

**GENERAL COMMENT No. 5 ON THE AFRICAN
CHARTER ON HUMAN AND PEOPLES' RIGHTS:
THE RIGHT TO FREEDOM OF MOVEMENT
AND RESIDENCE (ARTICLE 12(1))**



Preface

Article 12 (1) of the African Charter on Human and Peoples' Rights (the African Charter) enshrines the right to freely move and choose one's residence within a State while limiting it by clause of style: "subject to comply with the rules enacted by law". As a result, the exercise of this right is subject to the intervention of the legislative authority, which may allow itself to restrict its application.

The General Comment No. 5 on freedom of movement and to choose one's residence is of particular interest, in that it obliges us to examine this freedom / right from the angle of the jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission), but also in relation to the strategies and policies of African States, Regional Economic Communities and the African Union.

As a result of a global reflection on the interpretation of Article 12 (1) of the African Charter, this General Comment is in line with the development and strengthening of soft law in continental legal arena focused on individual freedom, which suffers in Africa from several legislative and practical restrictions that affect many vulnerable groups of people.

The aim of this work is to be useful and creative so that all the state and non-state actors can, through synergy, legitimize the exercise of the right of everyone to move freely in a country, to reside there; and to increase the effective protection of human rights as enshrined in the African Charter.

The General Comment responds and contributes in the long term to the requirements of the African Union Agenda 2063, a key aspect of which is- to ensure and facilitate the integration of Africa through the free movement and right of establishment of all Africans within national borders and beyond.

This General Comment therefore invites States, National Human Rights Institutions, civil society and all partners to take full ownership in order to contribute fully to the effective realization of the rights contained in the African Charter.

The African Commission, through the mandate of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, expresses its thanks to all those who supported from inception and contributed to the realization of this General Comment, in particular the Norwegian Refugee



Council (AU Liaison Office), and consultants from the Human Rights Center of the University of Pretoria as well as the staff of the Secretariat of the African Commission for their involvement in the successful completion of this project.

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**GENERAL COMMENT No. 5 ON THE AFRICAN CHARTER ON HUMAN AND
PEOPLES' RIGHTS: THE RIGHT TO FREEDOM OF MOVEMENT AND RESIDENCE
(ARTICLE 12(1))**

A. Objective and scope of this General Comment

1. Article 12(1) of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to freedom of movement and residence for every person in the following terms: "Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law." This right is imperative to advance other human rights, including the rights to freedom of association, family, education and work. Article 12(1) is part of article 12, which protects mobility into, within and from a state.

B. Background to the General Comment on the right to freedom of movement and residence in Africa

2. While article 12(1) of the African Charter is part of article 12 which protects mobility into, within and from a state, this General Comment focuses specifically on article 12(1). It deals with mobility within the borders of the state. Positive developments on the right to freedom of movement and residence in Africa including their inclusion in the constitutions of all 55 African Union Member States, have been marred by a number of negative developments on the ground.
3. Three reasons therefore justify the focus of this General Comment on article 12(1). First, it is often taken for granted that movement of persons within the borders of a state are without challenges. This is not always the case. In several African countries, the right to freedom of movement and residence of human rights defenders, members of opposition parties, internally displaced persons, migrants and refugees within the borders of states have been infringed upon by several forms of restrictions including detention and confinement. Although international human rights law provides for principles and standards in relation to restriction of the right to freedom of movement and residence without any ground for discrimination, these are hardly respected partly because states

have developed different understanding of their obligation toward realising this right. This General Comment seeks to address this issue. Second, existing treaties at the sub-regional and regional level mostly relate to cross-border mobility, but are not very elaborate on the human rights obligations of states with respect to intra-state mobility. Third, there are differences in national constitutions regarding the right to freedom of movement and residence within the borders of a state for which clarity, leveraging the provision of article 12(1), is important.

4. The right to freedom of movement and residence intersects with several other rights, including the right to liberty protected under article 6 of the African Charter. Any restriction on the right to freedom of movement amounts to deprivation of liberty and its legality should accordingly be assessed in light of the jurisprudence and interpretative guidance on article 6 of the African Charter and other international human rights law instruments.¹ The right to freedom of movement and residence intersects also with other civil, political, socio-economic and cultural rights. The right to freedom of movement and residence is an indispensable condition for the exercise of human development.
5. This right is recognised in regional and sub-regional legal instruments and at the national level. In addition to the African Charter, the following African Union legal instruments protect the right to freedom of movement and residence: the 2006 African Youth Charter;² the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons;³ the 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities;⁴ and the 2018 Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment.⁵
6. This General Comment aims to provide clarity to state parties to the African Charter on their obligations under article 12(1). It therefore focuses on the right to move freely and choose residence within the borders of a state. It is anticipated that greater clarity will foster a common understanding of this right and improve its implementation in practice. While the General Comment does not establish new rules, it sets out and builds on universally recognised standards related to the right to freedom of movement and

residence under international human rights law. It is developed in line with the Resolution 407 on the Elaboration of a General Comment on Article 12(1) of the African Charter on Human and Peoples' Rights adopted by the African Commission on Human and Peoples' Rights at the 63rd ordinary session in Banjul (the Gambia), Resolution 72 adopted at the 36th ordinary session of the African Commission laying out the mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons, and the mandate of the African Commission under article 45(1)(b) of the African Charter.⁶

C. The elements of article 12(1) of the African Charter

7. Article 12(1) contains five elements: 'every individual', 'the right to freedom of movement' '[the right of freedom to choose] residence' 'within the borders of a State' and 'provided he abides by the law'. The content of these five elements are set out in this section.

'every individual'

8. Article 12(1) of the African Charter requires states to recognise the right of 'every individual' to freedom of movement and residence. As the phrase 'every individual' indicates,⁷ recognition as a rights holder under this provision is not conditional on being legally within a state. As such, 'every individual' includes those who are legally and irregularly in the state including nationals, permanent residents, internally displaced persons, asylum seekers, refugees, indigenous populations, holders of residence permits and undocumented migrants.

'the right to freedom of movement'

9. The right to move freely within a state encompasses the prerogative to move around within a state without arbitrary confinement of movement. It imposes a duty on the state not to interfere with the enjoyment of the free movement of individuals. The right to move freely requires states to ensure that arbitrary distinctions on movement are not drawn between nationals and non-nationals. Non-nationals, unlawfully in the territory of a state, whose status become regularised either by becoming a refugee, permanent resident, holder of a temporary residence permit or any other equivalent document, are

entitled to move freely in the state and benefit from the protection of that state. It is crucial that states afford the same standard of protection to everyone within its territory, including asylum seekers. The emphasis of this guidance is that national legislations that bifurcate protection on the basis of nationality⁸ must be revised to avoid indiscriminate and arbitrary interference with this right contrary to the object and purpose of the African Charter.

10. Domestic laws that seek to curtail the free movement and residence of refugees, migrant workers or internally displaced persons within the borders of a state must be reviewed. Freedom of movement must be the rule and restriction the exception. States must prohibit unlawful and disproportionate exercise of stop-and-search powers by law enforcement officials. Laws that seek to restrict the movement of specific categories including persons with disabilities should also be revised.⁹ States must endeavour to ensure that young people¹⁰ move freely. National legislation that grants the executive the power to banish or confine (including through house arrests and travel ban) certain persons, such as members of opposition parties and human rights defenders, to certain areas without judicial authorisation must be reviewed.

the right of freedom to choose residence'

11. Freedom to choose residence¹¹ encompasses the prerogative of individuals to freely choose and change their place of dwelling within a state.¹² It does not matter whether the place is a temporary residence or a place of permanent residence, or whether the person owns such a place, rents it or belongs to it. Mandatory residence must not be imposed on anyone, unless prescribed by law. Impediments, whether socially constructed or politically driven, must be removed for the exercise of the right of freedom to choose residence.

'within the borders of a state'

12. The territorial component of article 12(1) of the African Charter requires state parties to protect the right to freedom of movement of every person primarily within their borders. The phrase 'within the borders of a state' contemplates the geographical areas of a state including airspace and maritime zones over which a state exercises control. The territory

envisioned in the concept of ‘within the borders of a state’ includes, but is not limited to, the capital city of a state, the various regions, and provinces, including cities, towns, villages, precincts, divisions, communes, sectors and chiefdoms. The right to freedom of movement and residence must be guaranteed in the same way in every political and administrative subdivisions of states.

‘provided [every individual] abides by the law’

13. Although article 12(1) of the African Charter requires individuals to abide by ‘the law’ as a condition for the exercise of the right to freedom of movement and residence, the African Commission has emphasised that this formulation does not allow national law to be interpreted in a way that conflicts with international human rights law.¹³

D. Limitations

General limitation

14. While limitation of rights is permissible under international human rights law, generally, and under the African Charter, specifically, such limitations must never render rights illusory. To be permissible, any limitation on the right to freedom of movement must serve a legitimate aim; and must be proportionate with and absolutely necessary for the advantages that are to be obtained in a free and democratic society.
15. A free and democratic society is a society where equality, human dignity, non-discrimination and freedom of expression prevail. Restriction on movements must also respect the right to equality and non-discrimination; and must not be exercised indiscriminately or targeted specifically at stigmatising a particular group. In extraordinary situations posing a fundamental threat to the country, restrictions on the right to freedom of movement and residence may be imposed. Restrictions may also occur for the purpose of public health in the case of national epidemics. However, states must ensure that limitation on the right to freedom of movement is only undertaken for the purposes under article 27(2) of the African Charter, which are due regard to the rights of others, collective security, morality and common interest.¹⁴

16. Potential grounds of limitation should not be vaguely construed so as to deprive the right to freedom of movement and residence of its essence. They should be construed with due respect to other rights in the African Charter taking into consideration the object and purpose of the Charter itself.
17. States must ensure that laws permitting limitation on the right to freedom of movement are not ambiguous or create room for discretionary restrictions. Where restrictions on movements are based on lawful detention, these restrictions must be in compliance with the accepted limitation on the right to personal liberty under international human rights law. States must be aware that any deprivation of liberty resulting from a violation of a formal or substantive safeguard of the African Charter, including those based on discriminatory grounds or practices, are arbitrary and unlawful.

Disasters

18. In situations of natural disasters, the right to freedom of movement and residence of persons at risk of serious and imminent threat may not be restricted, unless such restriction is provided by law and is absolutely necessary to respond to the threat to life, health or safety of affected populations. Affected persons should be allowed to move and settle in other parts of the state. Following the emergency period, the return of affected persons to their places of residence must not be restricted except if such residence is situated in places that present real danger to the life, health or safety of the population.

Development projects

19. States must ensure that, in matters where the right to freedom of movement and residence is to be limited for development projects, the free, prior and informed consent of affected populations is sought through an inclusive and non-discriminatory decision-making process. Arbitrary land grabs from peasant populations must also be prevented. As a matter of principle, states should not remove indigenous peoples from their land without their consent.¹⁵

Armed conflict

20. In situations of armed conflict, the right to freedom of movement and residence must not be restricted unless for the safety of civilians or for military necessity such as clearing a combat zone or preventing the use of human shield.¹⁶ Parties to the conflict must refrain from forced displacement of civilian populations. Displacement must not be used as a method of warfare and must not amount to war crimes, genocide, crimes against humanity or ethnic cleansing.¹⁷ The movement of the population must not violate international human rights and humanitarian law.
21. Parties to the conflict must take all feasible precautions to avoid, or at least minimise, incidental civilian harm. Parties to the conflict must take all feasible precautions to protect the civilian population under their control against the effect of attacks.¹⁸ In the case of displacement, parties to the conflict must take all necessary measures to ensure that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition, and that family members are not separated. Children must not be moved to areas where they may be conscripted. All persons must be protected from all forms of abuse including sexual violence.
22. The parties to the conflict must allow, ensure and enable the unimpeded passage of humanitarian relief and assistance as well as authorized humanitarian personnel to civilians in need. While the movement of authorized humanitarian personnel may be temporarily restricted in cases of military necessity,¹⁹ restrictions must not affect the exercise of their functions where the necessity ceases to exist.
23. Displaced persons have the right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.

E. State obligation for actions by state actors

24. States have the primary duty to protect and ensure the protection of the right to freedom of movement and residence provided for under article 12(1) of the African Charter. States must take measures to respect, protect, promote and fulfil that right. States are responsible for the violation of the right by their public organs including the police,

armed forces, state security officials, national agencies and authorities at various tiers of government.

25. Overall, the right to freedom of movement and residence, also recognised in national constitutions, require states to eliminate impediments to the exercise of freedom of movement. It is imperative that states recognise the importance of the duty to ensure this right and provide protection for various categories of persons within the state.

Obligation of the executive arm of the state

26. The executive arm of the state must ensure that laws and policies relating to the free movement of persons are implemented. The executive must also ensure that it ratifies international and regional legal instruments on the right to freedom of movement and residence without delay. Executive organs at state and sub-state level including members of the security forces must ensure that the right to freedom movement and residence is not arbitrarily deprived.
27. In respecting the right to freedom of movement and residence, the executive arm of the state must ensure that public officials refrain from acting contrary to international law standards including human rights and humanitarian law in the regulation of the right to freedom of movement and residence. The executive arm must also refrain from interfering with judicial processes and impeding access to remedies for victims of violations of the right to freedom of movement and residence. Conditions imposed on individuals to report to police services or immigration officers whenever they seek to change their residence, unless founded on reasonable grounds of suspicion, should be regarded as inconsistent with the exercise of the right to freedom of movement and residence.
28. In protecting the right to freedom of movement and residence, the executive arm must ensure that violations of the right by non-state actors are prevented, promptly investigated and adequately prosecuted. Security officials should be trained and effectively equipped to examine allegations on a case-by-case basis. The failure of the executive arm of the state to investigate perpetrators of acts of harassment and violence that create well-

founded fear for individuals and prevent them from returning to their places of residence violates the right to freedom of movement and residence.

29. In the promotion of the right to freedom of movement and residence, the executive arm must ensure that public officials including law enforcement, members of the armed forces, emergency management authorities, border and immigration personnel are trained on international human rights and humanitarian standards for the furtherance of the right to freedom of movement and residence. The executive arm should also implement programmes that enable the furtherance of societal cohesion and support knowledge generation on the furtherance of social harmony. Such programmes include awareness-raising campaigns, training, education and knowledge-dissemination in the furtherance of the right. Laws for the furtherance of human rights including the right to freedom of movement and residence must be gazetted.
30. In the fulfilment of the right to freedom of movement and residence, the executive arm must ensure that public officials in various state agencies take measures that enable the realisation of the right to freedom of movement and residence. Such measures must include access to roads, pathways and means of transportation for all persons including persons with disabilities. Given the importance of identity documents in facilitating movement, the executive arm must set in place effective mechanisms for the issuance of identity documents to individuals within the state, including individuals who may have lost these documents in situations of armed conflict, natural disasters or other disruptive situations.
31. The executive of the state must strengthen its capacity including the capacity of other arms of government in the furtherance of the right to freedom of movement and residence. The executive arm must not negatively interfere with the activities of other arms of government in the realisation of this right. The executive arm must also execute judicial decisions in furtherance of the right to freedom of movement and residence. Xenophobic tendencies that may interfere with the enjoyment of the freedom to choose residence must be addressed.

Obligation of the legislative arm of the state

32. The legislative arm of the state must ensure that laws and policies are adopted in furtherance of the right to freedom of movement and residence. It must repeal laws that are contrary to international standards including international human rights and humanitarian law. The legislature must domesticate international and regional laws standards for the furtherance of the right to freedom of movement and residence.
33. In the furtherance of the obligation to protect the right to freedom of movement and residence, the legislature must ensure that it adopts laws that enable the accountability of non-state actors including businesses and armed groups for violations of the right to freedom of movement and residence.
34. In the promotion of the right to freedom of movement and residence, the legislature must ensure that its members actively engage in supporting debates on the furtherance of this right in legislative debates, committee sessions and at constituency level.
35. In fulfilling the right to freedom of movement and residence, the legislature must pass laws that build societal cohesion and prohibit negative sentiments and xenophobia against non-nationals. Laws that create an environment of impunity or incite violations must be reviewed. Such laws may include laws that permit police and army officers to supervise residences of nationals or foreigners without evidence that they might pose serious threat to the defence or security of the country; laws that limit the movement of nationals and foreigners in certain area of the state and permit law enforcement officers to arrest and detain such persons who may have allegedly violated those restrictions, without due process of law.

Obligation of the judicial arm of the state

36. The judicial arm of the state should serve as a custodian for the right to freedom of movement and residence. The judiciary should interpret and apply laws on this right in line within international standards.
37. In respecting the right to freedom of movement and residence, the judicial arm of the state should ensure that it refrains from making orders or giving decisions that arbitrarily limit the right to freedom of movement and residence.

38. In protecting the right to freedom of movement and residence, the judiciary should ensure that justice is properly done where non-state actors violate the right to freedom of movement and residence. The judiciary should also ensure that perpetrators of violation of this right are sanctioned. In promoting the right to freedom of movement and residence, the judiciary should ensure that it elaborates on the value and significance of this right in its jurisprudence.
39. In fulfilling the right to freedom of movement and residence, the judiciary must ensure, through judicial writs, that public officials do not fail to carry out their duties. In any judicial review on legislative or executive action touching on freedom of movement and residence, the judiciary shall uphold the right to freedom of movement and residence.

F. Responsibility of states for actions by non-state actors

40. The obligation to protect requires states to ensure that non-state actors do not violate the right to freedom of movement and residence. This duty requires states to ensure that due diligence measures are established. In general, these measures should seek to prevent infringements, investigate allegations, prosecute perpetrators and punish violations by non-state actors.²⁰
41. The duty to prevent infringement require states to establish safeguards for the actualisation of the right to free movement and residence for all persons within the state. Well-suited measures of protection must be adopted by states where there is factual evidence to suggest threats or restrictions to the exercise of the right to freedom of movement and residence by non-state actors.
42. Further, states should investigate allegations of violations of the right to freedom of movement and residence carried out by private actors. Threats to the right to freedom of movement and residence must also be investigated, as they constitute *de facto* deprivation of the right to freedom of movement. Efforts must be directed at investigating alleged threats, harassments and abuses by non-state actors.

43. States should prosecute and punish perpetrators of violation of the right to freedom of movement and residence. In addition, states must ensure accountability of armed groups for violation of the right to freedom of movement and residence.
44. Where business enterprises, including multinationals are involved, states must ensure that the responsibility to respect human rights is complied with.²¹ States must also ensure that businesses adopt human rights policy statements and internalise within their structures respect for human rights including the right to freedom of movement and residence of all persons within the area of their operations.
45. In the exercise of due diligence, states must also ensure that individuals are protected from violations of other African Charter rights ancillary to the exercise of the right to freedom of movement and residence.

G. Specific categories

46. In view of existing international and regional human rights standards, the responsibility of states is amplified where certain groups are concerned. These groups include internally displaced persons, asylum seekers, refugees, returnees, migrant workers, women, children, nomadic populations, human rights defenders, older persons, persons with disabilities and persons living with HIV. While each of these categories are distinct, from the point of intersectionality, it is important to emphasise that they can overlap.

Internally displaced persons

47. Internally displaced persons must be allowed to move freely and reside anywhere within the borders of a state.²² States must ensure that members of armed groups refrain from restricting the right to freedom of movement and residence of internally displaced persons within and outside their places of residence.²³ Through laws and institutional measures, states must guarantee the right of internally displaced persons to exercise agency in their choice of residence. Where families are separated due to displacement, states must adopt measures to facilitate mobility for family reunification.²⁴ States must enable internally displaced persons to make a free and informed choice on local integration, return or resettlement.²⁵ Internally displaced persons must be protected

against forced return or resettlement in places where their life, safety, liberty or health would be at risk.²⁶

Asylum seekers

48. States must ensure that asylum seekers are accorded the right to move freely and reside within the borders of a state. States must refrain from detention of asylum seekers and seek alternatives to detention in the treatment of asylum seekers. Alternatives to detention must not be alternative forms of detention. Asylum seekers must not be detained in maximum-security facilities. Restriction on the movement of asylum seekers must not be indefinite, and any restrictions or conditions must be subject to regular review by a judicial authority. States must facilitate and expedite the process of documentation for asylum seekers.

Refugees

49. Refugees have the right to freedom of movement and residence within the borders of the state of refuge.²⁷ States must respect and safeguard the principle of *non-refoulement* (prohibition of return) and establish conditions that ensure that refugees are allowed to move freely within the state. States must refrain from arbitrarily detaining refugees. States must ensure efficient and quick processing of documentation to allow refugees free movement and residence within their borders. Access to institutional services for ease of movement and residence must also be protected. Under no circumstance may states engage in mass expulsion or involuntary repatriation of refugees.

Returnees

50. States must protect the right to freedom of movement and residence of returnees. Negative prejudices and actual barriers against the exercise of this right by returnees must be prohibited. States must ensure that circumstances that initially caused returnees to flee their residence do not reoccur. Returnees must be allowed to exercise the freedom to return to, and settle in, their former places of residence or any other place they choose. Discriminatory practices and administrative impediments to the enjoyment of this right by returnees must be removed.

Migrant workers

51. Migrant workers and their families have the right to move freely within the borders of the state of employment.²⁸ As such, states must ensure conditions that facilitate the mobility of migrant workers and their families within its borders. States must facilitate documentation processes for the residence of migrant workers and their families. States must ensure that employers and employment firms respect international labour standards relevant to the enjoyment of this right by migrant workers. Also, states must ensure access to social services that ease movement and support programmes that build societal cohesion and create conditions for the exercise of this right by migrant workers and their families. States must protect migrant workers and their families from arbitrary expulsion and refrain from mass expulsion of migrants from their territories.

Women

52. Women must enjoy the right to freedom of movement and residence. States must protect women and girls from all forms of violence and abuse including sexual exploitation.²⁹ States must ensure that laws, policies and practices that subject women to the authorisation of a male guardian for the exercise of the right to freedom of movement and residence, are abolished. Widows must have the right to continue to reside in their matrimonial homes.³⁰

Children

53. In line with the cardinal principle of the best interest of the child, states must guarantee the free movement of children with their parents and guardians. Non-custodial sentences must be preferred for mothers of young children to ensure that mothers are not imprisoned with their children.³¹

Nomadic populations

54. States must protect the free movement of nomadic populations within the borders of a state. States must create conditions suitable for their exercise of this right, including effectively addressing issues that are likely to occasion conflict between nomadic populations and agrarian groups, and facilitating the movement of this population.

Human rights defenders

55. States must protect the free movement and residence of human rights defenders. Measures that restrict the movement of these persons on the basis of their defence for human rights must be prohibited. States must refrain from arbitrary arrest, detention and deprivation of the freedom of movement of human rights defenders and ensure that an enabling environment exists for the exercise of human rights of these persons including the right to free movement and residence.

Older persons

56. States must ensure that older persons have the right to freedom of movement and residence.³² States must facilitate the access of older persons to the enjoyment of freedom of movement through adequate infrastructural and institutional facilities. States must tackle socio-cultural barriers to the exercise of freedom of movement and residence by older persons. Residential care must be optional and affordable for older persons.³³

Persons with disabilities

57. The right to freedom of movement and residence of persons with disabilities must be protected.³⁴ States must ensure that persons with disabilities have the opportunity to choose their place of residence and where and with whom they want to live on an equal basis with others.³⁵ States must facilitate access to the physical environment, means of transportation, facilities and services to enable the freedom of movement of persons with disabilities.³⁶ States must prohibit practices and rules that require that persons with disabilities must be accompanied by an individual prior to gaining access to transportation services. Measures taken by states requiring that persons with physical disabilities obtain medical clearance prior to travelling by plane, or requiring that persons with intellectual disability obtain permission from their legal guardians before they can travel must be eliminated unless is in the best interest of the person. States must also protect the socio-economic rights of persons with disabilities that are integral to the furtherance of the right to freedom of movement and residence.

Persons living with HIV

58. Persons living with HIV must be allowed to move freely and reside within the borders of a state. Restriction on the right to freedom of movement and residence based on HIV status must be prohibited.³⁷ Discriminatory practices that affect the freedom of movement and residence against persons living with HIV must be eliminated. States must ensure that persons living with HIV are not detained, threatened or arbitrarily deprived of liberty on the basis of their status.³⁸ Using HIV status to determine residency must be prohibited.

H. Access to justice and remedies

59. States must ensure the right to seek a remedy to persons who have been deprived of their right to freedom of movement or residence in a timely manner before an accessible competent tribunal or any other authority designated by law. States must provide legal aid and other forms of legal assistance to persons who seek to enforce their right to freedom of movement or residence. States must also ensure that businesses, including multinational corporations, establish operational-level grievance mechanisms in furtherance of the responsibility to respect human rights including the right to freedom of movement and residence.

I. Interpreting the right to freedom of movement and residence broadly

60. States should ensure that it interprets the right to freedom of movement broadly, in line with international standards. In circumstances where the exercise of the right is affected by factors other than the actions of public or private actors, states should take effective steps to ensure redress. For instance, in situations of natural disasters, states should ensure that they provide an appropriate humanitarian response. Attention should be paid to the needs of particularly vulnerable groups including women and children. Interpretations of the right to freedom of movement and residence that promote the socio-economic well-being of individuals should be promoted. States should also ensure that other African Charter rights that will aid the exercise of the right to freedom of movement and residence should be broadly interpreted in furtherance of the right.
61. The right to freedom of movement and residence should also be treated as essential to human life. Expansive interpretations of the freedom of movement that further intra-regional trade, promote regional integration and advance the aspirations outlined in the

African Union Agenda 2063, must be encouraged. National laws on free movement must foster active participation of individuals in their socio-economic development and must not place arbitrary restrictions on individual freedoms. States should support knowledge generation that seeks to promote societal cohesion in the furtherance of the right to free movement. States must also ensure that processes at the national, regional and continental level aimed at the protection of freedom of movement align with international human rights law and the provisions of the African Charter which sets a common standard on human rights in Africa.

J. Submission of reports under articles 62 of the African Charter

62. In their report to the African Commission under article 62 of the African Charter, states must be guided by this General Comment when reporting on article 12(1). In particular, states must provide details on relevant laws that have been adopted in order to give effect to the rights to freedom of movement and residence. In instances where restrictive laws have been adopted, states must specify in a clear and precise manner the extent to which they are legitimate in a free and democratic society, the legitimate aim they seek to achieve and the absence of less intrusive means.

¹ See African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003); 54/91-61/91-96/93-98/93-164/97_196/97-210/98: *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants Droit, Association mauritanienne des droits de l'Homme / Mauritania*; Constitutional Rights Project and Civil Liberties Organisation v Nigeria (1999); African Commission on Human and Peoples' Rights *Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa* (2017); United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1998); United Nations Standard Minimum Rules for Non-custodial Measures (1990); Report of the United Nations Working Group on Arbitrary Detention, A/ HRC/10/21 (19 February 2009); Principles and Guidelines on Human and Peoples' Rights while countering terrorism in Africa (2015).

² African Youth Charter (2006).

³ African Union Convention for the Protection and Assistance of Internally Displaced Persons (2009) (Kampala Convention).

⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (2018).

⁵ Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (2018). At the sub-regional level, various instruments have been adopted including the Economic Community of West African States (ECOWAS) Protocol relating to Free Movement of Persons, Residence and Establishment (1979); Protocol Relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States (1983); Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence (1998); Southern African Development Community Protocol on the Facilitation of Movement of Persons (2005); Protocol on the Establishment of the East African Community Common Market (2009).

⁶ See also Resolution 72 adopted at the 35th Ordinary Session of the African Commission on Human and Peoples' Rights (Banjul, The Gambia 21 May – 4 June 2004), para 6.

⁷ In contrast, article 12(1) of the International Covenant on Civil and Political Rights makes recognition as a rights holder conditional on being legally within a state. Article 12(1) provides that ‘Everyone *lawfully* within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.’ (Italics added for emphasis).

⁸ The right to nationality in Africa, study undertaken by the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons, adopted at the 55th Ordinary Session of the African Commission on Human and Peoples’ Rights in Luanda, Angola (May 2014).

⁹ Article 5 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa (2018)(PWD Protocol) prohibits discrimination on the basis of disabilities

¹⁰ Young people are persons within the ages of 15 and 35 years old. See African Youth Charter (2006).

¹¹ On the face of it, there is a contradiction between the English and French versions of this provision. The French version makes it clear that every individual has the right to freely choose his or her residence. In line with the French version, informed by the principle of priority of the primary text, the phrase ‘freedom to choose residence’ is inserted in the English version of the document.

¹² We recognise residence as a factual situation and where applicable domicile.

¹³ *Media Rights Agenda v Nigeria* (2000) AHRLR 273 (ACHPR 2000), para 75.

¹⁴ *Mtikila v The United Republic of Tanzania* (Application No. 009/2011), para 106.1.

¹⁵ Communication 276/03: *Centre for Minority Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2009).

¹⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (12 August 1949), arts 49 and 147; *Additional Protocol I*, art. 85(4)(a); *Additional Protocol II*, art. 17; *ICRC Study on customary IHL*, rule 129; *Kampala Convention*, art. 4(4)(b).

¹⁷ *Kampala Convention*, art 4(4)(c) and 4(6).

¹⁸ *Additional Protocol I*, arts 57 and 58; *ICRC Study on customary IHL*, rules 15, 20, 22 and 24.

¹⁹ *ICRC Study on customary IHL*, rule 56; see also *Kampala Convention*, arts. 5(3) and 5(7).

²⁰ 245/02: *Zimbabwe Human Rights NGO Forum v Zimbabwe*, para 142-146.

²¹ UN Guiding Principles on Business and Human Rights (2011); Draft African Union Business and Human Rights Policy Framework (2017).

²² *Kampala Convention*, art 9(2)(f).

²³ *Kampala Convention*, art 7(5)(d).

²⁴ *Kampala Convention*, art 9(2)(h).

²⁵ *Kampala Convention*, art 9(11).

²⁶ *Kampala Convention*, art 9(2)(e).

²⁷ UN Convention Relating to the Status of Refugees (1951), art 26.

²⁸ United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990), art 39.

²⁹ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003) (African Women’s Protocol), arts 5 and 22.

³⁰ African Women’s Protocol, art 21(1).

³¹ General Comment on article 30 of the African Charter on the Rights and Welfare of the Child: Children of Incarcerated and Imprisoned Parents and Primary Caregivers (8 November 2013).

³² Every person aged 60 years and above should be considered as older person. See Protocol to the African Charter on Human and Peoples’ Rights on the Right of Older Persons (2016) (Older Persons Protocol); African Union Policy Framework and Plan of Action on Ageing (2002).

³³ Older Persons Protocol (n 35 above), art 11.

³⁴ United Nations Conventions on the Rights of Persons with Disabilities (2006), art 18.

³⁵ PWD Protocol (n 11 above), art 14(2)(a).

³⁶ As above, art 9.

³⁷ African Commission on Human and Peoples’ Rights *HIV, the law and human rights in the African human rights system: key challenges and opportunities for rights-based responses*, Report on the Study of the African Commission on Human and Peoples’ Rights (2017), para 101.

³⁸ As above.

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