



POLICY BRIEF ON A RIGHTS BASED APPROACH TO
FREEDOM OF MOVEMENT
AND NATIONAL SECURITY IN KENYA



1. Introduction

Freedom of movement of people refers to the ability to enter a foreign country without a visa, the right to live and work in that country, and the right to establish and to set up a business there without discrimination.¹ There are benefits to freedom of movement of people, and it can be a potential aid to development as various studies have shown. Irrespective of the African Union's encouraging position on freedom of movement of people across the continent, and its commitment evidenced by its launch of the AU passport, many African countries persist in subjecting foreigners who are African, to severe restrictions to entry into their territories. It is not uncommon for Europeans and Americans to be granted visas upon entry and African colleagues travelling with them to be denied entry.² Africans face many challenges in not only entry, but also with the possibility of residence and working in other African countries.

Regional organisations such as COMESA and the EAC have in place treaties that move us closer towards seamless borders as a way to enhance economic development. According to these legal documents on visas and free movement, citizens of the countries in COMESA should be able to move freely between the 19 countries and also live and work without undue restraint.

Just as removing barriers to the free movement of goods enhances trade and economic integration, removing barriers to the free movement of people enhances deeper levels of socio-economic cohesion and integration amongst nations and regions.³

In Kenya, freedom of movement and residence is one of the fundamental rights recognised in the Constitution. However, while the right to leave Kenya is extended to all, the right to enter, remain in and reside anywhere in Kenya is restricted to Kenyan citizens only. In this regard, the right to freedom of movement apart from the right to leave Kenya remains a privilege in Kenya for non-citizens for now. This situation may change should Kenya decide to ratify and then fully implement the provisions of the COMESA free movement protocol.⁴

2. Rights-based approach to free movement

Free movement of people is not a new phenomenon, but it has increased exponentially in the recent past driven by modern technologies of communication and transportation, which has made it easier for people to travel to and explore living in other countries. The fact that free movement is bound to increase, requires that appropriate regulatory frameworks be put in place both at the international, but most importantly at the domestic level, to protect those who are moving. Movements of African peoples takes different forms including forcibly, legally, irregularly, for labour reasons, smuggling and human trafficking, as well as intra-state, inter-state, inter-regional and intercontinental movement. There is an inordinate number of moving Africans who are subjected to egregious human rights violations and fail to find protection or recourse to justice. This policy brief looks at free movement as a right in and of itself as well as the rights that ensue to Africans who are and/or would like to move across the region and continent.

¹ See; Mandla Lionel Isaacs (26 August 2016) Free movement in Africa is desirable, but how to realize it?, Africa Development Bank Blog, <https://www.afdb.org/en/blogs/integrating-africa/post/free-movement-in-africa-is-desirable-but-how-to-realize-it-16033/> (last accessed 20 January 2017)

² Omanga (2015) Restrictive visa requirements make a big mockery of Africa's stated bid for unity, Daily Nation, <http://www.nation.co.ke/oped/Opinion/Restrictive-visa-rules-make-a-big-mockery-of-Africa/440808-3005234-yk5rqbz/index.html> (Visited 14 November 2016)

³ CCPAU (2013) Continental Report: Freedom of Movement of People Study

⁴ COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, 1998 (COMESA Free Movement Protocol)

All African countries, States Parties to the African Charter on Human and Peoples' Rights, should adhere to their commitments under the Charter and guarantee the protection of Africans of other nationalities living or travelling within their territories, especially against actions triggered by deep-seated discrimination and xenophobia. Countries are obliged to take all measures to stem the vulnerabilities and dangers of migration, at origin, transit and destination, as well as upon return. Countries should also provide comprehensive gender-sensitive and rights-based policies to regulate migration, and ensure the education of and awareness-raising amongst their citizens.

However, there is a lacuna in this regard as African peoples' needs are rarely at the centre of policies and legislation and they are excluded from participation in decision-making. Instead state-centric concerns like security dominate the human movement discourse. Stronger national and regional legislation coupled with international co-operation aimed at protecting migrants rather than criminalising them, as well as the enhancement of legal and organised migration will stem the vulnerabilities faced particularly by women and youth. Different types of Africans are moving for different reasons and with differing levels of resources, education, and abilities. When borders are closed, it pushes them, particularly young people to the vagaries of irregular migration. Some of the main challenges faced by Africans on the move, whether regularly or irregularly, include lack of basic services like education and healthcare; lack of social protection including insurance and pensions; lack of access to justice, including lack of legal representation and ability and/or opportunity to challenge and appeal deportation orders and processes; and lack of access to consular services, especially in instances of lost or confiscated identity documents. Most recently, we have seen gory images of Africans in Libya subjected to slavery, but we have little indication of the extent of harm that is done to Africans on the move due to lack of available data.

The United Nations Office of the High Commissioner for Human Rights (UN-OHCHR) elaborates that a rights-based approach to human movement is one that places the traveller at the centre of policy making, and "pays particular attention to the situation of marginalized and disadvantaged groups". They have developed a number of instruments that enable countries to maintain a human movement framework that is based on protection, rather than control of travellers no matter what their status might be.⁵ The African Union also has a Migration Policy Framework⁶ that provides *inter alia*, for the protection of the rights of migrants. Although the AU treats free movement and migration as separate policy issues, the recommended strategies on the rights of travellers as set out in the migration policy are pertinent in the free movement agenda. These include:

- *Promote respect for, and protection of, the rights of migrants through combating discrimination and xenophobia;*
- *Enhance national and regional labor migration data collection, analysis and exchange to document, among others, the conditions and needs of migrant workers and their families;*
- *Promote equality of opportunity by strengthening gender-specific approaches to policies and activities;*
- *Facilitate the integration of migrants in the labor market including the education and training sector; as well as the right to join trade unions, and to form community organizations;*
- *Incorporate mechanisms that monitor the provision of decent work for migrants and, enable them to access legal provisions for social protection;*

⁵ OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders, a study on the situation of migrants in transit, the economic social and cultural rights of migrants in an irregular situation, promoting and protecting the human rights of migrant domestic workers in an irregular situation, the Special Rapporteur on the Human Rights of Migrants, and the Committee on Migrant Workers <http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>

⁶ The Migration Policy Framework for Africa, Banjul, The Gambia, June 2006.

- *Set up national and sub-regional social dialogue mechanisms to address migrant labor issues;*
- *Provide social protection and social security benefits particularly unemployment insurance, compensation for employment injury and old age pension for labor migrants while working abroad and/or upon their return;*
- *Extend adequate protection and assistance to victims of trafficking, including establishing reception centers, return and reintegration assistance;*
- *Develop common regional countermeasures, that incorporate considerations to encourage more legal channels and orderly migration, dismantle international organized criminal syndicates, prosecute smugglers and others involved in such activities while, at the same time providing humane treatment for migrants.*⁷

In January 2018, the AU is expected to adopt a treaty on the free movement of persons, which regrettably omits provisions on human rights, social and labour protections for travellers and their families.

3. Rights of Women who are moving

Statistics (UNDESA) indicate that 46% of African migrants are women. There are few measures in place to protect women as they move across the continent. There is little focus on the gendered dimensions of migration including drivers, vulnerabilities at origin, in transit and at countries of destination, which are intensified for women by the channels and sectors into which they migrate such as carer work, domestic work and the entertainment industry. Issues of trafficking, sexual exploitation and abuse, and gender based violence must be specifically tackled and protections must be put into place and implemented in all African countries.

There are several key instruments which different states are party to, that offer such protection for women including, the Universal Declaration of Human Rights (UDHR);⁸ the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW);⁹ the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP),¹⁰ Supplementing the United Nations Convention Against Transnational Organized Crime; and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).¹¹

4. The Kenyan legal and policy context

The Constitution of Kenya provides various rights to “every person” and does not limit basic economic and social rights only to citizens.¹² In addition, the Constitution incorporates into national law, all the above international instruments to which Kenya is a party. Other relevant laws include, the Kenya Citizenship and Immigration Act; the Kenya Citizens and Foreign Nationals Management Service Act; the Refugees Act; the Security Laws Amendment Act; the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act; and the Counter Trafficking in Persons Act.¹³ The International Crimes Act is also relevant in as far as it criminalises enslavement and sexual violence where the factors amount to a crime against

⁷ *ibid.*

⁸ 1945.

⁹ 1979.

¹⁰ 2000.

¹¹ 2003.

¹² Rights in the 2010 Kenya Constitution which are limited to citizens only are access to information and political rights,

¹³ IOM, Migration in Kenya, A Country Profile 2015.

humanity. The Refugee Act is also important as it deals with the protection of refugee women and children requiring the Commissioner to undertake “specific measures” to ensure their safety.¹⁴

5. Conclusion

In its profiling of Kenya, IOM recommended that Kenya, “develop and implement a comprehensive migration governance framework, including through finalization and implementation of the Migration Policy and the National Labour Migration Policy”.¹⁵ In addition, we make the following recommendations for the Government of Kenya to ensure that there is full and effective protection of the rights of women, youth, children, persons with disability, the elderly, refugees and other vulnerable travellers.

Policy Recommendations

- Kenya should ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;
- Kenya should take concrete steps to implement its international, regional and national obligations towards migrants and travellers including the setting up of various assistance and response mechanisms, and gender-responsive services e.g. legal aid at places of detention and easy access to SRH services;
- Kenya should collect and make publicly available disaggregated data on human movement into, out of, and within Kenya, with further statistics on voluntary and forced movement, and trafficking;
- Kenya should enhance its legislation on Counter Trafficking to allow for permanent residence of appropriate cases of trafficking in line with CEDAW and the UN TIP Protocol;
- Kenya can lead the AU countries in terms of ensuring that the protection of women and other vulnerable migrants and travellers is taken seriously on the continent. A good starting point could be for Kenya to demand for the finalisation and adoption of the AU Revised Migration Policy Framework and workplan for 2018 – 2027;
- Kenya should enhance opportunities for legal human movement to the country. We welcome the announcement from the President of Kenya that all Africans would now be able to obtain visas upon arrival. However, Kenya should go further and abolish visa requirements and instead encourage intra-regional and intra-African labour exchanges, in line with the new free movement treaty and its commitments under COMESA. In particular, Kenya should expand the right to freedom of movement to all COMESA citizens immediately in line with the recommendations in the COMESA treaties, domesticate the COMESA and AU treaties, and remove any barriers to African and COMESA visitors’ movement into and within the country.

¹⁴ S. 23 of the Refugee Act, Laws of Kenya.

¹⁵ IOM, Migration in Kenya.

About the Pan African Citizens Network (PACIN)

PACIN (formerly CCPAU) has established itself as a critical Pan-Africanist initiative which facilitates a deeper engagement of African civil society organisations and citizens with regional and continental policies and programmes. PACIN's mandate is to ensure that the continent has its people at its centre and not governments, and that decision-making is driven by, and accountable and accessible to African citizens. PACIN is a network of national, regional and continental African civil society organisations and citizens. We utilise invited and claimed spaces to foster substantive and procedural changes within regional and continental mechanisms, and to amplify African citizen voices. Our theory of change recognises citizen-led accountability as the bedrock of democratic governance and development on the continent. Citizens are the legitimate rights holders and need to be more involved in claiming the promise of a "peaceful, prosperous and integrated Africa". PACIN undertook research on freedom of movement of Africans across Africa in 2013. The report which is available on request, was carried out at two levels, at the sub-regional level (with some country analysis) and at the continental level.



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