamu & Abraham M. 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.

<sup>49</sup>The African Economic Community (AEC) is an organization of African Union states establishing grounds for mutual economic development among most African states. The stated goals of the organization 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; AU Treaty Establishing the African Economic Community.

<sup>50</sup> Agenda 2063 was launched at 50th Anniversary Solemn Declaration during the Golden Jubilee celebrations of the formation of the OAU /AU in May 2013. The Declaration marked the re-dedication of Africa 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 and Agenda 2063 is the concrete manifestation of how the continent intends to achieve this vision within a 50 year period from 2013 to 2063; 'Flagship Projects of Agenda 2063' (African Union) <<https://au.int/en/agenda2063/flagship-projects>> accessed 23 May 2020.

<sup>51</sup>The African Continental Free Trade Area (AfCFTA) is a free trade area which as of 2018 includes 28 countries. It was created by the African Continental Free Trade Agreement among 54 of the 55 African Union nations. The free-trade area is the largest in the world in terms of the number of participating countries since the formation of the World Trade Organization; OAU Treaty Establishing the African Economic Community 1991.

the regional and AU level. The agreement generally covers trade in goods, trade in services, investment, intellectual property and competition policy.<sup>52</sup> It is this age-long aspiration, expressed in several Conventions and Protocols that culminated in the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (AUFMP).<sup>53</sup>

Although the primary driver of free movement in the continent is economic, its full realization will entail a measure of social and cultural integration, which cannot co-exist with Afrophobia and mass expulsion. It must be anchored on shared values of the parties to promote the protection of human and people's 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.<sup>54</sup> The AUFMP is also a restatement of the commitment of the Parties to Pan Africanism and African integration, with a common vision of creating an integrated, people-oriented and politically united continent, committed to free movement of people, goods and services among Member States.<sup>55</sup> Furthermore, the Protocol builds on the commitment of the Parties to gradually remove obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment among Member States.<sup>56</sup>

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<sup>52</sup>Collins C Ajibo, 'African Continental Free Trade Area Agreement: The Euphoria, Pitfalls and Prospects' [2019] 53 (5) *Journal of World Trade* 871.

<sup>53</sup>AUFMP 2018.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid. This goal is also in line with Aspiration 2 of the African Union Agenda 2063 which aims to create 'An integrated continent; politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance'.

<sup>56</sup>Ibid. This aim is predicated in the commitment of the Parties under Article 4 (2) (1) of the Treaty Establishing the African Economic Community 1991.



It is also a prelude to instituting the African citizenship.<sup>57</sup> It is essential to ensure that effective measures are put in place in order to prevent situations whereby upholding the freedom of movement of people will not lead to situations whereby the arrival and settlement of migrants in a given host country will create or exacerbate inequalities or will constitute challenges to peace and security. Noting that there is real and potential security and economic challenges that may arise from implementing the Protocol on free movement, the African Union Council acknowledged that the benefits of the free movement outweigh the challenges perceived or generated.<sup>58</sup>

African Union has recognised and acknowledged regional economic communities (RECs), as pillars for continental integration and development.<sup>59</sup> The AUFMP defines regional arrangement as ‘agreements, measures or mechanisms on free movement of persons developed and implemented by regional economic communities’.<sup>60</sup> This is based on pragmatic considerations. Firstly, these RECs have established a history of cooperation that the continental vision can build on. Secondly, the RECs have few negotiation partners, which should promote easier decision making. Furthermore, the RECs have their own protocols on free movement of persons, goods, and services; which are at different levels of implementation. Whereas the West African Sub-region has abolished visa and entry permits issuance requirement within the sub-region; the East African Community is still in consultations on how to introduce a region-wide agreement similar to the West African

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<sup>57</sup>Ibid. The Solemn Declaration of the 50<sup>th</sup> Anniversary of the Union adopted this by the 21<sup>st</sup> Ordinary Session of the Assembly of Heads of State and Government in Addis Ababa on 23 May, 2013.

<sup>58</sup>AUFMP 2018.

<sup>59</sup>Ibid art 28.

<sup>60</sup>Ibid art 1.

sub region.<sup>61</sup> This section will identify key provisions of the AUFMP and contrast them with provisions of the regional free movement agreements of the regions mentioned earlier – West Africa and Southern Africa.

The Protocol stipulates a few guiding principles which cover a broad area most pertinent to the issue of freedom of movement. They include sovereign equality and interdependence among Member States of the Union;<sup>62</sup> respect of borders existing on achievement of independence;<sup>63</sup> respect for democratic principles, human rights, the rule of law and good governance;<sup>64</sup> promotion of social justice to ensure balanced economic development;<sup>65</sup> respect for the sanctity of life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities.<sup>66</sup>

The AUFMP also provides that States Parties shall not discriminate against nationals of another Member State from entering, residing 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.<sup>67</sup> It demands that such citizen of another States Party shall enjoy the protection of the law of the host States Party, in accordance with the

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<sup>61</sup>Samuel Kehinde Okunade and Olusola Ogunnubi, ‘The African Union Protocol on Free Movement: A Panacea to End Border Porosity?’ [2019] 8 (1) *Journal of African Union Studies* 84.

<sup>62</sup>AUFMP (2018), art 4(a).

<sup>63</sup>Ibid art 4(b).

<sup>64</sup>Ibid art 4(m).

<sup>65</sup>Ibid art 4(n).

<sup>66</sup>Ibid art 4 (o).

<sup>67</sup>Ibid art 4(1).

relevant national policies and laws of the host States Party.<sup>68</sup> They are antithetical to Afrophobia and mass expulsion but do not find corresponding or similar provisions in the RECs. These principles, therefore, represent positive ideological underpinning for the AUFMP.

The AUFMP envisages a citizen of another States Party, who enters through designated points or official points of entry and with recognised and valid travel document. Since the focus is on entry through designated ports or official entry areas, they will exclude illegal and undocumented immigrant from enjoying the protection offered under the AUFMP. Similarly, Article 2 of the ECOWAS Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment provides for right of entry, residence and establishment of Community Citizens in the territory of Member States.<sup>69</sup> Also, Article 14 of the SADC Protocol on the Facilitation of Movement of Persons recognize the right of entry of citizens of Member States with valid travel documents through designated border areas.<sup>70</sup> 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 such other conditions as are not inconsistent with the Protocol<sup>71</sup> and the ECOWAS and SADC agreements.

Whereas the AUFMP and agreements focus on legal migration, it requires State Parties to also establish specific procedures for 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

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<sup>68</sup>Ibid art 4(3).

<sup>69</sup>ECOWAS FMP 1979.

<sup>70</sup>SADC Protocol on the Facilitation of Movement of Persons (SADC FMP) 2005.

<sup>71</sup>AUFMP 2018 art 7(1)(c) & (2).

the protection of each group. It also makes an exception for resident of border communities, by requiring State Parties to identify and facilitate their free movement through bilateral and regional agreements without compromising the security or public health of host Member States.<sup>72</sup> Vulnerable groups and residents of border areas are the commonest means by which undocumented immigrants enter states. By recognizing their rights, the AUFMP would appear to afford and recognize the rights of these undocumented residents. SADC reaffirms the rights of refugees in line with international agreements and envisages a Memorandum of Understanding between the Parties that covers the mode of management of refugees by the State Parties. ECOWAS agreement has no similar provision on the right of vulnerable groups and residents of border communities to free movement. Yet, these vulnerable groups have the capacity of overwhelming the services of host states and generate hostility towards migrants.

The right of free entry and employment is regulated by national laws, by which State Parties shall issue residence permits, work permits or other appropriate permits or passes to national of other Member States seeking and taking up residence or work in the host Member State.<sup>73</sup> In order to guarantee the transparency and non-discrimination of these national law and procedures, the foreign national shall have the right to appeal against a decision denying them a permit or pass.<sup>74</sup> Whereas this represents an admirable safety and confidence building measure, it practical benefit may be undermined by political interference.

The objective of the AUFMP is intended to be realized progressively through the following phases: Phase one calls for implementation of the

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<sup>72</sup>Ibid art 12 (1).

<sup>73</sup>ECOWAS FMP 1979 art 2; SADC FMP art 3.

<sup>74</sup>AUFMP 2018 art 15.

right of entry and abolition of visa requirements;<sup>75</sup> Phase two, during which States Parties shall implement the right of residence;<sup>76</sup> and Phase three, during which States Parties shall implement the right of establishment.<sup>77</sup> This accommodates the various levels of progress in free movement that different countries and sub-regions have made with regards to free movement. Article 4 & 5 of the SADC agreement also envisages a phased implementation programme that accommodates disparities and imbalances in levels of Member States' economic development. In the same vein, ECOWAS agreement provides a three phase.

On what grounds can the nationals of a Member State be removed from the State of Residence? The AUFMP outrightly prohibits mass expulsion of non-nationals.<sup>78</sup> It defines mass expulsion as that which is aimed at national, racial, ethnic or religious groups.<sup>79</sup> The 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 such a decision is taken in accordance with the law in force in the host Member State.<sup>80</sup> In order to promote the transparency of the process of expulsion, deportation or repatriation; the host State Party shall notify the national of a Member State and the Government of that national of the decision to expel, deport or repatriate that citizen from the territory of the host Member State.<sup>81</sup> The SADC agreement protects immigrants against indiscriminate expulsion except

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<sup>75</sup>Ibid art 5(1)(a).

<sup>76</sup>Ibid art 5(1)(b).

<sup>77</sup>Ibid art 5(1)(c).

<sup>78</sup>Ibid art 20(1).

<sup>79</sup>Ibid art 20(2).

<sup>80</sup>Ibid art 21(1).

<sup>81</sup>Ibid art 21(2).

on grounds of national security, public health and other grounds allowed by the agreement.<sup>82</sup> The regional agreements do not address this directly.

Having recognized the right of residence and establishment, host Member State shall not nationalize, expropriate, confiscate or acquire property belonging to an immigrant national, except in accordance with the law and after fair compensation being paid to that national.<sup>83</sup> The expulsion, deportation or repatriation of a host Member State shall not deprive a national of another Member State of his/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.<sup>84</sup> Such lawfully acquired assets shall be protected by the host Member State in the event of a dispute between the national's home Member State and host Member State.<sup>85</sup>

Differences of opinion are bound to arise with respect to state actions towards foreign nationals. Any dispute that may arise among Member States regarding the interpretation or application of the AUFMP shall be amicably settled by mutual consent through negotiation, mediation, conciliation or any other peaceful means or binding arbitration or decision of the African Court of Justice.<sup>86</sup> Also, a foreign national, having exhausted all legal remedies in the host Member State without redress, may refer a matter to the African Commission on Human and People Rights.<sup>87</sup> Article 7 of ECOWAS agreement enjoins the parties to settle any dispute arising between State Parties through mutual consent through peaceful means including negotiations, mediations, and conciliation.

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<sup>82</sup>SADC FMP 2005 art 22-25.

<sup>83</sup>AUFMP 2018 art 22(2).

<sup>84</sup>Ibid art 22(4).

<sup>85</sup>Ibid art 22(3).

<sup>86</sup> Ibid art 31.

<sup>87</sup> Ibid art 30(2).

SADC requires negotiated settlement and referral to the Tribunal, whose decision shall be final and binding.

## **5. Prospects and Way Forward**

The idea of a united Africa has always loomed large and formed the *raison-detrê* for the formation of Organisation of African Unity (now AU). The challenges on the path of this initiative have disheartened many and prevented vigorous efforts at pursuing the vision. It is in this context that the formulation and signing of the AUFMP represents a major step forward, coming 55 years after the founding of the OAU/AU. The FMP offers a great opportunity to accelerate the process of integrating African peoples and States. It is a veritable instrument in the African Unity vision. Such unilateral actions that occurred in the past are not reconcilable with the objective of the AU Free Movement and the commitment of African countries to their subregional free movement agreements.

The Protocol focuses on migration through official entry and exit points. Yet, most of the intra-African migration have been driven by economic and existential challenges. With the growth of insecurity in several African states; climate change and the likelihood growth in the number of environmental refugees in the continent, it is likely that countries with perceived economic prospects will see an increase in undocumented migrants from neighbouring African states. Unless the incentives for using these unofficial channels are addressed, migrants will not use the designated exit and entry points. It also raises the question of the capacity of the African States to improve and ensure effective border control and to regularise migration. The provision of the AUFMP for vulnerable groups and residents of border communities does not provide sufficient mechanisms for controlling the inflow of these undocumented immigrants. If this form of migration is not checked, it poses the risk of exacerbating resentment of foreigners in Member States. The dispute resolution mechanisms set up under AU may not robust enough to engage

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State Members and/or deter unilateral state actions against African immigrants.

But the economic and other benefits of actualizing this project far outweigh the cost of implementing and enforcing the AUFMP. It is therefore desirable that the States and peoples will mobilize the resources needed to realize the ideals of this Protocol. Furthermore, considerable attention should be devoted that the regional and subregional levels, to harmonize migration laws and standards. Also, there is paucity of reliable data on population figures and migration from a lot of the states, which makes it effective research and policy making difficult. Should these unilateral state actions that contravene the Protocol arise, it is expected that the AU will do better than the muted trumpets that subregional organizations have blown in similar circumstances. There is also the nutty issue of harmonization of immigration, economic and social policy which is currently 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 much progress will not be made in this area without effective coordinated efforts. Also, it is important to address the issue of economic imbalances, to ensure that the more prosperous States are likely to be overwhelmed by immigration from other states. This explains the fact that the continental powers like - Nigeria, South Africa, and Egypt - have not signed the AUFMP and have militated against the progress of regional free movement agreements.

The role of the AU Commission, as a rule setting and enforcing entity needs to be strengthened in the mould of the European Commission. The Secretariat and various commissions therein should be empowered to act more decisively. This will also complement inter-governmental committees that will monitor countries' progress in the implementation of AUFMP. The coordinated assistance will ensure that the efforts made



at the regional and continental levels are consistent and conform to the same guideline.

The dispute settlement mechanism provided under the AUFMP is an improvement on the processes existing under other regional agreements. By giving foreign nationals access to the ACHPR, it provides an avenue for getting relief, where national processes do not afford adequate remedies. The fact that states can also approach the ACJ provides another valuable layer for avoiding retaliatory state actions as was the case in the Ghana and Nigeria cases.

## **6. Conclusion**

Resentment of immigrants by nationals of host states has long been a feature of human existence. In some cases, this resentment snowballs into outright attacks on these immigrants. Unilateral government actions, taken out of political and economic expediency, usually results in denial of the rights of these immigrants. This paper has shown that despite the existence of subregional free movement agreements, African countries have expelled or attacked immigrants from contracting parties. In most cases, these attacks have arisen in times of economic and political instability. In those instances, the institutions of the subregion were not able to uphold the tenets of their free movement agreements and protect the rights of the migrant Africans. The AUFMP represents an improvement over existing African subregional free movement agreements. The principles provide sound framework on which State Parties can build shared vision around. However, the domestic factors that prevented subregional free trade agreements from preventing Afrophobia and mass expulsion will most likely, undermine the effectiveness of AUFMP.