

Study on the human rights impact of law enforcement on asylum seekers, refugees and migrants in Africa

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1. Introduction

Migration has become a complex and nuanced human rights crisis driven by multiple intersecting factors. These factors differ for each migrant, ranging from socio-economic need, the search for improved work opportunities, war, terrorism, persecution, insecurity and climate change.¹ Migration itself is a natural practice, and a manifestation of the fundamental right to freedom of movement.² However, national responses to migration, often implemented by law enforcement,³ frequently result in migrants facing a myriad of human rights violations. Examples of these harms include murder, sexual and gender-based violence (“GBV”), torture, unlawful detention, loss of contact with family members and discrimination.⁴ Migrants also face the risk of economic or physical exploitation, destitution, reduced access to socio-economic resources and refoulement to their country of origin, where their life and dignity may continue to be at risk.⁵

The international human rights framework reminds us however, that “all migrants, regardless of their legal status, [their mode of transport], where they come from or what they look like, are entitled to enjoy human rights.”⁶ The human rights framework further underscores the importance of moving beyond viewing migrants as passive victims of capitalist or geo-political forces. Instead, what is required is a more intricate understanding of agency and how it is inevitably influenced by inequitable power relations and State action.⁷ Migration is often

¹ The African Union’s Migration Policy Framework and Plan of Action refers to the following underlying causes of migration: “deteriorating political, socio-economic and environmental conditions, as well as armed conflict, insecurity, environmental degradation and poverty [as significant] root causes of mass migration and forced displacement in Africa.” African Union (2018) “Migration Policy Framework for Africa and Plan of Action (2018 – 2030)” < https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd-english_revised_au_migration_policy_framework_for_africa.pdf> (accessed 26/04/2023) page 3.

² African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) < https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022).

³ The rationale and justification for this focus is explored in further detail under section 2.

⁴ United Nations Office of the High Commissioner of Human Rights (OHCHR) “Recommended Principles and Guidelines on Human Rights at International Borders” *Foreword* (2014) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf> (accessed 09/09/2022).

⁵ United Nations Human Rights Office of the High Commissioner (2022) “Monitoring and protecting human rights in the context of migration” < <https://www.ohchr.org/sites/default/files/documents/publications/2022-11-14/Chapter26-Monitoring-Protecting-HR-Migration.pdf>> (accessed 23/01/2023) page 5; Office of the High Commissioner of Human Rights (2017) “Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations” < <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/PrinciplesAndGuidelines.pdf>> (accessed 09/02/2023) pages 6-7.

⁶ United Nations Office of the High Commissioner of Human Rights (OHCHR) “Recommended Principles and Guidelines on Human Rights at International Borders” *Foreword* (2014) <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf> (accessed 09/09/2022) page iii. This is grounded in the universality of human rights, as recognised in the preamble of the Universal Declaration on Human Rights and the preamble to the African Charter.

⁷ Efforts to protect migrants from exploitation must therefore refrain from serving as an additional obstacle migrants must overcome in order to achieve mobility in a manner that preserves their human dignity.

referred to as a crisis; however human rights advocates continually emphasise that the “migrant crisis” is only a crisis, due to our inadequate and inhumane response to it.⁸

While States have the right to manage their borders in accordance with their national laws, this study examines how States must balance this power with respect for fundamental human rights, morality and common interest as envisaged by international human rights law.⁹ This is important as a human rights-based approach to mobility has the potential to foster human resilience, adaptation and development across the African continent. There is therefore a need to review how States and State institutions, such as law enforcement, are exercising this power.

While migration is driven and impacted by various factors, this report examines the international legal framework governing migration and how these rights are impacted upon by the actions of law enforcement, security concerns, national use of criminal justice systems together with privatisation and the use of technology.

This research therefore examines the extent to which States are fulfilling the African Union’s vision of shared prosperity and unity in a manner that can free the full potential of all Africans, including migrants.¹⁰ Drawing from the international legal framework, as well as the unique human rights risks posed by the use of criminal justice systems and the nuanced insights offered by relevant case studies, this report concludes with recommendations on how to improve State responses to migration.

2. Context and Justification

In view of the above and in pursuance of Article 45(1)(a) of the African Charter on Human and People’s Rights, the African Commission on Human and Peoples’ Rights (“ACHPR”) adopted *Resolution ACHPR/Res. 404 (LXII) 2018 (“Resolution 404”) on the need to conduct a study on the violation of the human rights of migrants*. This resolution was adopted during its 63rd Ordinary Session held from 24 October to 13 November 2018 in Banjul, the Republic of the Gambia.¹¹ In order to implement this Resolution, the Commission opted for a progressive approach, leading first to its adoption in 2019, of a “Pilot study on Migration and Respect for

⁸ P Kingsley (2016) “The New Odyssey: The Story of Europe’s Refugee Crisis” Faber and Faber, London, page 7; F Banda (2020) “African Migration, Human Rights and Literature” Bloomsbury Publishing, London.

⁹ *African Institute for Human Rights and Development (on behalf of Sierra Leonean Refugees in Guinea) v Guinea* (2004) AHRLR 57 (ACHPR 2004) paras 67-68. See also: Article 27(2) of the African Charter on Human and Peoples’ Rights.

¹⁰ African Union (2013) “Agenda 2063: The Africa we want” < https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf > (accessed 12/09/2022).

¹¹ African Commission on Human and Peoples’ Rights (2018) “Resolution on the Need to Conduct a Study on Violations of the Human Rights of Migrants -ACHPR/Res. 404 (LXIII) 2018” <<https://achpr.au.int/en/adopted-resolutions/404-resolution-need-conduct-study-violations-human-rights-m>> (accessed 23/01/2023).

Human Rights: Focus on the Responses provided by Niger.”¹² The Pilot Study focused on the migratory route from Niger to North Africa and provided an overview of the key human rights challenges experienced by migrants on their journey. This study is a follow up from the pilot study and is broader in that it focuses on all regions within Africa.

There are a multitude of stakeholders involved in the human rights violations that are perpetrated against migrants, including smugglers and human traffickers. However, the focus of this study is on the role of law enforcement. This focus is due to the fact that law enforcement officials have unique and discretionary powers that can ultimately affect the life, safety, liberty and well-being of vulnerable migrants. It is thus imperative to address human rights abuses against migrants that have been perpetrated by law enforcement.

As further justification, Article 1 of the African Charter on Human and Peoples’ Rights (“African Charter”) imposes a legal obligation on member States of the African Union to recognise and protect the human rights enshrined in the Charter. In light of their responsibility to uphold law and order and to protect the safety of the public,¹³ law enforcement officials are required to adhere to the highest standards of human rights protection. In particular, as recognised agents of the State,¹⁴ law enforcement officials play a critical role in ensuring that the State meets its obligations under the African Charter. This role includes upholding the human rights of all persons regardless of their background or status.¹⁵ Law enforcement are also required to investigate and prosecute cases of human rights violations, including those perpetrated by smugglers, gangsters, human traffickers, foreign intelligence agencies and their own

¹² African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) < https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf > (accessed 19/10/2022).

¹³ African Commission on Human and Peoples’ Rights, “General Comment No. 3 on the African Charter on Human and People’s Rights: The Right to Life (Article 4)” 18 November 2015 < <https://www.refworld.org/docid/5e67c9cb4.html> > (accessed 28/04/2023) para 27, where it states that: “The primary duty of law enforcement officials—meaning any actor officially tasked with exercising a law enforcement function, including police, gendarmerie, military or private security personnel—is to protect the safety of the public.” ; *Zimbabwe Human Rights NGO Forum v Zimbabwe* (Communication No. 245/2002) [2006] ACHPR 73; (25 MAY 2006) para 70: “The responsibility of maintaining law and order in any country lies with the State specifically with the police force of that State. As such, it is the duty of the State to ensure through its police force that where there is a breakdown of law and order, the perpetrators are arrested and brought before the domestic courts of that country.”

¹⁴ International Law Commission (2001) Commentary, para. 2, of Chapter II: “Attribution of Conduct to a State” Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Text adopted by the International Law Commission (ILC) at its fifty-third session, in 2001, and submitted to the United Nations (UN) General Assembly as a part of the Commission’s report covering the work of that session, in UN doc. A/56/10 < <https://bit.ly/32A30cT> > (accessed 02/05/2023).

¹⁵ Article 2 of the African Charter; see also: UN General Assembly (1979) “Code of Conduct for Law Enforcement Officials” adopted by UN General Assembly Resolution 34/169 of 17 December 1979 < <http://bit.ly/3bHsEIX> > (accessed 02/05/2023), Article 1.

colleagues.¹⁶ Law enforcement personnel must furthermore, provide appropriate remedies to victims of such violations.¹⁷

Due to the nature of their work, law enforcement personnel frequently come into close contact with vulnerable groups of society, such as survivors of GBV and those targeted by hate crimes and discrimination, including xenophobic violence. Law enforcement are thus often the “first responders” to people in vulnerable situations, including migrants. As such, law enforcement officials are uniquely positioned to promote and safeguard the human rights of migrants. It is therefore imperative to shine a light on the consequences of utilising law enforcement in migration governance. While the actions of law enforcement can be dangerous for migrants, the failure of law enforcement personnel to act in certain instances can also create unique forms of vulnerability, implicating a number of rights protected in the African Charter, which are traversed below.

Given the aforementioned justifications, existing resource constraints, and the need for a detailed thematic focus, this study primarily examines the unique role of law enforcement in migration governance. For the purposes of this study, law enforcement personnel include any entity or individual that has been given a mandate to enforce laws, including border control officials, immigration officers, members of the army, police officers, other internal security forces and the defence and security forces.

Against this backdrop, this study examines the overarching normative framework at the ACHPR level, which should be utilised to inform the daily actions and discretionary choices of law enforcement officials. Focusing on the African region, this paper examines the key human rights challenges affecting migrants, drawing from relevant international human rights law, refugee law, humanitarian law, as well as relevant soft law instruments. This framework is also informed by the African region’s standards and norms relating to law enforcement and criminal justice. While the migration experience is complex and ever-changing, the human rights framework should be utilised to shape the law enforcement response to this intricate issue.

3. Recognising the complexity of the migration experience

It is important to recognise the diversity of the migration experience, which includes voluntary, forced, regular or irregular, international, domestic, documented and undocumented,

¹⁶ African Commission on Human and Peoples’ Rights, “General Comment No. 3 on the African Charter on Human and People’s Rights: The Right to Life (Article 4)” 18 November 2015 <<https://www.refworld.org/docid/5e67c9cb4.html>> (accessed 28/04/2023) paras 16-19.

¹⁷ African Commission on Human and Peoples’ Rights, “General Comment No. 3 on the African Charter on Human and People’s Rights: The Right to Life (Article 4)” 18 November 2015 <<https://www.refworld.org/docid/5e67c9cb4.html>> (accessed 28/04/2023) paras 18-19.

temporary, seasonal or long-term and permanent migration, as well as labour migrants who move for employment and economic migrants who seek to improve their standard of living. It is also important to adopt an intersectional understanding of vulnerability. For example, certain migrants (such as undocumented migrants, women migrants and unaccompanied children) experience intersecting grounds of discrimination and vulnerability.

Drawing from the African Guiding Principles on the Human Rights of Migrants, the term “migrant” refers to “a person who is outside of a State of which they are a citizen or national, or, in the case of a stateless person or person of undetermined nationality, their State of birth or habitual residence.”¹⁸

4. The overarching legal framework

Part of the challenge in addressing compliance with the human rights framework pertaining to migration is that it is inherently difficult to integrate the multiple intersecting layers of “global, continental, regional, national, and local migration regimes”.¹⁹ This ultimately results in the legal status of migrants being regulated by a patchwork quilt of legal rules and principles, with vulnerable migrants often falling through the cracks of the legal system. Local law enforcement, either through a lack of awareness, lack of coordination, xenophobic tendencies, corruption or wilful non-compliance, also contribute to the failure to implement the existing human rights framework.²⁰

4.1 Introduction

Existing international law instruments provide a comprehensive legal framework for the governance of international migration. Migration has also been a permanent feature of history

¹⁸ African Commission on Human and Peoples’ Rights (2022) “African Guiding Principles on the Human Rights of Migrants” (still in draft form).

¹⁹ African Centre for Migration & Society University of the Witwatersrand, Johannesburg, on behalf of the Open Society Foundation (2018) “Free and safe movement in Africa: Report on research to inform advocacy promoting safe and unencumbered movement of people across Africa’s international borders” page 25. For example, once the Protocol on Free Movement comes into force, there will be an additional layer of applicable legal rules governing migration. The first layer concerns the rules pertaining to nationals of third States with which the host country has concluded one or more bilateral agreements on the regulation of migration. Following this, is the legal regime applicable to those African states which participate in Regional Economic Communities (RECs). This is then followed by the rules governing the Member States of RECs which have in place specific rules and regulations on migration/free movement of persons applicable to those nationals coming from the Member States of the relevant RECs. A fifth regime would concern the rules emanating from treaties that AU Member States have concluded with non-African states, principally with the EU. The final layer concerns the international law rights contained in instruments such as the African Charter and UN instruments. See also: K Magliveras & G Naldi (2021) “Migration and Human Rights in Africa” in Olayiwola Abegunrin, Sabella O. Abidde (eds) *African Migrants and the Refugee Crisis* Springer Link.

²⁰ African Centre for Migration & Society University of the Witwatersrand, Johannesburg, on behalf of the Open Society Foundation (2018) “Free and safe movement in Africa: Report on research to inform advocacy promoting safe and unencumbered movement of people across Africa’s international borders” page 16 and page 118. IOM (2022) “The state of migration in East and Horn of Africa” <<https://publications.iom.int/books/state-migration-east-and-horn-africa-report>> (accessed 16/08/2023) page 140.

and is deeply rooted in the history of international law.²¹ There are therefore, a myriad of well-defined rules that effectively address the treatment of migrants. As recognised in the preamble to the African Charter, “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.”²² It is thus essential to outline and emphasise the international and regional human rights law that should inform national responses as well as the discretionary choices of law enforcement.

4.2 International law

While the focus of this report is on the African region, it is important to briefly examine the international legal framework, as this has had a substantial influence on the African Union (“AU”). One of the progressive features of the African Charter is that it lends itself to such a comparative analysis.²³

4.2.1 The Universal Declaration of Human Rights

Serving as the foundational text for modern international human rights law, Article 1 of the Universal Declaration of Human Rights (“UDHR”) emphasises that: “all human beings are born free and equal in dignity and rights.” This entitlement applies to all people, regardless of citizenship, employment, socio-economic position or any other status. In addition to being universal, the UDHR makes it clear that human rights are indivisible in that political and civil rights cannot be separated from economic, social and cultural rights. One example of this interdependence is the manner in which discrimination impacts upon the capacity of migrants to enjoy access to quality health care.²⁴ In terms of being inalienable, these rights cannot be denied to any human being. This is the basis of the concept “human rights for all” as articulated in the UDHR.

²¹ The term “jus gentium” designated the set of customary rules governing the legal status of aliens under the law of Ancient Rome. D J Bederman “International Law in Antiquity” (2004) Cambridge University Press.

²² Preamble to the African Charter.

²³ Article 60 of the African Charter: “The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.”

²⁴ This is exemplified by the treatment experienced by migrants seeking healthcare in Kenya. While the status of migrants and refugees in the two main refugee camp complexes within Kenya (Dadaab and Kakuma) should be clear, in that they are not legally required to present documentation in order to access health care, when trying to access health care services, officials demand documentation to prove their status. While fear of police harassment and deportation due to documentation issues is not as strong in Kenya as it is in other countries, it is still a relevant concern for migrants in Kenya. See: African Union (2021) “Migration and Health: Addressing current health challenges of migrants and refugees in Africa- from policy to practice” <https://au.int/sites/default/files/documents/41748-doc-Study_Report-Migration_and_Health-From_Policy_to_Practice_ENG.pdf> (accessed 08/11/2022). South Africa’s Immigration Act 13 of 2002 also provides that staff at clinics and hospitals must find out the legal status of patients before providing care (except in an emergency), which undermines equal access to health care services.

While the UDHR protects a range of foundational human rights such as the rights to equality, dignity and the rule of law, Article 13 specifically protects the right to leave one's own country. Article 14 grants the right to seek and enjoy asylum from persecution and Article 15 protects the right to nationality.²⁵

While the UDHR protects a range of socio-economic and civil and political rights on an equal basis, the right to development (Article 22), is particularly important as it is firmly interlinked to one of the driving forces behind migration. Article 22 of the UDHR states that: "Everyone, as a member of society, has the right to social security and is entitled to realisation (through national effort and international co-operation) of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Scholars have also pointed out that development has been a key driving factor in the growth in migration, with the challenge lying in the fact that developmental progress has not always matched the aspirations of individuals themselves, consequently leading to migration as a method for further growth, expansion and development.²⁶ This emphasises the importance of human agency in driving migration, as well as the need for solutions that are able to improve the feasible options available to migrants.

4.2.2 Subsequent International human rights treaties and conventions

Building upon the UDHR is Article 12 of the *International Covenant on Economic, Social and Cultural Rights* ("ICESCR"), and Article 2(2) of the *International Covenant on Civil and Political Rights* ("ICCPR") which extends the entrenched rights to everyone, with certain limited exceptions.²⁷ Together, the UDHR and these two Covenants serve as the *International Bill of Human Rights*. These treaties are supplemented by regional human rights instruments such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms*

²⁵ Human Rights Council (2022) "Human rights violations at international borders: trends, prevention and accountability" < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/328/57/PDF/G2232857.pdf?OpenElement> > (accessed 12/10/2022).

²⁶ H De Haas (2020) "Why development will not stop migration" < <http://heindehaas.blogspot.com/2020/02/why-development-will-not-stop-migration.html> > (accessed 12/11/2022).

²⁷ The International Covenant on Civil and Political Rights (ICCPR) reserves to citizens the right to vote and take part in public affairs (article 25), and grants the right of freedom of movement to foreigners provided they are lawfully present in a country (article 12). This said, the Human Rights Committee has made it clear in General Comment No. 15 that all foreigners may enjoy the protection of the Covenant, including in relation to entry and residence, when issues of discrimination, inhuman treatment, or respect for family life arise. ICCPR, General Comment No. 15: The position of aliens under the Covenant, 1986, para 2. The ICCPR also guarantees to everyone without discrimination the right to leave any country, including their own, and to enter their own country. ICCPR, articles 12(2) and 12(4). Article 2(3) of the ICESCR also identifies an exception to the general rule of equal and universal access stating that "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals." However, it is important to note that article 2(3) must be narrowly construed, may be relied upon only by developing countries, and refers only to economic rights. Under the ICESCR, States may not discriminate between nationals and non-nationals with respect to social and cultural rights.

(“ECHR”),²⁸ *the American Convention on Human Rights* (“ACHR”)²⁹ *the African Charter*, and *the Arab Charter on Human Rights*.

Specific rights and the protection of certain groups has been further expanded through detailed Conventions. Many of these instruments include specific provisions that impact upon migrants, as exemplified by Articles 2(1),³⁰ 4,³¹ 5(b)³² and 5(d)(i)³³ of the International Convention on the Elimination of All Forms of Racial Discrimination (1969), Articles 2-5,³⁴ and 6³⁵ of the Convention on the Elimination of All Forms of Discrimination against Women (1979), Articles 2,³⁶ 3,³⁷ 10³⁸ and 13³⁹ of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Articles 2,⁴⁰ 3,⁴¹ 6-9,⁴² 12,⁴³ 19,⁴⁴ 20,⁴⁵ 22,⁴⁶ and

²⁸ Read together with its Protocols and the *Revised European Social Charter*.

²⁹ Read together with its *Additional Protocol in the Area of Economic, Social and Cultural Rights* (Protocol of San Salvador) and the *American Declaration on the Rights and Duties of Man* (ADRDM).

³⁰ This Article provides that: “States condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...”

³¹ This Article states that: “States condemn all propaganda and all organisations which are based on ideas or theories of superiority of one race, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination.”

³² This Article provides that: “States undertake to eliminate racial discrimination in the enjoyment of the right to security of the person through preventing violence or bodily harm, whether inflicted by government officials or by any individual group or institution.”

³³ This Article states that: “States undertake to eliminate racial discrimination in the enjoyment of the right to freedom of movement and residence within the border of the State.”

³⁴ These Articles contain the obligations on states to promote equality (including substantive equality) and to undertake due diligence in promoting substantive equality for women.

³⁵ This section prohibits human trafficking.

³⁶ This Article provides that: “States will take effective measures to prevent torture.”

³⁷ Article 3(1): “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

³⁸ Article 10: “Each State Party shall ensure that education and information regarding the prohibition against torture are fully included in the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment.”

³⁹ Article 13: “Each State Party shall ensure that any individual who alleges he has been subjected to torture in any territory under its jurisdiction has the right to complain to, and to have his case promptly and impartially examined by, its competent authorities. Steps shall be taken to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of his complaint or any evidence given.”

⁴⁰ This Article protects the right to non-discrimination.

⁴¹ This Article underscores that the best interests of the child shall be a primary consideration in all matters concerning the child.

⁴² These Articles protect the rights to life, to acquire nationality, to preserve identity and nationality, and the right not to be separated from parents, respectively.

⁴³ This Article protects the right to participation.

⁴⁴ Article 19 provides protection from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.

⁴⁵ Article 20 states that: “A child deprived of his family environment is entitled to special protection”.

⁴⁶ Article 22: “Child refugees or children seeking refugee status shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.”

34-35⁴⁷ of The Convention on the Rights of the Child (1989), Articles 5,⁴⁸ 9-11⁴⁹ and 18⁵⁰ of the Convention on the Rights of Persons with Disabilities (2006), and Articles 1,⁵¹ 6,⁵² 16,⁵³ 17(2)(d)⁵⁴ and 23⁵⁵ of the International Convention for the Protection of All Persons from Enforced Disappearance (2006). Given that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Family (“ICMWF”) is a key international human rights instrument pertaining to migrants, this Convention is discussed in further detail below.

4.2.3 The International Convention on the Protection of the Rights of All Migrant Workers

In 1990, the United Nations General Assembly adopted the ICMWF. This Convention has been positively recognised for identifying and attempting to protect the human rights of migrant workers. The Convention is seen as progressive for moving beyond viewing migrants as only labourers or economic entities, with migrants recognised as relational entities with families. The Convention further recognises that by virtue of being non-nationals, migrant workers were not always protected by the national legal framework of their receiving states. The Convention emphasises that all migrant workers, including undocumented migrants, have fundamental rights. One of the underlying intentions of the Convention is thus to recognise and respond to the unique vulnerabilities⁵⁶ of migrant workers while protecting the rights of migrant workers and their families, regardless of their migration status or their reason for migrating.⁵⁷ Article 1

⁴⁷ These Articles provide that: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse and state parties undertake to take all appropriate measures to prevent child trafficking.

⁴⁸ This article protects the right to equality and non-discrimination.

⁴⁹ These articles protect the rights to life, accessibility and the obligation to protect persons living with disabilities in situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters, respectively

⁵⁰ Article 18 provides that: “States Parties shall recognise the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.”

⁵¹ Article 1 states that: “No one shall be subjected to enforced disappearance.”

⁵² Article 6 provides that: “Each State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance.”

⁵³ Article 16: “No State Party shall expel, return (“refouler”), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”

⁵⁴ Article 17(2)(d): “State parties shall guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.”

⁵⁵ Article 23: “Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention.”

⁵⁶ Preamble to the Convention: “Considering the situation of vulnerability in which migrant workers and members of their families frequently find themselves owing, among other things, to their absence from their State of origin and to the difficulties they may encounter arising from their presence in the State of employment.”

⁵⁷ Part III of the Convention (Articles 8 to 35) grants a significantly broad framework of rights to all migrant workers and members of their families, irrespective of their migratory status.

(2) of the Convention confirms that it applies during the entire migration process experienced by migrant workers and members of their families. This process includes preparation for migration, departure, transit, and the entire period of stay and remunerated activity in the State of employment as well as the return to the State of origin or the State of habitual residence. The Convention also calls for an end to illegal and clandestine movements and the establishment of minimum standards of protection for migrant workers and members of their families.

Important rights within the Convention include the right to non-discrimination,⁵⁸ the right to enjoy fair and equal labour practices,⁵⁹ the right to join trade unions,⁶⁰ the right to family reunification,⁶¹ the right to liberty and security of the person⁶² and the right to access education⁶³ and healthcare.⁶⁴ The Convention also requires states to ensure that migrant workers have access to legal remedies and judicial procedures in cases of rights violations. The Convention also prohibits collective expulsions without individual case reviews.⁶⁵

The Convention has been lauded for strengthening the rights of migrants by establishing a comprehensive framework for the protection of their human rights, while simultaneously addressing the unique vulnerabilities experienced by migrant workers. The Convention has not however, been universally ratified with many states struggling to effectively implement its provisions.

4.2.4 International soft law on migration: The Global Compact on Migration (GCM)

In 2018 the Global Compact for Safe, Orderly and Regular Migration (“GCM”) was adopted under the auspices of the United Nations. The GCM seeks to address migration holistically

⁵⁸ Article 7 of the Convention: “States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.”

⁵⁹ Article 25 of the Convention: Article 25(1). “Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the State of employment in respect of remuneration.”

⁶⁰ Article 26 of the International Convention.

⁶¹ Article 44(2) “States Parties shall take measures that they deem appropriate and that fall within their competence to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.”

⁶² Article 16 of the International Convention.

⁶³ Article 30 of the Convention: “Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the State concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the State of employment.”

⁶⁴ Article 28 of the Convention: “Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.”

⁶⁵ Article 22.

while seeking to balance State sovereignty with respect for human rights. While it is a non-binding document, it does send a powerful political message regarding the importance of migration and the need for a holistic response. The GCM is framed in alignment with target 10.7 of the 2030 Agenda for Sustainable Development in which Member States committed to cooperate internationally to facilitate safe, orderly and regular migration.

The GCM includes twenty-three overarching objectives. These objectives include collecting accurate data, minimising the drivers of migration, providing accurate information at all stages of the migration journey, providing migrants with adequate documentation, enhancing regular pathways of migration and ensuring ethical recruitment. The GCM also calls for reducing vulnerabilities in migration, saving lives, ensuring a trans-national response to smuggling, eradicating human trafficking, managing borders in a secure manner, strengthening certainty in migration procedures, using detention as a last resort, enhancing consular protection, ensuring access to basic services, promoting full social inclusion, promoting evidence based public discourse, ensuring international skills development and recognition, promoting financial inclusion, providing for safe and dignified returns, portable social security and strengthening international cooperation.

Objective 1 of the GCM calls for the collection of accurate data to ensure evidence-based migration policies. While there are significant data gaps when it comes to migration that need to be addressed, without robust data protection frameworks in place, there is the danger of States using data protection as a justification for restricting access to information on migrants. This could potentially prevent human rights organisations from monitoring places of detention or from gaining access to information on conditions of detention. The collection of data relating to migration status must also be managed carefully so as to protect the rights to human dignity, equality, privacy and access to socio-economic resources, while ensuring that patterns of discrimination and bias are not reproduced.⁶⁶

The GCM states that it is based on international human rights law and that it upholds the principles of non-regression and non-discrimination. The GCM does however seek to balance its commitment to human rights with securitisation. It unfortunately does this through often conflating human trafficking and human smuggling with migration. For example, Objective 9 provides for “strengthen[ing] the transnational response to smuggling of migrants”. One of the ways in which it seeks to accomplish this objective is to “facilitate cross-border law

⁶⁶ E Guild (2018) “GCM Commentary: Objective 1: Collect and utilize accurate and disaggregated data as a basis for evidence-based policies” < <https://rli.blogs.sas.ac.uk/2018/09/20/gcm-commentary-objective-1-collect-and-utilize-accurate-and-disaggregated-data-as-a-basis-for-evidence-based-policies/> > (accessed 26/02/2023).

enforcement and intelligence cooperation... to end impunity for smugglers and prevent irregular migration, while ensuring that counter-smuggling measures are in full respect for human rights.” This approach frames migrants as primarily victims of smugglers, while failing to further elucidate the rights of migrants who come into contact with law enforcement. Moreover, references to the need to train law enforcement is primarily couched in terms of the need to have the capacity to identify survivors of trafficking in persons and smuggling of migrants, with an insufficient focus on the need to protect the substantive rights of migrants.⁶⁷

The GCM also specifically refers to the need to protect the sovereignty of states, providing that: “Within their sovereign jurisdiction, States may distinguish between regular and irregular migration status... as they determine their legislative and policy measures for the implementation of the Global Compact.” This undermines the commitment to protect the human rights of all human beings, including irregular migrants. While the GCM can be used as a tool to engage with States on the extent to which their migration policies protect human rights, it does however encapsulate the inherent tension between securitised border management and the protection of human rights.

4.3 International law pertaining to refugees and asylum seekers

As noted above, refugees, asylum seekers and migrants are not a homogenous group. However, refugees and asylum seekers fall within a broad and inclusive understanding of migrants. Refugees and asylum seekers are also often targeted by law enforcement with many asylum seekers being incorrectly pushed into immigration governance systems, due to errors in enforcement or through institutionalised xenophobia.⁶⁸ The following sections therefore briefly examine the relevant rights pertaining to asylum seekers and refugees.

4.3.1 Asylum seekers

An asylum seeker refers to an individual who is seeking international protection (refugee status) on the grounds that returning to his or her country would lead to persecution. In countries with individualised procedures, an asylum-seeker is someone whose application for asylum has not yet been finalised. Asylum seekers have the right of entry into a country. The country that receives their application has a duty to examine their claim and cannot expel

⁶⁷ This is demonstrated under Objective 10 (para 26(i)) which provides that states will: “Create national and local information systems and training programmes which alert and educate citizens, employers, as well as public officials and law enforcement officers, and strengthen capacities to identify signs of trafficking in persons, such as forced, compulsory or child labour, in countries of origin, transit and destination.” United Nations (2018) “Global Compact for Safe, Orderly and Regular Migration” <https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf> (accessed 23/02/2023).

⁶⁸ In States that have inadequate asylum procedures, many Africans fleeing persecution are ultimately (and incorrectly) pushed into the immigration governance system.

(return) the asylum seeker to their home country while their application is under consideration. Apart from this key protection, the 1951 Convention on the status of Refugees is largely silent on the rights of asylum seekers. Asylum seekers do however, enjoy other overarching human rights protected under international law, including the rights to life, non-discrimination, freedom from torture and liberty, the right to an adequate standard of living, freedom of movement and the right to health.

An important contested principle within the legal framework is what is often referred to as “the first safe country” or “the safe third country” principle. This refers to the practice of refusing entry to asylum seekers who, prior to their arrival in the country where they are seeking asylum, have travelled through an alternative country that could have offered them asylum protection. As emphasised by the African Centre on Migration and Society: “There is no general, recognised first safe country principle in international law.” Certain States have however, taken steps to give effect to this principle through treaties⁶⁹ and domestic legislation.⁷⁰ Part of the problem with this principle is that legal debates often narrowly focus on the State’s obligations in terms of Article 33 of the 1951 Refugee Convention (which pertains to the prohibition of expulsion or return). Underlying this debate is the idea that States’ obligations towards refugees who have not been granted asylum do not go beyond the principle of *non-refoulement*.

As pointed out by the Office of the United Nations High Commissioner for Refugees (UNHCR), nobody can guarantee that a country is safe for all its citizens and “in so far as application of the concept would automatically exclude a whole group of asylum-seekers from refugee status, this would be inconsistent with the spirit and possibly the letter of the 1951 Convention relating to the Status of Refugees”, such as the principle of non-discrimination on grounds of nationality.⁷¹ The African Commission on Human and Peoples’ Rights has specifically

⁶⁹ One example of such an agreement is the Dublin III Regulation which provides that: “In certain cases, Croatia will not be responsible for examining your application, and this responsibility will be transferred to another country in the European Union, or Iceland, Lichtenstein, Norway or Switzerland (so called “Dublin III” States). The Dublin III Regulation means that only one country examines your asylum application and you cannot choose which country this will be. You can only apply for asylum in one country and only one country can grant you asylum.”

⁷⁰ This is particularly noteworthy within the European Union, where the legal basis for the notion of “safe countries of origin” under Community law appeared in 2005, in the first Asylum Procedures Directive, and was maintained when the directive was recast in 2013. Under this directive, asylum seekers from “safe” countries may be eligible only for “accelerated” procedures for the examination of their applications (Article 23(4)). The transposition of the directive into national legislations resulted in the adoption by several Member States of lists of countries considered “safe” based on their own criteria. Some Member States adopted such lists recently as part of measures taken in the context of the crisis of EU’s migration policies in recent months.

⁷¹ Euromed Rights & European Association for the Defense of Human Rights (2016) “Safe” countries: A denial of the right of asylum” <https://www.ohchr.org/sites/default/files/Documents/Issues/MHR/ReportLargeMovements/FIDH2_.pdf (accessed 14/01/2023).

recommended that State parties respect the principle of customary international law, relating to non-refoulement and that they revoke the notion of “safe third country”.⁷²

4.3.2 Refugees

The International legal framework for the protection of refugees is grounded in two key instruments, the first being the Convention on the status of Refugees which was adopted in 1951.⁷³ This was supplemented by the Protocol which was adopted in New York on 31 January 1967. Under the UN Convention, a refugee is strictly defined as a person who is fleeing persecution or conflict in his or her country of origin. The 1951 Convention establishes a framework for the protection of the human rights of refugees and sets out the legal obligations of States towards them. The Convention is underpinned by the key principles of non-discrimination, non-penalisation, non-refoulement and fair treatment. Key rights protected in the Convention include the right to have access to legal assistance,⁷⁴ and the right to have access to basic services.⁷⁵

4.3.3 International soft law on refugees: The Global Compact on Refugees

On 19 September 2016, the landmark New York Declaration for Refugees and Migrants⁷⁶ was adopted by the UN. The New York Declaration incorporates a Comprehensive Refugee Response Framework (“CRRF”). This framework recognised that refugees require specific protection, and that there is a need for country-specific assessments and plans of action on how to respond to refugees. Against this backdrop, the Global Compact on Refugees (“GCR”) was adopted by member states at the end of 2018.⁷⁷

⁷² African Commission on Human and Peoples’ Rights, “Resolution 114 on Migration and Human Rights, 42nd Ordinary Session” (Brazzaville, Republic of Congo, Nov. 15 – 28, 2007), Available at <[http://www.achpr.org/sessions/42nd/resolutions/114/.](http://www.achpr.org/sessions/42nd/resolutions/114/)> (accessed 12/10/2022).

⁷³ The 1951 Convention on the Status of Refugees as modified by the Protocol of 31 January 1967, constitutes the basic and universal instrument relating to the status of refugees and reflects the deep concern of States for refugees and their desire to establish common standards for their treatment. The Refugee Convention elaborates on Article 14 of the UDHR. The Convention was the first in a series of treaties which translated the ideals of the UDHR into legally binding obligations.

⁷⁴ Article 16 of the Convention provides that: “1) A refugee shall have free access to the courts of law on the territory of all Contracting States. 2) A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, *including legal assistance* and exemption from *cautio judicatum solvi*. 3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

⁷⁵ Chapter 4 of the Convention provides limited protection for the right to housing (Article 21), education (Article 22) and social security (Article 24).

⁷⁶ All 193 UN member states signed the New York Declaration, a pledge of support to those affected and the states that host them, and a catalyst for the GCR and the GCM.

⁷⁷ In 2018, the GCR was launched and signed by 164 states. African states that have signed it include Cameroon, Chad, Congo, Djibouti, Eswatini, Ethiopia, Gambia, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia and Zimbabwe.

The GCR is a non-binding framework that offers a more predictable and equitable approach to responsibility-sharing when it comes to assisting refugees. Its primary objectives include easing pressure on host countries, enhancing refugee self-reliance, expanding access to third-country solutions and supporting conditions in the country of origin to allow for safe and dignified returns. While it is a non-binding document, it represents a political commitment to “transform the way the world responds to refugee situations”⁷⁸ in a manner that benefits both refugees and the communities that host them. The GCR recognises the principle of non-refoulement while calling for durable solutions to the governance of refugees, as well as commitments to cooperation and burden-sharing. While international law recognises the need for cooperation and solidarity, the GCR goes further in that it provides a framework to achieve this. The GCR further introduces a shift from the traditional emergency response to a response that encapsulates a humanitarian approach together with a developmental focus.⁷⁹ For example, the GCR specifically provides that: “the humanitarian principles of humanity, neutrality, impartiality and independence, as well as the centrality of protection [should] guide the overall application of the Global Compact.”⁸⁰ The GCR also calls for states to include planning for refugees in their national action plans. It states that: “capacity development for relevant authorities will be supported.”⁸¹ In this manner States should take steps to build the capacity of law enforcement to effectively respond to vulnerable members of society, including refugees. This is necessary if States are to balance: “legitimate security concerns with the importance of upholding the civilian and humanitarian character of international law, both in emergency and protracted situations.”⁸² The GCR further states that at the request of States and while respecting national laws and policies, “the UNCHR will support capacity development for community-oriented policing and access to justice”.⁸³ While the GCR offers a non-binding framework and further detail on how States should better protect the rights of refugees, it has been criticised.⁸⁴ There is also a need for further support, particularly in relation to capacity building.

⁷⁸ UN Refugee Agency (2022) “The Global Compact on Refugees” <<https://www.unhcr.org/the-global-compact-on-refugees.html>> (accessed 21/02/2023).

⁷⁹ F Khan & C Sackeyfio (2022) “Situating the Global Compact on Refugees in Africa: Will it Make a Difference to the Lives of Refugees “Languishing in Camps”?” *Journal of African Law*, 65, S1 35–57 page 52.

⁸⁰ UN Refugee Agency “Global Compact on Refugees” <<https://www.unhcr.org/5c658aed4>> (accessed 23/02/2023) para 5.

⁸¹ UN Refugee Agency “Global Compact on Refugees” <<https://www.unhcr.org/5c658aed4>> (accessed 23/02/2023) para 53.

⁸² UN Refugee Agency “Global Compact on Refugees” <<https://www.unhcr.org/5c658aed4>> (accessed 23/02/2023) para 56.

⁸³ UN Refugee Agency “Global Compact on Refugees” <<https://www.unhcr.org/5c658aed4>> (accessed 23/02/2023) para 57.

⁸⁴ J Hyndman & J Reynolds (2020) “Beyond the Global Compacts” *Refuge: Canada's Journal on Refugees* Vol. 36, No. 1 pp. 66-74 page 68. While the GCR contains laudable humanitarian principles, it has been criticised for naturalising state divisions and for attempting to ignore historical relations based on hiding “exploitation, including imperialism, colonialism, and slavery”.⁸⁴ Scholars have also critiqued the GCR for its use of the “self-reliance” trope

When compared to international human rights law,⁸⁵ it is clear that refugee law is more specific in its focus, in that refugee law aims to provide alternate state protection for a specifically defined group of individuals, as opposed to expressly monitoring human rights abuse. The two regimes have however, increasingly converged and contributed to each other's growth. As a result of this interrelationship, following the examination of the African regional human rights system below, this study analyses the overarching human rights norms. This is due to these norms effectively supplementing favourable treatment as envisaged by the relevant international refugee treaties.⁸⁶

4.4 The African regional human rights system

In the specific context of the African continent, the African Charter on Human and Peoples' Rights 1981 (African Charter), the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment 2018 (Protocol on Free Movement) are the most pertinent legal instruments, pertaining to migrants and to the regulation of migration.⁸⁷ To date, the 2018 Protocol is not yet in force. While the key rights pertaining to migration are discussed in detail later in this document, it is essential to highlight the primary importance of the right to freedom of movement. This right is protected under Article 12 of the African Charter and will be further explored in subsequent sections.

4.4.1 The African Charter

The preamble to the African Charter recognises the intrinsic nature of fundamental human rights, and requires that these rights enjoy both national and international protection. Echoing the universality referenced in the UDHR, the African Charter recognises that "every individual shall be entitled to the enjoyment of the rights and freedoms [in the Charter]."⁸⁸ The Charter also affirms the interdependence⁸⁹ and interconnection of rights stating that "the satisfaction

and the concomitant neo-liberal loan programmes offered by the World Bank to States hosting the majority of the world's refugees. This strategy has been criticised for supporting the political goal of primarily keeping refugees in the Global South.

⁸⁵ Refugee law is a specialised area of international law while international law provides a broader framework that regulates relations between states and monitors human rights abuses.

⁸⁶ For example, these norms are particularly relevant in situations where the Geneva Refugee Convention and African Refugee Convention are silent. See: C Kavuro (2018) "Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity" LLD Dissertation (Stellenbosch University) page 40.

⁸⁷ African Charter on Human and Peoples' Rights, June 27, 1981, 1520 UNTS 217, all AU Member States except Morocco are contracting parties; Protocol to the Treaty establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment, Jan. 29, 2018, Available at https://au.int/sites/default/files/treaties/36403-treaty-protocol_on_free_movement_of_persons_in_africa_e.pdf, not yet in force (currently ratified by three Member States: Niger, Rwanda and Mali).

⁸⁸ Preamble to the African Charter and Article 2 of the African Charter.

⁸⁹ The African Commission has also specifically held that being an undocumented immigrant is perceived as the most degrading form of legal, political and social identification. This indicates that certain rights protected by the Charter (such as the right to nationality) have an important relationship with the right to human dignity.

of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.”⁹⁰ The founders of the Charter were thus careful to draw upon the unique nature of African values and experiences. They were also careful to ensure that the Charter is responsive to the African continent’s communal focus, the balance between rights and responsibility,⁹¹ as well as its socio-economic and developmental challenges. As a result, the African Charter recognises the indivisibility of human rights,⁹² the solidarity rights of peoples, equality, self-determination, peace, development, socio-economic rights and a satisfactory environment.⁹³ The substantive rights to life, dignity,⁹⁴ liberty,⁹⁵ access to justice,⁹⁶ access to information,⁹⁷ freedom of conscience,⁹⁸ freedom of movement,⁹⁹ association¹⁰⁰ and assembly¹⁰¹ also expressly apply to “everyone” within the African Charter. These integral rights do not therefore, cease to apply at borders or when people are designated as “illegal” or as irregular migrants. While these integral rights need to be balanced with a State’s right to manage its borders, this needs to be done in a manner that gives effect to the overarching ethos and norms of the African Charter.¹⁰²

Apart from Article 13 of the African Charter, which governs political participation, no other Article expressly makes a distinction between citizens and non-citizens in the enjoyment of rights. Any exceptions to the general principle of non-discrimination between citizens and non-citizens must therefore be limited and construed narrowly.

⁹⁰ This was further affirmed in the case of *Centre for Minority Rights Development v Kenya* (communication NO. 276/2003) [2009] ACHPR 102; (25 NOVEMBER 2009) para 277. Where the African Commission stated that “the Charter goes on to weave a tapestry which includes civil and political, socio-economic and people’s rights”.

⁹¹ Preamble to the African Charter: “Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone”.

⁹² Preamble to the African Charter: “Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.

⁹³ Articles 16-24 of the African Charter.

⁹⁴ Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of *his legal status*. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

⁹⁵ Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

⁹⁶ Article 7 of the African Charter.

⁹⁷ Article 9 of the African Charter.

⁹⁸ Article 8 of the African Charter.

⁹⁹ Article 12 of the African Charter.

¹⁰⁰ Article 10 of the African Charter.

¹⁰¹ Article 11 of the African Charter.

¹⁰² *African institute for human rights and Development v Angola* Communication No. 292/2004, 24th Activity Rep. 79 (2008).

4.4.2 The African Refugee Convention

The first treaty with a human rights focus adopted under the Organisation of African Unity (now the African Union) was the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa.¹⁰³ This instrument affirmed the provisions of the 1951 UN Refugee Convention, while going further in that it expanded the refugee definition to include individuals fleeing due to “external aggression, occupation, foreign domination or events seriously disturbing public order”. The African Convention reinforces key refugee protection standards, including the closely interconnected principles of non-refoulement and voluntary repatriation. This Convention also calls on States to accept refugees and provide them with protection, confirming that: “The provision of asylum to refugees is a peaceful and humanitarian act and should not be considered by another State as an unfriendly act”.¹⁰⁴ The Convention is an important regional complement to the 1951 UN Refugee Convention. Read together, these instruments reflect an integral set of standards on how refugees living in exile should be treated. The African Refugee Convention further grounds the protection of refugees and asylum-seekers on international cooperation, relying on the spirit of African solidarity.¹⁰⁵

4.4.3 The Migration Policy Framework for Africa and Plan of Action 2018-2027

In 2001 the OAU Council of Ministers undertook Decision CM/Dec 614 (LXXIV), which called for the development of a Migration Policy Framework. This culminated in the AU Migration Policy Framework (adopted in 2006) which provides comprehensive and integrated policy guidelines to AU member states and RECs on migration governance. In 2016, after reviewing the Migration Policy Framework and Plan of Action (MPFA) it was recommended that the policy framework be updated together with a 10 year action plan for its implementation. The reviewed MPFA (2018-2027)¹⁰⁶ seeks to reflect current migration dynamics in Africa while providing policy recommendations relating to key themes. The eight thematic issues traversed by the MPFA include migration governance, labour migration and education, diaspora engagement, border governance, irregular migration, forced displacement, internal migration and migration and trade. Under each pillar, the framework proposes specific objectives,

¹⁰³ The African Refugee Convention widens the definition of the term refugee to include not only persons fleeing from political persecution, but also persons who seek refuge owing to safety and security problems caused by —external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole [of the country of an asylum-seeker].

¹⁰⁴ Article 2(2) of the African Convention on Refugees.

¹⁰⁵ Para 8 of the Preamble, read together with article 2(4). See also: C Kavuro (2018) “Refugees’ Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity” LLD Dissertation (Stellenbosch University) pages 103 and 122.

¹⁰⁶ African Union (2018) “Migration Policy Framework for Africa and Plan of Action” <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf> (accessed 09/05/2023).

strategies and actions to be implemented by the AU, its member States and other stakeholders to address the challenges and opportunities of migration in Africa.

Under the sub-theme of border governance, the MPFA underscores that: “The trend towards the securitisation of migration and borders *should not* engender the closing of borders and hamper integration efforts in Africa.”¹⁰⁷ It goes on to emphasise that States need to enhance cooperative efforts pertaining to security, immigration and development, if Africa is to facilitate efficient border governance and economic integration.¹⁰⁸ The MPFA therefore advocates for a comprehensive and integrated approach to border governance in a manner that is responsive to underlying economic, social and political factors. This approach entails cooperation and coordination among relevant government agencies as well as regional and international partners. The MPFA further affirms that: “It remains paramount to uphold the rights of all migrants, asylum seekers and refugees during all stages of the migration process, and enhanced security measures should serve to uphold these rights”.¹⁰⁹

The MPFA also addresses cross-cutting issues, such as migration and development, data and research, the human rights of migrants and the importance of an engendered response to migration. The framework is non-binding and provides guidelines and principles to assist governments and RECs in formulating and implementing their own policies. While the MPFA provides a comprehensive and holistic approach to migration that seeks to enhance the benefits of migration while mitigating its negative impacts, the existing policy framework is non-binding. The MPFA therefore only provides recommendations while failing to evoke a sense of State responsibility or compelling binding commitments.¹¹⁰

4.5 The international and regional legal framework pertaining to state sovereignty

State sovereignty remains an important overarching principle pertaining to migration governance. In accordance with this principle, each State has the right to control its own territory and to make its own laws that regulate the admission of non-nationals into their

¹⁰⁷ African Union (2018) “Migration Policy Framework for Africa and Plan of Action” <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf> (accessed 09/05/2023) page 11.

¹⁰⁸ African Union (2018) “Migration Policy Framework for Africa and Plan of Action” <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf> (accessed 09/05/2023) page 11.

¹⁰⁹ African Union (2018) “Migration Policy Framework for Africa and Plan of Action” <https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/other_documents/35316-doc-au-mpfa_2018-eng.pdf> (accessed 09/05/2023) page 12.

¹¹⁰ N sempijja (2021) “Policy Brief Examining migrants’ vulnerabilities and migration policies in Africa” *Institute for Peace and Security Studies* volume 15 (08) page 3. Professor Norman Sempijja is an Associate professor with the Faculte de Gouvernance, Sciences Economiques et Sociales at Mohammed VI Polytechnique University, Morocco.

country.¹¹¹ States also have the responsibility to protect the security and welfare of their citizens and to control their borders. However, this right is not absolute, and States must also respect and protect the human rights of all individuals, regardless of their migration status. As emphasised by the African Commission “This [sovereignty]¹¹² does not [however] in any way mean that the African Charter gives member States free hand to unnecessarily and without due process deal with non-nationals.”¹¹³ The Commission went on to underscore that non-nationals should not be treated in such a manner that they are denied the basic guarantees enshrined under the African Charter.¹¹⁴

From the above legal analysis, it is clear that international law recognises the right of everyone to leave any country, including their own country, as well as the right to return to it. While there is no standalone right to enter into another country under international law, individuals facing persecution have the right to seek asylum,¹¹⁵ which is then subject to specific rules.

Notwithstanding the lack of an automatic and general right to enter into another country, the 1951 Convention on the Status of Refugees and the African Convention on Refugees, do require States to facilitate pathways towards naturalisation for those fleeing persecution.¹¹⁶

The manner in which a State gives effect to these international law duties will vary according to the particular country’s bilateral agreements and their domestic legal regime. However countries are not entitled to automatically refuse entry to those who face acute threat.¹¹⁷

When drafting, updating or reviewing their immigration laws and policies, States are therefore obliged to infuse their national legal framework with the principles of non-discrimination and

¹¹¹ International Covenant on Civil and Political Rights; Declaration on the Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live; International Convention for Migrant Workers and Their Families, Article 16; African Charter, Article 2.

¹¹² In para 84, the ACHPR states that: “There is nothing in the African Charter that requires Member States of the African Union to guarantee for non-nationals an absolute right to enter and/or reside in their territories.”

¹¹³ *Institute for Human Rights and Development in Africa v Angola* para 84.

¹¹⁴ *Institute for Human Rights and Development in Africa v Angola* para 84.

¹¹⁵ Article 14(1) of the Universal Declaration on Human Rights: “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”

¹¹⁶ Article 34 of the 1951 Convention provides that: “The contracting States shall, as far as possible, facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.” Article II (1) of the Convention Governing the Specific Aspects of Refugee Problems in Africa states that: “Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.” Article II (3) goes on to provide that: “No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”

¹¹⁷ Article II(3) of the African Refugee Convention provides that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I”.

due process, in terms of how they treat migrants.¹¹⁸ States should furthermore, take steps to ensure that bilateral agreements encapsulate the principles that are recognised at the level of international law, including non-discrimination, non-refoulement and the protection of human dignity. States thus retain a measure of sovereign prerogative to decide on the criteria for admission and expulsion of non-nationals, while being obliged to ensure that these rules comply with international law provisions.¹¹⁹ States are furthermore, required to give effect to the rights that are implicated when law enforcement personnel target migrants. These rights are discussed below.

4.6 Pertinent rights pertaining to migrants

Drawing from the above instruments, it is clear that migrants are entitled to a number of key human rights protections. While the laws and policies pertaining to refugees discussed above are more specific in focus, given the emphasis on the African continent, and that many of the rights and principles in the above-mentioned instruments are reflected in the African Charter and in African regional instruments, the balance of this section will focus on the specific integral rights that should inform State responses to migrants.

4.6.1 The right to equality

With regard to international law, the prohibition on discrimination is at the centre of all human rights treaties.¹²⁰ The Convention on the Elimination of all Forms of Racial Discrimination goes further however, and specifically emphasises the need to address institutionalised racism and xenophobia, stating that discrimination on the grounds of race has the potential to disturb peace and security. This is important as migrants who become the target of criminal law enforcement are frequently “racialised men and women of colour”.¹²¹ Workplace raids, stop and search practices and by-laws are frequently utilised to perpetuate racial oppression and subordination.¹²²

¹¹⁸ *Institute for Human Rights and Development in Africa v Angola* para 84.

¹¹⁹ *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 84.

¹²⁰ For example, the ICCPR protects the rights of ‘all individuals within its territory and subject to its jurisdiction’ without distinction; it guarantees to all persons equality before the law and equal protection by the law without any discrimination. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) applies these universal rights to the specific situation of migrant workers and. Office of the United Nations High Commissioner for Human Rights “Migration and Development: a Human Rights Approach” <<https://www2.ohchr.org/english/bodies/cmw/docs/HLMigration/MigrationDevelopmentHC%27spaper.pdf>> (accessed 12/10/2022).

¹²¹ G Sanchez (2021) “To Other and Vilify: Manufacturing Migration as Crime” *European Journal on Criminal Policy and Research* (2021) 27:1–4 page 1; G Sanchez & Romero (2010) “Critical Race theory in the US sociology of migration” *Sociology Compass*, 4(9), 779–788.

¹²² G Sanchez (2021) “To Other and Vilify: Manufacturing Migration as Crime” *European Journal on Criminal Policy and Research* (2021) 27:1–4 page 1; G Sanchez & Romero (2010) “Critical Race theory in the US sociology of migration” *Sociology Compass*, 4(9), 779–788.

At the regional level, the preamble to the African Charter specifically refers to the duty to eliminate “all forms of discrimination, particularly those based on race, ethnic group, colour, sex, language, religion or political opinions.”¹²³ This is a non-exhaustive list of grounds. The importance of the right to equality has been further underscored by the African Commission which has recognised that this right facilitates the enjoyment of many other integral human rights.¹²⁴

Article 2 of the Charter builds on the preamble’s recognition of the importance of equality and specifically refers to the importance of non-discrimination on the grounds of national and social origin, fortune, birth or other status. In light of the interdependence of rights, Article 2 should be read together with other key civil and political rights, as well as the socio-economic rights protected in the African Charter. For example, equality before the law (Article 3) requires that migrants should be able to enjoy due process when coming into contact with the criminal justice system, on an equal basis, at all stages of the detention continuum. This was emphasised in the case of *Institute for human rights and Development in Africa v Angola (“IHRDA v Angola”)*.¹²⁵ In this case, the African Commission pointed out that States cannot deal with non-nationals in a manner that denies migrants their rights in the African Charter. Even in extreme cases involving expulsion, migrants should be able to challenge the order, to have their case reviewed and they should be able to access legal counsel.¹²⁶

In a 2017 press release, the African Commission further pointed out, that in attempting to balance security and humanitarian needs, States have to ensure, “without any discrimination, respect for their regional and international obligations regarding the protection of migrants, asylum seekers [and] refugees.”¹²⁷

Article 18 of the Charter specifically provides that: “the family shall be protected by the State which shall take care of its physical health”. The State shall therefore, have the duty to assist the family, to ensure the elimination of every form of discrimination against women migrants and to ensure the protection of the rights of the child migrant as stipulated in international declarations and conventions (Article 18(3)). The African Charter’s insistence on non-discrimination further manifests in Article 19, which extends the principle of non-discrimination

¹²³ Article 2 of the African Charter.

¹²⁴ *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006) para 68.

¹²⁵ (COMMUNICATION N. 292/2004) [2008] ACHPR 83; (22 MAY 2008).

¹²⁶ *Institute for human rights and Development v Angola* Communication No. 292/2004, 24th Activity Rep. 79 (2008) para 84.

¹²⁷ African Commission on Human and Peoples’ Rights (2017) “Press Release on the Trafficking in Persons and Slavery in Libya” < <https://www.achpr.org/pressrelease/detail?id=73> > (accessed 12/10/2022).

to the community as a whole by proclaiming the equality of all peoples (a collective of individuals sharing certain bonds and identities).¹²⁸

When reading Article 1 of the African Charter, together with Articles 2, 3 and 18 it is clear that the African Charter requires both positive and negative measures to respect, protect and fulfil the rights of all persons, regardless of their migration status. Substantive equality therefore requires States to not only prohibit and prevent direct and indirect discrimination against migrants through law, policies and practices. States must also achieve structural change by seeking to dislodge the underlying norms and causes of inequality, xenophobia and racism while introducing special measures to protect the rights of migrants. The United Nations High Commissioner has furthermore called on States and other actors to “utilise information campaigns and the media to protect migrants and challenge xenophobia at borders.” The High Commissioner further notes that the term “illegal” should not be used to refer to migrants in an irregular situation.¹²⁹

In accordance with a positive conception of equality, states should remove discriminatory barriers that prevent migrants from accessing integral socio-economic resources. For example, States need to confront institutionalised xenophobia, which takes the form of systemic and entrenched discrimination against foreigners (or those individuals perceived to be foreign) across routine structures and institutions of society.¹³⁰

Equal access to integral resources is also important for migrants who have been detained. This was underscored in *IHRDA v Angola*, whereby the African Commission recommended that the government of Angola ensure all persons placed in detention (including migrants) have access to proper medical examination, treatment and care.¹³¹ Given that States have a special position of guarantor of the rights of those who are in their custody in migrant detention centres, States must take rigorous measures to mitigate any risks to life, personal integrity and health of those they detain.¹³²

¹²⁸ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. No. 276/2003, 27th Activity Rep. 151 (2009).

¹²⁹ United Nations Office of the High Commissioner of Human Rights (2014) “Recommended Principles and Guidelines on Human Rights at International Borders” <https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf> (accessed 10/09/2022).

¹³⁰ K P Vanyoro & L Ncube (2018) “[Re]-presenting knowledge: The coverage of xenophobia research in selected South African newspapers, 2008 -2013” < <http://www.migratingoutofpoverty.org/files/file.php?name=2017-18-3-vanyoro-2018-re-presenting-knowledge-the-coverage-of-xenophobia.pdf&site=354>> (accessed 04/05/2023).

¹³¹ *Institute for human rights and Development v Angola* Communication No. 292/2004, 24th Activity Rep. 79 (2008) para 87.

¹³² *Institute for human rights and Development v Angola* Communication No. 292/2004, 24th Activity Rep. 79 (2008) para 87.

In addition, all law enforcement personnel must be properly screened and receive training on how to protect, promote and fulfil the right to equality for migrants, with explicit prohibitions against discriminatory spot checks, arrests, detention, harassment and abuse.¹³³ This is in accordance with Article 1 and Article 25 of the African Charter. While Article 1 requires States to recognise and give effect to the rights in the Charter, Article 25 provides that “State Parties shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter”. States are also obliged to ensure that the rights and corresponding obligations are understood by those responsible for implementing them (such as law enforcement). There is furthermore, a need for accountability against those who utilise or perpetuate negative political rhetoric in their work and daily actions.¹³⁴ A substantive understanding of equality further seeks to create conducive conditions that enable all migrants to equally enrich society through their human, economic and social capacities, and thus facilitate their contributions to sustainable development at the local, national and international levels.¹³⁵ This is reflected in the GCM which requires States to eliminate all forms of discrimination.

Regional protocols and charters, such as the Maputo Protocol and the Charter on the Rights and Welfare of the Child, further strengthen this protection of equality through providing supplementary detail on the interpretation of the non-discrimination principle in relation to these groups. In particular, Article 2(1) of the Maputo Protocol provides that States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures, while calling for States to integrate gender at all levels of implementation. In recognition of the fact that asylum-seeking and refugee women have gender-specific needs, the African Women’s Protocol further provides for equality of access in respect of the refugee status determination process; the provision to refugee women of their own identity as well as other documentation;¹³⁶ the inclusion of women in decision-making structures at all levels; and the protection of asylum-seeking, refugee, returnee and displaced women from ‘all forms of violence, rape and other forms of sexual exploitation’.¹³⁷ These rights are important as women and girls, are particularly vulnerable to sexual violence and abuse at

¹³³ *Institute for human rights and Development v Angola*, Communication No. 292/2004, 24th Activity Rep. 79 (2008) para 87.

¹³⁴ United Nations Office of the High Commissioner (2018) “Global Compact for safe, orderly and regular migration” (A/RES/73/195) < <https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm> > (accessed 06/10/2022). United Nations Office of the High Commission (2022) “South Africa: UN experts condemn xenophobic violence and racial discrimination against foreign nationals” <<https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence-and-racial>> (accessed 03/10/2022).

¹³⁵ United Nations Office of the High Commissioner (2018) “Global Compact for safe, orderly and regular migration” (A/RES/73/195) < <https://www.ohchr.org/en/migration/global-compact-safe-orderly-and-regular-migration-gcm> > (accessed 06/10/2022).

¹³⁶ Article 4(2)(k) of the Maputo Protocol.

¹³⁷ Article 11(3) of the Maputo Protocol.

border checkpoints.¹³⁸ The African Charter's commitment to equality, read together with the Maputo Protocol's call to streamline gender into all plans and policies (Article 2(1(c))¹³⁹ calls for gender-responsive migration approaches.

The Charter on the Rights and Welfare of the Child expressly addresses questions of refugee protection. Under Article 23 of the Charter, States must take appropriate measures to ensure that asylum procedures provide appropriate protection to children. Article 3 of the Charter on the Rights of the Child also provides that: "Every child shall be entitled to the rights and freedoms recognised and guaranteed in this Charter irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or other status." Notably, they should not suffer any adverse consequences because of their migration status or that of their parents or legal guardians. The Charter recognises the principle that the best interests of the child (Article 4) must be a primary consideration in any measure that affects or might affect a child's human rights. States must put the necessary arrangements in place for children of all ages to be heard in proceedings that concern them. This sentiment is reflected in the AU's Agenda 2063, which pledges to leave no-one behind.¹⁴⁰

The African Refugee Convention specifically recognises the right to equality for refugees stating that: "Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions."¹⁴¹ This reveals that the standards of favourable treatment, as envisaged by the Geneva Refugee Convention must be informed and applied through the lens of substantive equality.¹⁴²

¹³⁸ United Nations High Commissioner on Refugees (2020) "Thousands of refugees and migrants suffer extreme rights abuses on journeys to Africa's Mediterranean coast, new UNHCR/MMC report shows" <<https://www.unhcr.org/news/press/2020/7/5f1ee9314/thousands-refugees-migrants-suffer-extreme-rights-abuses-journeys-africas.html>> (accessed 09/02/2023).

¹³⁹ Article 2(1)(c) of the Maputo Protocol provides that "States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall (c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life".

¹⁴⁰ The Committee on the Rights of the Child has published detailed General Comments on States' obligations with respect to children in the context of migration. Other valuable and authoritative standards are the *Recommendation of the Committee of Ministers of the Council of Europe on effective guardianship for unaccompanied and separated children in the context of migration*.

¹⁴¹ Article 4 of the African Convention on Refugees.

¹⁴² C Kavuro (2018) "Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity" LLD Dissertation (Stellenbosch University) page 336.

4.6.2 The right to life

Given that the African Commission has described the right to life as “the fulcrum” of all rights, this right is clearly a supreme and non-derogable right, applying to all persons at all times. The substantive right to life as protected in the African Charter expressly applies to “everyone”. Article 4 of the African Charter provides that: “Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” The duty to prosecute violations of the right to life, extends to extrajudicial killings that take place during a migrant’s journey from the country of origin to the country of destination and vice versa.¹⁴³ States also have a duty to mitigate loss of life when migrants cross land and sea borders.¹⁴⁴

While the right to life is impacted upon by the actions of law enforcement, it is also affected by the failure of law enforcement to act, in certain instances. The right to life together with Article 1 of the African Charter, which requires states to take steps to give effect to the rights in the Charter, emphasises the importance of the due diligence principle¹⁴⁵ under international law. This principle pertains to the State’s responsibility to not only refrain from causing harm but to also *prevent* acts of violence. This is particularly important in relation to the duty on law enforcement to exercise due diligence in their everyday work.

The African Charter’s right to life read together with the African Refugee Convention’s Article 2 paragraph 3, makes it clear that the principle of non-refoulement must also be informed by a dignified conception of life. Article 2 paragraph 3 of the Refugee Convention provides that “no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article 1.” The ACHPR, General Comment No. 3 on the African Charter on Human and People’s Rights: The Right to Life (Article 4), 18 November 2015 (“General Comment 3”), specifically calls for a broad interpretation of State’s responsibilities when it comes to protecting life.¹⁴⁶ The General

¹⁴³ See UN General Assembly, Resolution 23/20, *Human rights of migrants*, UN Doc. A/HRC/RES/23/20, 26 June 2013, para. 4(c).

¹⁴⁴ See UN General Assembly, Resolution 23/20, *Human rights of migrants*, UN Doc. A/HRC/RES/23/20, 26 June 2013, at para. 4(d).

¹⁴⁵ The due diligence concept refers to a State’s duty to *prevent* acts of violence that occur in private or between state subjects. As early as the seventeenth century jurists referred to it as the sovereign’s obligation to prevent injury to foreign nationals and their property by private individuals and to ensure that reparations were paid where damages were perpetrated. The concept was first used for the protection of human rights in the 1970’s in relation to forced disappearances in Latin America. In the case of *Velsquez Rodriguez Case, 1988 Inter-American Court on Human Rights (ser. C) No. 4 (July 29)*, the Inter-American Court of Human Rights found that Honduras had failed to fulfil its obligations in terms of article 1(1) of the American Convention of Human Rights emphasising that: “States have a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.” (para 174).

¹⁴⁶ African Commission on Human and Peoples’ Rights “General Comment No 3: On the Right to life”, para 3.

Comment 3 goes on to refer to humanitarian responses to emergencies, as a reflection of the Charter's ambition to ensure a better life for all.¹⁴⁷ Para 40 of the General Comment further provides that States should not violate the principle of non-refoulement and that the right to life should be interpreted broadly to encompass a dignified life. As further emphasised in the Common African Position (CAP) on Humanitarian Effectiveness:¹⁴⁸ "States bear the primary responsibility under International law with respect to the humanitarian needs of all segments of its population."¹⁴⁹ While States are primarily responsible in this regard, the CAP underscores that the international community should assist in sharing this burden.¹⁵⁰ The CAP goes on to provide that States are required to create appropriate and conducive spaces to protect and assist, and ensure the security of all populations.¹⁵¹

Even in situations where States are attempting to combat security threats and organised crime, restrictions on the right to life are subject to strict requirements.¹⁵² As emphasised in the African Commission's *Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*: "Counterterrorism operations must be narrowly tailored and strictly proportionate to the aim of protecting individuals against violence and be planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal or non-lethal force."¹⁵³ The existing international standards relating to the use of force also already address substantial threats to life, including those posed, by armed terrorists or suicide bombers. Basic principle 9¹⁵⁴ is widely understood to allow for the intentional use of lethal force only where it would be "strictly unavoidable in order to protect life."¹⁵⁵ The abusive actions of law enforcement must therefore be scrutinised in accordance with this framework.

¹⁴⁷ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para 5.

¹⁴⁸ African Union (2016) "Common African Position on Humanitarian Effectiveness" <<https://www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf>> (accessed 23/03/2023).

¹⁴⁹ African Union (2016) "Common African Position on Humanitarian Effectiveness" <<https://www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf>> (accessed 23/03/2023) para 38.

¹⁵⁰ African Union (2016) "Common African Position on Humanitarian Effectiveness" <<https://www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf>> (accessed 23/03/2023) para 126.

¹⁵¹ African Union (2016) "Common African Position on Humanitarian Effectiveness" <<https://www.tralac.org/images/docs/9719/common-african-position-cap-on-humanitarian-effectiveness-may-2016.pdf>> (accessed 23/03/2023) para 38.

¹⁵² African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para 2 particularly states that: "Organised crime and terrorism can pose significant threats to the enjoyment of the right to life and require a robust State response, but one that at all times takes into account the requirements of international human rights law."

¹⁵³ African Commission on Human and Peoples' Rights "Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa" Principle 2(B)(ii).

¹⁵⁴ Of the Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa.

¹⁵⁵ This language is from the UN Basic Principles on the Use of Force and Firearms, but was also adopted by the African Commission, see ACHPR, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa, Principle 2(B).

The African Commission's General Comment 3 also provides that States must take all reasonable precautionary steps to protect life and prevent excessive use of force by its agents. These steps include providing appropriate equipment and training, providing an effective legislative framework and undertaking effective planning.¹⁵⁶ The intentional lethal use of force by law enforcement officials is prohibited unless it is strictly necessary to protect life.¹⁵⁷

States therefore have a responsibility to prevent arbitrary deprivation of life caused by its own law enforcement agents,¹⁵⁸ and to protect individuals and groups from such deprivations by third parties.¹⁵⁹ This duty also encapsulates a responsibility to investigate any killings that take place, and to hold the perpetrators accountable. This intersects with Article 27(2) of the Charter which requires rights to be exercised "with due regard to the rights of others, collective security, morality and common interest." While crime and security concerns, such as terrorism necessarily require a robust State response, these responses must be informed by international human rights law.¹⁶⁰ Within law enforcement contexts, where use of force may threaten the right to life for migrants, the six core principles of legality, precaution, necessity, proportionality, accountability and non-discrimination must be considered.

With regard to legality, any use of force by law enforcement must be based on already existing and publicly available domestic laws which comply with international human rights laws and norms. Domestic laws pertaining to the use of force must also not sanction the use of prohibited weapons while the legitimate objectives of law enforcement must be clearly defined.¹⁶¹

In terms of the need to exercise precaution, international law requires that law enforcement operations must be planned and implemented in a manner that seeks to minimise damage,

¹⁵⁶ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para E 27.

¹⁵⁷ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para E 27.

¹⁵⁸ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para E 27.

¹⁵⁹ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para 2.

¹⁶⁰ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life", para 2.

¹⁶¹ African Commission on Human and Peoples' Rights (2023) "Study on the Use of Force by Law Enforcement Officials in Africa" < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 8.

injuries and loss of life.¹⁶² As a result any overt “shoot to kill” operations targeting migrants or “no retreat” policies are generally deemed unlawful.¹⁶³

With regard to necessity, law enforcement officials should only use force when absolutely necessary and in pursuit of a legitimate law enforcement purpose, with only the minimum necessary force being used.¹⁶⁴ Law enforcement should also attempt to use non-violent mechanisms, such as negotiation and persuasion, to encourage compliance with their instructions.¹⁶⁵

The principle of proportionality requires law enforcement to restrict their use of force to a level that corresponds to the severity of the relevant offence and the lawful objectives to be achieved. Simultaneously, law enforcement officials must take into account and attempt to minimise the potential impact on bystanders.¹⁶⁶

In terms of accountability, States have a duty to hold law enforcement officials accountable for their actions, which includes the use of force¹⁶⁷ as well as a failure to protect members of the public against serious threats. To achieve accountability, it is essential for law enforcement

¹⁶² African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 9, where the study directly quotes the Commission’s Guidelines on Policing Assemblies:

“In the planning, preparation and conduct of an assembly operation, tactical and other measures must be taken to avoid the use of force and, where force is unavoidable, to minimise the harmful consequences of the use of force. If the use of force is necessary and proportionate, but the need for force could reasonably have been prevented from arising in the first place by exercising all precautions in planning and preparation for an assembly operation, operational commanders must be held accountable”. See: African Commission on Human and Peoples’ Rights (2017) *Guidelines on Policing Assemblies*, para. 21.2.1.

¹⁶³ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 9, where the Study cites the case of the European Court of Human Rights, *Yukhymovych v. Ukraine*, Judgment (Fifth Section), 17 December 2020, paras.73, 86, 87, in reference to the prohibition against shoot to kill policies.

¹⁶⁴ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 11.

¹⁶⁵ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 11.

¹⁶⁶ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 12.

¹⁶⁷ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 13, where the study references the African Commission on Human and Peoples’ Rights, General Comment No.4 on The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 2017, para.46.

agencies to establish independent internal accountability mechanisms. In addition, oversight authorities, reporting and transparency are essential elements of accountability.¹⁶⁸

Law enforcement officials should furthermore, not discriminate based on status, such as gender, socio-economic status, gender identity or sexual orientation. Law enforcement officials cannot therefore infringe upon the rights protected in the African Charter, including the right to life, based on discriminatory profiling.¹⁶⁹ Law enforcement personnel must consequently be responsive to the unique needs and vulnerabilities of migrants.

All migrants are therefore entitled to enjoy the right to life, and States have an obligation to ensure that no migrant is arbitrarily deprived of this right.¹⁷⁰ When reading international human rights law together with the international law of the sea, States also have a duty to protect and ensure the right to life of individuals at sea in their territory. States further have an obligation to protect the right to life for migrants aboard a ship that is under their jurisdiction. The international law of the sea in particular has developed provisions concerning the duties pertaining to rescuing those who are lost at sea. For example, Article 98 of the UN Convention on the Law of the Sea places an obligation on shipmasters to assist any person found at sea who is in danger of being lost. Shipmasters are also required to rescue persons in distress if informed of their need for assistance, provided that such action does not seriously endanger the ship, crew, or their passengers. In addition, there is a positive obligation on coastal States to cooperate with all neighbouring States to effectively promote search and rescue services.¹⁷¹

4.6.3 The right to human dignity

Article 5 of the African Charter provides that: “every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.” All forms of exploitation including torture, are also prohibited. The right to human dignity holds significant importance within the context of migration, particularly when migrants are separated from their families, denied access to documentation processes, held in degrading conditions of detention or when they are abused, tortured or mistreated at the hands of law

¹⁶⁸ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 13.

¹⁶⁹ African Commission on Human and Peoples’ Rights (2023) “Study on the Use of Force by Law Enforcement Officials in Africa” < <https://achpr.au.int/en/documents/2023-02-17/study-use-force-law-enforcement-officials-africa> > (accessed 23/03/2023) page 10.

¹⁷⁰ See ICCPR, article 6; ICRMW, article 9.

¹⁷¹ The 1979 International Convention on Maritime Search and Rescue provides that persons in distress at sea should be assisted regardless of their nationality, status, or the circumstances in which they are found. See International Commission of Jurists, *Migration and International Human Rights Law: A Practitioner’s Guide* (2014), page 101.

enforcement. As the African Commission has observed, torture and other cruel, inhuman or degrading punishment or treatment remain a serious concern throughout the African continent.¹⁷² The right to freedom from torture and other ill-treatment is also of particular concern with respect to detainees. In situations where a migrant is initially taken into police custody without any apparent injuries but subsequently presents with wounds, it becomes imperative for the State to provide a credible and coherent account of what caused those injuries.¹⁷³ Accordingly, there exists a presumption that any person, irrespective of their migrant status, who sustains injuries while under detention, has likely been subjected to ill-treatment. The right to dignity inevitably intersects with other rights, such as the right to equality, due process, freedom of movement, socio-economic rights and the right to liberty and security of the person.¹⁷⁴

4.6.4 The right to liberty and security of the person

As pointed out by Alice Edwards, the UN Special Rapporteur on freedom from torture, “Except in specific individual cases, detention is largely an extremely blunt instrument to counter irregular migration.”¹⁷⁵ As a general principle, deprivation of the right to liberty is only acceptable if it is authorised by law and is compatible with the African Charter.¹⁷⁶ Unless there is a threat to human safety or security, law enforcement officials must consider all other options before making an arrest.¹⁷⁷ There are existing State commitments, at the national, regional and international level, to develop and implement alternatives to detention.

¹⁷² ACHPR, General Comment No. 4 on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), para. 1.

¹⁷³ European Court of Human Rights, *Shuriyya Zeynalov v. Azerbaijan*, Judgment, 10 September 2020, para. 50.

¹⁷⁴ The African Commission has recognised the link between socio economic rights and dignity. See: *Social and Economics Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), 260 para 64-66.

¹⁷⁵ United Nations High Commissioner for Refugees (2011) “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants” <<https://www.unhcr.org/4dc949c49.pdf>> (accessed 12/10/2022).

¹⁷⁶ However, the mere mention of the phrase ‘except for reasons and conditions previously laid down by law’ in Article 6 of the African Charter does not mean that any domestic law may justify the deprivation of such persons’ freedom and neither can a State party to the African Charter avoid its responsibilities by recourse to the limitations and claw back clauses in the African Charter; *Purohit and Moore v The Gambia*, ACHPR Communication No. 241/2001 (2003), para. 64. Available at http://www.achpr.org/files/sessions/33rd/comunications/241.01/achpr33_241_01_eng.pdf (accessed 12/04/2019) See the African Charter, article 6; American Convention, article 7; ECHR, article 5; ICCPR, article 9. Under Article 9 of the ICCPR, a State must not arbitrarily arrest and detain an individual, and the State must show that other less intrusive measures besides detention have been considered and found to be insufficient to prove detention is not arbitrary.

¹⁷⁷ General Comment No.5 on the right to liberty and security of the person states that: “Asylum seekers who unlawfully enter a State party’s territory may be detained for a brief initial period in order to document their entry, record their claims and determine their identity if it is in doubt. To detain them further while their claims are being resolved would be arbitrary in the absence of particular reasons specific to the individual, such as an individualised likelihood of absconding, a danger of crimes against others or a risk of acts against national security.”

The Human Rights Committee's General Comment no.35 on the right to liberty and security of the person confirms that detention in the course of governing migration is not per se arbitrary. It does however, go on to state that the detention must be justified on the basis that it is reasonable, necessary and proportionate when taking the particular circumstances into account. The detention must also be reassessed as it extends in time.¹⁷⁸

When a state official relies on detention, there must be a rational connection between the law, its enforcement and the intended objective. Border control officials may therefore never arrest a migrant with the sole purpose to intimidate or harass them or to extort a bribe. All persons deprived of their liberty shall also be treated humanely. Arrest and detentions are furthermore, only permitted if conducted in accordance with human rights principles and standards, including those deriving from the African Commission's Luanda Guidelines.¹⁷⁹ The Luanda Guidelines emphasise that all persons are entitled to the same fundamental rights and freedoms, without discrimination of any kind, including the right to be free from arbitrary arrest and detention and to be promptly informed of the reasons for their arrest.¹⁸⁰ They are also entitled to be brought before a judicial authority promptly and to have a fair and impartial trial.¹⁸¹ The Guidelines further emphasise that law enforcement officials need to be responsive to the specific needs of vulnerable groups, such as refugees and non-nationals.¹⁸² Examples of vulnerabilities facing migrants include language barriers, lack of access to legal representation and limited knowledge of their rights.

If the arrested or detained person is a foreign national, they must be promptly informed of the right to communicate with their embassy or consular post. In addition, if the person is a refugee

¹⁷⁸ The Human Rights Committee "General comment no. 35 on the right to liberty and security of person" <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>> (accessed 16/03/2023) para 18.

¹⁷⁹ *However, the mere mention of the phrase 'except for reasons and conditions previously laid down by law' in Article 6 of the African Charter does not mean that any domestic law may justify the deprivation of such persons' freedom and neither can a State party to the African Charter avoid its responsibilities by recourse to the limitations and claw back clauses in the African Charter; Purohit and Moore v The Gambia, ACHPR Communication No. 241/2001 (2003), para 64. Building on this existing framework and on the rights to equality, life, dignity, security, a fair trial and an independent judiciary, are the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa ("Luando Guidelines"). These guidelines clarify the grounds for lawful arrest. As such, arrests can only be carried out on grounds and procedures established by law, which must be clear, accessible and precise. Arrests may also not be carried out in a discriminatory manner, with explicit prohibition against discrimination on the grounds of race, ethnicity, colour, language, religion, political affiliation, nationality, social origin, or any other status.*

¹⁸⁰ African Commission on Human and Peoples' Rights (2016) "Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa" < <https://www.refworld.org/docid/5799fac04.html>> (accessed 02/05/2023) sections 1 and 4.

¹⁸¹ African Commission on Human and Peoples' Rights (2016) "Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa" < <https://www.refworld.org/docid/5799fac04.html>> (accessed 02/05/2023) section 7.

¹⁸² African Commission on Human and Peoples' Rights (2016) "Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa" < <https://www.refworld.org/docid/5799fac04.html>> (accessed 02/05/2023) sections 29 and 34.

or stateless person or under the protection of an inter-governmental organisation, they must be notified without delay of the right to communicate with the appropriate international organisation.¹⁸³

The prolonged detention of a migrant is furthermore, never justified simply by prolonged waiting periods for administrative documents, such as an entry permit or until the end of removal proceedings,¹⁸⁴ particularly when State parties can utilise reporting obligations¹⁸⁵ or other less intrusive measures to ensure compliance with domestic law.¹⁸⁶ The UN High Commissioner on Human Rights has specifically called on States to amend their laws to establish a legislative presumption against detention, and to legally prescribe human rights-compliant alternatives to detention.¹⁸⁷

4.6.5 The rights pertaining to due process

Due process is founded upon the rule of law, which the United Nations has defined as: “A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”.¹⁸⁸ The African Charter itself is deeply rooted in the principle of legality¹⁸⁹ and the rule of law.¹⁹⁰ The commitment to protecting due process, in accordance

¹⁸³ African Commission on Human and Peoples’ Rights (2016) “Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa” < <https://www.refworld.org/docid/5799fac04.html> > (accessed 02/05/2023) sections 4 and 34.

¹⁸⁴ The inability of a State party to carry out the expulsion of an individual because of statelessness or other obstacles does not justify indefinite detention. See: The Human Rights Committee “General comment no. 35 on the right to liberty and security of person” <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>> (accessed 16/03/2023) para 18.

¹⁸⁵ “The decision [to detain] must consider relevant factors case by case and not be based on a mandatory rule for a broad category; must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding; and must be subject to periodic re-evaluation and judicial review.” See: The Human Rights Committee “General comment no. 35 on the right to liberty and security of person” <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>> (accessed 16/03/2023) para 18.

¹⁸⁶ See Human Rights Committee, *A v. Australia*, Communication No. 560/1993, Views of 30 April 1997, para. 8.2.

¹⁸⁷ Office of the United Nations High Commissioner for Human Rights Migration Team (2019) “Initial written submission to General Comment No. 5 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on the Right to Liberty and Protection from Arbitrary Detention” < <https://www.ohchr.org/sites/default/files/Documents/HRBodies/CMW/GC5/MigrationTeam.pdf> > (accessed 07/11/2022).

¹⁸⁸ United Nations Secretary General (2004) “The Rule of law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary General, page 4.

¹⁸⁹ See, *African Charter on Human and Peoples’ Rights*, Article 7(2); throughout the *African Charter on Human and Peoples’ Rights*, States may only restrict the rights and freedoms of individuals when provided for by law as found in Articles 6, 7, 8, 10, 11, 12, and 14; *International Covenant on Civil and Political Rights*, Article 15(1); Comms. 48/90-50/91-52/91-89/93, *Amnesty International, Comité Loosli Bachelard, Lawyers’ Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* (November 1999), para. 59; *United Nations Human Rights Committee*, General Comment 29, para 7; *United Nations Human Rights Committee*, General Comment 27, para 13; ECtHR, and Explanatory Note to Principle 1(G), *Prohibition of Discrimination*.

¹⁹⁰ Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Para 13 of the Preamble provides that African leaders are aware ‘of the fact that the development of strong democratic institutions and culture, observance of human rights and the rule of law ... are essential for the promotion of collective security,

with the rule of law is most pointedly manifested in Article 7 of the African Charter which provides that every individual shall have the right to have his cause heard, including the right to an appeal, the right to be presumed innocent, the right to provide a defence, and the right to be tried within a reasonable time by an impartial court.

In its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa and decisions on communications, the African Commission noted that: “States must ensure that any person arrested or detained is provided with the necessary facilities to communicate, as appropriate, with his or her lawyer, doctor, family and friends, and in the case of a foreign national, his or her embassy or consular post or an international organisation.” The Principles and Guidelines further clarify that ‘[n]o circumstances whatsoever, whether a threat of war, or any other public emergency, may be invoked to justify derogations from the right to a fair trial’.¹⁹¹ States and State institutions, such as law enforcement, should furthermore, consider the individual circumstances of all migrants at their borders, and ensure effective protection and access to justice.

The African Commission has held that persons with an irregular status are not without rights and, “while [the Commission] accepts the right of State parties to bring legal action against illegal migrants and to deport them if justified, migrants are entitled to due process of law and the full protection of their fundamental rights”. These rights include the right to life and the prohibition of torture and degrading behaviour.¹⁹²

In a 2010 decision, the African Commission further clarified that Article 7 specifically applies to migrants. In this case, a professor of political science at the University of Botswana (Kenneth Good) had written an article in which he criticised Botswana’s approach towards presidential succession. Not long thereafter, the president of Botswana declared Kenneth Good an “undesirable inhabitant” of Botswana.¹⁹³ Good was only provided with 56 hours’ notice, without having the opportunity to challenge his expulsion. The African Commission held that Botswana had violated Article 7 of the African Charter. The Commission further

durable peace and stability, as well as for the prevention of conflicts’. Art 3(f) provides that one of the objectives of the Peace and Security Council of the African Union is to ‘promote and encourage ... the rule of law ... as part of efforts for preventing conflicts’. According to the Universal Declaration of Human Rights, 1948 (Universal Declaration) ‘it is essential, if a man is not to be compelled to have recourse ... to rebellion against tyranny and oppression, that human rights should be protected by the rule of law’.

¹⁹¹ African Commission, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, section R. Dakar Declaration and Recommendations on the Right to a Fair Trial in Africa, 26th Ordinary Session, 1-15 November 1999; Communication 218/98 Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project/Nigeria; Communication 301/05 Haregewoin Gebre-Sellaise & IHRDA (*on behalf of former Dergue officials*) v. Ethiopia, 7 November 2011, para 239. See also UN Human Rights Committee, General Comment No.32, CCPR/C/GC/32 (2007), para 6.

¹⁹² *Rencontre Africaine pour la Défense des Droits de l’Homme* (n 10) para 31.

¹⁹³ Utilising his powers under the Immigration Act.

clarified that this right specifically includes the right to an appeal, the right to be presumed innocent, the right to provide a defence, including the right to choose defence counsel and the right to be tried within a reasonable time by an impartial court or tribunal.¹⁹⁴

In its Resolution on the Establishment Committee on the Protection of People Living with HIV and Those at Risk,¹⁹⁵ the African Commission specifically noted that: “in circumstances where the rule of law... [is] not respected as an integrated part of society, the most vulnerable groups within that society are often denied the level of protection they require and hence, are exposed to increased vulnerability.”¹⁹⁶ States are therefore required to ensure that their responses to migration are informed by the right to due process while grounded in the rule of law.

In accordance with the Constitutive Act of the African Union’s commitment to promoting the principles of gender equality, human rights, the rule of law, good governance and the promotion of social justice, States have an obligation to provide adequate, appropriate, and effective remedies to victims of violations of international human rights law and international humanitarian law.¹⁹⁷

Given that the African Charter is open to comparative analysis, it is worthwhile to examine relevant procedural protections provided in specific international instruments. In particular, Article 22 of the International Convention on the Rights of Migrant Workers requires States to put procedural safeguards in place to protect migrants during individual expulsion proceedings. These safeguards include, but are not limited to, communicating the grounds of the decision to a migrant in a language they understand, providing the decision and reasoning in writing (except if this would constitute a threat to national security), permitting a migrant to provide a defence as to why they should not be expelled; and ensuring that the decision is reviewed by a competent authority. Additionally, Article 22(6) notes that States must permit an individual to settle claims for wages within a reasonable time before or after they depart.¹⁹⁸

The GCM specifically recognises that respect for the rule of law, due process and access to justice are fundamental to all aspects of migration governance. Due process is particularly

¹⁹⁴ See African Commission Good v. Republic of Botswana, Communication No. 313/05, 47th Ordinary Session, May 2010.

¹⁹⁵ Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV, and Those at Risk, Vulnerable to and Affected by AIDS, ACHPR/Res 163(XLVII) 2010.

¹⁹⁶ Resolution on the Establishment of a Committee on the Protection of the Rights of People Living with HIV, and Those at Risk, Vulnerable to and Affected by AIDS, ACHPR/Res 163(XLVII) 2010.

¹⁹⁷ See UN General Assembly, Resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147, 16 December 2005, articles 2-3.

¹⁹⁸ See also ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) article 9(1).

important in relation to the everyday discretionary choices of law enforcement officials whose actions can severely impact upon the life, safety and liberty of migrants.

4.6.6 The right to freedom of movement

Freedom of movement is a fundamental human right that is widely recognised under various international human rights instruments. Article 12(1) of the African Charter provides that “*Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.*” The application of this right therefore extends to both citizens and non-nationals. The right to freedom of movement includes the right to move freely within a given territory, the right to choose a residence, the right to leave any country, including one’s own and the right to enter one’s own country.

Article 12(2) of the African Charter goes on to provide that: “Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.” Article 12(3) of the Charter provides those who have been persecuted with the right to seek and obtain asylum. Article 12(4) states that a non-national legally admitted in a territory of a State Party to the Charter, may only be expelled from it by virtue of a decision taken in accordance with the law. Article 12(5) confirms that the mass expulsion of non-nationals is prohibited.

While States can designate legal status as a requirement to exercise this right, State parties have positive obligations to extend this right, within a reasonable amount of time, even to irregular non-nationals living in their jurisdiction where such persons are asylum seekers.¹⁹⁹ The African Commission’s General Comment No.5 on the African Charter on Human and Peoples’ Rights: the Right to Freedom of Movement and Residence (Article 12(1)) also calls for States to review national legislation that bifurcates State protection on the basis of nationality to ensure that this legal framework is not contrary to the purpose and objects of the African Charter.²⁰⁰

The African Commission has described Article 12 as “a fundamental human right to all individuals within States”.²⁰¹ The general principles concerning sovereignty asserted above

¹⁹⁹ African Commission on Human and Peoples’ Rights General Comment 5 para 48. “States must ensure that asylum seekers are accorded the right to move freely and reside within the borders of a state... States must facilitate and expedite the process of documentation for asylum seekers.”

²⁰⁰ African Commission on Human and Peoples’ Rights General Comment 5 para 9.

²⁰¹ *Sudan Human Rights Organisation and Sudan Centre for Housing Rights and Evictions v Sudan*, Communication Nos. 279/03, 296/05, 28th Activity Rep. 187 (2010).

have been endorsed by the African Commission: “Although governments have the right to regulate entry, exit and stay of foreign nationals in their territories, and...although the African Charter does not bar deportations *per se*...‘a State’s right to expel individuals is not absolute and it is subject to certain restraints.’”²⁰² Where States rely on threats to security to infringe upon the right to freedom of security there is an obligation on the State to prove that the individual does pose a genuine risk to law, safety and order. A vague assertion of a “likely” threat is insufficient and is not likely to be accepted.²⁰³

The right to freedom of movement and residence concerns the liberty to freely move within the jurisdiction of a State party, and to reside in a place of an individual’s choice. Freedom of movement needs to be understood as an integral aspect of autonomy and as necessary for facilitating the realisation of human capabilities, as well as the ability to exercise other rights such as the rights to family, association and education.²⁰⁴ It encompasses the liberty to decide where to move to, regardless of the duration of residence and the type of housing tenure. This right must not be made dependent on any particular purpose, condition or requirement.²⁰⁵

The right to freedom of movement and residence imposes certain positive obligations on States. Under the African Charter States are required to refrain from arbitrarily infringing upon individuals’ freedom to move and choose their residence, while they are also required to refrain from making an arbitrary distinction between nationals and foreigners in terms of how they are able to access and enjoy this right. For example, in protecting this right, States are required to prohibit the unlawful and disproportionate exercise of stop and search operations by law enforcement.²⁰⁶

The freedom to choose residence creates an obligation on States to refrain from imposing mandatory residence except where this is provided for by law.²⁰⁷ In addition to the obligation to respect Article 12, State parties to the African Charter have the obligation to protect these rights from violations caused by third parties.²⁰⁸

²⁰² *Institute for Human Rights and Development in Africa v. Angola*, Communication No. 292/2004, 24th Activity Rep. 79 (2008); See also: K Magliveras & G Naldi (2021) “Migration and Human Rights in Africa” in Olayiwola Abegunrin, Sabella O. Abidde (eds) *African Migrants and the Refugee Crisis* Springer Link; African Commission on Human and Peoples’ Rights General Comment 5 para 13.

²⁰³ *Amnesty International v Zambia*, Comm. No. 212/98, 12th Activity Report 42 (1998–99); African Commission on Human and Peoples’ Rights General Comment 5 paras 16-17.

²⁰⁴ African Commission on Human and Peoples’ Rights General Comment 5 para 1.

²⁰⁵ United Nations Human Rights Committee ‘General Comment 27: Article 12 (Freedom of movement)’ para 5; African Commission on Human and Peoples’ Rights General Comment 5 para 11.

²⁰⁶ African Commission on Human and Peoples’ Rights General Comment 5 para 10.

²⁰⁷ African Commission on Human and Peoples’ Rights General Comment 5 para 11.

²⁰⁸ African Commission on Human and Peoples’ Rights General Comment 5 para 11.

In Rencontre Africaine pour la Defense des Droits de l'Homme ("RADDHO") v Zambia, the ACHPR confirmed the importance of the right to freedom of movement within the context of mass deportations. The Commission stated that the right to freedom of movement creates a duty on the contracting State to: "secure the rights protected in the Charter to all persons within their jurisdiction, nationals or non-nationals."²⁰⁹ In this case RADDHO challenged Zambia's decision to deport 517 West Africans without providing them with an opportunity to challenge their deportation or seek asylum. Some of the migrants were subjected to administrative detention for a period of up to two months.²¹⁰ The migrants were furthermore, kept in a camp during their detention and were unable to contact their lawyers.²¹¹ The plaintiff argued that the mass deportation violated the right to freedom of movement as well as the right to seek asylum. It was also argued that the deportation was discriminatory and violated the principle of non-refoulement.

The ACHPR confirmed that African States have a right to bring legal action against all persons illegally residing in their territory, and to resort to deportation when it is legally justified. The ACHPR went on to state that: "However, the mass deportation of the individuals in question here, including their arbitrary detention and deprivation of the right to have their cause heard, constitute a flagrant violation of the Charter."²¹² The ACHPR found that the deportations were discriminatory, arbitrary and violated the rights to due process and protection from inhuman treatment. While underscoring the importance of the right to freedom of movement, this case also highlights the dangers of mass deportation, which can lead to violations of human rights and the displacement of vulnerable populations.²¹³

Article 12 of the African Charter also needs to be understood within the context of the Charter's right to development (Article 22). Article 22(1) provides that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind." Article 22(2) then goes on to state that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development." Where mobility is required in order to enjoy economic, social and cultural development, States must take steps to facilitate such mobility.²¹⁴

²⁰⁹ RADDH v. Zambia, Decision, Comm. 71/92 (ACmHPR, Oct. 31, 1996) para 22.

²¹⁰ RADDH v. Zambia, Decision, Comm. 71/92 (ACmHPR, Oct. 31, 1996) Para 1.

²¹¹ RADDH v. Zambia, Decision, Comm. 71/92 (ACmHPR, Oct. 31, 1996) Para 28.

²¹² RADDH v. Zambia, Decision, Comm. 71/92 (ACmHPR, Oct. 31, 1996) Para 31.

²¹³ RADDH v. Zambia, Decision, Comm. 71/92 (ACmHPR, Oct. 31, 1996)

²¹⁴ African Commission on Human and Peoples' Rights General Comment 5 para 4.

Article 26 of the 1951 Refugee Convention provides for the right to freedom of movement. The Convention provides that “each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”

4.6.7 The rights pertaining to accessing socio-economic services

Access to socio-economic resources within particular African States is determined by a complex intersection between international and national law provisions. While a lack of resources often contributes to the receiving State’s burdens in terms of governing a high influx of migrants, the 2006 African Common Position on Migration and Development specifically points out that migration can be an effective tool in the fight against poverty. This is through for example, enhancing income distribution, promoting development and productive work for growth.²¹⁵ This demonstrates the complex and interconnected relationship between socio-economic rights and migration governance. While many immigration laws emphasise the importance of self-reliance, in order to facilitate migration that effectively fosters human dignity, participation and agency, migrants vulnerable to poverty require access to socio-economic resources.²¹⁶

The socio-economic rights (health and education) included within the African Charter also specifically apply to “every individual”. Article 16 (1) of the African Charter provides that “Every individual shall have the right to enjoy the best attainable state of physical and mental health”. Article 16(2) goes on to provide that “States parties to the African Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.” When migrants are mistreated by state officials or smugglers, or where they are detained in inhumane conditions, this has implications for their capacity to attain the highest standard of physical and mental health. In the light of the expressly protected socio-economic rights, decisions regarding whether to detain migrants must take into account the effect of their detention on their physical or mental health.²¹⁷

Under the African Commission’s *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights*, migrants are specifically recognised as a particularly

²¹⁵ African Commission on Human and Peoples’ Rights (2018) “398 Resolution on Mixed Migratory Flows, Challenges of Protecting Migrants and the Prohibition of Trafficking in Persons and all forms of Violence in North and Sub-Saharan Africa” <<https://www.achpr.org/sessions/resolutions?id=407>> (accessed 12/11/2022).

²¹⁶ C Kavuro (2018) “Refugees’ Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity” LLD Dissertation (Stellenbosch University).

²¹⁷ The Human Rights Committee “General comment no. 35 on the right to liberty and security of person” <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/244/51/PDF/G1424451.pdf?OpenElement>> (accessed 16/03/2023) para 18.

vulnerable group.²¹⁸ The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also contains a general provision on the prohibition of discrimination with respect to socio-economic rights.²¹⁹

This is important as access to socio-economic resources can be “policed” and consequently restricted on the basis of nationality. For example, in South Africa under the Immigration Act 32 of 2002,²²⁰ medical practitioners are obliged to report “illegal” foreigners to authorities. The requirement to ascertain a patient’s legal status before administering medical care contravenes established global health standards that mandate the provision of basic health care services, including emergency medical treatment, to all individuals without discrimination based on their legal status.²²¹ Provisions such as this may exacerbate xenophobic tendencies as exemplified by the 2022 ongoing “xenophobic protests” outside the Kalafong Provincial Tertiary Hospital. When law enforcement fail to act proactively in these situations, they ultimately create a situation that sustains discrimination.

Access to comprehensive documentation systems and pathways also plays a crucial role in facilitating equitable access to vital socio-economic resources, including health care and education. This is due to the fact that statelessness effectively undermines the capacity to access these integral resources. This was emphasised during the 75th ordinary session of the African Commission on human and peoples’ rights. During this session, it was reported that ethnic minorities in Libya face discrimination when attempting to access health care and education. This was due to nationality laws and regulations which led to the State failing to recognise their nationality.²²² It is therefore imperative to address the discriminatory impact of these laws while also addressing how law enforcement ‘police’ these provisions.

²¹⁸ African Commission on Human and Peoples’ Rights (2011) Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights page 37.

²¹⁹ The rights to equal conditions of work, to social security, to urgent medical care and to education, among others, are applicable to all migrant workers and members of their families, whether they are documented or not. Part IV of the Convention guarantees certain additional rights to documented migrants and migrants in a regular situation.

²²⁰ Section 44 of the Act provides that “When possible any organ of State shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Department any illegal foreigner or any person whose status or citizenship could not be ascertained advising through public notices or directly the person concerned of such reporting practice, provided that such requirement shall not prevent the rendering of services to which illegal foreigners and foreigners are entitled under the Constitution or any law, including the law of contract.”

²²¹ APCOF (2023) “Convening for the Global Campaign to Decriminalise Poverty and Status Theme: Decriminalising status and activism” < <https://apcof.org/wp-content/uploads/report-for-the-annual-convening-of-the-global-campaign-to-decriminalise-poverty-and-status-eng-fr-por-27-29-september-2022pdf.pdf>> (accessed 31/07/2023) page 13, presentation by Gideon Basson.

²²² African Commission on Human and Peoples’ Rights (2023) “75th ordinary session of the African Commission on Human and Peoples’ Rights inter-session activity report of Commissioner Mrs Maya Sahli-Fadel as Special Rapporteur on Refugees, Asylum seekers, displaced persons and migrants in Africa, page 12.

4.7 Conclusion

Given the international and regional legal framework it is clear that the State response (and particularly the law enforcement response) to migrants should always be informed by the principles of non-discrimination, due process, and the obligation to protect, promote and fulfil human rights, including civil and political and socio-economic rights. While States have the right to manage their borders, they are not free to do this in a manner that infringes upon human rights. As stated in the Charter of the Organisation of African Unity: “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.” In *Legal Resources Foundation v Zambia*,²²³ the African Commission further underscored that the African Charter must be interpreted holistically, emphasising that all clauses must reinforce each other.²²⁴

Given the progressive human rights framework that is applicable to migrants, it is necessary to examine the barriers that prevent its effective implementation. A key area of concern is in relation to the punitive and discriminatory actions of State officials, as well as the use of criminal justice responses to what is essentially a human rights issue. The section below traverses how States have undertaken a securitised approach to migration over recent decades. Part of the risk of the current dominant securitisation narrative is that it tends to supersede any discussion on the benefits of migration for African countries.²²⁵ The subsequent sections below discuss how migrants encounter law enforcement on their migration pathways through Africa and how the actions of these officials create additional burdens that shape the ways in which migrants are subjected to processes of differentiation and exclusion.

5 Migration governance in practice: The regional shift towards securitisation

While observers have generally denounced interference from the northern hemisphere, the African continent has however, been influenced by geopolitical trends. This trend began with a spike in migrant arrivals in Europe in 2015, which triggered what has been referred to as a ‘migrant crisis’ in Europe.²²⁶ In an attempt to address the rise in migration, the European Union (“EU”) entered into a number of agreements and summits with the AU. For example, in 2014,

²²³ (2001) AHRLR 84 (ACHPR 2001).

²²⁴ *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 70.

²²⁵ Examples of these benefits include skills transfer, economic expansion, private-sector development and diaspora remittances.

²²⁶ European Parliament (2021) “The EU Approach on Migration in the Mediterranean” < [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU\(2021\)694413_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/694413/IPOL_STU(2021)694413_EN.pdf) > (accessed 17/10/2022). While the EU Council has openly referred to the rise in migration as a “migrant crisis”, the African Commission on Human and People’s Rights has also at times referred to migration as a crisis. For example, in a 2017 press statement, the ACHPR referred to the “migrant crisis in Libya”. See: ACHPR (2017) “Statement by the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa on the occasion of International Migrants Day” < <https://www.achpr.org/pressrelease/detail?id=66> > (accessed 31/01/2023).

the Fourth EU-Africa summit on migration and mobility took place which led to the Declaration on Migration and Mobility. *The EU Emergency Trust Fund for Africa for stability and addressing root causes of irregular migration and displaced persons in Africa* was subsequently launched at the Valletta Summit on Migration in November 2015.²²⁷ Further examples of agreements between Africa and the EU include: the Tripoli Declaration on Migration and Development²²⁸ and the Ouagadougou Action Plan to Combat Trafficking.²²⁹ In instances where these agreements are supported by EU funding, this raises the risk of distorting AU priorities.

A significant proportion of the EU measures are aimed at combating human trafficking and smuggling. For example, the Declaration on migration and mobility specifically underscores security concerns by highlighting: “the importance of prosecuting smugglers and traffickers and dismantling their criminal networks as they present a serious threat to the lives of migrants”.

Smuggling, human trafficking and terrorism do need to be legitimately tackled. Simultaneously however, States need to recognise and address how securitisation creates a demand for smugglers as well as a breeding ground for multiple human rights violations.²³⁰ The duty to proactively safeguard existing human rights is underscored by the preamble²³¹ to the African Charter read together with Article 1 of the African Charter. These provisions require member States to enact legislative and other measures to recognise, safeguard and uphold the human rights protected under the African Charter, including the right to freedom of movement. Moreover, law enforcement personnel are required to enforce migration governance regulations in compliance with the highest standards of human rights protection. Given the

²²⁷ Mixed Migration Centre (2021) “Fixing” people in place through policy and development? Efficacy and unintended consequences of migration deterrence in Kantché” < https://mixedmigration.org/wp-content/uploads/2021/05/168_briefing_paper_efficiency_and_unintended_consequences_migration_deterrence_Kantche.pdf> (accessed 05/2023).

²²⁸ African Union, Joint Africa-EU Declaration on Migration and Development, Tripoli, November 2006, <https://au.int/sites/default/files/pages/32899-file-4._the_joint_africa_eu_declaration_on_migration_and_development_2006.pdf. > (accessed 17/01/2023).

²²⁹ African Union, Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children as Adopted by the Ministerial Conference on Migration and Development, <https://au.int/sites/default/files/pages/32899-file-3._ouagadougou_action_plan_to_combat_trafficking_en_1.pdf. > (accessed 17/01/2023). There are further layers of cooperation between the EU and individual African States, as well as between individual member States on both sides. One example is the cooperation demonstrated between Morocco and the EU. See: Council of the EU (2019) “Joint declaration by the European Union and Morocco for the fourteenth meeting of the Association Council” < <https://www.consilium.europa.eu/en/press/press-releases/2019/06/27/joint-declaration-by-the-european-union-and-the-kingdom-of-morocco-for-the-fourteenth-meeting-of-the-association-council/pdf>> (accessed 17/01/2023). There have also been a number of agreements between Libya and Italy. There is also an agreement between Mauritania and Spain, as well as an agreement between Europe and Senegal, which is known as the Joint EU-Senegal Strategy 2018-2023.

²³⁰ J Howard (2021) “Humanitarianism and Securitisation: Contradictions in State Responses to Migration” <<https://www.e-ir.info/pdf/94598>> (accessed 12/11/2022).

²³¹ The preamble states that member states to the African Charter: [are] “Firmly convinced of their duty to promote and protect human and peoples’ rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa”.

above, it is necessary to further examine the manner in which securitisation and authoritative law enforcement create implementation challenges for States at the sub-regional level.

6 Migration governance at the sub-regional level

While there is a lack of integral data points on migrants,²³² research reports continually indicate that global migration,²³³ as well as African migration, is on the rise.²³⁴ This emphasises the growing need for a holistic, humane, and united response to migration.²³⁵ According to the United Nations Economic Commission for Africa: “between 2015 and 2019, African migration increased from 23.5 million in 2015 to 26.5 million in 2019.”²³⁶ The rise in African migration is partially due to increasing regional integration, which has been driven by the continent’s regional economic communities (“REC”).²³⁷ Other factors driving migration include population growth, the search for economic opportunities, instability, war, and climate changes.

Policy debates have largely been dominated by the need to regulate migration out of Africa, with many of these initiatives having significant consequences for mobility within the continent itself.²³⁸ There is however, a need for pragmatic and responsive policies and decisions pertaining to movements within the African continent. This is necessary as most movements comprise relatively short distances. For example, more than half of African migrants migrate across African countries, while only a quarter of migrants travel to Europe.²³⁹ Eastern and Western Africa currently host the highest number of migrants.²⁴⁰ With regard to individual

²³² African Centre for Migration & University of the Witwatersrand, Johannesburg, on behalf of the Open Society Foundation (2018) “Free and safe movement in Africa: Report on research to inform advocacy promoting safe and unencumbered movement of people across Africa’s international borders” page 25: “Insufficient data limits the ability to design evidence-informed public policy and responses that adequately address protection gaps. Insights from fieldwork show that this increases vulnerabilities of hard-to-reach and hidden migrant populations. Other studies are addressing this gap in greater detail.” Furthermore, the lack of data properly disaggregated by sex, age and other factors continue to hinder comprehensive responses to the plight of migrants – African Union (2018) “Revised migration policy framework for Africa and plan of action 2018-2027” <https://au.int/sites/default/files/newsevents/workingdocuments/32718-wd_english_revised_au_migration_policy_framework_for_africa.pdf> (accessed 15/11/2022) page 6.

²³³ Global migration can also be referred to as transnational migration or international migration. This refers to the movement of people across the globe, from one continent to another.

²³⁴ United Nations Economic Commission for Africa (2021) “African regional review of implementation of the Global Compact for Safe, Orderly and Regular Migration” <<https://uneca.org/sites/default/files/SROs/North-Africa/gcm2021/E2100831.pdf>> (accessed 05/11/2022) pages 3-4.

²³⁵ This further aligns with the African Union’s Agenda 2063, which aspires to achieve an “integrated and politically united Africa”.

²³⁶ United Nations Economic Commission for Africa “African regional review of implementation of the Global Compact for Safe, Orderly and Regular Migration” (2021) <<https://uneca.org/sites/default/files/SROs/North-Africa/gcm2021/E2100831.pdf>> (accessed 12/10/2022).

²³⁷ United Nations Economic Commission for Africa “African regional review of implementation of the Global Compact for Safe, Orderly and Regular Migration” (2021) <<https://uneca.org/sites/default/files/SROs/North-Africa/gcm2021/E2100831.pdf>> (accessed 12/10/2022).

²³⁸ This is discussed in detail under section 5 above.

²³⁹ Statista (2022) “Immigration in Africa - statistics & facts” <<https://www.statista.com/topics/8523/immigration-in-africa/>> (accessed 12/10/2022).

²⁴⁰ Statista (2022) “Immigration in Africa - statistics & facts” <<https://www.statista.com/topics/8523/immigration-in-africa/>> (accessed 12/10/2022).

countries however, as of 2020, South Africa and Côte d'Ivoire hosted the highest number of immigrants.²⁴¹ Migration within Africa is complex, given the unique geographical, political and socio-economic context facing each African country and region. The following sections provide a snapshot of migration patterns and traits within the relevant sub-regions.

6.1 North Africa

As a result of its geographical position, North Africa is a popular destination country as well as the most popular transit sub-region for African migrants wishing to travel to Europe via the Mediterranean. As of mid-2020, North Africa hosted an estimated 3.2 million international migrants.²⁴² The most popular countries within North Africa that serve as significant countries of migrant destination, transit and departure, include Algeria, Egypt, Libya, Morocco and Tunisia.

According to the IOM, migration from North Africa to Europe is primarily channelled through regular pathways.²⁴³ People who are forced to migrate irregularly often rely on migrant smugglers and facilitators.²⁴⁴ While regular migration routes may be a popular mechanism for migration, the use of illegal routes has increased as regulation has amplified. This has resulted in deaths in the Mediterranean Sea, with more than 5,000 people reportedly losing their lives in 2016 alone.²⁴⁵ In a 2015 *Statement on the Deterioration of the Situation of African Migrants in the Mediterranean*, the African Commission expressed its deep concern about the horrors experienced by migrants, and particularly noted the deplorable reality that several of the victims were unaccompanied children.²⁴⁶ While 2016 represented a disturbing peak in migrant deaths, recent estimates show that in 2021 there were 1369 reported migrant deaths along the Mediterranean Sea.²⁴⁷

²⁴¹ Statista (2022) "Number of international migrants in Africa as of 2020, by country" <<https://www.statista.com/statistics/1237618/international-migrants-in-africa-by-country/>> (accessed 15/10/2022).

²⁴² Migration Data Portal (2021) "International migrant stocks" <<https://www.migrationdataportal.org/regional-data-overview/northern-africa>> (accessed 10/10/2022).

²⁴³ International Organisation for Migration, H d Haas (2007) "Irregular Migration from West Africa to the Maghreb and the European Union: An Overview of Recent Trends" <<https://www.unhcr.org/49e479ca0.pdf>> (accessed 01/11/2022). The author confirms that: "The majority of migrants enter Europe legally and subsequently overstay their visas." Page 9.

²⁴⁴ United Nations Office on Drugs and Crime (2010) "Smuggling of migrants into, through and from North Africa: A thematic review and annotated bibliography of recent publications" <https://www.unodc.org/documents/human-trafficking/Migrant_smuggling_in_North_Africa_June_2010_ebook_E_09-87293.pdf> (accessed 13/11/2022); Centre for Strategic International Studies (2022) "Peril in the Desert: Irregular Migration through the Sahel" <<https://www.csis.org/analysis/peril-desert-irregular-migration-through-sahel>> (accessed 12/02/2022).

²⁴⁵ United Nations Refugee Agency (December 2016) "Mediterranean Sea: 100 people reported dead yesterday, bringing year total to 5,000" <<https://www.unhcr.org/en-us/news/briefing/2016/12/585ce804105/mediterranean-sea-100-people-reported-dead-yesterday-bringing-year-total.html>> (accessed 12/10/2022).

²⁴⁶ African Commission on Human and Peoples' Rights (2015) "Statement on the Deterioration of the Situation of African Migrants in the Mediterranean" <<https://www.achpr.org/news/viewdetail?id=104>> (accessed 05/10/2022).

²⁴⁷ Statista (2021) "Number of recorded deaths of migrants in the Mediterranean Sea from 2014 to 2021" <<https://www.statista.com/statistics/1082077/deaths-of-migrants-in-the-mediterranean-sea/>> (accessed 23/01/2023).

Between 2014 and 2018, approximately 36000 Nigerians were deported from Algeria.²⁴⁸ Libyan security forces, have also been implicated in private pushbacks and incidents of torture against migrants seeking to cross the Mediterranean.²⁴⁹ These migration corridors have therefore become synonymous with many of the horrors associated with migration, such as deaths at sea, disappearances, exploitation, GBV, trafficking and smuggling of migrants, arbitrary detention and forced labour.²⁵⁰ While it is imperative that States develop migration policies that positively address these human rights challenges, it is important to do so in a manner that expands human agency while refraining from essentialising migrants as passive victims.

At present, the dominant political rhetoric on migration within the North African region is characterised by concerns around “crises, acute and protracted displacement, and the inadequacy of international support”.²⁵¹

6.2 Central Africa

Migration in Central Africa is a complex issue driven by poverty, persistent conflict and natural disasters within this sub-region.²⁵² In spite of existing formal free movement commitments, dating from the 1980s,²⁵³ there have been significant impediments to their implementation and cohesion.²⁵⁴ While there are significant gaps in implementation, most Central African refugees have however, been able to move freely across Central African borders. Refugees in Central Africa therefore currently embody a significant proportion of refugees for the entire African continent. As of 2022, West and Central Africa reportedly hosted 1.6 million refugees, an

²⁴⁸ Mixed Migration Centre (2021) “Fixing” people in place through policy and development? Efficacy and unintended consequences of migration deterrence in Kantché” < https://mixedmigration.org/wp-content/uploads/2021/05/168_briefing_paper_efficiency_and_unintended_consequences_migration_deterrence_Kantche.pdf> (accessed 05/2023).

²⁴⁹ Forensic Architecture (2019) “<Privatised Pushback of the Nivin” <<https://forensic-architecture.org/investigation/nivin>> (accessed 26/01/2023).

²⁵⁰ International Organisation on Migration UN Migration (2020) “World Migration Report 2020” <https://publications.iom.int/system/files/pdf/wmr_2020.pdf > (accessed 12/10/2022); see also: African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) < https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022) page 20.

²⁵¹ International organisation on Migration “IOM Middle East and North Africa Regional Strategy 2017–2020” < https://publications.iom.int/system/files/pdf/mena_regional_strategy.pdf> (accessed 05/10/2022).

²⁵² IOM (2022) “A Region on the Move: Mobility Trends in West and Central Africa – January to December 2021” (Dakar, 2022), p 6.

²⁵³ An example of this includes the Economic Community of Central African States (ECCAS), which is a regional organisation comprised of ten countries in Central Africa, including Angola, Burundi, Cameroon, the Central African Republic, Chad, Republic of Congo, Democratic Republic of Congo, Equatorial Guinea, Gabon and Sao Tome and Principe. The organisation has a protocol on the free movement of people, goods and services that allows citizens of member states to move freely within the ECCAS zone without visas.

²⁵⁴ UNHRC (2022) “Regional Bureau for West and Central Africa Persons of Concern” (as of 30 November 2022) <<https://reliefweb.int/report/burkina-faso/regional-bureau-west-and-central-africa-persons-concern-30-november-2022>> (accessed 25/04/2023).

increase of 7% since September 2021.²⁵⁵ Conflict and insecurity in Central Africa and particularly inside the Central African Republic (CAR), continues to contribute to the challenge of forced displacement both within CAR and into neighbouring countries, such as the Democratic Republic of the Congo (DRC).²⁵⁶ Simultaneously, female migrants experience particular gendered vulnerabilities in Central Africa, including heightened levels of sexual and GBV.²⁵⁷

In a 2021 report UN human rights experts expressed grave concerns regarding the government of Burundi's alleged involvement in a multitude of human rights violations, including enforced disappearances, torture, forced repatriations, and political oppression.²⁵⁸ The report highlighted the UN's call to the government of Burundi to uphold the rights of individuals seeking refuge and asylum.²⁵⁹ Human rights challenges facing migrants in Central Africa therefore include internal conflict, arbitrary arrest, unlawful detention, enforced disappearances,²⁶⁰ bribery, GBV and forced returns.

6.3 East Africa

The East African Community (EAC) has taken certain steps aimed at easing mobility across the region, including a moderately successful economic integration process. The EAC passport allows multiple entries into partner States for EAC citizens for a period of six months. Within East Africa, Kenya and Tanzania serve as particularly popular migration destinations. In March of 2021, the Kenyan government announced its plan to close the Dadaab and Kakuma refugee camps, which hosts over 400,000 refugees as well as a high number of Somali and South Sudan migrants. In relation to the role of law enforcement, Kenya's Independent Policing Oversight Authority (IPOA) has specifically underscored the profiling of immigrants by police officers due to a lack of training.²⁶¹ Research reports have further highlighted that the East African region is troubled by issues of forced returns without due

²⁵⁵ UNHRC (2022) "Regional Bureau for West and Central Africa Persons of Concern" (as of 30 November 2022) <<https://reliefweb.int/report/burkina-faso/regional-bureau-west-and-central-africa-persons-concern-30-november-2022>> (accessed 25/04/2023).

²⁵⁶ Inter-Agency Refugee Response Plan (2021) "Central African Refugee Emergency in the Northern Democratic Republic of the Congo" <<https://reporting.unhcr.org/index.php/document/1181>> (accessed 28/04/2023).

²⁵⁷ United Nations Refugee Agency (2022) "Central African Republic" <<https://www.unhcr.org/countries/central-african-republic>> (accessed 28/04/2023).

²⁵⁸ United Nations Human Rights Officer of the High Commissioner (2021) "UN experts deplore rights violations against Burundi refugees" <<https://www.ohchr.org/en/press-releases/2021/04/un-experts-deplore-rights-violations-against-burundi-refugees>> (accessed 26/04/2023).

²⁵⁹ United Nations Human Rights Officer of the High Commissioner (2021) "UN experts deplore rights violations against Burundi refugees" <<https://www.ohchr.org/en/press-releases/2021/04/un-experts-deplore-rights-violations-against-burundi-refugees>> (accessed 26/04/2023).

²⁶⁰ IOM (2020) "Irregular Migration Routes to Europe: West and Central Africa January - December 2020" <<https://dtm.iom.int/reports/west-and-central-africa---irregular-migration-routes-europe-january---december-2020>> (accessed 03/05/2023).

²⁶¹ Kenya Independent Policing Oversight Authority Annual Performance Report Jul–Dec. 2019, pages 36–38.

process, alleged abuse of migrants and refugees (including GBV), alleged police abuse and arbitrary arrest.²⁶²

6.4 Southern Africa

The South African Development Community (SADC) has developed and adopted the SADC Labour Migration Policy as well as the Protocol on Free Movement. The SADC Labour Migration Policy states that it seeks to support the overarching spirit of the SADC Treaty, which aims to, “achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration.”²⁶³

The Protocol on Free Movement was aimed at ensuring the uninhibited movement of people within the SADC. While member States have approved the SADC Protocol, it has been criticised for its lack of implementation.²⁶⁴ Migration in this region has also been shaped by the labour intensive industries within the SADC region, including mining and agriculture, which attracts a high number of migrants.²⁶⁵ In terms of this region, South Africa is widely known as a migration destination,²⁶⁶ with immigrants made up of individuals from Zimbabwe, Mozambique, the Democratic Republic of the Congo, Angola, Somalia, Rwanda and Malawi. Many of these migrants seek out economic opportunities, while there are also migrants who have been forced to flee conflict and persecution in the region.²⁶⁷ Challenges facing the SADC region include reported concerns related to xenophobia,²⁶⁸ refoulement²⁶⁹ and unlawful detention.

²⁶² N Barasa (2015) “Kenya’s implementation of the Smuggling Protocol in response to the irregular movement of migrants from Ethiopia and Somalia” *Law, Democracy and Development* (19) <<http://dx.doi.org/10.4314/idd.v19i1.2>> (accessed 16/03/2023) page 30.

²⁶³ South African Development Community (2013) “Labour Migration Policy” <https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/meetingdocument/wcms_239821.pdf> (accessed 07/10/2022).

²⁶⁴ V Mlambo (2017) “Cross-border Migration in the Southern African Development Community (SADC): Benefits, Problems and Future prospects” <<https://ojs.amhinternational.com/index.php/jsds/article/view/2062/1575>> (accessed 13/09/2022); P Kok (2006). *Migration in South and Southern Africa: dynamics and determinants*. HSRC Press. Pretoria.

²⁶⁵ D Lippoldt, (2012). “Policy Priorities for International Trade and Jobs” OECD. Paris pages 125 -142.

²⁶⁶ Migration reports from 2020 estimate that as of 2020 2.9 million migrants resided in South Africa. Migration Data Portal (2021) “Migration Data in the Southern African Development Community (SADC)” <<https://www.migrationdataportal.org/regional-data-overview/southern-africa>> (accessed 21/10/2022).

²⁶⁷ L Edwards & L Freeman (APCOF) (2021) “Policing and non-nationals” <<https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>> (accessed 14/09/2022).

²⁶⁸ Xenophobia is a form of racial discrimination and othering. South Africa’s National Strategic Plan specifically defines xenophobia as: “an unreasonable fear, distrust or hatred of strangers, foreigners or anything perceived as foreign or different (which is often based on unfounded reasons and stereotypes). Xenophobia can manifest itself in several ways in a country. For example, it can be through victimisation on the basis of one’s nationality or appearance, brutal assaults, murders, ethnic cleansing in an area, and mass expulsion from the country.”

²⁶⁹ Refoulement is the practice of forcibly returning (deporting) refugees or asylum seekers to a country where they are liable to be subjected to persecution.

Botswana also serves as a popular destination country for migrants within the SADC region. Within Botswana, human rights challenges for migrants relate to exploitative working conditions, such as excessive hours and unpaid wages and unlawful detention.²⁷⁰

6.5 West Africa

The West African region is known for high levels of intra-regional migration. Niger serves as a popular country of departure and transit.²⁷¹ Mobility is often seen as a strategy to cope with socio-economic pressures including poverty, unemployment, lack of education and violence. Women and children comprise an important part of these migration flows. According to the United Nations Department of Economic and Social Affairs (UNDESA), in the country of Mali, “49% of the 485,800 international migrants in mid-2020 were women migrants”.²⁷² As of 2021, Mali also hosted 46,919 refugees, the majority of which travelled from Niger, Mauritania, and Burkina Faso.²⁷³

With regard to the REC strategy, ECOWAS citizens are able to move freely due to the adoption of a number of protocols guaranteeing the right to free movement. Thus, the majority of migration is interregional. In recent decades, the Sahel countries have become a key corridor and departure point for migrants attempting to reach Europe. While the initial stages of their journey may fall under the scope of the ECOWAS protocols, many migrants then lack the requisite paperwork to legally travel into North Africa. When moving beyond ECOWAS borders, West Africans therefore often make use of smugglers to reach North African countries such as Libya and Morocco, particularly when conventional routes are inaccessible.²⁷⁴ Particular human rights problems facing the policing of migrants within West Africa include

²⁷⁰ United Nations Human Rights Office of the High Commission (2022) “Botswana must urgently embrace further safeguards against arbitrary detention for all – UN experts” < <https://www.ohchr.org/en/press-releases/2022/07/botswana-must-urgently-embrace-further-safeguards-against-arbitrary>> (accessed 13/03/2023).

²⁷¹ For an in-depth discussion on Niger, please see: African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) < https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022)

²⁷² Mixed Migration Centre (2021) “COVID-19 and social and economic rights of migrants in Mali: Analysis of 4Mi data collected in Mali between July 2020 and January 2021” < https://mixedmigration.org/wp-content/uploads/2022/02/210_COVID-19_social_economic_rights_of_migrants_in_Mali_updated.pdf> (accessed 12/10/2022).

²⁷³ Mixed Migration Centre “COVID-19 and social and economic rights of migrants in Mali: Analysis of 4Mi data collected in Mali between July 2020 and January 2021” < https://mixedmigration.org/wp-content/uploads/2022/02/210_COVID-19_social_economic_rights_of_migrants_in_Mali_updated.pdf> (accessed 12/10/2022) page 4.

²⁷⁴ United Nations Office on Drugs and Crime (2010) “Smuggling of migrants into, through and from North Africa: A thematic review and annotated bibliography of recent publications” < https://www.unodc.org/documents/human-trafficking/Migrant_smuggling_in_North_Africa_June_2010_ebook_E_09-87293.pdf> (accessed 13/11/2022); UNODC (2021) “West Africa, North Africa and the Central Mediterranean: Key Findings on the Characteristics of Migrant Smuggling in West Africa, North Africa and the Central Mediterranean” < https://www.unodc.org/res/som/docs/Observatory_Storymap_1_Final_2021.05.19.pdf> (accessed 15/08/2023); Centre for Strategic International Studies (2022) “Peril in the Desert: Irregular Migration through the Sahel” < <https://www.csis.org/analysis/peril-desert-irregular-migration-through-sahel>> (accessed 12/02/2022).

bribery²⁷⁵ and corruption,²⁷⁶ sexual violence,²⁷⁷ stigmatisation and the particular vulnerability of displaced children.

7 How securitisation has shaped migration policing

For the purpose of this study, migration policing can broadly be described as an emerging punitive regulatory system made up of various (and complex) rules as well as a multitude of stakeholders, with an underlying presumption of criminality. Given the broad and mobile nature of migration, migration policing constitutes a transnational enterprise of intersecting rules and actors. While this report is primarily focused on the conduct of law enforcement personnel, with the role of the police discussed below, the governance of migration is characterised by a wide nexus of international and domestic law, administrative regulations or processes, stigma and discriminatory norms.

These rules are further enforced by a wide range of State and non-State actors, including organs of State, administrative departments, law enforcement personnel, private organisations and the courts, ultimately leading to fragmentation and a lack of oversight. The danger of privatisation is that security organisations are more likely to focus on profits, to neglect human rights considerations and to frame migration as a security issue. Given the fluid nature of migration, migration policing involves both border control and the harmful conduct of law enforcement that occur within a State's borders. The policing of migration is also an extremely intricate and contested issue as it is embedded within complex geo-political

²⁷⁵ According to the Mixed Migration Centre: "58% of all refugees and migrants surveyed reported contact with state officials; 82% of these refugees and migrants paid a "gift" to state officials they had contact with during their journey. 59% of these officials were police at a border." Mixed Migration Centre (2021) "Corruption and the role of state officials in human smuggling" < https://mixedmigration.org/wp-content/uploads/2021/12/203_MMC_WA_NA_UNODC_4Mi_Snapshot_corruption_smuggling.pdf> (accessed 17/05/2023). As further stated in the report on page 4, bribery and corruption impacts upon the capacity to avoid detention and to access documents: "Bribery is also used by smugglers to secure their release from detention or avoid detention after being arrested. 26 of the 41 smugglers who affirmed that they had been arrested at least once stated that they paid a bribe to be released from detention. An additional 14 of the 41 respondents paid a bribe upon being apprehended, to avoid detention."

²⁷⁶ United Nations office on Drugs and Crime (2021) "West Africa, North Africa and the Central Mediterranean: Key Findings on the Characteristics of Migrant Smuggling in West Africa, North Africa and the Central Mediterranean" < https://www.unodc.org/res/som/docs/Observatory_Storymap_1_Final_2021.05.19.pdf> (accessed 08/05/2023) page 13 which states that: "Corruption and migrant smuggling are two closely interconnected crimes. Along migrant smuggling routes, smuggled migrants become a source of income not only for smugglers, *but also for law enforcement* and local economies".

²⁷⁷ Research by the United Nations Office on Drugs and Crime provided that: "Key informants confirm that women and girls may be asked or forced to have sexual intercourse with smugglers, border guards, police officers or along the route as an alternative form of compensation for the passage. In these cases, the value attached to sexual intercourse may far outweigh the available cash held by the migrant and speed up the journey for the migrant and for the group she is travelling with. As a consequence, rape and sexual exploitation of women and girls may be subject to group pressure, especially in situations of economic need." See: UNODC (2021) "West Africa, North Africa and the Central Mediterranean: Key Findings on the Characteristics of Migrant Smuggling in West Africa, North Africa and the Central Mediterranean" < https://www.unodc.org/res/som/docs/Observatory_Storymap_1_Final_2021.05.19.pdf> (accessed 12/11/2022) page 17.

tensions, socio-economic pressures and polarising personal views. Migration governance therefore reveals the unique challenges of relying on the legal system, and particularly the criminal justice system, to govern migration. As law is rooted in the history of society and is inevitably influenced by social norms and prevailing bias, these tensions have contributed to normative and implementation gaps²⁷⁸ within the existing human rights framework. The resulting tensions between securitisation, racial bias and discrimination have consequently restricted the transformative potential of existing international human rights law, both domestically and internationally. While the legal regime is an imperfect tool, it can however, be utilised to underscore the existing human rights issues, to identify gaps within the existing framework, to empower vulnerable migrants and ultimately to guide the everyday choices and actions of law enforcement.

Migration within and from Africa is driven by a number of complex and interconnected social, political, environmental and economic factors. Given that migration is strongly driven by socio-economic needs and political instability, it is imperative to develop long-term solutions that address the underlying forces that shape migration across the African continent. This is in contrast to adopting a reactive response, that is primarily focused on utilising security, control and exclusion to reinforce structural inequality. While State security and serious crimes such as human trafficking and smuggling require effective responses, security should not be the only, or the primary factor that shapes State responses to migration. Particularly as securitisation is often utilised as a tool of exclusion and discrimination, ultimately exacerbating existing patterns of disadvantage. In contrast, integral human rights should play a key role in informing State responses to migration.

8 The role of the police in migration governance at the national level

The policing (enforcement) actions described below can be perpetrated by all forms of law enforcement that play a role in implementing migration rules, such as border control officials, immigration officers and internal security forces. However, given that the police serve as the primary gatekeepers of the criminal justice system, this section predominantly utilises the example of the police in demonstrating the dangers of criminalising migration.

²⁷⁸ M Zard, C Beyani & C Odinklau (2003) "Refugees and the African Commission on Human and Peoples' Rights" ESCR Net Vol. 16 *Forced Migration Review* 33 <<https://www.fmreview.org/fr/node/4650>> (accessed 06/02/2023). See also: APCOF (2017) "The Luanda Guidelines: Assessments for Ghana, Malawi, South Africa, Tanzania, Uganda" < <http://apcof.org/wp-content/uploads/2017/04/apcof-implementation-of-the-luanda-guidelines> > (accessed 06/02/2023) page 101.

The primary duties of the police include preventing and investigating crime, preserving social peace and protecting the safety of the public.²⁷⁹ The police also have a legitimate role to play in preventing international crimes, such as human and drug trafficking and preventing the abuse of migrants while protecting the migrant's right to life.

While the police may inevitably be involved in detecting and preventing human trafficking and other legitimate crimes, migration control, has traditionally been designated as an administrative area of law. Immigration legislation has however, increasingly provided the police with the mandate to enforce migration governance, as exemplified by the South African Immigration Act 13 of 2002.²⁸⁰

Law enforcement personnel have furthermore increasingly resorted to stop and search operations, with research indicating that law enforcement primarily target and profile suspected foreigners.²⁸¹ This is partially due to the tendency by law enforcement to associate non-nationals with high rates of criminality. The existing prejudice against migrants can ultimately blur the lines between legitimate policing and policing that specifically targets non-nationals in a manner that seeks to circumvent existing procedural safeguards.

The discriminatory policing of migrants has a severe impact on the capacity of non-nationals to settle peacefully within an area and to earn a living, ultimately impacting upon their ability to access socio-economic resources. As these non-nationals tend to operate at the margins of the law, they are often too afraid to report discriminatory practices.

While the focus of this report is primarily on the role of law enforcement officials, these officials inevitably interact with other key stakeholders in the criminal justice system. This includes the courts, prosecutors and legal defenders for accused persons. While migrants have the right to due process as discussed above, the courts play a key role in either strengthening or restricting access to justice for migrants. For example, migrants often encounter discriminatory sentencing, as well as prolonged detention due to irrational fears concerning the risk of

²⁷⁹ African Commission on Human and Peoples' Rights "General Comment No 3: On the Right to life" para 27, which specifically refers to the duty to protect the safety of the public.

²⁸⁰ The Immigration Act regulates the entry, exit and residence of non-nationals who are not citizens and provides the SAPS with discretionary power to arrest and detain people suspected of residing in South Africa in contravention of the Act. Under section 41 of the South African Immigration Act, a police officer may request that an individual identify their residential status. If on reasonable grounds, the police officer is not satisfied that the person is legally entitled to be in the Republic, the officer may take such person into custody without a warrant. Another national example includes sections 43 and 49 of the Kenyan Citizenship and Immigration Act (Cap 172-Laws of Kenya).

²⁸¹ A Hiropoulos (2017) "Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals", APCOF Policy Brief 18 <<http://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf>> (accessed 21/11/2021); L Edwards & L Freeman (APCOF) (2021) "Policing and non-nationals" <<https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf>> (accessed 14/09/2022) page 11.

absconding.²⁸² Other obstacles include a lack of access to information and the lack of effective legal recognition, which is often compounded by institutional and structural barriers in the design and operation of justice systems, including corruption and extensive delays.²⁸³

While the police can play a positive role in articulating a more inclusive conception of national identity, there is the risk of them abusing this administrative power. The danger of this convergence between administrative law and criminal justice law lies in the power of law enforcement to arrest, to use force as well as the power to detain suspected migrants. As further pointed out by Alpa Palmer: “When the police are enlisted to carry out the dual function of delineating who belongs, alongside suspecting who might be an offender as part of their routine work, the collateral consequence is that all racialised groups are treated as automatically suspect.”²⁸⁴ Given the context of policing migration, it is crucial to examine instances where the national police response to migration falls short in effectively implementing the existing international legal framework. The following section thus focuses on specific gaps in implementation.

9 Law enforcement challenges and opportunities deriving from national experiences

In recent years, there has been a wealth of literature problematising the ways in which migration law and criminal law have increasingly converged. Authors have specifically examined how law, policy and everyday practices have progressively designated migrants and the very human desire to escape hardship and build better lives, as criminal. While South Africa, Libya and Niger have received significant attention for the challenges faced by migrants, the World Organisation Against Torture has pointed out that: “Libya is not the only dangerous place for African migrants. There is an urgent need for all African governments to realise the centrality of torture along their borders, police checkpoints and migrant detention centres.”²⁸⁵

In 2007, in Resolution 114 on migration and human rights, the African Commission underscored the extent of violations (pertaining to the rights to life, freedom of movement, the

²⁸² Special Rapporteur on the Rights of Migrants (2016) “Human rights of migrants” < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/248/76/PDF/N1624876.pdf?OpenElement> > (accessed 06/02/2023) paras 80-81 and paras 90 and 95; B Kamolane (2019) “Courts should not refuse bail to immigrants without good reason” < <https://www.groundup.org.za/article/courts-should-not-refuse-bail-immigrants-without-good-reason/> > (accessed 23/03/2023).

²⁸³ Special Rapporteur on the Rights of Migrants (2016) “Human rights of migrants” < <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/248/76/PDF/N1624876.pdf?OpenElement> > (accessed 06/02/2023) paras 80-81.

²⁸⁴ A Palmer (2020) “Arresting (non)Citizenship: The Policing Migration Nexus of Nationality, Race and Criminalisation” *Theoretical Criminology* Volume 24, Issue 1, pages 28-49, page 29.

²⁸⁵ World Organisation Against Torture (2021) “The Torture Roads: The Cycle of Abuse against People on the Move in Africa” < <https://www.omct.org/site-resources/files/The-Torture-Roads.pdf> > (accessed 07/11/2022) page 4.

obligation to protect civilians and the right to non-discrimination), perpetrated during migration. The African Commission went on to urge State parties to ratify and implement the relevant international and regional instruments. Unfortunately, there are still significant regulatory gaps and weaknesses in law enforcement that prevent migrants in Africa from exercising their rights.

The examination of each African country at the national level is beyond the scope of this study. Rather, representative case studies demonstrating law enforcement challenges at the national level have been carefully selected on the basis of their regional representation and their ability to provide relevant examples of the challenges associated with the criminalisation of migration. This section primarily focuses on *Kenya, Niger, South Africa* and *Tunisia*. This is due to these countries representing States with significant migration and refugee populations, as well serving as important transit or destination countries. These countries were also chosen on the basis of the accessibility of relevant and up-to-date data and expert informants relevant to this study. Selected researchers conducted comprehensive research on migration policing in the particular States, involving in-depth qualitative interviews with relevant experts and representatives.

The findings of the research into policing and migration across these four countries cannot be extrapolated to provide general findings on national practices in the African context. However, they are instructive of the types of good practice and challenges that can arise in the implementation of normative frameworks for migration policing when various localised factors are taken into account. Examples of these factors include:

- Diversity of legal systems, socio-economic conditions, and political systems;
- The impact of historic and current sub-regional migratory patterns on policy and practice;
- Types of migratory patterns, including whether there is a statistically significant migrant population; cross-border movement of people as a result of socio-economic conditions, conflict, climate change or other contributing factors; and whether countries are predominantly destination countries or part of transitory routes; and
- The priorities and progress of security sector reform, particularly in terms of policing and border management.

The following section thus explores how the use of criminal justice measures by these countries has aligned with normative frameworks and good practice, and in what situations

impediments arise which impede effective implementation of the human rights framework, discussed in section 4.6 above.

9.1 Migration trends

Kenya serves as a source, destination and transit point for various migration flows. Refugees and migrants constitute approximately 2% (roughly one million individuals) of Kenya's total population.²⁸⁶ Migration to Kenya is driven by various motivations, including education pursuits, job opportunities and seeking sanctuary following displacement.²⁸⁷ As of 2023, Kenya hosts almost 580,000 refugees.²⁸⁸ This has resulted in Dadaab camp becoming the largest refugee camp in the world and Kenya's third-largest city.²⁸⁹ A significant portion of migration occurs from rural to urban centres, driven by aspirations for improved economic prospects, higher education, and better health care.

Migration dynamics in Tunisia can be characterised as mixed migration, including both domestic and international migration. Tunisia serves as an origin, transit and destination country for migrants, refugees and asylum seekers heading to Europe via the Mediterranean Sea. The number of Tunisians attempting to reach Europe has notably increased since mid-2017, making them the second largest nationality among migrants arriving in Italy through the Central Mediterranean route, accounting for over 17% of arrivals in 2022.²⁹⁰ Notably there has been a significant increase in sub-Saharan migrants fleeing Tunisia.²⁹¹

As a trade hub between North and Sub-Saharan Africa, Niger is mainly a country of origin, and transit²⁹² for both voluntary and forced migrants.²⁹³ As of January 2023, UNHCR indicated that Niger was 'hosting 255,309 refugees and asylum seekers, with 69% coming from Nigeria,

²⁸⁶ K Hargrave, I Mosel & A Leach (Overseas Development Institute) (2020) "Public narratives and attitudes towards refugees and other migrants" < https://cdn.odi.org/media/documents/kenya_migration_country_profile_final.pdf> (accessed 09/07/2023).

²⁸⁷ K Hargrave, I Mosel & A Leach (Overseas Development Institute) (2020) "Public narratives and attitudes towards refugees and other migrants" < https://cdn.odi.org/media/documents/kenya_migration_country_profile_final.pdf> (accessed 09/07/2023).

²⁸⁸ UNHCR, *Kenya Registered Refugees and Asylum-Seekers as of 31 January 2023* (Nairobi: UNHCR, 2023).

²⁸⁹ Ben Rawlence, 'Story of Cities #44: Will Dadaab, the World's Largest Refugee Camp, Really Close?,' *The Guardian*, May 17, 2016, sec. Cities, <https://www.theguardian.com/cities/2016/may/17/story-of-cities-44-dadaab-kenya-worlds-largest-refugee-camp-closed>.

²⁹⁰ Assessment Capacities Project (2022) "Tunisia Mixed migration" < <https://www.acaps.org/country/tunisia/crisis/mixed-migration>> (accessed 09/07/2023).

²⁹¹ Assessment Capacities Project (2022) "Tunisia Mixed migration" < <https://www.acaps.org/country/tunisia/crisis/mixed-migration>> (accessed 09/07/2023).

²⁹² It must be noted that Niger's profile as a destination country is low. Niger primarily functions as a country of origin and transit. There are however, forced returns of migrants to Niger. As further pointed out by the Global Detention Project: "More recently, the country has begun receiving third-country nationals who are "returned," often forcibly, from Algeria and Libya". See: Global Detention Project (2019) "Niger: Overview" < <https://www.globaldetentionproject.org/countries/africa/niger>> (accessed 15/07/2023).

²⁹³ ACHPR (2019) "Pilot Study on Migration and Respect for Human Rights: Focus on the Responses Provided by Niger" <<https://www.humanrights.dk/publications/pilot-study-migration-respect-human-rights-focus-responses-provided-niger>>(accessed on 26 April 2023).

21% from Mali, 5% from Burkina Faso, and 5% from other countries. Furthermore, there are more than 380,000 Internally Displaced Persons (IDPs) and Nigerien returnees (who have stayed outside the country for more than 10 years and who have recently returned to Niger).²⁹⁴

Migration trends in South Africa are complex and influenced by a range of factors. South Africa serves as both a destination and transit country for various types of migration, including economic migration, asylum seekers and refugees. Economic migration is a significant driver of migration flows. South Africa hosts the largest number of immigrants on the African continent. According to official estimates, the country is home to approximately 2.9 million immigrants.²⁹⁵

9.2 Legal frameworks

Kenya,²⁹⁶ Tunisia,²⁹⁷ Niger²⁹⁸ and South Africa²⁹⁹ have all demonstrated a commendable level of commitment to international law treaties pertaining to migration, as evidenced by their levels of ratification. A central gap pertaining to all of these countries has however been the lack of ratification of the ICMWF and the AU's Protocol relating to the Free Movement of Persons. Many of the rights protected at the international law level are also reflected to some extent, in the legal frameworks governing migration within their respective jurisdictions. It is however, important to acknowledge the contextual challenges that shape law and policy in each individual country. For example, Kenya is under significant pressure to take measures to combat terrorism and other forms of violent extremism,³⁰⁰ while Niger is working with technical partners to implement priorities relating to migration flow and management.³⁰¹ South Africa is grappling with socio-economic challenges and incidents of xenophobic violence.³⁰² These

²⁹⁴ ACHPR (2019) "Pilot Study on Migration and Respect for Human Rights: Focus on the Responses Provided by Niger" <<https://www.humanrights.dk/publications/pilot-study-migration-respect-human-rights-focus-responses-provided-niger>> (accessed on 26 April 2023).

²⁹⁵ Migration Data Portal (2023) "Migration Data in the Southern African Development Community (SADC) <<https://www.migrationdataportal.org/regional-data-overview/southern-africa>> (accessed 09/07/2023).

²⁹⁶ Kenya has ratified the African Convention on Human and Peoples Rights; and the Convention Governing the Specific Aspects of Refugee Problems in Africa.

²⁹⁷ In terms of Tunisia, the State has ratified the African Charter on Human and Peoples' Rights as well as the AU Convention Governing Specific Aspects of Refugee Problems in Africa.

²⁹⁸ Key international instruments ratified by Niger include: the International Covenant on Civil and Political Rights; the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime; the Convention relating to the Status of Refugees; and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. At the regional level, Niger has ratified the African Charter and the African Convention on Refugees.

²⁹⁹ South Africa has ratified a number of international legal instruments, as well as regional instruments, including the African Charter and the African Convention on Refugees.

³⁰⁰ C.E Bailey (2019) "Counterterrorism law and practice in Kenya" in C. Bailey (ed.). *Counterterrorism law and practice in the East African community*. Leiden, Netherlands: Brill Nijhoff; K Allen (2020) "Why is the US ramping up anti-terrorism efforts in Kenya?" Pretoria: Institute for Security Studies. <<https://issafrica.org/iss-today/why-is-the-us-ramping-up-anti-terrorism-efforts-in-kenya>> (accessed 15/07/2023).

³⁰¹ Niger government to adopt the 2015 Law as part of its containment agenda. See: Global Detention Project (2019) "Niger: Overview" <<https://www.globaldetentionproject.org/countries/africa/niger>> (accessed 15/07/2023).

³⁰² The recommendation of the African Commission on Human and Peoples' Rights on South Africa's combined second periodic report 2003-2014 (2016) pages 18, 22, 24 and 28. On page 18, the ACHPR expresses its concern

factors have a significant impact on the development and implementation of laws and policies relating to migration, contributing to the complex landscape in which migration governance operates.

Even in jurisdictions with a progressive Constitution and detailed legislation in place, the absence of a coherent policy framework leads to a deficiency in guidance and accountability within the realm of migration governance. This is demonstrated by Kenya, which has not yet adopted a comprehensive policy on migration.³⁰³ This lack of a framework results in inadequate coordination and insufficient policy integration, particularly at the local level.³⁰⁴ While subsequent sections delve into the practical implementation challenges, this lack of integration has contributed to arbitrary arrests,³⁰⁵ prolonged detentions and deportations.³⁰⁶

While many States have progressive constitutional frameworks in place, there is a need to ensure that these constitutional guarantees are translated into legislative and policy measures that implement the constitutional protections. This is evidenced by Tunisia where despite constitutional guarantees to the rights to equality,³⁰⁷ dignity³⁰⁸ and the right to seek political

over socio-economic issues, underscoring the “existence of a cross-section of the population who live in poor socio-economic conditions with limited access to basic amenities such as food, health care, housing and education.” While the ACHPR also expresses its concern over “acts of Xenophobia and other intolerances directed at foreign nationals” on page 24 on page 28, the ACHPR recommends that South Africa: “strengthen various initiatives taken in the fight against acts of Xenophobia directed at foreign nationals to bring about a more coordinated response to the increased protection needs of foreign nationals.”; Human Rights Watch (2023) World Report 2023: South Africa <https://www.hrw.org/sites/default/files/media_2023/01/World_Report_2023_WEBSPREADS_0.pdf > (accessed 15/07/2023) page 538.

³⁰³ Interview with ILO official from case study on Kenya. The IOM has also stated that: “In 2017 the National Coordination Mechanism on Migration (NCM) drafted a Kenya National Migration Policy, which includes comprehensive guidelines for migration [governance] that are in line with the UN Sustainable Development Goals; however, it is yet to be formally adopted by the government.” IOM (2018) “Migration Governance Snapshot: Republic of Kenya” < <https://www.migrationdataportal.org/sites/g/files/tmzbdl251/files/2018-10/Migration%20Governance%20Snapshot-%20Republic%20of%20Kenya.pdf>> (accessed 07/06/2023). This is in spite of numerous drafts of a migration policy being presented to policy makers

³⁰⁴ This is according to the Regional Coordinator -Commissioner of the Kenya National Commission on Human Rights (2019) This was expounded in a paper presented during the National Migration Conference “Towards Implementation of the Global Compact on Migration” in July of 2019 in Nairobi.

³⁰⁵ Indeed, despite safeguards, human rights advocates report increased police harassment, random arrests, and disappearances. These are particularly common in the kind of poor urban areas where new arrivals (including refugees and domestic and international migrants) often live. IPOA, Independent Policing Oversight Authority: Strategic Plan (Nairobi: IPOA, 2019).

³⁰⁶ In a report on the Status of Migrants in places of detention in Kenya, the Kenya National Commission on Human Rights pointed out that the blanket approach to detention for irregular border crossings “results in the detention of victims of trafficking and smuggling as they often commit infractions or offences such as irregular entry, use of false documents and other violations of immigration laws and regulations. These offences are often punished as criminal offences and victims of trafficking are thus often detained and deported without regard for their assistance.” Kenya National Commission on Human Rights (2020) “A survey report on the status of migrants in places of detention in Kenya” < <https://www.knchr.org/Portals/0/A%20Survey%20Report%20on%20the%20Status%20of%20Migrants%20in%20Places%20of%20Detention%20in%20Kenya.pdf>> (accessed 08/07/2023).

³⁰⁷ Article 21.

³⁰⁸ Article 23.

asylum,³⁰⁹ there is no specific legislation on asylum and refugee status.³¹⁰ Authors highlighted that Organic Law 7 of 1968 further allows for the detention and expulsion of foreign citizens found in administrative irregularity without provision for judicial review.³¹¹

Commitments to international human rights can further be undermined by provisions that criminalise migration. This is demonstrated by Niger which provides for the granting of asylum or refugee status, while also having a system for providing protection to refugees. However, the 2015 Law on the illegal smuggling of migrants, has created a security-oriented approach to migration governance. This legislation coupled with externally funded policies, has led to an increasingly securitised and criminalised approach to all forms of human mobility and migration. According to reports, the shift towards securitisation has prevented migrants from fully enjoying their human rights while creating a disconnect between national measures and international and regional human rights obligations.

Progressive legal frameworks further need to be translated into coherent and comprehensive policies that are sufficiently resourced and effectively implemented. For example, South Africa has a progressive Constitution, as well as a detailed legislative³¹² and policy framework on migration, refugees and asylum seekers. However, there are significant gaps in legislation and policy that hinder the full realisation of the duties of the State and the police. These gaps include the absence of explicit recognition of xenophobic violence and discrimination as a distinct crime and the use of operations that bypass procedural safeguards provided in immigration law.

9.3 Discrepancies between the existing legal framework and practice

The articulation of policy approaches and statements by political leaders can either bolster the significance of a rights-based approach to migration policing or hinder the comprehensive implementation of such a framework. This is due to the fact that these policy approaches and

³⁰⁹ Article 26.

³¹⁰ ReliefWeb (2023) "Tunisia: No Safe Haven for Black African Migrants, Refugees" where it is stated that: "Tunisia has no national asylum law or system" < <https://reliefweb.int/report/tunisia/tunisia-no-safe-haven-black-african-migrants> > (accessed 15/08/2023); United Nations Refugee Agency (2021) "Tunisia: Fact sheet" < https://reporting.unhcr.org/sites/default/files/UNHCR%20Tunisia_Factsheet_June%202021_ENG.pdf > (accessed 15/08/2023).

³¹¹ Giuffr , M., Denaro, C., & Raach, F. (2022). 'On 'Safety' and EU Externalization of Borders' *European Journal of Migration and Law* 24(4), 570-599. doi: <https://doi.org/10.1163/15718166-12340141>. This gap undermines Article 29 of the Constitution

³¹² Examples of these measures include the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998. Section 34 of the Immigration Act provides for the deportation and detention of illegal foreigners, subject to certain procedural safeguards. The country also has progressive legislation that aims to eliminate discrimination and foster substantive equality, as exemplified by the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The issue of "nationality" was introduced in the directive principles in section 34 of PEPUDA to ensure that non-nationality should not be a ground for denial of equality in line with the Constitution as well South Africa's regional and international treaty obligations.

statements are influential in shaping the practical implementation of legal frameworks and the provision of adequate resources. In recognising the intricate nature of migration discourse, it is important to acknowledge the multitude of factors that influence it. Political leaders are challenged to develop nuanced migration policies that have broader political, social and economic implications. Consequently, migration policy is interconnected with other public policy priorities, including the integration of migration considerations into national laws. State governments also have to grapple with addressing socio-economic challenges such as labour and housing, countering terrorism and serious violent crime and managing international and bilateral relations.

In recognising this complexity, it is important to address how the framing of migration in policy and political discourse can hinder the effective implementation of human rights. When migration is perceived solely as a cultural and security threat, it may lead to discriminatory measures that overlook the positive contributions and development potential of migrants. Instead, it is essential to adopt a balanced and evidence-based approach, one that ensures the protection of human rights while addressing legitimate security and labour market concerns.

While Kenya has a strong legal framework for protecting the rights of refugees and migrants,³¹³ it provides a case study on the challenges associated with implementation, particularly in contexts where government capacity and resources are constrained. As pointed out by the Kenya National Commission on Human Rights, in spite of the extensive legal framework, migrants do not enjoy these guaranteed rights in practice.³¹⁴ As further pointed out by the Commission: “Given the limitations in the current screening of migrants in the country, there is [a] tendency to offer blanket detention of migrants including those in need of asylum services and victims of trafficking.”³¹⁵ The gap between policy and practice is further emphasised by the lack of progress towards the effective implementation of the existing refugee policy. This has been attributed to funding and capacity constraints, and prevailing social tension, particularly with regard to Somali refugees.³¹⁶ Despite legal safeguards, the prevailing

³¹³ For example, the *Refugee Act* promotes refugee inclusion and integration in Kenyan society. Moreover, once registered, the law allows refugees and immigrants access to the National Hospital Insurance Fund. There are also basic protections for children including broad access to primary health care and education for refugees.

³¹⁴ Regional Coordinator -Commissioner Kenya National Commission on Human Rights (2019) Paper presented during the National Migration Conference “Towards Implementation of the Global Compact on Migration” July 2019 Nairobi.

³¹⁵ Regional Coordinator -Commissioner Kenya National Commission on Human Rights (2019) Paper presented during the National Migration Conference “Towards Implementation of the Global Compact on Migration” July 2019 Nairobi.

³¹⁶ Izza Leghtas and David Kitenge, ‘What Does Kenya’s New Refugee Act Mean for Economic Inclusion?’ Refugees International, May 4, 2022, <https://www.refugeesinternational.org/reports/2022/4/29/what-does-kenyas-new-refugee-act-mean-for-economic-inclusion>.

challenges in implementation and policy have resulted in adverse human rights outcomes in the policing sphere, with reports indicating increased police harassment, corruption,³¹⁷ random arrests, and disappearances.³¹⁸ These violations are particularly common in the poor urban areas where new arrivals (including refugees and domestic and international migrants) often live.³¹⁹

With regard to Tunisia, in February 2023, the Chairperson of the AU Commission condemned a statement issued by Tunisian authorities, which cast African migration in a negative light. The AU underscored that these statements “[go] against the letter and spirit of our Organization and founding principles”.³²⁰ The Chairperson of the AU went on to remind Member States: “to honour their obligations under international law and relevant AU instruments to treat all migrants with dignity, wherever they come from, [to] refrain from racialised hate speech that could bring people to harm, and [to] prioritize their safety and human rights.”³²¹

The legal framework in Niger has also intersected with the political situation, leading to discriminatory policing practices and a failure to protect migrants.³²² For example, engagement

³¹⁷ IOM (2022) “The state of migration in East and Horn of Africa” <<https://publications.iom.int/books/state-migration-east-and-horn-africa-report> > (accessed 16/08/2023) page 140.

³¹⁸ APCOF ‘Common Standards for Policing in Eastern Africa: Kenya’, available at <https://apcof.org/wp-content/uploads/common-standards-for-policing-in-eastern-africa-kenya-.pdf> (accessed on 7 June 2023).

³¹⁹ Human Rights Watch, Kenya: Rein in Police, Condemn New Abuses (New York: Human Rights Watch, 2017), <https://www.refworld.org/docid/5a153114.html>; Human Rights Watch, ‘They Were Men in Uniform’: Sexual Violence against Women and Girls in Kenya’s 2017 Elections (New York: Human Rights Watch, 2017). ; IOM (2022) “The state of migration in East and Horn of Africa” <<https://publications.iom.int/books/state-migration-east-and-horn-africa-report> > (accessed 16/08/2023) page 140.

³²⁰ Chairperson of the African Union (2023) “The Chairperson of the African Union Commission strongly condemns the racial statements on fellow Africans in Tunisia” < https://au.int/sites/default/files/pressreleases/42632-pr-The_Chairperson_of_the_African_Union_Commission_strongly_condemns_the_racial_statements_on_fellow_Africans_in_Tunisia.pdf.> (accessed 12/03/2023).

³²¹ Chairperson of the African Union (2023) “The Chairperson of the African Union Commission strongly condemns the racial statements on fellow Africans in Tunisia” < https://au.int/sites/default/files/pressreleases/42632-pr-The_Chairperson_of_the_African_Union_Commission_strongly_condemns_the_racial_statements_on_fellow_Africans_in_Tunisia.pdf.> (accessed 12/03/2023).

³²² The 2015 Law on Trafficking has intersected with the EU’s externalised approach to border control. For example, the response of EU policy makers to Niger being a transit country for migrants has been an increasing externalization of their restrictive migration policies to stem the movements of people and to shift the responsibility for preventing irregular immigration to so-called transit states. As the most significant transit country between West and North Africa, Niger has attracted the attention of the EU as a ‘laboratory’ for the implementation of its efforts aimed at curbing the movement of migrants and refugees toward Europe and increasing the number of returns. According to multiple reports and sources, those responsible for acts violating the fundamental rights of migrants are the police, gendarmes, soldiers, smugglers, drivers, and the citizenry. While responsibility is widespread, it appears as if the police are the leading perpetrators of incidents violating the rights of migrants, followed by smugglers, gendarmes, soldiers, armed groups, the population and drivers. See: The African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) < https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022) page 54.

with international actors, such as the EU have resulted in efforts to protect migrants and combat smuggling, often through development or humanitarian-focused assistance programs. However, there are indications that these policy efforts have unintentionally contributed to increasing securitisation with human rights implications. This coupled with laws such as the 2015 Law on the smuggling of migrants: “has led to the criminalisation of migration and violations of the human rights of migrants.”³²³ As a result, policing-related violations of migrants’ human rights include: “physical and psychological violence, threats, restrictions on free movement, discrimination, confiscation of money, property and documents, extended detention, and denied access to life saving humanitarian aid.”³²⁴ Where migrants are detained, the African Commission’s Pilot study on Niger, further revealed that conditions of detention, fall far below the expected international standards and infringe upon the enjoyment of the right to health.³²⁵ “Torture and cruel, inhuman or degrading treatment of migrants occur mainly during arrests and detention. In addition to the physical atrocities inflicted on migrants, the ill-treatment of migrants is exacerbated by prison overcrowding and difficult conditions of detention.”³²⁶

As mentioned above, South Africa has a progressive legislative and policy framework which imposes a clear obligation on the State to protect the rights of migrants. The police also have a responsibility to ensure equitable service delivery to non-nationals and to effectively address xenophobic violence and hate crimes. This is pointedly manifested in the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance 2016-2021 (“NAP”). The NAP serves as a strategic framework to address these issues and aims to promote equality, non-discrimination and social cohesion in the country. This policy framework has however, been plagued by implementation challenges.

³²³ Felipe González Morales, the UN Special Rapporteur on migration UN Human Rights Office of the High Commissioner (2018) “Niger: human rights protection must be central to migration policies, says expert” <<https://www.ohchr.org/en/press-releases/2018/10/niger-human-rights-protection-must-be-central-migration-policies-says-expert>> (accessed 08/07/2023).

³²⁴ African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) <https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022) page 39.

³²⁵ African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) <https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022).

³²⁶ African Commission on Human and Peoples’ Rights “Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger” (2019) <https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022).

9.4 Training

In order to establish a rights-based approach to the policing of migrants, it is imperative to ensure that the training provided to law enforcement agencies clearly outlines the requirements and expectations set forth by the international legal framework. This is necessary as a lack of training has at times resulted in law enforcement personnel failing to distinguish between refugees, asylum seekers and migrants while often placing them in the same category (as non-nationals to be targeted). Regrettably, challenges and constraints hinder the progress of training programs across the African continent. Nevertheless, by addressing these obstacles and through prioritising comprehensive training initiatives, law enforcement officials can be equipped with the necessary knowledge and skills to contribute to upholding the rights of migrants in a just and humane manner. Simultaneously it is crucial to recognise that training on its own is insufficient to address the systemic challenges and inherent political incentives that lead to non-compliance with the human rights framework. There is therefore, a pressing need for training to be accompanied by comprehensive political and institutional interventions.

While the extent of migration and refugee law inclusion in basic police training for the Kenyan National Police Service (NPS) is unclear, the impact of training deficits on policing performance, including in relation to migrants, is evident. A joint report by APCOF and Police Reforms Working Group - Kenya identified training deficiencies, particularly in human rights protections as a systemic issue affecting policing across all mandate areas.³²⁷ Updating the training curriculum to incorporate human rights norms and standards, especially for marginalised groups, is recommended.³²⁸ IPOA has also specifically raised concerns about the treatment of migrants by the NPS, attributing it partially to training gaps. The IPOA conducted inspections in 2019, revealing the lack of training on immigration matters, challenges in processing immigrant detainees involving other agencies and the profiling of immigrants due to training deficiencies.³²⁹ The IPOA recommends providing specific training to NPS members on handling migrant detainees.³³⁰ Police training is currently being reviewed

³²⁷ African Policing Civilian Oversight Forum (APCOF), the East African Police Chiefs Cooperation Organisation (EAPCCO), the Police Reforms Working Group – Kenya, and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2022), ‘Common Standards for Policing in Eastern Africa: Kenya’, available at <https://apcof.org/wp-content/uploads/common-standards-for-policing-in-eastern-africa-kenya-.pdf> (accessed on 7 June 2023).

³²⁸ African Policing Civilian Oversight Forum (APCOF), the East African Police Chiefs Cooperation Organisation (EAPCCO), the Police Reforms Working Group – Kenya, and the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2022), ‘Common Standards for Policing in Eastern Africa: Kenya’, pp 56-57, available at <https://apcof.org/wp-content/uploads/common-standards-for-policing-in-eastern-africa-kenya-.pdf> (accessed on 7 June 2023).

³²⁹ IPOA Annual Performance Report, July to December 2019, pp 36-38, available at <http://www.ipoa.go.ke/wp-content/uploads/2020/10/IPOA-Performance-Report-July-Dec-2019.pdf> (accessed on 7 June 2023).

³³⁰ IPOA Annual Performance Report, July to December 2019, pp 38, available at <http://www.ipoa.go.ke/wp-content/uploads/2020/10/IPOA-Performance-Report-July-Dec-2019.pdf> (accessed on 7 June 2023).

by a task force assessing the terms and conditions of service for police and prison officers, with expected recommendations in 2023.³³¹ This presents an opportunity for the NPS, IPOA and the NPS Commission to ensure that training aligns with Kenya's human rights obligations under international law.

During its recent Universal Periodic Review (UPR), the Tunisian government reported on plans to improve and modernise training for law enforcement agencies to promote human rights and increase transparency and efficiency in policing practices.³³² In 2022, a formal agreement was concluded between the EU's Agency for Law Enforcement Training (CEPOL) and Tunisia, which will enable Tunisian police to participate in CEPOL training activities with EU Member States.³³³ Though the details of the agreement are not available, CEPOL does offer migration-focused training modules which may be available to Tunisian law enforcement participants.³³⁴

The Manual on Human Rights Training for the National Police in Niger was developed in 2003, and has undergone several revisions to take into account changes to relevant constitutional and legislative provisions, which represents a positive development.³³⁵ While human rights are included as part of the formal curricula, gaps in the training have been noted, with the Committee against Torture (CAT) recommending that Niger include specific training on the use of force and the prevention of torture (including investigative interviewing) in line with its obligations under the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.³³⁶ The CAT also raised its concerns regarding the lack of systems in place to identify and protect the rights of refugees and migrants in Niger. Following the CAT's recommendations, Niger reviewed the rights training manual for the police and integrated training on the use of force and human rights as well as training on the prevention of torture. In addition, the Niger Police School has a training tool titled: "Border policing and foreigners" which specifically deals with human rights pertaining to migration. There is

³³¹ Republic of Kenya, Gazette, Vol CXXIV-No 281, Nairobi, 21 December 2022, available at <https://gazettes.africa/archive/ke/2022/ke-government-gazette-dated-2022-12-21-no-281.pdf> (accessed on 7 June 2022).

³³² UN General Assembly, Report of the Working Group on the Universal Periodic Review: Tunisia, 14 December 2022, UN Doc A/HRC/52/6, para [64], available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/606/32/PDF/G2260632.pdf?OpenElement> (accessed on 7 June 2023).

³³³ <https://south.euneighbours.eu/news/first-ever-working-arrangement-signed-between-cepola-and-tunisia/>

³³⁴ See, for example, <https://www.cepola.europa.eu/taxonomy-migration>

³³⁵ Monique Alexis (2018), 'Policing of Assemblies by Law Enforcement Officials in Africa: Review of public order legislation of Burkina Faso, Cote d'Ivoire, Mali and Niger', APCOF, p 42, available at <http://apcof.org/wp-content/uploads/review-of-public-order-legislation.pdf> (accessed on 7 June 2023).

³³⁶ Committee against Torture, concluding observations on the initial report of Niger, UN Doc CAT/C/NER/CO1, 20 December 2019, para 36, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/350/39/PDF/G1935039.pdf?OpenElement> (accessed on 7 June 2023); Committee against Torture, Concluding observations on the initial report of Niger, UN Doc CAT/C/NER/CO1, 20 December 2019, para 26(c), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/350/39/PDF/G1935039.pdf?OpenElement> (accessed on 7 June 2023).

therefore, *ad hoc* training on migration issues for police occupying border posts. A further example of training is through the support by the EU Capacity Building Mission (EUCAP Sahel) to the Niger Direction de la Surveillance du Territoire to strengthen border management structures under the Renewed EU Action Plan against migrant smuggling (2021-2025).³³⁷ This includes specific training to border officials, though details of that training are not publicly available.³³⁸ EU capacity building is however, likely to be influenced by the underlying tenets of the EU action plan with some reports highlighting the fact that the EU action plan places a primary focus on securitisation.

As mentioned above, the legal framework for migration and asylum in South Africa provides specific powers to the South African Police Service (SAPS) within their broader mandate to uphold and enforce the law.³³⁹ This includes the discretionary power to arrest and detain suspected irregular migrants in South Africa, and to support the Department of Home Affairs (DHA) with document verification.³⁴⁰ However, the SAPS training curriculum lacks modules on immigration and refugee law, as well as the technical information required to conduct document verification.³⁴¹ Incidents of arbitrary detention and deportation of asylum seekers due to procedural failures have also resulted in litigation against the SAPS.³⁴² In certain instances, attitudes of police towards migrants have contributed to inequitable service delivery and resource allocation during xenophobic violence outbreaks.³⁴³ These attitudes shape the police responses to specific incidents, while also affecting operational decision-making and systemic resource allocation from station to national levels.³⁴⁴ As a result, the Western Cape

³³⁷ European Commission “Renewed action plan against migrant smuggling” < https://home-affairs.ec.europa.eu/renewed-eu-action-plan-against-migrant-smuggling-2021-2025-com-2021-591_en > (accessed 15/02/2023).

³³⁸ European Commission, ‘New Pact on migration and asylum: reporting on developments and stepping up fight against migrant exploitation’, Press Release, 29 September 2021, cited in UNODC, ‘Smuggling of Migrants in the Sahel’, p 34, Vienna, 2022.

³³⁹ Constitution of the Republic of South Africa, 1996, section 205(3).

³⁴⁰ Immigration Act 13 of 2002, sections 41 and 34(1).

³⁴¹ Information received during an interview with a representative of the South African Police Service (SAPS) on 13 October 2020, cited in Edwards et. al., ‘Policing and non-nationals: Analysis of police prevention, detection and investigation of xenophobic violence in South Africa’, APCOF, 2021, available at <https://apcof.org/wp-content/uploads/policing-and-non-nationals-report.pdf> (accessed on 7 June 2023).

³⁴² Theresa Alfaro-Velcamp & Mark Shaw (2016), ‘Please GO HOME and BUILD Africa’: Criminalising immigrants in South Africa’, *Journal of Southern African Studies*, 42:5, p. 995-997.

³⁴³ See for example, Unreported judgment in *Said and others vs Minister of Safety & Security and others*, Western Cape High Court; South African Human Rights Commission (2010), ‘Report on the SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals’, available at https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf (accessed on 6 June 2023).

³⁴⁴ K O’Regan and V Pikoli, ‘Towards a safer Khayelitsha: The report of the Commission of Inquiry into the Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community in Khayelitsha, Summary, August 2014, p. xxix, available at https://www.westerncape.gov.za/police-ombudsman/files/atoms/files/khayelitsha_commission_report_0.pdf (accessed 6 June 2023).

High Court has expressly recognised the urgent need for training to address police attitudes and procedural knowledge.³⁴⁵

9.5 REC efforts and the need for oversight mechanisms

As highlighted in this document there have been key developments at the sub-regional levels through the Regional Economic Communities (REC's) which have aimed to promote freedom of movement. While these initiatives can be strengthened, they serve as a significant and positive starting point. Nevertheless, existing REC mechanisms need to be coupled with concomitant oversight procedures. This is necessary for migrants to be able to effectively enjoy the human rights protected under the legal frameworks of the respective REC's. For instance, in the ECOWAS community, citizens are free to move in the region, subject to minimum conditions. Despite this progressive legal framework, in practice, there are reports and allegations that the free movement of ECOWAS citizens is undermined by the conduct of law enforcement officials through acts of bribery, corruption³⁴⁶ and intimidation.³⁴⁷ Effective control mechanisms, particularly at borders can therefore contribute to safeguarding the enjoyment of key rights protected under the REC's legal frameworks.

9.6 Key lessons from the case studies

In spite of the progressive framework of rights discussed in section 4, the above examples demonstrate the challenges experienced by African States in seeking to comply with the rights pertaining to equality, dignity, freedom of movement, freedom from torture and due process, as well as the obligation to ensure that detention is a measure of last resort and is not arbitrary. The case studies further reveal that securitised border management, the criminalisation of migration³⁴⁸ and the privatisation of migration governance serve as particular challenges in seeking to protect the human rights of migrants. While the unique nature of each migrant's journey needs to be recognised and addressed, there is inherent danger in requiring law enforcement to determine which migrants are deserving of protection and which are not.

³⁴⁵ Unreported judgment in *Said and others vs Minister of Safety & Security and others*, Western Cape High Court.

³⁴⁶ UNODC (2021) "West Africa, North Africa and the Central Mediterranean: Key Findings on the Characteristics of Migrant Smuggling in West Africa, North Africa and the Central Mediterranean" <https://www.unodc.org/res/som/docs/Observatory_Storymap_1_Final_2021.05.19.pdf> (accessed 15/08/2023).

³⁴⁷ African Commission on Human and Peoples' Rights "Pilot study on Migration and Respect for Human Rights: Focus on the responses provided by Niger" (2019) <https://www.achpr.org/public/Document/file/English/Pilot%20Study%20on%20Migration_ENG.pdf> (accessed 19/10/2022).

³⁴⁸ The case studies illustrate that this shift towards securitization and criminalization has been driven by two key factors: i) the externalisation of borders and the war on terror, and ii) the political economy rationale behind migration governance (including containment aid in Niger and funding and support for the war on terrorism in Kenya; as well as the advantages of political populism in South Africa and Tunisia).

With regard to criminalisation and securitisation, the 2021 Continental Migration Report highlighted key trends that have specifically impeded the implementation of the GCM.³⁴⁹ These trends included increased levels of identified human trafficking, severe human rights violations, securitised border governance, ineffective mechanisms for legal identity, inadequate access to basic services, missing migrants, unlawful detention and refoulement.³⁵⁰ The conflation between smuggling, human trafficking and migration further serves to legitimise containment and detention while constraining the agency of migrants.³⁵¹

Through criminalising migration, States place vulnerable migrants at the mercy of law enforcement officials who have been tasked with enforcing primarily punitive measures. Law enforcement agencies frequently lack the capacity and the training to enforce nuanced legal rules in a manner that is sensitive to the rights of migrants while being non-discriminatory³⁵². Limited capacity, resources and support for law enforcement therefore prevents effective and human-rights based responses to the complex and evolving needs of migrant populations.³⁵³ While it is beyond the scope of this study to document every case of infringement upon the rights of migrants by law enforcement, the case studies offer a unique insight into the specific hurdles States experience in seeking to give effect to the human rights of migrants.

10 Conclusion and recommendations

Migration on both a global and a regional scale is on the rise. Part of the complexity of seeking to address migration is that the migration experience is constantly evolving, while being unique

³⁴⁹ United Nations (2021) "Africa makes progress on global compact for migration but more action is needed" <<https://www.un.org/africarenewal/news/africa-makes-progress-global-compact-migration-more-action-needed>> (accessed 22/02/2023).

³⁵⁰ United Nations (2021) "Africa makes progress on global compact for migration but more action is needed" <<https://www.un.org/africarenewal/news/africa-makes-progress-global-compact-migration-more-action-needed>> (accessed 22/02/2023).

³⁵¹ J Hyndman & J Reynolds (2020) "Beyond the Global Compacts" *Refuge: Canada's Journal on Refugees* Vol. 36, No. 1 pp. 66-74 page 67.

³⁵² While Morocco was not identified as a key case study, the recent violence that broke out at its border and the resultant study by the Moroccan human rights council, underscores the importance of training and capacity building for law enforcement. While news reports indicated that 37 migrants died in June of 2022, a fact-finding mission by the Moroccan national human rights council found that there were 23 deaths while hundreds were wounded while trying to reach the Spanish city of Melilla. While there were instances of the Moroccan riot police using excessive force, the majority of the deaths were caused by Mechanical asphyxia. This was due to the massive stampede of approximately 2000 migrants attempting to storm the border. The Moroccan riot police used teargas and in certain instances, truncheons against the migrants. This event has been described as "the heaviest death toll in years of such attempts to cross the frontier into Melilla." A fact-finding mission conducted by the Moroccan human rights council, emphasised that: "The confrontation between migrants and law enforcement forces was marked by severe violence and an unusual character in terms of time and place, as the incursions usually took place at night and at other points of the iron fence." The police forces were also not prepared for the high number of migrants or for the manner in which they organised their attacks and attempted crossings. The report indicated that one of the key challenges in terms of attempting to implement the progressive human rights framework pertaining to migration, is the dynamic and changing nature of migration. There is also a lack of capacity, training and knowledge on the part of law enforcement, in terms of effectively responding to these changing dynamics.

³⁵³ Moroccan National Human Rights Council (2022) "Unprecedented Confrontations at the Melilla Crossing : Preliminary report of the Fact-Finding Commission" page 13-14.

for each migrant. What is clear is that securitised border management and the criminalisation of migration, often on the basis of vaguely defined security concerns, has served as a cruel system of exclusion and discrimination, targeting those that attempt to escape hardship to build a better life. The increased criminalisation of migration has further resulted in migrants being forced to turn to illegal routes, often relying on smugglers, placing themselves at greater risk. The legal vulnerability created by the increased criminalisation of migration has furthermore, intersected with the unique powers and discretion given to law enforcement, resulting in migrants experiencing human rights abuses. This has led to excessive deaths, incidents of torture, GBV, ill-treatment, mass expulsions and deaths at sea. It has also led to enforced disappearances and infringements upon integral socio-economic rights, such as the right to education for children and access to health care for vulnerable migrants, such as pregnant women. In summing up this horror, the Chairperson of the Migration and Torture Working Group fittingly stated that: “I have not [before] seen such a level of horror and dehumanisation of men and women”.³⁵⁴

The discriminatory actions of law enforcement officials has further served as a tool to enforce racial discrimination and patterns of exclusion within our society. Utilising the criminal justice system to govern migration is furthermore, ineffective as it has done nothing to slow down migration rates.

Contributing to the complexity of attempting to address migration is that there is a complex interplay of applicable national, regional and international laws that apply to migration. While this has created some confusion, the existing international law framework makes it clear that migrants, regardless of their legal status or their reason for migrating, are entitled to international human rights, including the rights to human dignity, equality, life, freedom from torture, liberty, freedom of movement and access to justice.

As migration is driven by complex historical, cultural, socio-economic and environmental factors that are difficult to surmount, there is a need for sustainable migration governance solutions.³⁵⁵ If States are truly committed to governing migration in a manner that gives effect to the aspiration to leave no-one behind and to build back better, then there is a need for a paradigm shift, whereby migration is no longer automatically criminalised, both in terms of its

³⁵⁴ World Organisation Against Torture (2021) “The Torture Roads: The Cycle of Abuse against People on the Move in Africa” < <https://www.omct.org/site-resources/files/The-Torture-Roads.pdf>> (accessed 07/11/2022) page 4.

³⁵⁵ Mixed Migration Centre (2021) “Fixing” people in place through policy and development? Efficacy and unintended consequences of migration deterrence in Kantché” < https://mixedmigration.org/wp-content/uploads/2021/05/168_briefing_paper_efficiency_and_unintended_consequences_migration_deterrence_Kantche.pdf> (accessed 05/2023).

conception and its governance. Given that the criminal justice system is an inappropriate mechanism to deal with socio-economic and developmental challenges, which serve as integral factors driving migration, there is a need for States to work cooperatively to develop long-term human rights based responses to migration.³⁵⁶ Simultaneously, law enforcement agencies need to be better equipped with the training and the knowledge to more effectively respond to the evolving needs of migrants.

Recommendations:

States need to ratify relevant international and regional instruments, such as the AU Protocol relating to Freedom of Movement, and take all necessary measures to ensure implementation. This includes prioritising development and implementation of comprehensive and coherent legislation and migration policies that align with international human rights standards. Laws, policies and training on migration also need to be responsive to intersecting forms of vulnerability, including gender, socio-economic status and age.

There is a need for research into the underlying causes of migration while collecting and utilising accurate and disaggregated data as a basis for evidence-based migration policies. This research needs to be conducted in a manner that adheres to the international rules governing data protection. Disaggregated data on migrants in detention must be prioritised.

Migration measures need to strike a balance between the interests of the State in addressing security and the rights of migrants, while selecting the least restrictive options and ensuring that any law enforcement measures are based on sound legal policy and existing human rights principles.

In reviewing laws and policies on migration, States need to ensure that securitisation is not the only factor influencing migration policy.

³⁵⁶ As pointed out by the Mixed Migration Centre: “To the extent that development projects privilege solving the “problem” of migration over the creation of sustainable alternatives, they are fundamentally out of step with local history, culture and circumstances.” Mixed Migration Centre (2021) “Fixing” people in place through policy and development? Efficacy and unintended consequences of migration deterrence in Kantché” < https://mixedmigration.org/wp-content/uploads/2021/05/168_briefing_paper_efficiency_and_unintended_consequences_migration_deterrence_Kantche.pdf> (accessed 05/2023). While this research report focused on West Africa, there is a need for long-term migration governance solutions.

There is a need for African States to critically review bilateral agreements to ensure that they align with regional and national priorities and do not compromise the rights and interests of migrants. They should resist undue financial pressure and prioritise policies that respect human rights and address the underlying causes of migration.

States need to invest in and address existing shortcomings in policing, including capacity building, training and combating corruption for all levels of law enforcement and border control. This should include human rights training, cultural sensitivity and effective migration governance techniques. This is essential in order to create an environment in which people can safely enjoy their right to freedom of movement. Effective policing is part of the necessary infrastructure required to ensure secure and orderly migration for all.

States need to actively counter anti-migrant sentiments by promoting accurate information and challenging negative narratives. There is a need to engage with the media, civil society organisations and the public to foster a more inclusive and empathetic understanding of migration, emphasising the contributions migrants make to society.

States need to carefully consider the ethical and human rights implications of utilising technologies such as artificial intelligence, drones, and cell phone tracking in migration governance. Technology needs to be used in a manner that respects privacy, dignity, autonomy and the presumption of innocence. Mechanisms for oversight, transparency, and accountability need to be established.

States need to proactively monitor and regulate the outsourcing of migration governance to private security companies. There is a need to ensure that human rights considerations are not neglected in the pursuit of profit and that there is democratic control, transparency and accountability