



AGOSS
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AFRICA GOVERNANCE INSIGHTS

Volume I:
Governance, Human Rights
and Migration in Africa

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AFRICA GOVERNANCE INSIGHTS

Volume I:

Governance, Human Rights
and Migration in Africa

1. *A prosperous Africa based on inclusive growth and sustainable development*
2. *An integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa's Renaissance*
3. *An Africa of good governance, democracy, respect for human rights, justice and the rule of law*
4. *A peaceful and secure Africa*
5. *An Africa with a strong cultural identity, common heritage, values and ethics*
6. *An Africa where development is people-driven, unleashing the potential of its women and youth*
7. *Africa as a strong, united and influential global player and partner.*

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FOREWORD



Migration across the globe remains politically and economically consequential. In Africa, this has implications for effective economic, corporate, and democratic governance. Migration affects, and is affected, by dynamics in socioeconomic development including access to services, environmental factors, and democratic activities such as unconstitutional changes in government.

Over the past two decades, migration patterns on the African continent have raised serious concerns about the role of governments and multilateral institutions regarding the movement and conditions of persons across borders. Migration is therefore a key governance issue confronting the continent today.

In recent times, the Covid-19 pandemic has challenged the resilience of governments globally and has directly affected the free movement of people as states introduced a series of lockdowns and various regimes of restrictions around the world. According to the World Migration Report by the International Organization for Migration (IOM), global air travel dropped by 60 per cent from 2019 to 2020, and the number of international migrants was estimated at only 3.6 per cent of the global population in 2020, with the majority being labour migrants.

This report recognises the predominant narrative that locates developing countries, including Africa, in the migration spectrum as labour-sending, and developed countries as labour-receiving. The phenomenon understood in the context of historical colonial relations and contemporary political economy is central to the migration–development nexus. The African Union (AU) Report on Labour Migration Statistics in Africa (2017) stated that the total estimated transfers received from African international migrants, including those living and working outside Africa, amounted to 75,7 billion US dollars in 2017. This highlights the diaspora’s potential as a catalyst for development in migrant’s respective African countries.

The intrinsic link between migration and the economy was also highlighted by his H.E. President Cyril Ramaphosa of the Republic of South Africa at his State of the Nation Address (SoNA) on 10 February 2022, when he stated: ‘... the world over, the ability to attract skilled immigrants is the hallmark of a modern, thriving economy.’

African states can also benefit from intra-Africa immigration and emigration between countries and regions on the continent. In 2020, there were 21 million Africans living in another African country within the same region as their home country, as compared to 18 million in 2015. The number of Africans living in different regions from their homes also increased from 17 million in 2015 to 19.5 million in 2020 (IOM, 2022).

Although it is recognised that migration patterns differ across Africa and that they are informed by a multiplicity of factors – such as economic, geographic, political, and demographic – there are profound distortions in the current narrative on African migration. The Africa Migration Report (IOM, 2019:1) notes that ‘(a) most African migrants are not crossing oceans, but rather crossing land borders within Africa; (b) 94 per cent of African migration across oceans takes on a regular form; and (c) most global migrants are not African. Africa accounts for 14 per cent of the global migrant population, compared, for example, to 41 per cent from Asia and 24 per cent from Europe’. Thus, there is a need to provide an accurate picture of migration in Africa, as it relates to governance and rights.

The United Nations Human Rights Council acknowledges that human rights, democracy, and the rule of law create an environment for states to promote development, protect individuals from discrimination and ensure equal access to justice for all. This is supported by Article 3 of the AU Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights that was adopted in 1998. The court extends to all cases and disputes submitted to it concerning the interpretation and application of the Charter, the protocol and any other relevant Human Rights instrument ratified by the states concerned, from countries across the continent.

The importance of countries opening their borders to migrants was underscored by H.E. President Abdel-Fattah El-Sisi of the Arab Republic of Egypt, who noted that migration is a human right, during the fourth World Youth Forum (WYF) which took place from 10 – 13 January 2022 in Sharm El-Sheikh, Egypt.

Considering that Africa has a growing youth and working-age population, which is forecast to increase from 750 million in 2019 to 1 billion by 2030 (ISS, 2021), and that most parts of the world have a declining youth population, there is bound to be a greater demand on governments to deliver optimal and effective governance processes. Similarly, the current fourth industrial revolution will see a more globalised world with increased movement of people. In this regard, the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted in 2018, will become increasingly important as a mechanism to ensure the promotion of free movement of people and the right of establishment by citizens of African Union member states, within Africa.

The New York Declaration for Refugees and Migrants, adopted by the United Nations General Assembly in 2016, also recognizes the need for a comprehensive approach to human mobility and enhanced cooperation at the global level. The Declaration resulted in the development of a Global Compact for Safe, Orderly, and Regular Migration, which is a non-binding instrument that respects states' sovereign right to determine who enters and stays in their territory. It demonstrates commitment to international cooperation on migration. Further meaningful cooperation will be required by countries to ensure the fulfilment of shared values and principles, including the realisation of the UN Agenda 2030 and AU Agenda 2063.

This maiden publication of Africa Governance Insights is a culmination of thorough dialogue and discourse between experts interested in improving the state of governance in Africa. It covers a broad spectrum of topics in governance, migration, and human rights in the context of political, economic, and corporate governance in 21st century Africa. This work will complement discourse and clarify ambiguities about the governance of migration and its relationship to sustainable development and human rights in Africa. Therefore, wide use and distribution of this publication is encouraged in all AU member states.

We hope that this volume will shed more light on the complex issues of governance and migration and offer new insights for policymakers and all concerned with governance, rights, and migration in Africa.

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ABOUT THE APRM

The African Peer Review Mechanism (APRM) is an autonomous entity of the African Union established in 2003 by the Heads of States and Governments of the African Union. Its mandate is to promote good governance and facilitate self-monitoring by participating member states. The APRM process is founded on the values of the African Union. These include principles of effective political, economic, social, and corporate governance, including democracy, equitable economic development, the rule of law, responsive states, respect for human rights, and peaceful resolution of conflicts. The four (4) governance pillars of the APRM are: Democracy and Political Governance, Economic Governance and Management, Corporate Governance and Socio-Economic Development. Each thematic area focuses on different aspects of the promotion and establishment of good democratic governance. These promoted by institutions which act as the supportive architecture on which governance can be measured. By joining the mechanism, African member states agree to voluntarily undergo an independent review of their compliance with African and international governance standards, codes, and commitments. The APRM undertakes governance assessment and reporting on governance on the continent through several instruments such country reviews, targeted and specialized reporting in African countries such as undertaking the Africa Governance Report, among others. The APRM process ensures the full participation of all stakeholders in society in the review of the member states through its peer review process. To date, the APRM has 42 Member States, 24 of which have undergone the APRM review process.

BACKGROUND

The African Governance Seminar Series (AGoSS) is a multi-stakeholder interactive platform for debate and analysis of developments and trends on governance in Africa. The platform brings together multiple stakeholders including academics, practitioners as well as public and private non-state actors to dialogue.

The APRM has since 2018 held African Governance Seminar Series (AGoSS) annually, conceived through a collaborative partnership between the APRM and the University of the Witwatersrand, WITS School of Governance (WSG). The Seminars were established on the recognition that there is a gap and need to create a platform where academics and practitioners converge to interrogate dominant and orthodox approaches to governance, through an examination of practice, trends, and actors. The seminars are therefore established as an interactive platform, as well as for construction of afro-genic and afro-centric governance paradigms on the APRM's four thematic areas: democracy and political governance, economic governance and management, corporate governance, and socio-economic development.

The seminar platform, amongst others, contributes towards bridging the divide between theory and practice, to reduce reliance on external non-African agencies, and ensure country-level capacity for Governments to monitor, evaluate and interact African expertise towards writing their own narrative. This is in addition to the main purpose, which is to encourage and promote continent-wide good governance based on AU values, standards, and codes. It is envisioned that the proceedings and outcomes of seminars will periodically be published in a series of papers and book publications.

Ultimately, therefore, the seminars primarily seek to interrogate current, mainstream governance ideological and policy frameworks for suitability and feasibility to the political economy of governance and development in African. Furthermore, the seminars offer novel perspectives and introduce innovative approaches from various policy communities and academia. The key objectives of the Seminars are to:

1. Develop generate knowledge on innovative alternatives in governance practice and theory (reviewing and assessing emerging literature and trends on governance).
2. Monitor trends in Governance on the continent; (allow for consolidation of various governance reports from within and outside the continent).
3. Create a community of practitioners and different actors (a network which the platform itself and community-expound on).
4. Peer review papers for publication.



PREFACE

This volume comprises seven papers which present historical and geo-political contexts, and subsequently reimagine how people and their movement across Africa will be governed in the future.

The first paper, titled *International Migration and Economic Governance: an Assessment of the Role of the African Peer Review Mechanism*, analyses international migration from African countries as it relates to various governance aspects, conflict, unemployment, as well as macroeconomic performance. In utilising qualitative and quantitative analyses of migration patterns over time, the paper makes recommendations on the governance–economy–migration nexus, and its relation to the APRM.

The second paper focuses on strategies to *Strengthening Local Governance for Agenda 2063: the Role of the African Union*. It posits that local governance, as a prerequisite to development, provides the opportunity for citizens to experience engagement, inclusiveness, and participation in governance processes. Through providing an overview of the state of local governance in Africa, the paper outlines ways in which the African Union can, through its structures and frameworks, further foster local governance towards the attainment of the aspirations of Agenda 2063.

The third paper explores the APRM as a *Tool for Democracy and Political Governance in The Gambia*. Following The Gambia’s political transition to a democracy in 2016, and subsequent accession to the APRM in 2018, the key governance challenges that have been faced by the country are noted. The paper outlines the constitutional and legal reforms made by The Gambia in its transition and recommends how the member state can utilise the APRM processes to further promote democratic rule, respect for human rights, rule of law and maintenance of political stability.

The fourth paper on *21st Century Migration from Africa to Europe: a Governance Perspective*, is an exploration of the role of governance in the migration of African populations to Europe. The paper defines and identifies the drivers of irregular migration, as well as useful approaches that may be utilised by the African Union to promote the characteristics of good governance, as it relates to migration, at regional, continental, and international levels.

Migration and Human Rights: Exploring Key Policy Gaps: an International Human Rights Law Perspective is the title of the fifth paper, which brings to the fore the link between migration and human rights. The authors explore the principles of international law and international human rights law that are applicable to migration governance. They discuss theoretical frameworks that support better understanding of migration and suggest ways to reconcile various policy positions for successful migration governance in Africa.

The sixth paper looks to the future by *Reimagining Africa: State Resilience and Governance in a Post Covid-19 Era*. In a bid to improve African governments’ resilience to external and internal shocks arising from epidemics and pandemics, the paper analyses the healthcare, economy, and socio-economic sectors for possible interventions. The study envisages an Africa with strong institutions and provides recommendations for increasing state resilience.

The focus of the seventh paper, *Social Protection for Refugee Children in South Africa: A Governance Paradox*, applies a case study to inform policy approaches to the challenges faced by refugee children. It considers policies, treaties, protocols, conventions, and institutional frameworks on the protection of refugee children, who are vulnerable to child-protection risks and violations that epitomise the deprivation of those outside the cover of social security systems. The study demonstrates that improved governance processes can alleviate the precarious conditions that children in this vulnerable category often live in. The paper proposes a human-rights-based approach to social protection of refugee children. It makes recommendations on improvement and harmonisation of policies on refugee children at the national, regional, continental, and international levels.

ACRONYMS AND ABBREVIATIONS

ACHPR	African Commission on Human and Peoples' Rights
AGF	Africa Governance Forum
AHCLA	African Union High Council of Local Authorities
APRM	African Peer Review Mechanism
AUC	African Union Commission
AU	African Union
AVATT	Africa Vaccine Acquisition Task Team
CAR	Central African Republic
CIDO	Citizens and Diaspora Organizations Directorate
Covid-19	Severe Acute Respiratory Syndrome Coronavirus 2: SARS-COV-2
CSO	Civil society organisation
DRC	Democratic Republic of Congo
EAC	East African Community
ECA	Economic Commission for Africa
ECCAS	Economic Community of Central African States
ECOSOCC	Economic and Social Cultural Council
ECOWAS	Economic Community of West African States
ECRE	European Council on Refugees and Exiles
EU	European Union
EURA	EU Readmission Agreement
GBV	Gender-based violence
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GDP	Gross domestic product
GNI	Gross national income
GSDRC	Governance and Social Development Resource Centre
IATA	International Air Transport Association
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDP	Internally displaced person
IGAD	Intergovernmental Authority on Development
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IIAG	Ibrahim Index of African Governance
IMF	International Monetary Fund
IOM	International Organization for Migration
JAES	Joint Africa–Europe Strategy for Development
MDG	Millennium Development Goal

NCC	National Command Council (South Africa)
NEET	Not in employment, education or training
NEPAD	New Partnership for Africa's Development
NEMA	National Emergency Management Agency
NGO	Non-Governmental Organisation
NICD	National Institute for Communicable Diseases
OAU	Organisation of African Unity
OHCHR	Office of the High Commissioner for Human Rights (UN)
PACE	Parliamentary Assembly of the Council of Europe
PPE	Personal protective equipment
REC	Regional economic community
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANDF	South African National Defence Force
SARB	South African Reserve Bank
SDG	Sustainable Development Goal
SDGEA	Solemn Declaration on Gender Equality in Africa
StatsSA	Statistics South Africa
TRRC	Truth, Reconciliation and Reparations Commission (The Gambia)
UMA	Arab Maghreb Union
UN	United Nations
UNCTAD	United Nations Economic Conference for Trade
UNDAF	United Nations Development Assistance Framework
UNDP	United Nations Development Programme
UNDRR	United Nations Office for Disaster Risk Reduction
UNECA	UN Economic Commission for Africa
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNHCR	United Nations High Commissioner for Refugees
UNISDR	United Nations International Strategy for Disaster Reduction
UNOPS	United Nations Office for Project Services
USD	US dollar
WB	World Bank
WDI	World Development Indicator
WDR	World Development Report
WFP	World Food Programme
WHO	World Health Organization
WTO	World Trade Organization



PAPER 1

INTERNATIONAL MIGRATION AND ECONOMIC GOVERNANCE: AN ASSESSMENT OF THE ROLE OF THE AFRICAN PEER REVIEW MECHANISM

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ABSTRACT

This chapter assesses the linkage between international migration and economic governance in Africa. It critically analyses international migration as it relates to manifestations of governance such as changes in the level of conflict, macroeconomic performance and unemployment, by examining the role of the African Peer Review Mechanism (APRM). It provides theoretical underpinnings on the possible relationship between migration and governance on one hand and migration and other factors on the other hand, and analyses the flow of migration in Africa, with figures to illustrate this.

The chapter also discusses the interactions and possible relationships of conflict, governance, macroeconomic performance and migration to one another and shows that there has been an increase in intra- and inter-continental migration in Africa, especially since 2000. In addition, it demonstrates that there is insufficient evidence to support the notion that conflicts play a key role in determining the migration patterns observed.

Moreover, generally speaking, low levels of governance and income per capita and high unemployment rates (above 5 per cent) persist across Africa, irrespective of whether countries belong to APRM or not, although many APRM countries have maintained single digit inflation rates. Findings show that countries that have acceded to APRM appear to have better outcomes compared to those that are yet to accede. The study therefore recommends that governance issues should be taken more seriously and that non-APRM member countries should accede to APRM to address governance deficits and work towards ensuring the establishment of enabling environments for citizens to progress and to moderate the incidence of irregular migration.

1. INTRODUCTION

International migrant stock has increased over the last three decades with a precipitous surge between 2005 and 2019, at an average world population share of 3.3 per cent from 2.5 per cent between 1970 and 2000. In 2019, migrant stock was estimated to be 272 million, 100 million people more than 20 years before. Migration patterns show that North America and Europe are the most popular destinations. Increasingly, especially after 2010, there has been an upsurge in migration to other areas such as North Africa, West Asia, and sub-Saharan Africa.

Compared to other global regions, African countries still host the largest number of refugees in the world; Uganda, Ethiopia and Kenya collectively host about 2.8 million refugees, in spite of a low share of migrant stock of about 9 per cent on average between 1990 and 2019. Other African countries with increasing migrant stock are Egypt, Libya and Sudan in North Africa; Angola, Cameroon and Democratic Republic of Congo in Central Africa; and Nigeria, Côte d'Ivoire and Burkina Faso in West Africa. It appears that the common trigger for migration across these countries is conflict within the country or neighbouring countries. The observed pattern supports the claim that much international migration in Africa is within Africa as a result of conflict in the home country. In 2017, 65.6 million people were classified as such and thus as part of forced migrations. These migrants undertake arduous journeys during which many lose their lives.

People also engage in irregular migration for reasons other than conflict. This migration is not shaped solely by immigration controls of destinations.¹ Migration pressure at source countries is fueled by economic reasons that increase the number of economic migrants. These migrants often leave their countries in search of a better quality of life and more job opportunities.

Other reasons include poverty and famine in their home countries. It could be argued that these are manifestations of economic mismanagement, which thrives under disproportionate and non-inclusive systems of government. The despondency and choicelessness that result prompt citizens to attempt irregular migration to change their situation. The recent increase in trafficking of people through Libya to Europe is an example of how irregular migrants end up as illegal migrants.

Despite the above observations, the narrative is not completely bleak. Some countries in Africa have plans and strategies to alleviate poverty and create opportunities. These include those offered when a country accedes to African Peer Review Mechanism (APRM) processes, which are geared to ensuring that governance is instituted in the affairs of the governments of African countries.

The transformation of Africa in recent decades is remarkable. Through the APRM and other mechanisms, Africa is creating opportunities and progress that cannot be ignored by investors. Since 2015, Africa has witnessed more than 27 leadership changes, which highlights the continent-wide push for greater accountability and democracy and hence, political stability. Governance performance has also improved in 34 countries, although it is acknowledged that challenges remain.

Emerging concerns relate to the role of APRM in countries and the outcomes of that role: to what extent have the activities of APRM moderated the incidence of irregular migration in countries that have acceded and is there any difference in the performance of these countries and those that are yet to accede to APRM? This chapter assesses the linkage between international migration and economic governance in Africa with regard to the role of the APRM.

The rest of the chapter is as follows: Section 2 documents the theoretical underpinnings of the linkage between migration and development; Section 3 provides an overview of migration in Africa as it relates to corruption, governance, and macroeconomic performance and Section 4 concludes the chapter.

1 Although there is no universal definition of 'irregular migration' the International Organization for Migration (IOM) defines it as 'Movement outside the regulatory norms of the sending, transit and receiving countries'. From the perspective of the destination country, irregular immigration refers to 'irregular entry, stay or work in a country', meaning that the migrant does not have the authorisation or documents required under immigration regulations to enter, reside or work in a given country; from the perspective of the sending country, irregular emigration refers to a departure in which a 'person crosses an international boundary without a valid passport or travel document, or does not fulfil the administrative requirements for leaving the country'. The IOM proposes to restrict the use of this term to 'cases of smuggling of migrants and trafficking in persons'.

2. THEORETICAL FRAMEWORK

Among advanced and developing countries and international agencies, migration issues have socioeconomic implications such as brain drain, movement of labour, and refugee management, among others. Migration is defined as regular (legal) and irregular (illegal). In addition, there are two types of migration theory: macro-theory and micro-theory.

Macro-theory of migration argues that migration is a key component of economic development. According to trade theory, the modern sector attracts huge quantities of labour from the traditional sector.² The modern sector, with the advantage of the benefits of capital accumulation, draws from surplus labour in the traditional sector. Typically, migration happens when a wage differential acts as a pull factor for rural labour (traditional sector) to migrate to urban areas (modern sector) and continues until there is wage equalisation of the rural and urban areas, as argued by Todaro and Harris and Todaro.^{3,4} Given the common feature of widespread unemployment in developing countries, a positive expected real wage differential encourages rural–urban migration. However, because job availability on arrival is not guaranteed, migration is risky. Migration from the rural area thus increases with the probability of finding a job (high employment rate/high wages) in the urban area. Although the model predicts that wage equalisation will occur, this may not hold true in real-world situations because of imperfect market owing to cost of mobility and asymmetric information. This scenario can be applied to migration between countries: labour in developing countries often migrates due to attractive wage or positive expected income in a developed country.

Other macro-theories identify economic and social changes,⁵ high demand for temporary labour,⁶ colonialism and capitalism,⁷ dynamic system^{8,9} globalisation¹⁰ and governance¹¹ as key drivers of migration at macro-level.

Micro-theory of migration focuses on individuals and their motivations for migration, rather than looking at the aggregate level. A push–pull framework gives special consideration to the demand and supply sides of migration and argues that positive and negative factors serve as the drivers of migration at the place of origin and destination. In line with this, Lee¹² posited that people diversity plays a critical role in migration, as lesser rate of migration can be expected where there is a great sameness among people – whether in terms of race or ethnic origin, education, income, or tradition – than where there is great diversity. Another migration-motivating factor is the quest for knowledge. Human capital development through individual investment encourages people to relocate to acquire more knowledge;¹³ a decision to relocate for this reason is based on a cost-benefit analysis where an individual considers the discounted returns on knowledge over future time (occupational upgrade and age). This assertion is faulty in that it is based on an unrealistic assumption of perfect information.

This assumption was relaxed by Fischer et al.¹⁴ who explained that knowledge acquired plays a significant role in migrant selection. Wolpert, on the other hand, relied on a behavioural model and concluded that the decision to migrate depends on the utility maximisation by an individual. Wolpert argued that an individual decides by comparing the utility at the place of origin with the threshold utility, which is the minimum level of utility at the destination for migration to occur.¹⁵

Other behavioural models argue that relative values and expectation,¹⁶ and structural and nominal tensions¹⁷ are also plausible factors of migration, not economic factors alone. However, these models are difficult to test because they assume rational decision-making. Nevertheless, it can be concluded that various factors account for both internal and external migration and that these can be applied to migration in Africa.

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3. AN OVERVIEW OF MIGRATION IN AFRICA

This section examines migration in Africa and the world to offer insights into migration issues and better solutions where there are still challenges.

Worldwide, the number of migrants has steadily increased in the last five decades. Figure 1 shows the increase in numbers as well as the migrant population as a percentage of the global population. In the 1970s and 1980s the average was 2.3 per cent; by the 1990s and 2000s it had increased to 2.8 per cent and in 2019, the share peaked at 3.5 per cent.

Fig. 2 shows the geographic distribution of migrant workers with respect to gender in 2017. It also reveals that North America, northern, southern and western Europe and the Arab States had the highest number of migrant workers, accounting for about 61 per cent of the total, while Africa accounted for the fourth largest share of migrant workers (North Africa and sub-Saharan Africa combined).

There is also evidence of gender differences in migrant worker numbers from Africa; males account for the largest proportion (see Fig. 2). This may be attributed to the nature of available jobs, which include construction and technical support in various sectors.

African migration includes the movement of large numbers of migrants within and outside the African region. Figure 3 shows that the number of migrants in the African region rose from 18.5 million in 2015 to about 21 million in 2019. The number of African migrants in other regions of the world also increased – from 17 million in 2015 to 19 million in 2019. The top three destinations of these migrants in 2019 were Europe (about 10 million); Asia (about 4.6 million); and North America (about 3.2 million).

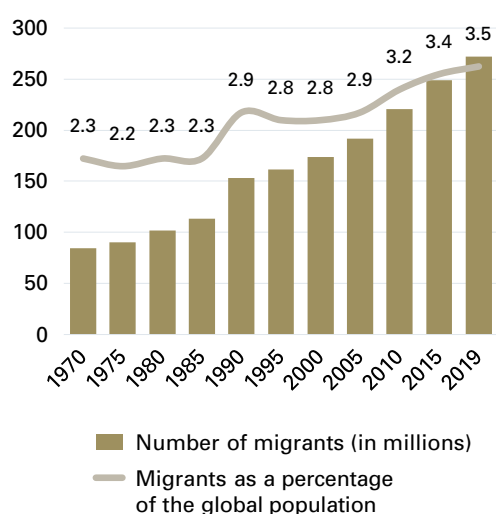


Fig. 1: International Migration, 1970–2019

Source: World Migration Report 2020

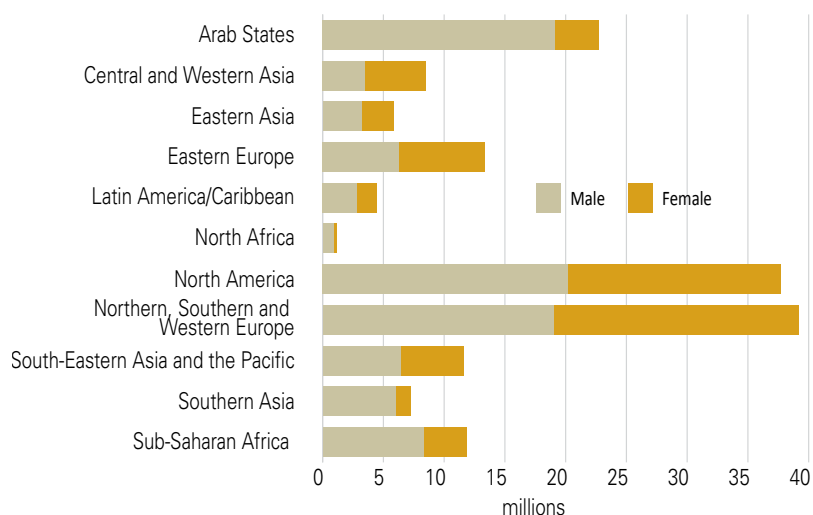


Fig. 2: Geographic distribution of migrant workers by gender, 2017

Source: World Migration Report 2020

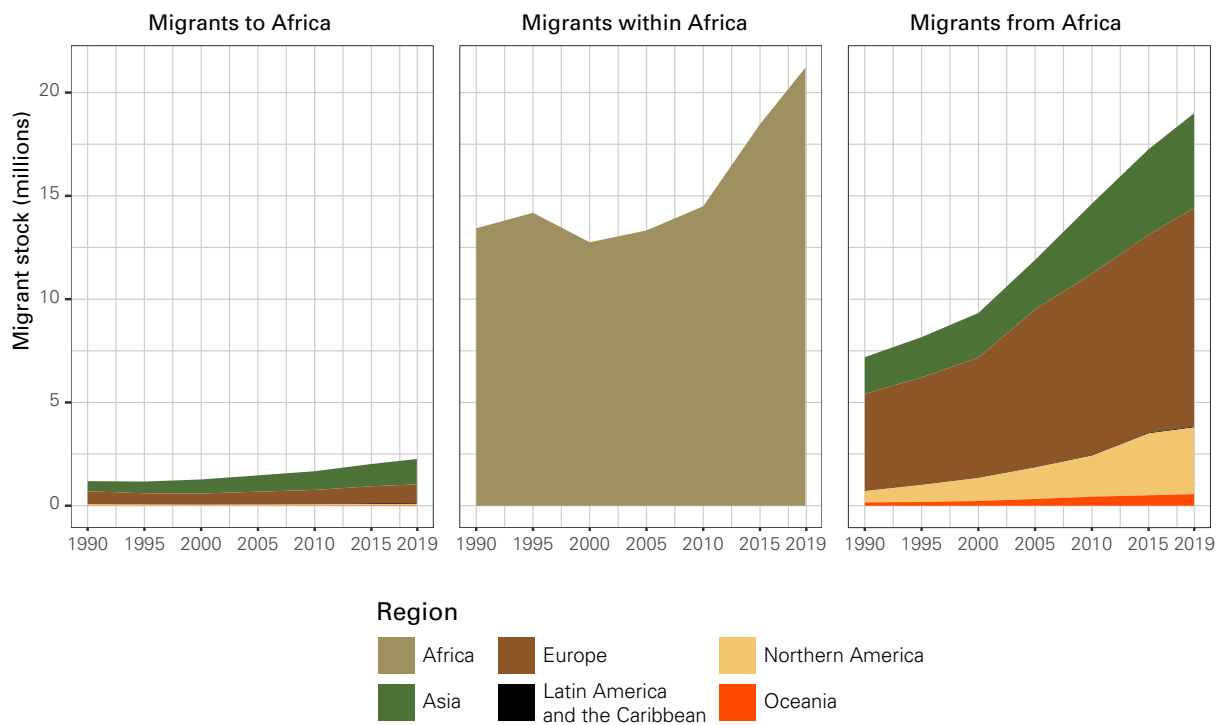


Fig. 3: Migrants to, within and from Africa, 1990–2019

Source: World Migration Report 2020

For a broader view of Africa in the global context, we examined migration in APRM member countries over time. In terms of absolute value, the number of migrants within and outside these countries has been increasing. For instance, the number of migrants increased from 201 703 in 1960 to 853 014 in 2017 (see Figure 4); the number of migrants has thus more than tripled. With respect to population, we see a slight decline between 1960 and 2017 (see Figure 4).

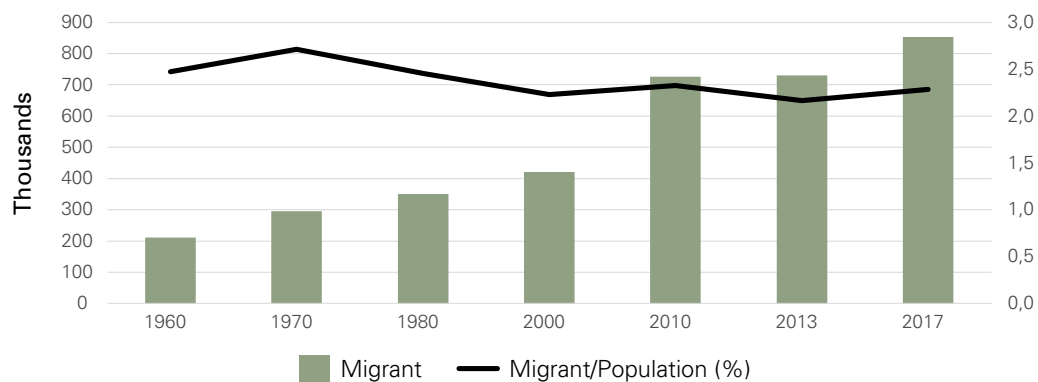


Fig. 4: Migration in APRM countries classification

Source: Computed from the World Bank database on Migration and Remittance 2018

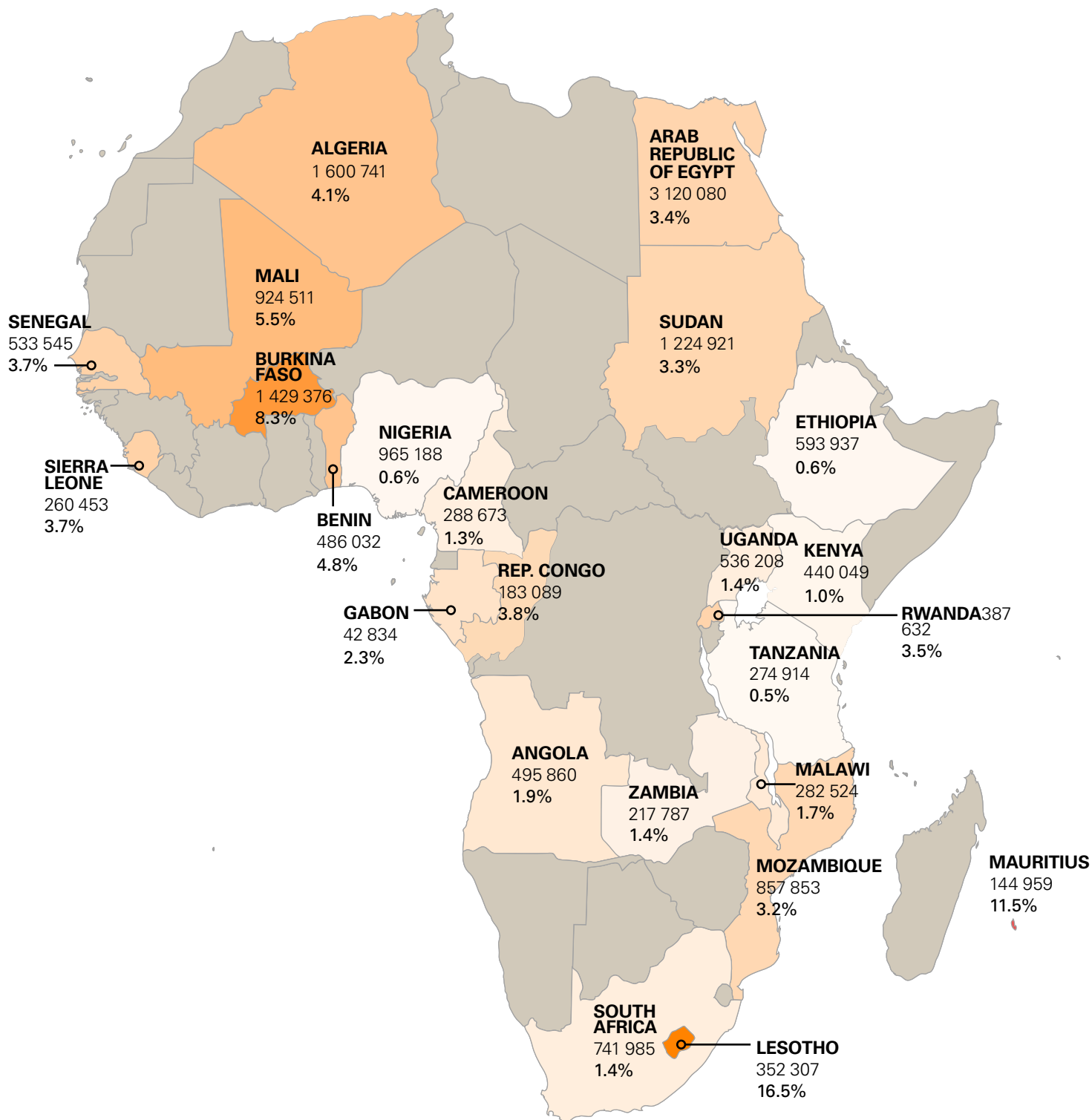


Fig. 5: Migration in APRM countries, 2010–2017, showing number of migrants and as a percentage of the population

Source: Computed from the World Bank database on Migration and Remittance 2018

The country-specific analysis in Figure 5 reveals that Egypt recorded the highest average number of migrants while Gabon recorded the lowest. Relative to its population, Lesotho has a high number of migrants (16.5%) while Tanzania has the lowest (0.5%). This suggests that some factors (pull and push) continue to play a significant role in the migration dynamics in these countries. Some of the identified key factors for the observed pattern are conflict, poor governance, macroeconomic uncertainty and unemployment.

3.1. CONFLICT AND MIGRATION

In the literature on migration, conflict is cited as a push factor for migration in many countries, particularly in Africa and the Middle East. In response to this, the African Union (AU) has been reviewing the activities of its 54 member countries towards achieving meaningful economic development.

The African Peer Review Mechanism (APRM), an arm of the AU, provides a platform for self-assessment through country review missions that result in reports that present key issues around four thematic areas (democracy and political governance, economic governance and management, socioeconomic governance and cooperate governance). Conflict has emerged as a key area in most of the country reviews. The reports also often point to potential conflict situations and offer solutions to encourage member countries to maintain peace.

To further examine the role of this self-evaluation process in member countries, figure 6 shows the relationship between conflict and migration. The most striking observation is that countries with a relatively high prevalence of conflict (such as Nigeria and Sudan) recorded relatively low migration. However, migration from these areas is regular and suggests that conflict may not be its main driver. Conversely, countries with the lowest prevalence of conflict appear to have a high number of migrants.

The missing narrative is that citizens from conflict countries migrate because of factors other than conflict. As expected, these countries experience more irregular migration and internally displaced persons (IDPs),¹⁸ while one could argue that a high number of migrants from countries with no or less conflict might be the result of an enabling economy, and hence, a bolstered ability for such movement to occur. This is supported by Flahaux and De Haas¹⁹ who have posited that African migration is driven by processes of development and social transformation that increase the capacity and aspirations of Africans to migrate, rather than by the conventional suspects – poverty, conflict and underdevelopment.

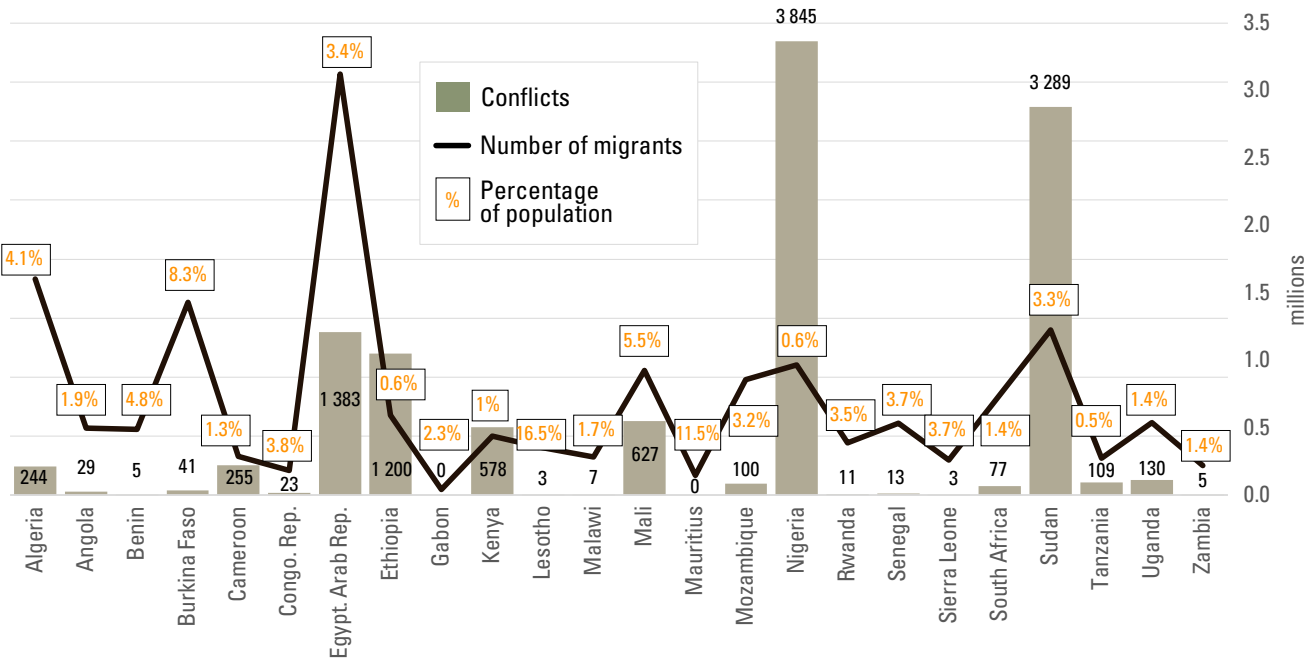


Fig. 6: Conflicts and Migration/Population, 2010-2017

Source: Computed from Armed Conflict Location and Event Data Project, 2019 and World Bank database on Migration and Remittance 2018

18 A case in point is Nigeria; Fig 10 shows that it has the third highest number of internally displaced people.

19 Flahaux, M.L. and De Haas, H., 2016. African migration: trends, patterns, drivers. *Comparative Migration Studies*, 4(1), pp.1-25.

Fig. 7 shows the 20 countries with the highest stock of persons displaced internally by conflict and violence at the end of 2018. APRM member countries, Nigeria and Sudan, were ranked among these countries, which corroborates the data in figure 7. Although the issue of conflict is critical for these APRM member countries (especially Nigeria and Sudan) it should not be generalised for all the member countries.

The data in Figure 8 shed more light on the issue of conflict and migrants. The only APRM member country in the top 10 countries with the highest number of refugees and asylum seekers was Sudan, while Kenya and Ethiopia were among the top host countries in Africa.

Further analysis of the top 20 African countries by new internal displacements (disaster and conflict) in 2018 (see Figure 9) shows more pronounced internal displacement arising from conflict among sub-Saharan APRM member countries. Ethiopia was ranked highest globally, with over 2.9 million new conflict displacements coupled with 290 000 new displacements arising from disaster.²⁰

In sum, there is insufficient evidence to suggest that conflict plays a key role for most migration in APRM member states although research attention is still needed in this regard.

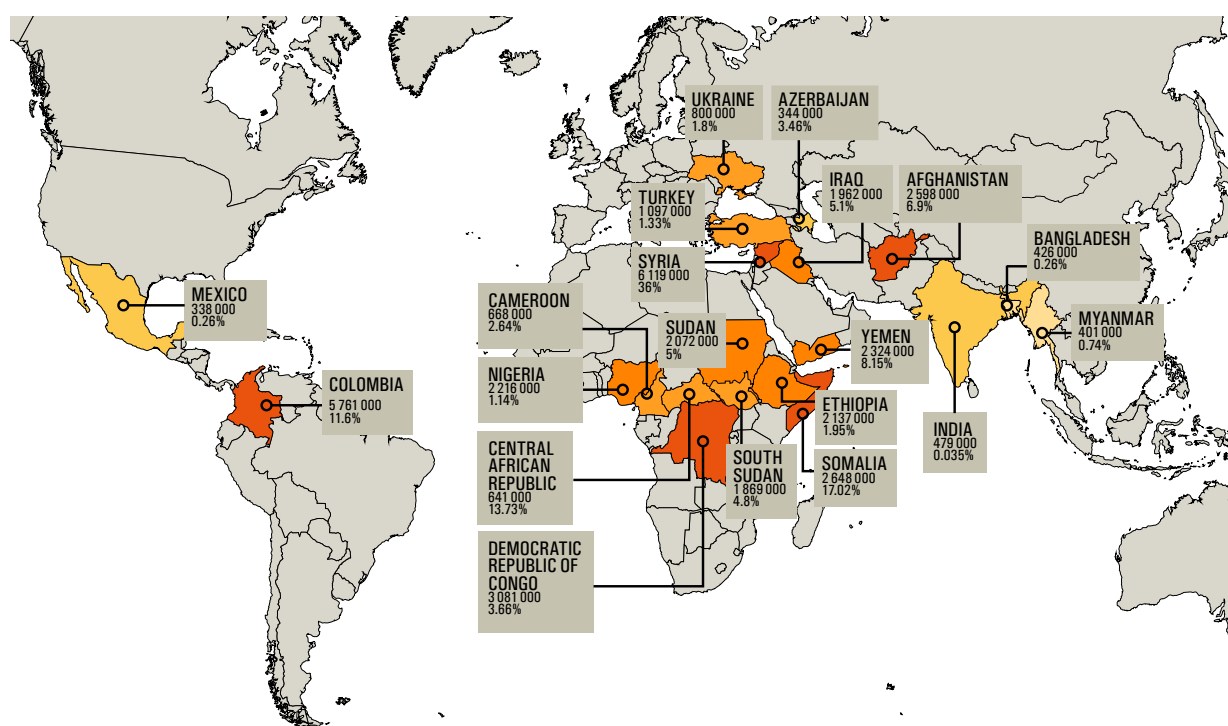


Fig. 7: Top 20 countries with the largest stock of persons displaced internally by conflict and violence as at the end of 2018

Source: Adapted from World Migration Report 2020

20 International Organization for Migration, 2020. World Migration Report 2020.

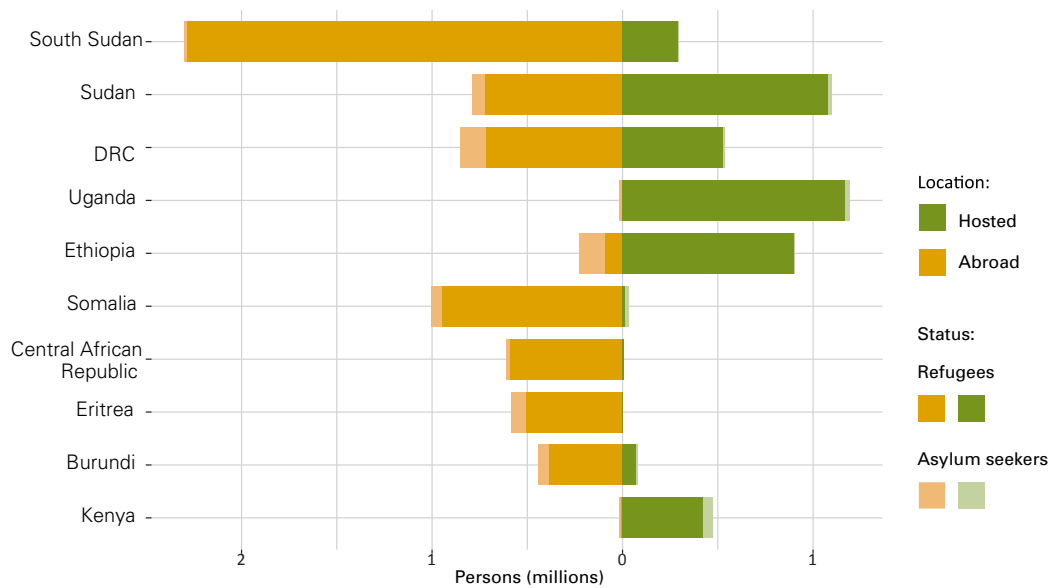


Fig. 8: Top 10 African countries by total refugees and asylum seekers, 2018

Source: World Migration Report 2020

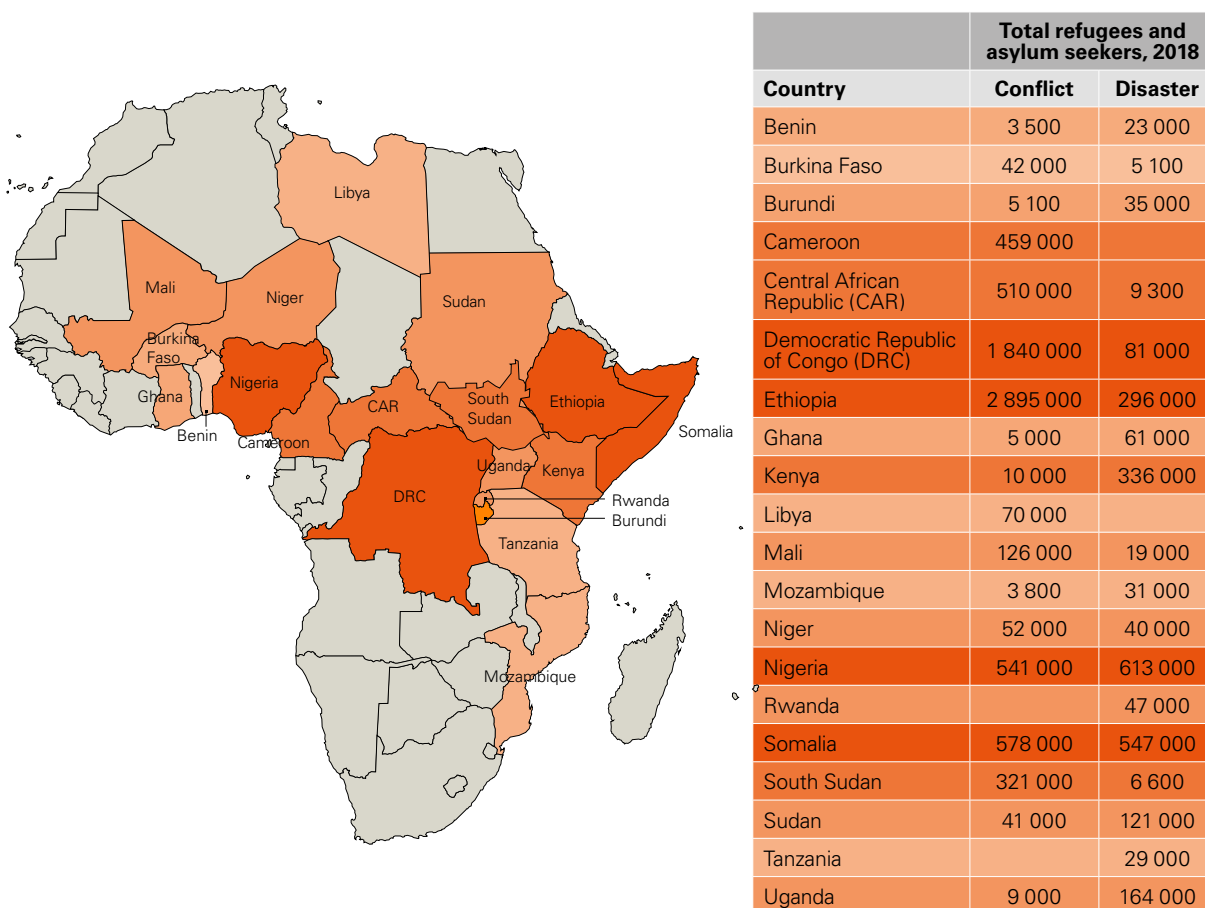


Fig. 9: Top 20 African countries by new internal displacements (disaster and conflict), 2018

Source: Adapted from World Migration Report 2020

3.2. GOVERNANCE AND MIGRATION

This section further interrogates the role of governance in the migration process. The aim is to provide sufficient evidence for governance-related migration in these countries. Figure 10 shows that only Mauritius and South Africa have been given positive governance ratings. From this it can be deduced that the level of governance in a country may offer a plausible explanation for its migration patterns. The data in the figure suggest that countries with positive, or very low negative, governance levels, have higher migration–population ratios compared to countries with high negative governance levels, which are associated with a lower share of the ratio. This seems to confirm the migration transition theory that materially poor populations in least-developed countries have less capacity to move (legally), and if they do move, they tend to move over shorter distances, either internally or to other African countries.

Notably, high levels of corruption, poor rule of law and poor regulatory quality hinder access to service delivery and basic amenities. The growing concern over poor governance systems in most of the APRM-acceded countries (in fig.10) has been further validated in many of the recent APRM country reports.

Citizens who struggle to make a living in stifling environments established by mismanagement of resources would find it difficult to resist migration – particularly irregular migration – when they receive information about the high-quality lifestyles of migrants. This places pressure on countries such as Gabon, Uganda and South Africa and other countries with guaranteed basic needs of life that experience influxes of irregular migrants. It is therefore imperative for countries to work towards achieving good governance – a key agenda of the African Union. Good governance will create an enabling environment for citizens to stay in their countries and will thus reduce the incidence of migration for survival.

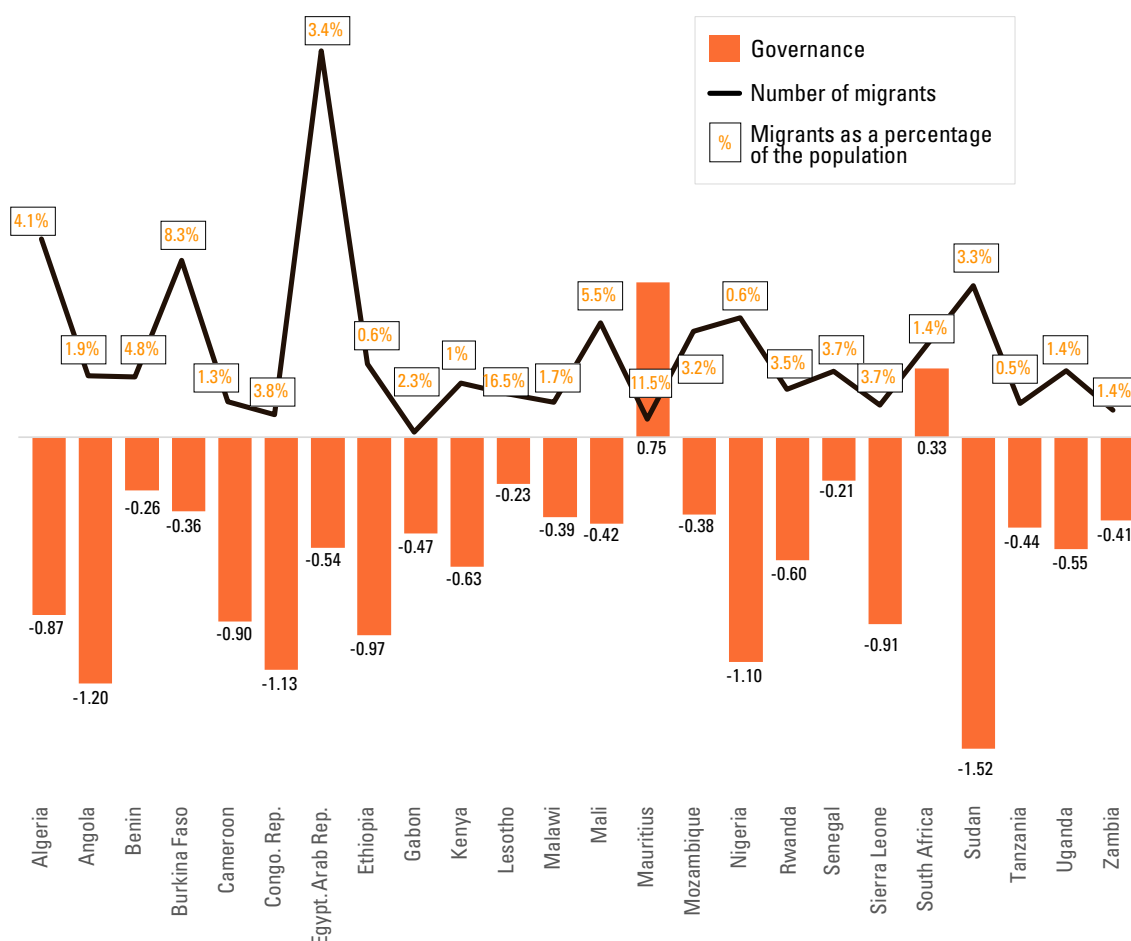


Fig. 10: Governance and migrancy (as number of migrants and as a percentage of the population) 2010–2017

Source: Computed from World Governance Index (2018) and World Bank database on Migration and Remittance 2018

Note: Governance is measured as the average of all six governance indices as captured in World Governance indicator

3.3 MIGRATION AND MACROECONOMIC PERFORMANCE

The movement of Africans to foreign countries may be attributed to unfavourable economic conditions in their respective countries. Although APRM advocates for good macroeconomic conditions, some APRM and non-APRM countries still record very low GDP per capita, high inflation rates and slow economic growth. These economic challenges may cause citizens to become desperate enough to attempt migration, typically through illegal channels as it is unlikely that they have the financial capacity to obtain necessary documents for legitimate migration.

The 2017 ranking of countries according to GDP per capita as documented in the World Fact Book by the Center for the Study of Intelligence (an organisation within the CIA) shows that Burundi has the lowest GDP per capita in the world followed by Central African Republic and Democratic Republic of Congo.²¹ Other African countries in the bottom 30 of the 229 countries ranked are Uganda (199), Benin (200), Zimbabwe (201), Chad (202), Mali (204), Ethiopia (205), Guinea (209), Burkina Faso (210), Guinea-Bissau (211), The Gambia (213), Togo (214), Sierra Leone (217), Madagascar (218), South Sudan (220), Liberia (221), Malawi (223), Niger (224), and Mozambique (225).

A similar trend was found in the real GDP per capita of the countries presented in Figure 11; although low income per capita is recorded in both APRM and non-APRM countries it appears to affect non-APRM countries (Burundi, DRC and CAR) more negatively. Ethiopia is one of the APRM countries with a low GDP per capita. According to the available records collected by the World Bank Migration and Remittance, 593 937 Ethiopians migrated between 2010 and 2017, which accounts for 0.62 per cent of the population. However, there are also records of irregular migration. One of the largest current international irregular migration flows is of Ethiopian women (chiefly from Addis Ababa) who either migrate illegally or are trafficked to the Middle East.

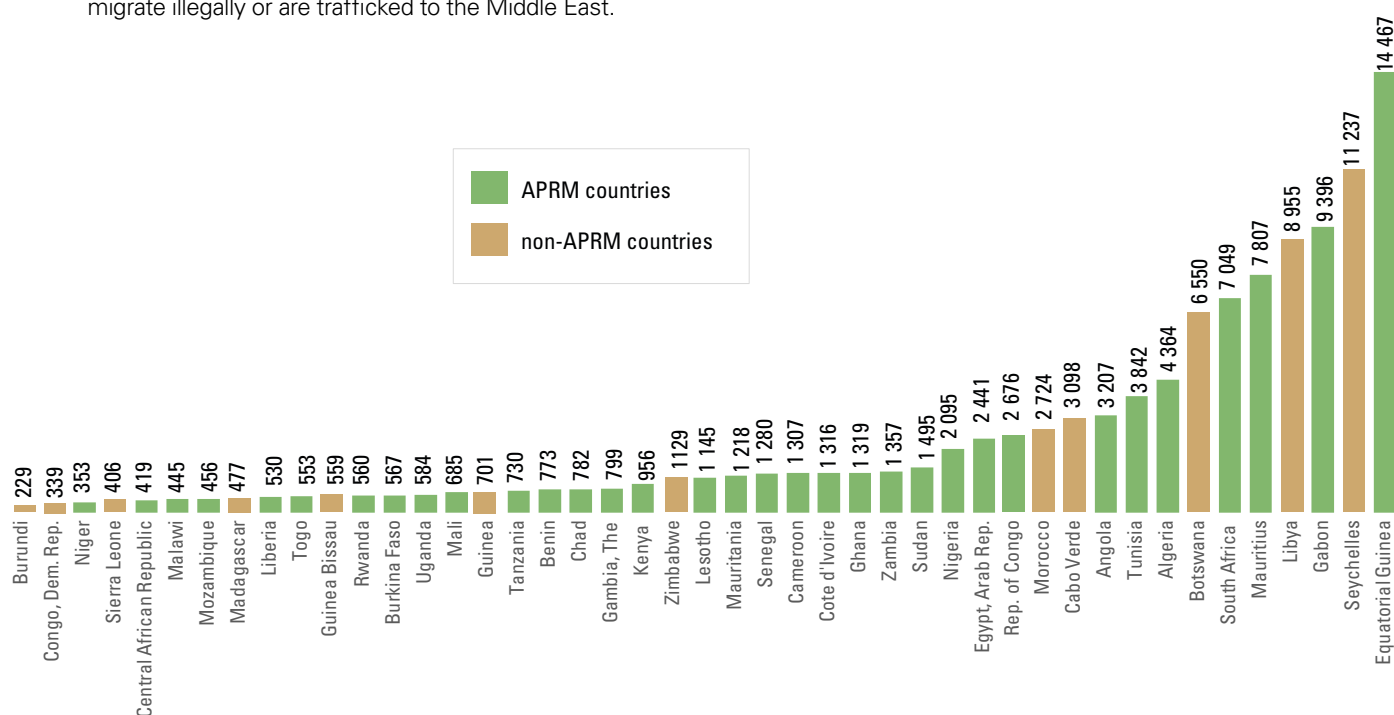


Fig. 11: Real GDP per capita (in USD) for APRM and non-APRM countries, 2000–2018²²

Source: World Development Indicators (WDI), retrieved February 6, 2020

Sierra Leone is another low-income country. A total of 260 453 Sierra Leoneans emigrated between 2010 and 2017, which is about 3.73 per cent of the population. Although this increasing migration rate may be attributable to low income and limited economic opportunities it may also be due to other socioeconomic factors such as lack of running water and electricity, malnutrition and disease outbreaks, like Ebola and malaria.²³

21 Available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>

22 Seychelles and Zimbabwe acceded to the APRM at the African Union Summit of February 2020. DRC acceded in 2021.

23 Department of Immigration and Citizenship, 2007. 'Sierra Leonean Community Profile' Canberra (Commonwealth of Australia) Retrieved August 2017 from https://www.dss.gov.au/sites/default/files/documents/11_2013/community-profile-sierraleone.pdf

While Lesotho is not among the countries with the lowest income per capita it has the highest migration in Africa – the total of 352 307 amounts to 16.5 per cent of the population leaving the country between 2010 and 2017. The fact is the country’s income is still low compared to that neighbouring South Africa.

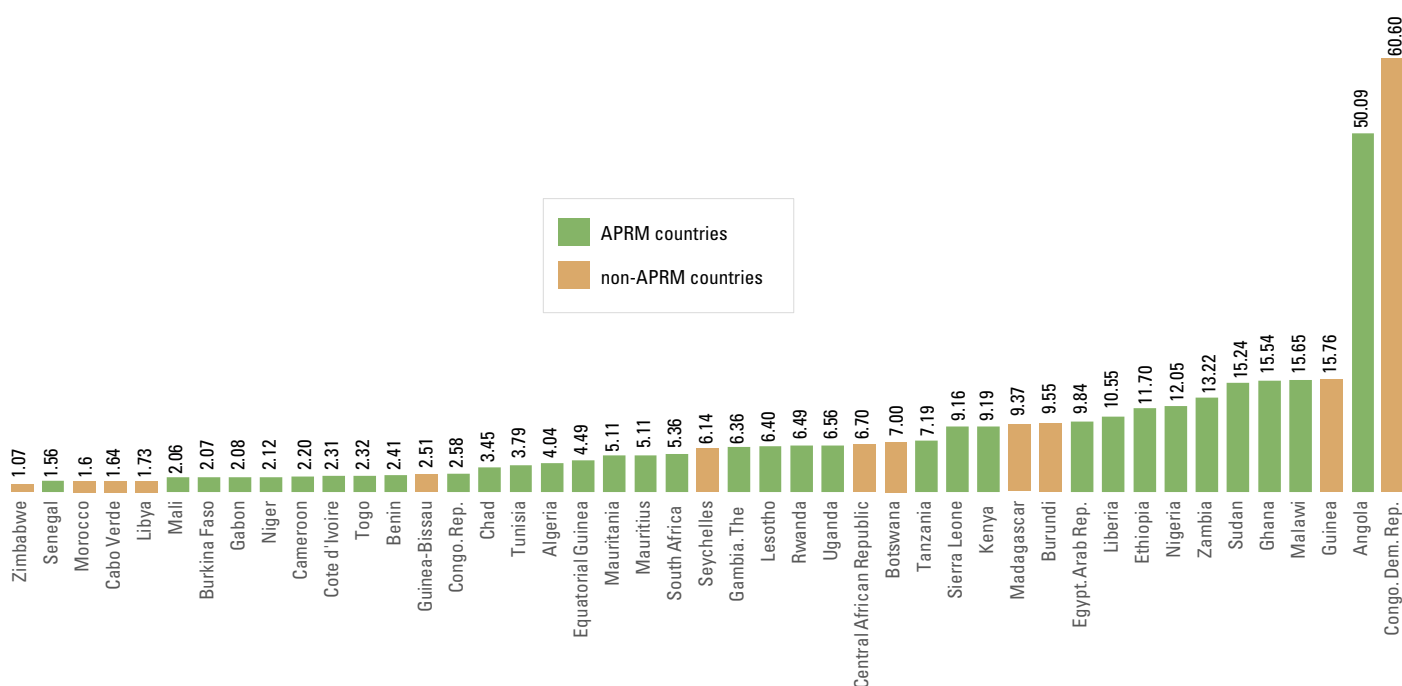


Fig. 12: Average inflation rate in APRM countries (left) and non-APRM countries, 2000-2018

Source: World Development Indicators (WDI), retrieved February 6, 2020

It is evident from Figure 12 that the macroeconomic performance of DRC, a non-APRM country²⁴ appears more stressed than APRM countries; it also recorded the highest inflation rate and lowest real income per capital (see Fig. 11). Economic conditions are a major push factor for Congolese migrants. Flahaux and De Haas²⁵ observed in their profile of the migration history of the Democratic Republic of Congo that this once attractive destination, in particular for migrants from other countries within Africa, has, since the early 1980s, been a country of outmigration, driven in part by economic downturn and a number of violent crises.²⁶ APRM member countries Angola, Malawi, Ghana, Sudan, Zambia, Nigeria, and Ethiopia recorded inflation rates above 10 per cent (as compared to non-APRM countries). This indicates a need for compliance with economic governance principles. Although some of these countries have maintained single digit inflation in recent times, they need to be closely monitored to ensure sustainability. High inflation indicates a reduction in real income, which may tempt citizens to consider migration as an option to survive domestic economic problems. Although Burkina Faso (an APRM member) has a relatively low inflation rate its high migration rate may be attributable to its low real income (see Fig. 11). The destinations of Burkinabe migrants within Africa are nearby and include Ghana, Mali, Benin and Niger.

Another factor often mentioned by illegal migrants is unemployment in their respective countries. According to unemployment data from World Development Indicators (WDI), Lesotho has the highest unemployment rate among the APRM countries while Botswana has the highest unemployment among non-APRM countries. High unemployment in Lesotho may be due to its dependence on a narrow economic base of textile manufacturing, agriculture, remittances and regional customs revenue and the vulnerability of economic activities to weather and climate variability.

24 DRC joined APRM when? 26 Feb 2021 — DRC is set to accede to the APRM at the 30th APR Forum on 25th March 2021.

25 Flahaux, M.L., 2016. New profile of Democratic Republic of Congo’s migration history. Available at: <https://www.migrationinstitute.org/imi-archive/news/new-profile-of-democratic-republic-of-congos-migration-history>

26 Online source, available at: <https://www.migrationinstitute.org/imi-archive/news/new-profile-of-democratic-republic-of-congos-migration-history>

Benin has a low unemployment rate (see Fig. 13), and is among the countries with a low GDP per capita. The resultant high level of poverty causes Benin’s citizens to strongly consider migration. Another reason for their migration is access to labour markets, particularly in Nigeria, where they work as in-house domestic help, in catering services, or in hairdressing salons.²⁷

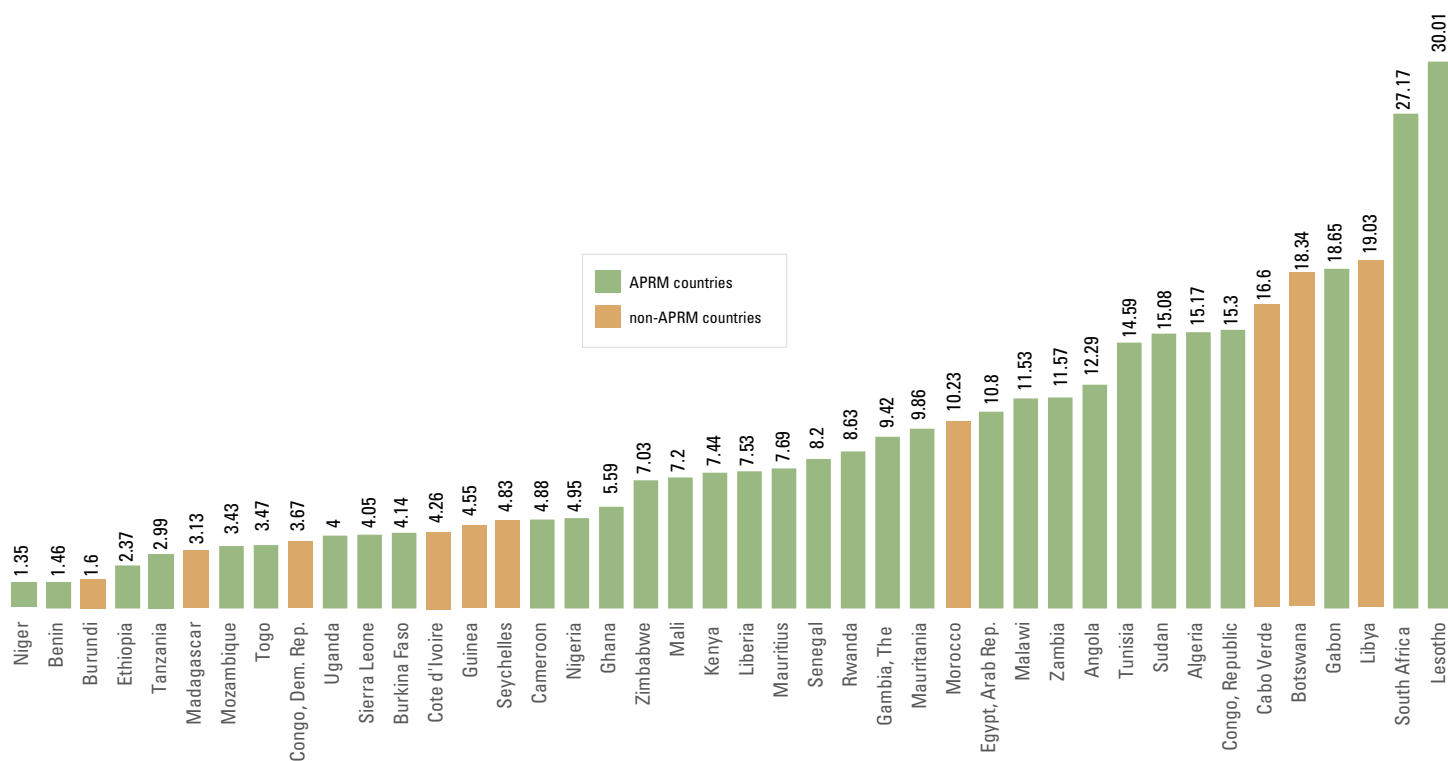


Fig. 13: Average unemployment rate in APRM countries (left) and non-APRM countries, 2000–2018

Source: World Development Indicators (WDI), retrieved February 6, 2020

Uganda is another low-income country with moderate inflation and unemployment rates which suggests that citizens migrate out of Uganda because of low income and poverty. It has been shown that more women than men emigrate out of the country and that most emigration is to Kenya and South Sudan, which border Uganda. At a regional level, most Ugandan nationals migrated to other African countries and many also migrated to Europe and North America.²⁸ The Ugandan diaspora, however, might be much bigger; results of the household survey on migration and remittances conducted in Uganda in 2008 stated that 42 per cent of Ugandans had a family member living abroad, which equates to about 3 million Ugandans. The same study showed that 30 per cent of the Ugandan diaspora were residing in the United Kingdom.²⁹

Ugandans also migrate because employers fail to offer attractive employment packages.³⁰ This is true of the health sector, for example, in which both government and private not-for-profit (PNFP) employers were unable to retain or attract workers. At the regional and international levels, the remuneration of health workers in Uganda is much lower compared with the remuneration of their counterparts abroad. On average, doctors (medical officers) in the UK and Kenya earn twelve and four times more, respectively, than doctors in Uganda.³¹

27 Benattia, T., Armitano, F. and Robinson, H., 2015. Irregular Migration Between West Africa, North Africa and the Mediterranean. Paris: Altai Consulting.

28 International Organization for Migration, 2015. Migration in Uganda: A rapid country profile 2013.

29 Orozco, M., 2008. *Remittance transfers, its marketplace and financial intermediation in Uganda: preliminary findings, lessons and recommendations*. Report Commissioned by the Inter-American Development Bank in co-operation with the African Development Bank.

30 National Planning Authority, 2010. *National Development Plan 2010/11-2014/2015*. Kampala: National Planning Authority.

31 Ministry of Health (MoH), 2009. National Health Policy II. Government of Uganda. Reducing poverty through promoting people’s health. Ministry of Health, Kampala, Uganda.

South Africa also has a high rate of unemployment (see Fig. 13). Although South Africa has received a high number of immigrants over time, many South African citizens have migrated to countries such as the UK, Australia, New Zealand, Canada and the US where they are employed in sectors such as health and education. According to Statistics South Africa (StatsSA) a total of 62 088 people (including 10 140 with professional qualifications) emigrated from South Africa between 1987 and 1997 to the abovementioned destination countries. Although skilled South Africans are recruited for work overseas on fixed contract, it could be argued that the major push factors are related to economic conditions such as high cost of living and taxation. The vast majority, pessimistic about the future of the economy, and security, seek any means of to leave their home country in search of better living conditions.³²

4. CONCLUSION

This chapter has analysed the possible reasons for international migration from African countries with the aim of assessing the influence of economic governance in relation to the role of APRM. It has provided theoretical underpinnings on the possible relationship between migration and governance on one hand, and migration and other factors on the other hand. It also analysed the flow of migration in Africa using charts to illustrate this and discussed the interactions and possible relationships between conflict, governance, macroeconomic performance and migration.

The chapter shows that there has been increase in intra- and inter-continental migration in Africa especially since the year 2000 and that there is insufficient evidence to support the notion that conflict plays a key role in the observed migration patterns.

Generally speaking, there are low levels of governance and income per capita coupled with largely high unemployment rate (above 5 per cent) across Africa irrespective of whether countries belong to APRM or not. A good number of APRM countries have maintained single digit inflation rate, especially, in recent times.

The study recommends that governance issues should be taken more seriously and that non-APRM member countries should ensure that they accede to APRM in order to address the governance deficit to work towards establishing enabling environments for citizens to progress.

32 Wike, R., Simmons, K., Vice, M. and Bishop, C., 2016. In key African nations, widespread discontent with economy, corruption. Washington, DC: Pew Research Center, p.26.

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PAPER 2

STRENGTHENING LOCAL GOVERNANCE FOR AGENDA 2063: THE ROLE OF THE AFRICAN UNION

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ABSTRACT

This paper discusses the importance of strengthening local governance as a means to foster Africa's development and achieve Agenda 2063. It argues that engaging citizens at the local levels of society creates a sense of empowerment and ownership over the development process, ensures its success and creates an inclusive growth. Finally, it looks at the status of governance on the continent, and the role of the African Union as a regional organisation in enhancing local governance of member states in order to achieve the objectives of Agenda 2063.

1. INTRODUCTION

The contemporary socioeconomic challenges facing countries are complex and multi-disciplinary. The African Union (AU) recognised at its inception that building and strengthening the capacity of a single actor is an inadequate response to these challenges if the goal is to guarantee inclusive growth that will enable Africa to integrate into the global economy.

Strengthening local governance and engaging communities at a local level is essential to respond to challenges such as inequality, environmental degradation, climate change, and a lack of economic opportunity. Enhancing collaboration between governments, the private sector and civil society organisations ensures that development is locally owned and driven, and inclusive and participatory, which contributes to its sustainability.

Local governance plays a crucial role in engaging citizens and addressing their needs, as it creates a sense of responsibility and common identity. Local ownership creates a supportive environment and a sense of

accountability, which, in turn, enable innovation and ensure sustainability. Currently, there is a growing focus on the need to improve local systems and local governance to achieve and sustain development outcomes.

This paper examines the role of the African Union in strengthening local governance to achieve the goals of Africa's development agenda, known as Agenda 2063. It emphasises the centrality of local governance in achieving economic and social development through an inclusive and participatory process that address the direct needs of citizens.

The paper acknowledges that local governance is not a panacea and that more efforts need to be undertaken to continuously assess the impact of development projects and policies to ensure the optimal outcome.

It also highlights the state of local governance in African countries and the role the African Union plays to move forward in enhancing local governance for development.

2. UNDERSTANDING THE CONCEPT OF LOCAL GOVERNANCE

The concept of governance as a prerequisite for development evolved in the 1990s as an attempt to make development policies more operational. At the time, development processes in developing countries, particularly in Africa, had yielded unsatisfactory outcomes, and efforts to industrialise and modernise did not lead to inclusive economic growth. There was a need to break away from old patterns of development and look at ways for countries to advance their economies.

Governance was perceived as a critical factor in accelerating a form of economic growth that would be both sustainable and inclusive.

Since the early 1990s, there has been a growing recognition that development is not only about projects and investments but also about politics. One of the earliest attempts to bring the idea of governance for development to the attention of the international community was a 1989 study issued by the World Bank (WB) entitled, *Sub-Saharan Africa: From Crisis to Sustainable Growth*.¹ The study focused on the economic challenges of African countries and lack of improvements in welfare; the gap between economic and population growth; and economic problems amplified by weak agricultural growth and industrial outputs, increasing debt and deteriorating social indicators. The study identified governance as a main element underlying Africa's development problems; it is defined in the study as 'the exercise of political power to manage a nation's affairs'.²

When the Cold War ended in 1989, the international community began putting governance at the core of development, making it indispensable for international development cooperation. The term 'good governance', which appeared in development-related discussions by international financial institutions, international donors, scholars and economists, outlined the most efficient ways for public institutions to manage resources to achieve sustainable development and inclusive growth.

Over the past 30 years, governance has become increasingly central to the field of development. It is worth mentioning here that the absence of a single internationally accepted definition for governance or criteria with which to measure it, allows greater flexibility for countries to adopt the term and tailor it to best serve their needs, interests and priorities. The United Nations Development Program (UNDP), for example, defines governance as the process by which public policy decisions are made and implemented as a result

of interactions, relationships and networks between the government, public sector, private sector and civil society to determine who gets what, when and how. These relationships and interactions determine how services are provided throughout the planning, management and regulation phases, taking into account a set of political, social and economic systems.³

The WB went a step further by looking not just at mechanisms and processes by which policies are decided but also at institutions and structures that make these policies and implement them. The WB defines governance as 'the traditions and institutions by which authority in a country is exercised'. This includes the process by which 'governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them'.⁴

One of the most important levels of governance is at the local level, in what is referred to as 'local governance'. The UNDP report, *An Integrated Framework to Support Local Governance and Local Development*, defines local governance as 'the whole range of interactions between players at the sub-national level, ranging from local governments, to private sector, civil society and community-based organizations. It is the combined set of institutions, systems and processes, at the sub-national level, through which local authorities interact with and provide services to citizens, groups and local communities and through which the latter articulate their interests and needs, mediate their differences and exercise their rights and obligations'.⁵

Likewise, the subject of local governance and local development became a focus in the discussions of the African Union (AU). Guided by a vision for growth, prosperity, unity and peace, in a charter adopted in 2014 – *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development* – the AU adopted a definition for local governance as 'governance process and institutions at the sub-national level, which includes governance by and with local governments or local authorities, civil society and other relevant actors at the local level'.⁶

Clearly, the concept of governance transcends the traditional concept of government. The latter consists of

1 World Bank, 1989. *Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long-term Perspective Study*. Washington, DC: World Bank.

2 Ibid. p. 60.

3 Laberge, M., Moretto, L., Narang, S. and Wilde, A., 2009. *A users' guide to measuring local governance*.

4 Kaufmann, D. & Kraay, A., 2018. *The Worldwide Governance Indicators*. Available at: <http://info.worldbank.org/governance/wgi/#home>.

5 United Nations Development Program, 2016. *An Integrated Framework to Support Local Governance and Local Development*, New York, NY: United Nations. p.10.

6 African Union, 2014. *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*. <https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local>

legal institutions with compelling powers and decision-making authority; governance, on the other hand, is a process that encompasses government institutions in addition to local actors, their relationships and the way they interact with each other, providing a framework for collaboration across sectors to overcome obstacles to sustainable development, particularly exclusion and inequality. Local governance – by definition – reflects essential elements to expand the benefits of sustainable development for all, such as inclusive growth, quality, effectiveness and efficiency of local administration and public service delivery; and the quality of local public policy and decision-making procedures, and their inclusiveness, transparency and accountability at the local level. In doing so, local governance aims to enhance relations between the central government and citizens through civil engagement for the options that best serve the interests of the people. Regular reviews by the World Bank and United Nations on the status of development emphasised that without an effective state, sustainable development goals are impossible to attain.⁷

It is worth clarifying that one of the key components of governance is decentralisation. While the two concepts are closely linked, and are sometimes used interchangeably, decentralisation denotes the national process undertaken at the political, legislative, institutional and financial aspects to divide responsibilities across institutions. The WB defines decentralisation as ‘the transfer of authority and responsibility for public functions from the central government to intermediate and local governments or quasi-independent government organizations and/or the private sector’.⁸

The AU has adopted a similar definition, referring to decentralisation as ‘the transfer of power, responsibilities, capacities and resources from national to all sub-national levels of government with the aim of strengthening the ability of the latter to both foster people’s participation and delivery of quality services’.⁹

The aim of decentralisation is thus to create a system that enhances responsiveness, efficiency, accountability, engagement and participation to provide better service delivery. It is considered as a form of engagement between citizens and public authority as it enables people to access basic services and participate in public processes, ensuring a more inclusive sustainable development at the local levels.

7 World Development Report, 2017. *Governance and the Law*. Washington, DC: World Bank.

8 Olsen, Hans Bjørn, 2007. *Decentralization and Local Governance Module 1: Definitions and Concepts*. Swiss Agency for Development and Cooperation: Switzerland.

9 African Union, 2014. *African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development*. <https://au.int/en/treaties/african-charter-values-and-principles-decentralisation-local-governance-and-local>.



3. UNDERSTANDING LOCAL GOVERNANCE THROUGH A SYSTEMS-BASED APPROACH

The ongoing discussions around local governance and development are based on the recognition that today's development challenges are multi-disciplinary and often too complex for one entity to solve on its own. Sustainable development requires a new approach with broader engagement and collaboration to address the political, economic, social and technical obstacles to development.

International financial Institutions, Intergovernmental organisations and governments consider local governance as a means to create a multi-layered and inclusive system capable of responding to these complex challenges. While local governance normally evolves complex, unpredictable and constantly shifting political, economic and social contexts, the success or failure of this system depends on how inclusive and participatory it is and to what extent it engages people, in particular the poor and marginalised. Implementing an effective model of local governance requires looking at governance as an open system of interactions between state and non-state actors. It is worth noting that there are no blueprints for local governance: governance efforts must be localised to respond to different contexts and settings.

So what changes with local governance?

Governance is transformational in nature. Through engagement, inclusiveness and participation, it aims to build the resilience of the system by making it more efficient and responsive. Unlike traditional approaches to development, local governance is not solely about technical capacity but includes roles, relationships and responsibilities as well. Local governance is particularly crucial as problems are always latent at the community level. Implementing a system of local governance typically leads to three major structural changes:

- **The social contract between state and society:** Decentralisation and local governance lead to a change in power as some authorities within the central government are transferred to the local one. Accompanied with power changes, local authorities become responsible before the citizens in their constituency as well as the central government.
- **Direction of accountability:** Decentralisation and local governance give citizens greater advocacy and make local authorities answerable, not only to the central government but also to their communities.
- **Access to resources and decision-making:** Decentralisation and local governance give more people access to control and authority.

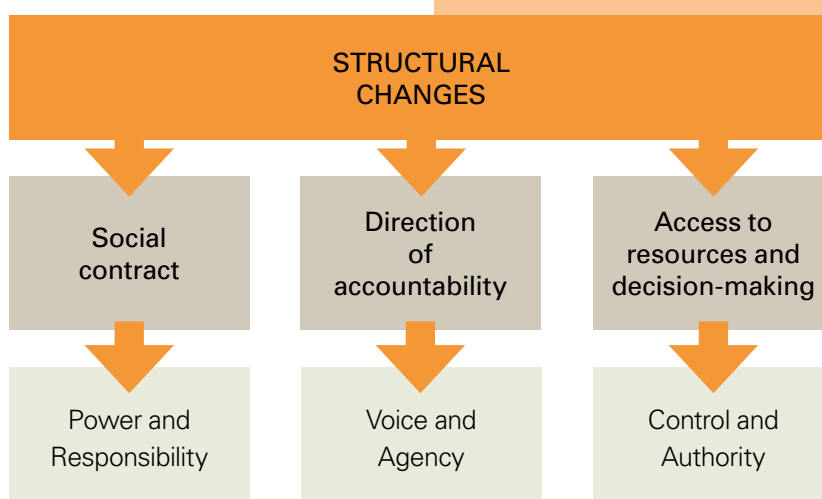


Fig. 1: Structural Changes associated with decentralisation and local governance

Decentralisation and local governance can thus be viewed as structural changes to inter-governmental relations to pass on some responsibilities, not as a political change or power contestation but rather as a means to create a sense of shared responsibility, complementarity and ownership at the community level and engage citizens in the process of their development.

4. THE STATE OF LOCAL GOVERNANCE IN AFRICA

Much attention has been directed at local governance and its relationship to inclusive growth and development. Africa is no exception to this relationship. As early as the 1980s, confronted with challenges to growth, development and stability, many African countries embarked on processes to establish decentralised systems and devolve some responsibilities to local entities. These efforts were meant to offset economic, political and social challenges and address the needs of the population at a local level. Increased stability in many African countries after independence, and particularly after the end of the Cold War, contributed to a shift to development strategies that demand local governance to effect economic and social development. Many African countries initiated governance-related programmes to address challenges of public management and development.

Olowu explains that countries like Nigeria and Uganda adopted a bottom-up approach to decentralisation and local governance by focusing on building the capacity for local democracy and then gradually expanding the decentralisation process to the centre. This approach meant to ensure that decentralisation does not result in the mere transfer of responsibilities and resources from the centre to local governments, but also the active engagement of the latter.¹⁰ The failure of public sector management and subsequent economic, fiscal and political crises in some countries, often due to over-centralisation, resulted in a decline in state resources and subsequent pressure to reform at political, economic and institutional levels.^{11 12}

Countries like Tanzania, Nigeria and Côte d'Ivoire viewed decentralisation as a means to re-invent governance structures to address their challenges, while in Uganda, Mali and Ethiopia, non-state domestic pressures pushed for decentralisation. Economic crises in these countries had made civil society organisations (CSOs) more politically active, and they called for reform.

The decline in development aid and increasing pressure from international donors that linked aid to good governance, increased the push for greater decentralisation. Rapid urbanisation on the continent was also an important factor in the move towards decentralisation and support for local governance.

In some contexts, decentralisation was used for conflict resolution and peacebuilding as ruling groups sought to contain conflict with regional or local elites through reallocation of responsibilities and resources. Decentralisation played a role in resolving conflict in Ethiopia, South Africa and Mozambique, among others.

Globalisation also drives decentralisation; free movement of capital between and within countries has enabled cities to compete for foreign investment, which was once monopolised by central governments. This change has compelled governments to focus on strategic issues of national economic and political management while leaving the management of cities and communities to local governments.¹³

Despite these efforts and initiatives, Africa is still one of the least decentralised continents. Only four African countries – Ethiopia, Nigeria, Eritrea and Comoros – have federal constitutions, while South Africa follows a semi-federal state structure, devolving some powers to regions and local governments. Ghana and Kenya have incorporated decentralisation into their constitutions, whereas most African countries have different forms of subnational authorities such as regional, provincial, urban and rural districts and local governments or administrations. While most countries remain highly centralised, African societies, in contrast, are highly decentralised and dispersed in rural communities and villages.¹⁴ Poor integration of state and society structures is regarded as a main factor of Africa's slow development.¹⁵

A lack of serious attempts at decentralisation can be attributed to the fact that decentralisation initiatives started during post-colonial state formation, which threatened to divide societies along ethnic, religious or cultural lines. Many leaders preferred centralisation as a means to exercise power and foster the power of fledgling central authorities. In addition, limited human resources made it harder to coordinate economic allocations.¹⁶

Likewise, challenges to the process of decentralisation and enhancing local governance include defining the relationship between central and local authorities, capture of power by the local elite, poor management systems, weak institutional capacities and mechanisms required to strengthen institutions, including leadership and human

10 Olowu, D., 2003. Local institutional and political structures and processes: recent experience in Africa. *Public Administration and Development: The International Journal of Management Research and Practice*, 23(1), pp.41-52.

11 Wunsch, J., Olowu, D., Harbeson, J.W. and Ostrom, V., 2019. *The failure of the centralized state: Institutions and self-governance in Africa*. Routledge.

12 Makara, S., 2018. Decentralisation and good governance in Africa: A critical review. *African Journal of Political Science and International Relations*, 12(2), pp.22-32.

13 Olowu, B., 1999. Building strong local government through networks between state and non-governmental (religious) institutions in Africa. *Public Administration & Development*, 19(4), p.409.

14 Olowu, D., 2003. Local institutional and political structures and processes: recent experience in Africa. *Public Administration and Development: The International Journal of Management Research and Practice*, 23(1), pp.41-52.

15 World Bank, 1989. "Sub-Saharan Africa: From Crisis to Sustainable Growth: A Long-term Perspective Study", Washington, DC: World Bank.

16 Olowu, D., 2003. Local institutional and political structures and: recent experience in Africa. *Public Administration and Development: The International Journal of Management Research and Practice*, 23(1), pp.41-52.

resources capacity, as well as lack of improvement in service delivery and scarcity of funding and economic resources. Makara¹⁷ argues that even if decentralisation and local governance were embraced by several countries to transform intergovernmental relations, reshape relations between central and local powers and empower civil society organisations to play a greater role in development, the benefits of these efforts remain limited.

Over the past decade, most African countries have shown positive signs in their overall governance performances. The 2017 Ibrahim African Governance Index (IAGI) analyses the status of governance on the continent for the period 2007 to 2016 using a wide range of indicators and covering four major categories:

1. Safety and rule of law;
2. Participation and human rights;
3. Sustainable economic opportunity;
4. Human development.

According to IAGI data, African countries have, on average, been improving in their overall governance indicators.¹⁸ The index shows that although the first five years of the analysis witnessed sustained progress in the level of overall governance, the pace of progress slowed down from 2012 to 2016 due to varying performances of countries across the continent.

There is a positive trend in the overall level of governance in the majority of African countries despite some showing slow progress or reversing their performance: 34 countries improved while 20 showed a decline.

Namibia, Tunisia, Seychelles and Senegal showed signs of improvement in the past five years that surpassed the average ten-year trend. Côte d'Ivoire, which started with a very low score, showed strong signs of improvement. However, Rwanda, which had ranked fourth-most-improved country, slowed down in the last five years (2012 to 2016), as did Liberia. South Africa, Mali and Madagascar deteriorated over the decade (2006-2016) but showed signs of bouncing back in the last five years (2012-2016). Burundi, Libya and Central African Republic registered the effects of ongoing crises.

Of the 45 African countries that showed improvement, Tunisia and Egypt were ranked among the highest, presenting cases for optimism in the improvement of overall governance. Both countries have shown improvement over the last five years; Egypt more than tripled its annual pace of improvement, which reflects a strong political will, delivery on improved laws, stronger institutions and a better economy.

5 LOCAL GOVERNANCE AND AGENDA 2063

Guided by a vision for growth, sustainable development, empowerment and inclusiveness, the AU recognised from its inception the growing significance of local governance in development.¹⁹ It acknowledged the role local development plays in maintaining sustainable solutions to overcome socioeconomic challenges building on innovative partnerships to reach remote areas and foster concrete initiatives on the ground. In fact, the idea of local governance and partnerships between the state and citizens are at the core of the AU Charter. The AU has brought governance-related progress based on its vision of a united and strong Africa and the need for partnerships between government and civil society to strengthen solidarity and cohesion among the peoples of Africa.

The AU adopted several strategies and mechanisms to reduce the impact of economic crises and achieve growth while emphasising the role of citizen empowerment, engagement and inclusiveness. The New Partnership for Africa's Development (NEPAD) was established as a political and administrative institution to promote good governance. The African Peer Review Mechanism (APRM) was formed in 2003 by the AU in the framework of the implementation of the NEPAD. In addition, the Africa Governance Forum (AGF) was established as a consultative process by the UNDP and the United Nations Economic Commission for Africa (UNECA) to support democratic and participatory governance efforts in African countries.²⁰

According to Mekolo and Resta, the APRM and AGI are corresponding continental instruments that African countries join on a voluntary basis to assess the status of governance within their respective countries, share information and learn from their various governance experiences.²¹

In 2005, a Governance Forum held by the AU Commission

17 Makara, S., 2018. Decentralisation and good governance in Africa: A critical review. *African Journal of Political Science and International Relations*, 12(2), pp.22-32.

18 Mo Ibrahim Foundation, 2017. *2017 Ibrahim Index of African Governance*, Mo Ibrahim Foundation.

19 For more information on the African Union, its objectives, vision and Constitutive Act, please visit <https://au.int/en>

20 United Nations Development Program, 2006. *Implementing the African Peer Review Mechanism - Challenges and Opportunities*, New York, NY: United Nations Development Program.

21 Mekolo, A. and Resta, V., 2005. Governance progress in Africa: challenges and trends. Division for Public Administration and Development Management United Nations Department of Economic and Social Affairs.

to address challenges pertaining to development adopted a declaration that emphasises the centrality of governance at local and national levels to address development challenges, alleviate poverty and resolve conflicts on the continent. According to Olaniyan the forum acknowledged that the local level should be the vital strategic level for the renewal of governance in Africa, prioritising localisation to improve living conditions of the people and prevent conflict.²² The declaration adopted by the forum built on the following AU initiatives:

- Cairo Agenda for Action (1995), a programme to relaunch Africa's political, economic and social development;
- African Common Position on Africa's External Debt Crisis (1997), a strategy for addressing the Continent's external debt crisis;
- Constitutive Act (2002) which articulated the guidelines of political, economic, and institutional governance for the continent;
- Durban Declaration on Elections, Democracy, Governance;
- New Partnership for Africa's Development (NEPAD);
- Declaration on Democracy, Political, Economic, and Corporate Governance;
- Protocol on the Rights of Women and the Algiers Decision on Unconstitutional Changes of Government (1999);
- Lomé Declaration on the framework for an OAU Response to Unconstitutional Changes in Government (2000);
- 2000 Solemn Declaration on the Conference on Security, Stability, Development, and Cooperation;
- African Common Position on the review of the MDGs;
- Solemn Declaration on Gender Equality in Africa (2004).

In 2013, the African Union adopted Agenda 2063 – The Africa We Want – with a guiding vision that builds upon the AU vision of 'An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in international arena',²³ that thus returns local ownership to the centrality of development, prosperity and peacefulness.

22 Olaniyan, R. Omotayo, 2008. International Meeting Process for Debate and Proposals on Governance. *The Southern African Perspectives*, pp.17-20

23 African Union, 2018a. "About Agenda 2063." About Agenda 2063 | African Union. 2013. Accessed October 10, 2018. <https://au.int/agenda2063/about>.

Agenda 2063 provides a strategic framework for socioeconomic transformation at the continental level, building on existing African initiatives. It lists the following seven aspirations for the continent:

- A prosperous Africa, based on inclusive growth and sustainable development.
- An integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's Renaissance.
- An Africa of good governance, democracy, respect for human rights, justice and the rule of law.
- A peaceful and secure Africa.
- Africa with a strong cultural identity, common heritage, values and ethics.
- An Africa whose development is people driven, relying on the potential offered by people, especially its women and youth and caring for children.
- An Africa as a strong, united, resilient and influential global player and partner.

What differentiates Agenda 2063 from previous AU initiatives is the bottom-up approach through which it was reached. Agenda 2063 is people driven; it is the result of extensive consultations with African citizens to enhance ownership of its processes and outcomes. It represents one of the strongest manifestations by the AU on the importance of local governance and citizen participation as a key component of development.

Agenda 2063 is result-oriented, with set goals and targets, a monitoring and evaluation process and a communication strategy to raise awareness of it. It also consolidates, for the first time, both continental and regional initiatives to enhance consistency, remove policy overlaps and redundancies and provides a resource mobilisation strategy and a strategy to expand partnerships for Agenda 2063 implementation.

Since 2013, there has been greater progress towards the implementation of Agenda 2063. In 2014, during the 25th ordinary session of the African Council held in Malabo, heads of states and governments adopted the African Charter on the Values and Principles of Decentralisation and Local Governance and Local Development. The Charter established links between local governance, local development and eradication of poverty in Africa, asserting the importance of inclusiveness and local accountability to facilitate the development of local economic opportunities and improve popular access to public services. The same year witnessed the establishment of the African Union High Council of Local Authorities (AHCLA) as a consultative body within the African Union Governance Structure with a mandate to promote effective participation of citizens at the local level in policy processes.

These initiatives aim to transform the African Union from that of the Union of the states and governments to that of the African people for a holistic economic and political integration of the continent. The AHCLA is the first direct institutional arrangement within the AU governance structure that aims to give a voice to people at the local level through their locally elected leaders and local authorities and create a two-way communication with AU policy-makers.

The initiatives also stipulate that local governance is important for Agenda 2063 as it should lead to achieving sustainable development, eradicate extreme poverty, reduce social and economic inequality, establish inclusive and effective governance systems, and enhance resilience in the face of disaster or conflict, all of which are areas present in the shared vision of the African people in Agenda 2063.

Without local governance, Africa's Agenda 2063 is unattainable. The AU efforts also emphasise that a knowledge of the public realm and key facets of society is essential to create a sense of responsibility and foster its role in development. Citizens have rights as well as responsibilities; local governance helps to foster this sense of responsibility. The fundamentals of development are not only based on service delivery but also on fulfilling expectations. Local governance structures that are close to the people and that voice their needs and concerns are crucial to understand these expectations and work to achieve them.

6. THE WAY FORWARD

The AU has come a long way towards proving that Africa is determined to find solutions to its problems. Although reform efforts are locally driven, the AU played an active role in supporting endeavours that push for such reforms. In doing so, it recognised the significance of local governance for development on the continent, and undertook several vital initiatives to establish legal and institutional frameworks, strategies and mechanisms to gradually incorporate governance into development practices.

In general, these initiatives and frameworks should enable African countries to devise innovative methods to manage public affairs and promote inclusive local development. The IAGI shows overall positive results in governance indicators on the continent. However, this progress is challenged by signs of slowdown or regression in some instances. The divergence in progress connotes that more effort should be undertaken to accelerate sustainable development, withstand positive achievements and move towards realising Agenda 2063. In doing so, the AU still has a role to play.

Governance varies according to context, culture, level of socioeconomic progress and political environment. There are no blueprints that can be applied to all countries. The IAGI shows a divergence in the way countries develop and progress across the continent with countries achieving progress in different areas, while others stumble or fail to make progress.

Firstly, a main task of the AU is to help member states implement and strengthen local governance while taking this divergence into consideration. The experience of countries that have faced or are still facing internal conflict is different from those that have already achieved some socioeconomic progress. Implementing local governance in conflict or post-conflict settings can be challenging, and requires a conflict-sensitive approach to local governance. Mitigating risks associated with local governance and decentralisation require an understanding of the contexts and outcomes of this process.

Secondly, local governance must be integrated into the various dimensions of the Agenda 2063 framework and local governance translated into measurable socioeconomic goals and targets. These goals and targets, such as the 10-year plan of Agenda 2063, must be evidence-based and politically feasible. The APRM and AGI play an important role in this regard by developing a best practice framework, highlighting success stories and uncovering underlying drivers of policy effectiveness.

Thirdly, in operationalising the AU charter on local governance and local development and Agenda 2063, it is of crucial importance to develop the capacity of African citizens at the managerial, administrative and financial levels to understand and respond to the complexity of socioeconomic challenges at a local level and adapt their local development strategies to different national and local contexts to ensure that local governance respond to development needs.

One of the greatest impediments to effective governance and development is resources. Although the AU has adopted structures and frameworks, it needs to devise mechanisms to facilitate mobilisation of resources, support reforms and create reliable financial and technical support for a robust governance system on the continent.

The AU, as much as it has done with the civil society in Agenda 2063, should establish a partnership with the African business community that aims to increase economic cooperation for development at a local level and examine how governance can contribute to regional and continental economies of scale and integrate Africa further into the global economy. Businesses bring opportunities, technology and innovation, all of which are important to create job opportunities for the youth, improve inclusive governance and advance economic growth.

7. CONCLUSION

In this paper, I have attempted to briefly present the case for local governance as an essential element of Agenda 2063. Local governance is becoming increasingly vital for inclusive growth and sustainable development.

The idea is that development must reach the periphery to be sustainable. It should not be concentrated in the centre alone. To reach the delineated areas of a state and achieve development that addresses the direct needs of the people, citizens must be engaged to create a sense of ownership over the process. Local governance is not only about power and resource allocation but also about taking responsibility and giving people, especially the marginalised, a voice. In this context, there is a trend of progressive development related to local governance and development in Africa at the local, national and continental levels. Since the early 1980s, many countries started a process to devolve some powers to local governments

or local administrative units and engage people at the local level. This process, albeit slow, reflects a growing awareness of the benefits of enhancing local governance for local development. The AU has played a major role in this respect. Through its structures and various bodies, the AU adopted various mechanisms and frameworks to foster local governance for development, growth and prosperity.

While these efforts are nascent, the AU needs to evaluate their long-term impact, highlight success stories and assess challenges to establish its own best practices. Furthermore, the AU needs to expand its partnerships by reaching out to the private sector and reinventing its role in local governance for development. Local governance is not a panacea; the success or failure of efforts to devolve resources and empower local institutions will depend on each context, existing capacities and commitment of the various actors involved.



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PAPER 3

THE APRM AS A TOOL FOR DEMOCRACY AND POLITICAL GOVERNANCE IN THE GAMBIA

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ABSTRACT

On Friday, 1 December 2016, Gambians voted in the fifth presidential election since Yahya Jammeh came to power following the 1994 coup d'état. Surprisingly, he lost the election to the leader of an opposition coalition, Adama Barrow. Following the extraordinary aftermath, The Gambia became sub-Saharan Africa's newest democracy following 22 years of authoritarian rule. The Gambia presents a new blueprint for transition from an authoritarian regime to a democratic one. Since the new government came into power, they have made major strides in concretising their political commitment to the country in the promotion of human rights and good governance.

The Gambia's decision to join the APRM on 28 January 2018 is an important milestone in their efforts to demonstrate their commitment to good governance, transparency and to a truly participatory democracy. The primary focus of this paper is to examine the modalities and the extent to which the APRM can play a role in monitoring and strengthening of The Gambia's political and governance architecture in line with the principles of democracy, respect for human rights, promotion of the rule of law and ensuring integrity of public institutions. This paper will explore how The Gambia can utilise the APRM as a veritable tool for enhancing the capacity of the state in designing and maintaining a system that promotes constitutional democracy.

1. INTRODUCTION

Few Gambians are aware of The Gambia's decision to accede to the African Peer Review Mechanism (APRM) on 28 January 2018¹ – a milestone for the country that suffered a great deal during the 22 years of dictatorship under former President Yahya Jammeh.

The Gambia became an independent republic in 1970, after decades of colonialism. The new dispensation ushered in a multiparty system with periodic elections held consistently until 1994 when the country went through a military coup d'état. After two years of transition, the country returned to constitutional rule in 1997 and periodic presidential and national assembly elections resumed every five years. However, an uneven playing field for political competition and a variety of mechanisms including amendments to the electoral law, a restrictive media environment, harassment, imprisonment and intimidation of political opponents, resulted in elections that led to the repeated re-election of Yahya Jammeh, whose party had seized power during the coup. In this case, elections were intended not to democratise but to maintain the status quo and legitimise Jammeh's authoritarian regime.²

After more than two decades of authoritarian rule, Gambians voted Jammeh out of office during elections on 1 December 2016. On 2 December 2016, the opposition coalition candidate, Adama Barrow, was announced the winner of the presidential elections.³ A dictator rarely loses his own 'window-dressing' election to the opposition this case stands as a departure from the assertion that elections in Africa are merely a political ritual; it serves as a meaningful mechanism for leadership change and the expression of political will.

Jammeh's regime, like most electoral authoritarian regimes, allowed for elections with multiple political parties participating but under very unfair conditions. Electoral authoritarian regimes may have multiparty systems and hold regular elections but they violate liberal democratic rules so fundamental that elections become an instrument of authoritarian rule rather than a democratic one.⁴ Schedler defines this electoral authoritarianism as 'elections [that] are broadly inclusive ... as well as minimally pluralistic ... minimally competitive ... and minimally open.'⁵

This is the manifestation of the gap between democratic rhetoric by authoritarian leaders and their undemocratic practices. Jammeh the incumbent controlled the media, put in place barriers to inhibit opposition parties from effectively competing and campaigning and controlled the electoral commission and courts.

This paper analyses how the APRM can be used as a tool for democratisation considering The Gambia's accession to the APRM. It gives an overview of the key issues and challenges relating to democracy and political governance in The Gambia. For more than 22 years a culture of impunity and fear, poor governance and the shackling of state institutions existed in The Gambia; this article critically examines the transition from authoritarianism to a multi-party democracy and, crucially, addresses the question of how The Gambia can benefit from the APRM.

2. DEMOCRACY AND POLITICAL GOVERNANCE IN THE GAMBIA: KEY ISSUES AND CHALLENGES

Under Jammeh, the political situation was volatile and unhealthy because of high levels of political repression and impunity. Governance and human rights challenges can be measured by the level and frequency of disregard for the rule of law, and numerous anti-human rights, undemocratic amendments to the Constitution.⁶

For instance, in 2003, section 48(3) of the Constitution was amended to change the voting system for presidential elections from absolute majority (50% + 1) to the first-past-the-post system. In the context of a fragmented opposition, this system ensured Jammeh's continuous victory. Ironically, however, this same system allowed the current president to win the 2016 elections with 43.3 per cent of the votes to Jammeh's 36.6 per cent, without the need for a second round of elections.⁷

The intolerance of the Jammeh regime can be seen in the changes it made to the laws, and in its perpetuation of practices that undermined fundamental freedoms and the ability of the people to hold the government accountable. In April 2013, the government introduced amendments to the Criminal Code, which received widespread condemnation because of its blatant infringement of rights and freedoms. Amendments to sections 114 and 167 of the Principal Act could be used to restrict the right to freedom of expression, assembly and association. Changes to the law also placed the president, vice president, parliamentarians and ministers in the category of public officers.

1 African Union. African Peer Review Mechanism (APRM). Available from <https://au.int/en/organs/aprm>. [Accessed 15 December 2019].

2 Levitsky, S. and Way, L.A., 2002. Elections without democracy: The rise of competitive authoritarianism. *Journal of democracy*, 13(2), pp.51-65.

3 Aljazeera. Yahya Jammeh loses to Adama Barrow in Gambia election. 2 December 2016. Available from <https://www.aljazeera.com/news/2016/12/gambia-yahya-jammeh-loses-election-adama-barrow-161202130519550.html> [Accessed 15 December 2019].

4 Schedler, A. ed., 2006. *Electoral authoritarianism: The dynamics of unfree competition*.

5 Ibid., 382.

6 This article cannot exhaustively list the number of human rights and governance issues and cases that took place between 1994-2016. However, an attempt is made to illustrate the precarious environment that prevailed under Jammeh.

7 Independent Electoral Commission: www.iec.gm. [Accessed 15 December 2019].

The significance of this change was revealed in the practice of charging citizens with ‘giving false information to a public officer’ when petitioning government officials with a grievance and seeking redress. The question: ‘Who is a public officer?’ became a contentious matter during the 2012 court case of Dr Gumbo Touray, a University of The Gambia (UTG) professor who sent a petition to the president in 2011 highlighting nepotism by the vice chancellor. Until then, public officers included all government employees except members of the cabinet and lawmakers. During the trial, defense lawyers argued that the charge was misplaced because the addressee of the petition, i.e., the president, is not a public officer as defined by the constitution.

Following the acquittal and discharge of Touray, amendments were made to section 114 of the Criminal Code in April 2013 to expand the definition of public officer. The Act also increases the punishment for providing false information to a public servant from six months to five years imprisonment and/or a fine of 50,000 dalasi (about USD 1,545), up from 500 dalasi (about USD 15). This meant a limitation of the ability of citizens to claim their rights by demanding efficient public services and holding government institutions and officials to account.

The respect, promotion and observance of fundamental human rights are cardinal pillars of democratic governance. Any assessment of the state of democratic governance in a country must probe the state and its human rights record. Under Jammeh’s rule, the media environment was characterised by draconian laws and arbitrary arrests, detentions, and physical assaults of journalists, as well as closure and burning down of media houses. A set of laws granted wide powers to restrict rights on the grounds of national security and arbitrary actions muzzled the freedom and independence of the media.⁸ The Gambia does not currently have an access to information law that affords legal protection of the right of access to information held by public bodies.

Additionally, the right of people to protest peacefully had been met with a consistently repressive response over the years.⁹ Although the right to freedom of assembly as guaranteed by the 1997 Constitution includes the right to take part in peaceful demonstrations people were prevented from organising and participating in such demonstrations. Section 18(4)(C) of the Constitution allows for the use of force and the deprivation of life in the ‘suppression of a riot, insurrection or mutiny’.

8 These include the National Media Commission Act, Criminal Code provisions on seditious publication and false information and news, Official Secrets Act. For an analysis of the laws, see, S Nabaneh., (2017) *The Gambia: Commentary*. In *Constitutions of the World*. Edited by R Wolfrum, R Grote & C Fombad (New York: Oxford University Press): 13-19.

9 See *Gambia Student’s Association v. The Inspector General of Police & Anor.*, 26/04/2000; *Peters (Femi) v. the State*, HC 195/10/CR/075/BO (Crim. Appeal).

In addition, the Public Order Act¹⁰ established the requirement of authorisation for organising rallies or demonstrations. This afforded law enforcement officials immunity when a person died in circumstances in which ‘reasonable force’ had been used.

The right of people to protest peacefully was met with a consistently repressive response over the years. In April 2016, Solo Sandeng, the organising secretary of the then opposition United Democratic Party (UDP), was reportedly tortured to death in state custody shortly after being detained during a peaceful demonstration for electoral reform.¹¹ Days after Sandeng’s arrest, UDP leader, Ousainou Darboe, was arrested during a peaceful protest to demand transparency about the fate of Sandeng and the release of political detainees. In July 2016, Darboe and 29 other people were sentenced to three years in prison for their roles in the protests.¹²

The gravity of Gambia’s governance challenges was further compounded by total control by the regime of state organs and institutions, which rendered them weak and inept.¹³ Due to lack of separation of powers, the legislative and judiciary were unable to nurture and consolidate democratic governance as the executive branch played a counter-productive role. One of the powers Jammeh exerted over the National Assembly, particularly with his party members, was section 91, which decrees that a parliamentarian may lose his seat if he or she is dismissed from the party. Through this provision, Jammeh was able to control parliamentarians to do his bidding. On several occasions, Jammeh used his authority as chairman of his party to expel parliamentarians.¹⁴

Similarly, the judicial system in The Gambia suffered large scale political interference by the former regime, which hampered its independence.¹⁵ Interference took the form of undue intimidation of judges and magistrates¹⁶ which, when coupled with severe lack of human resources and infrastructures, and under-investment, subverted judicial independence and rule of law and resulted in an unhealthy climate that undermined the protection of human rights.¹⁷

10 The 1961 Act came into force on 31 October 1961. It has since been amended by the Amendments Act, 2009 and 2010.

11 UN., *Gambia: Ban calls for release of detained protesters after death of opposition members*. 17 April 2016; *Human Rights Watch.*, *Gambia: Investigate death in custody, free protesters*. 18 April 2016.

12 B Sillah ‘Darboe & Co jailed’ *Standard Newspaper* 21 July 2016. Available from <http://standard.gm/site/2016/07/21/darboe-co-jailed/> [Accessed 15 December 2019].

13 See UN., (2015). *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Mission to The Gambia*. A/ HRC/29/37/Add.2: para 10.

14 These include Yaya Dibba and Borry Kolley in 2013 and Pa Malick Ceessay in 2015.

15 S Nabaneh., *The need for an independent Gambian judiciary*. *Law Hub Gambia Blog*, 14 December 2018. Available from <https://www.lawhubgambia.com/lawhug-net/independent-gambian-judiciary> [Accessed 15 December 2019].

16 Nabaneh, *Gambia: Commentary*, 30-32.

17 Senghore, A.A., 2010. *The judiciary in governance in the Gambia: The quest for autonomy under the second republic*. *Journal of Third World Studies*, 27(2), pp.215-248.

3. TRANSITION FROM AUTHORITARIANISM TO MULTIPARTY DEMOCRACY: BEST PRACTICES AND LESSONS LEARNT

The present government took office in January 2017, and has committed to promotion of democratic rule, respect for human rights, rule of law and maintaining political stability. To this end, the government is undertaking key constitutional and legal reforms to consolidate the democratic gains made by The Gambia.

3.1 Levelling the political playing field

The Jammeh era saw major shrinking of the political space, including the Elections (Amendment) Act 2015, which demanded high fees from election candidates. For example, the National Assembly, dominated by the ruling Alliance for Patriotic Reorientation and Construction (APRC), passed legislation in July that dramatically increased the registration deposits required for presidential, legislative, mayoral, and local council candidates. Presidential candidates were required to pay D 500,000 (approximately USD 12,500) up from D 10,000 (approximately USD 250); the fee for candidates for the National Assembly was increased from D 5,000 (approximately USD 125) to D 50,000 (approximately USD 1,000) and candidates for local council office were to pay D 10,000 (about USD 200). These were considerable sums given the average annual income. Opposition political parties regarded the increases as unreasonably high and a ploy by government to drastically limit the participation of the opposition in elections.¹⁸ The July 2015 election law amendments also imposed prohibitive new registration requirements on political parties. Most notably, parties had to deposit over USD 12,000; gather the signatures of 10,000 registered voters, up from 500; ensure that all executive members live in The Gambia; and hold biannual congresses.

In the spirit of re-examination and re-appraisal of the electoral system, the National Assembly passed the Elections (Amendment) Bill 2017 to 'encourage the widespread participation of the ordinary citizenry in the new democratization dispensation'. Fees reverted to their initial amounts: President D10,000, National Assembly D5000 and other categories to D2500 and D12500 respectively.

3.2 Accountability and truth telling

In a bid to address the atrocities committed under the Jammeh regime, the government has frozen assets suspected of belonging to the former president and a Commission of Inquiry into the Financial Activities of

18 S Nabaneh., New Gambia and the remaking of the Constitution. *ConstitutionNet*. 16 March 2017. Available from <http://constitutionnet.org/news/new-gambia-and-remaking-constitution> [Accessed 21 December 2019].

Public Bodies, Enterprises and Offices as Regards Their Dealings with Former President Yahya A.J.J Jammeh and Connected Matters (known as the Jammeh Commission) was established in July 2017.¹⁹ The Commission is mandated to investigate allegations of abuse of office, mismanagement of public funds, and willful violations of the Constitution by former President Jammeh. The Commission began hearing evidence in public sessions on 10 August 2017 and has heard testimonies from several witnesses including former public servants, heads of parastatals, business persons, military personnel, managers from commercial and government banks, and private citizens.

During 22 years of authoritarian rule, there was no effective investigation of human rights violations and in most cases, perpetrators were not brought to justice. Thus, government indicated strong commitment to break with past of systematic human rights violations through the enactment of the Truth, Reconciliation and Reparations Commission (TRRC) Act by the National Assembly on 13 December which received presidential assent on 13 January 2018.

The TRRC Act provides for the establishment of the historical record of the nature, causes and extent of violations and abuses of human rights committed between July 1994 and January 2017 and to consider granting reparations to victims. The Commission's mandate includes initiating and coordinating investigations into violations and abuses of human rights; the identity of persons or institutions involved in such violations; identifying the victims; and determines what evidence might have been destroyed to conceal such violations.²⁰

The TRRC was launched on 5 October 2018 with the swearing-in ceremony of eleven appointed members. The hearings, which began on 7 January 2019, serve as an initial first step towards securing justice, truth and reparations in The Gambia.²¹ The Gambia TRRC provides a foundation, if executed properly, to not only address the structures and causes of violations but also serves as a form of reparations to assure victims of past violations of non-repetition.

3.3 Constitutional review process

On 11 December 2017, eleven months after the new government took office, the Minister of Justice, Tambadou presented the Constitutional Review Commission Bill before the National Assembly. The passing of the Constitutional Review Commission (CRC) Act, 2017²²

19 This is in line with section 200(1) of the Constitution and the Commission of Inquiry Act (CAP. 30:01), Vol. 5 of the Laws of The Gambia.

20 Sec 14 of the TRRC Act, 2017.

21 'TRRC hearings begins today' *The Point* 7 January 2019.

22 This was assented to on 11 January 2018 by President Barrow.

for the establishment of a commission to draft and guide the process of promulgating a new constitution for The Gambia was a great step in addressing the deficiencies of the 1997 Constitution. The 1997 Constitution lacked legitimacy with Gambians who regarded it as an artefact of the Jammeh government.

According to Section 6(2)(a), 3 and 4 of the CRC Act, citizens within the country and abroad can participate in providing public opinion and proposals to the Commission. Nationwide consultations have just ended in which citizens shared their views and opinions on a number of issues contained in the CRC's Issues Document. Civil society organisations have also made submissions to the Commission. Key among the issues that surfaced are citizenship, fundamental rights and freedoms, elections, local government structures, the three branches of government, the need to establish service commissions for health, education, and agriculture and the environment, representation of women, youth and persons with disabilities, declaration of assets, the use of local languages in the National Assembly, public finance, political party finance, National Youth Service Scheme and security of tenure for the offices of the Auditor General, Governor of the Central Bank of The Gambia, and chief executives of the Public Enterprises.

Where deemed necessary, the Commission will invite persons, including representatives of professional, civic, political and other organisations, to appear before the Commission to make such presentations as those representatives consider relevant or make presentations on topics the Commission may specify. The CRC thus plays an indispensable role in efforts to achieve a unified and stable nation and align the new constitution with international standards.

3.4 Building a human rights culture

In building a culture for the respect, protection and promotion of human rights, the government of The Gambia recognised the need for a legal and institutional framework to which a human rights culture will be anchored. To this end, a national human rights commission was established. On 13 December 2017, the National Assembly passed the National Human Rights Commission (NHRC) Act and the President assented to it on 13 January 2018. The NHRC Act establishes a Commission for the promotion and protection of human rights in The Gambia. The NHRC is authorised to investigate and consider complaints of human rights violations in The Gambia committed by the state, private persons and entities. The National Assembly recently approved the nomination of five candidates with proven records of respect for human rights, but they are yet to be officially appointed by the President as provided by the Act.

In fulfilment of their international human rights obligations, The Gambia became the ninth country on 23 November 2018 to make the declaration under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court) to allow individual direct access to the Court.²³ In addition to granting access to individuals, the declaration allows the court to trigger its jurisdictional competency under article 5(3) to allow for a limited number of access for NGOs.

3.5 'Gambianisation' of the Judiciary

Given the various assaults on the independence of the judiciary, and its politicisation, President Barrow's government has taken steps to reform the judiciary by appointing a slate of new judges, including a respected Gambian Chief Justice, Hassan Jallow, former prosecutor of the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Following this, numerous appointments took place including at the level of the Supreme Court. In 2017, 16 superior court judges were appointed including 14 Gambians to the Supreme Court, Court of Appeal and High Court respectively.²⁴

While these positive strides are encouraging, some of the questionable constitutional amendments (in terms of procedure and motivation) and the immensely unpopular decision of the Supreme Court on the freedom of assembly are seen as regressive steps underscoring the need for vigilance. The new government has a critical opportunity to reengage with constitutional protections and see through its numerous campaign commitments.

Despite the excitement and enthusiasm that greeted the onset of multiparty democracy following decades of authoritarian rule, The Gambia's democracy remains fragile. It is worth noting that the government has yet to amend laws that curtail freedom of expression, including those criminalising sedition, defamation and the publication of false news and infringe on freedom of assembly through the requirement for a permit to hold public rallies. This has led to several incidents. On 2 June 2017, a protest demanding the removal of heavy security presence near Jammeh's former residence in Kanilai turned deadly when Senegalese peacekeepers fired live ammunition to disperse demonstrators leading to the death of one person and at least six injured.

23 African Court on Human and Peoples' Rights., The Gambia becomes the ninth country to allow NGOs and individuals to access the African Court directly. 23 November 2018. Available from <http://www.african-court.org/en/index.php/news/press-releases/item/257-the-gambia-becomes-the-ninth-country-to-allow-ngos-and-individuals-to-access-the-african-court-directly> [Accessed 20 December 2019].

24 G Sowe & S Nabaneh., (2018). The Gambia: The state of liberal democracy. In The I-CONnect-Clough Center 2017 Global Review of Constitutional Law. Edited by R Albert R, D Landau et al.: 100-101.

On 18 June 2018, during a deadly clash between personnel of the Police Intervention Unit (PIU) and the community of Faraba Banta, two men were shot dead and nine others injured. A public outcry led to swift establishment of a commission of inquiry mandated to investigate the circumstances, deaths, injuries, destruction, those who may have ordered shootings, those who fired the shots and any possible failure or breakdown in the police chain of command that led to the shootings among others.²⁵

The Commission was mandated to operate for a period of one month, from 1 July to 31 July 2018 with the possibility of a one-month extension which it sought and was granted a month's extension in a letter dated 31 July 2018 to 31 August 2018. The Commission concluded its work on 27 August and presented its findings and recommendations in the form of a report to the President.²⁶ At the time of writing, a white paper of the findings had been published and government had made an undertaking to use appropriate criminal prosecutions against the perpetrators.²⁷

Other incidents include the arrest of sports journalist Baboucar Sey for holding a protest and press conference over a disputed soccer field claimed by real estate company, Global Properties. A peaceful protest, Occupy Westfield, against electricity and water shortages, on 12 November 2017, was dispersed by riot police after a permit they were granted was later rescinded. The unanimous decision of the Supreme Court on 23 November 2017 held that the grounds set out in Section 25 (4) of the Constitution and section 5 of the Public Order Act were reasonably justifiable in any democratic society. The Supreme Court stated that:

The right to assembly, as with other individual or collective rights, is usually exercised within the public space. As a result, its exercise by one may conflict with the exercise of the same right by others or with the exercise or enjoyment of other rights by other persons or with the needs for the maintenance of public order and security. Hence the need for some regulation or restrictions on the exercise of the right ... The requirement of a licence from the Inspector General of police for the holding of a public procession ... to prevent a breach of the peace are reasonable limitations on the right to assembly and to free expression.²⁸

25 The establishment of the Commission was gazetted on 1 July 2018 and all the Commissioners were sworn before his Excellency on Thursday 5 July 2018.

26 Report of the Faraba Banta Commission of Inquiry into the events of Monday 18 June 2018 at Faraba Banta, West Coast Region (2018).

27 Gambia Government. White Paper on the report of the Faraba Banta Commission of Inquiry. Supplement "A" to The Gambia Gazette No. 33 of 28 November 2018, Legal Notice No. 47 of 2018: 11-12.

28 Ousainou Darboe v 19 Others IGP & Inspector General of Police, Director General of National Intelligence Agency & the Attorney General, CML SUIT NO: SC 003/2016, 7-8.

This freedom of assembly case was brought by current vice-president, Ousainou Darboe, who invoked the original jurisdiction of the Supreme Court by seeking declarations that section 5 of the Public Order Act was unconstitutional as it violated section 25 of the Constitution which guarantees freedom to assemble and demonstrate peaceably and without harm. The plaintiffs also claimed the requirement levied on a person to apply for a police permit before holding any public gathering is illegal, unconstitutional and made in excess of legislative authority.

As noted above, the fundamental challenge The Gambia continues to face is adherence to good governance principles and practices in line with respect for human rights and the rule of law. The review process serves as a way of collecting, collating and assessing data which is critical for self-evaluation, and a way of interrogating its own policies and procedures.

The Supreme Court's reasoning runs contrary to international and regional human rights standards. For instance, Rule 71 of the African Commission on Human and Peoples' Rights (African Commission) Guidelines on Freedom of Association and Assembly in Africa, adopted in 2017, provides that:

Participating in and organizing assemblies is a right and not a privilege, and thus its exercise does not require the authorization of the state. A system of prior notification may be put in place to allow states to facilitate the exercise of this right and to take the necessary measures to protect public safety and rights of other citizens.

Although the Constitution permits the imposition of restrictions on the exercise of fundamental rights under specified circumstance, the unconstitutional, undemocratic nature of section 5 of the Act lies in the discretionary or arbitrary nature of the decision of the Inspector General of Police (IGP) to grant or deny a permit. The coalition government's 2016 manifesto described the Public Order Act as a law that '... gives too much power to the Inspector General of Police and fetters freedom of association and assembly.'

Thus, the continuous presence of this law has led to the same repressive response by the Barrow government: preventing the exercising of oversight over governance processes by civil society and the citizenry.

4. MOVING THE GOVERNANCE AGENDA FORWARD IN THE GAMBIA: USING THE INSTITUTIONAL FRAMEWORK OF THE APRM

The African Peer Review Mechanism (APRM) is a continental innovation that forms part of the New Partnership for Africa's Development (NEPAD).²⁹ The APRM is used by member countries to self-monitor all aspects of their governance and socioeconomic development. The APRM serves as a framework to build African-owned approaches to the process of democratisation.

The different stages of the APRM process produce an in-depth analysis of country-specific governance and development challenges, as well as truly participatory local approaches to problem-solving that are not limited to the executive but include the legislative and judicial branches. Assessments of the private sector, civil society and the media in the areas of governance and socioeconomic development are also part of the APRM process. This is particularly important given the urgent need for building national cohesion and functional democratic institutions as a progressive process. Adopting a multifaceted approach to the transitional justice process acts as a catalyst for economic, institutional, constitutional and social change.

The APRM provides the Gambian government with a space within which to develop a relationship-centric approach to addressing concerns, especially those associated with the country's transitional phase. Political dialogue can strengthen legitimacy in state institutions many of which are rife with mistrust and dysfunctional because they have been compromised. Indeed, when the political system is accountable, with institutionally independent judicial systems and strong networks of civic engagement, levels of social trust, reconciliation and collective national healing can greatly be increased. The APRM offers The Gambia a structured dialogue process for a functional democracy.

Although The Gambia's accession to the APRM is a positive step, a lack of political will and commitment to the process are evident in the lack of further activity since accession and The Gambia has yet to implement the obligations of its APRM membership. In theory, the APRM may represent a valuable opportunity for civil society to place critical issues on the national agenda and engage the state in policies that concerns citizens; in practice, however, Gambians in general are not aware of the APRM and the level and extent of participation it envisages.

The pressing issue for the Barrow government is how to make the APRM a valuable tool to foster democracy in The Gambia within the context of a transition from a dictatorship. Government's political will needs to be concretised through fund raising, creating effective institutions, including a credible and objective National Focal Point (NFP), and national coordinating bodies to facilitate the APRM process and educate the public. Meaningful engagement of all stakeholders in the review process will allay fears that the APRM is an initiative of government solely for its own benefit.

5. CONCLUSION

To conclude, The Gambia has undergone various epochs of political development since its independence in 1965. The current transition from dictatorship to a stable multiparty democracy needs to be deliberately nurtured and consolidated. Contingent to The Gambia's positive decision to join the APRM with the goal of improving good governance in the country, is the critical step that The Gambia and her people understand the obligations and processes that the country must undergo as an APRM member. Government should make deliberate efforts to ensure meaningful participation of civil society and the citizenry in this governance process. Given that The Gambia is undergoing a transitional justice process, it is important for the process to begin as soon as possible. If utilised well, the APRM has the potential to foster national dialogue involving all stakeholders.

Indeed, it is time for President Adama Barrow and his government to continue the path that they started when they joined the APRM.

²⁹ APRM 'Statute of the African Peer Review Mechanism APRM Strategic Plan, 2016-2020' (2016) 7.

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AFRICA GOVERNANCE INSIGHTS

Volume I: Governance, Human Rights
and Migration in Africa



PAPER 4

21ST CENTURY MIGRATION FROM AFRICA TO EUROPE: A GOVERNANCE PERSPECTIVE

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ABSTRACT

There are diverging opinions on trends in migration from Africa. While there are safe and regular migration patterns, there are also unsafe and irregular patterns, the latter often rife with human rights violations and humanitarian concerns. The risks people take to reach different parts of the world demands attention and needs solutions. This humanitarian crisis is well documented. Human rights violations and assaults take place at the ports of exit to Europe, during the journey to Europe and when the migrants reach their destinations.

Arguably, it is an indication of a multi-layered problem, with governance at its core. Governance in some African countries has few or no deliverables aimed at creating better societies for all. This perpetuates and deepens poverty and the inhumane conditions that migrants seek to flee. Against this background, this paper explores of the role of governance in the migration of African populations to Europe.

This paper examines the drivers and impacts of migration and undertakes an analysis of the human rights implications of irregular migration patterns and explores possible solutions in law and policy, human rights discourse and forums like Agenda 2063. Moreover, prioritisation of well-functioning economies within Africa, through good governance, has the potential to address economic determinants of irregular migration and reduce their impact.

1. INTRODUCTION

Migration is a phenomenon that is part of African history and societal make-up of today. The Bantu migrations are a good example to cite in this regard. In a series of waves, the Bantu-speaking people moved from West Africa to settle in central, eastern and southern Africa.¹ These migrations were often initiated by ambitious leaders who seceded from a group in order to settle elsewhere.² As such, Bantu migrations are considered to have made 'a major contribution to the cultural history of mankind' because of the specialised skills they carried in smelting and working metal.³

Research shows that migration has increased in the 21st century due to a number of factors, including the fact that the world is much more interconnected today than it was 20 years ago.⁴ Improvements in transportation has not only made it easier, but also, in some instances, cheaper to move in search of jobs, opportunities, education and better quality of life.^{5 6 7} These are some of the socioeconomic determinants that drive people to migrate to 'safe havens'.

This paper focuses on irregular migration patterns from Africa to Europe, and the drivers and implications thereof. Irregular migration is defined as 'movement that takes place outside the regulatory norms of the sending, transit and receiving countries'.⁸

Research on human trafficking, slave trade, and loss of life, and other human rights violations by smugglers and transit countries, is robust and offers an opportunity to critically analyse the multi-layered issues, with governance at the core. It is the position of this paper that to adequately address irregular migration and its implications, governance is of paramount importance. More specifically, economic governance and prioritisation of well-functioning economies are essential to address some of the drivers of irregular migration mentioned earlier.

As a background to the study, the paper gives an account of some of the discussions around the drivers of irregular

migration from Africa to Europe. In doing so, the study will investigate whether economic determinants are central in pushing for irregular migration. Thereafter, the paper will interrogate some of the solutions given already and assess their efficacy. The study will conclude by offering solutions and recommendations.

2. IRREGULAR MIGRATION: DRIVERS AND EFFECTS

There is a view that irregular migration is not the first choice for those considering leaving the continent.⁹ However, new repressive policies on legal migration to Europe increases the likelihood that people will opt for irregular migration.^{10 11 12} This, coupled with the need to escape poverty, inequality and unsustainable livelihoods further increases the desire to move.¹³ Therefore, 'migration is seen as an opportunity of a lifetime that offers chance at a better life for migrants and their families, with benefits extending to generations to come'.¹⁴

Gimenez-Gomez states that although economic determinants are not the sole driver for irregular migration, they are the most common and that the income gap between African and European countries acts as a push-pull factor for migration.¹⁵ There is a significant difference in the average income in terms of average gross national income (GNI) per capita.¹⁶ The GNI is considered a good measure to show the earnings of residents in a country and its capacity to provide for their well-being.¹⁷ In 2019, the average GNI for sub-Saharan Africa was USD 1,588 while for the European Union it was USD 35,970.¹⁸ The statistics show us the stark differences in earnings; people would rather settle in a place where they might earn more and have more disposable income to meet their needs and wants.

Research by the United Nations High Commissioner for Refugees (UNHCR) records why some undertake the perilous journey to Europe via the northern parts of Africa.

1 Falola, T. 2002, *Key Events in African History: A Reference Guide*, Greenwood Publishing Group, p.49.
2 Ibid.
3 Gann, L.H. & Duignan, P., 1999, *Africa and the World: An Introduction to the History of Sub-Saharan Africa from Antiquity to 1840* University Press of America, p.175.
4 United Nations, Department of Economic and Social Affairs, Population Division, 2017. *International Migration Report 2017*.
5 United Nations, Department of Economic and Social Affairs, Population Division, 2017. *International Migration Report 2017*.
6 Browne, E., 2015. Drivers of irregular migration in North Africa. GSDRC Helpdesk Research Report 1271.
7 Giménez-Gómez, J.M., Walle, Y.M. and Zergawu, Y.Z., 2019. Trends in African migration to Europe: Drivers beyond economic motivations. *Journal of Conflict Resolution*, 63(8), pp.1797-1831.
8 International Organization for Migration (IOM), 2011. Key Migration Terms viewed on 31 January 2019, from <https://www.iom.int/key-migration-terms>.

9 Browne, E., 2015. Drivers of irregular migration in North Africa. GSDRC Helpdesk Research Report 1271.
10 Flahaux, M.L. and De Haas, H., 2016. African migration: trends, patterns, drivers. *Comparative Migration Studies*, 4(1), pp.1-25.
11 Giménez-Gómez, J.M., Walle, Y.M. and Zergawu, Y.Z., 2019. Trends in African migration to Europe: Drivers beyond economic motivations. *Journal of Conflict Resolution*, 63(8), pp.1797-1831.
12 Browne, E., 2015. Drivers of irregular migration in North Africa. GSDRC Helpdesk Research Report 1271.
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14 Muthumbi, J., Davis, J., & Chereh-Robson, M., 2018 'Is African migration a curse or a boon?' UN Conference on Trade and Development viewed 31 January 2019, from <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1763>.
15 Giménez-Gómez, J.M., Walle, Y.M. and Zergawu, Y.Z., 2019. Trends in African migration to Europe: Drivers beyond economic motivations. *Journal of Conflict Resolution*, 63(8), pp.1797-1831.
16 Giménez-Gómez et al, 2019.
17 World Bank on GNI and its development relevance viewed 31 January 2019, <https://data.worldbank.org/indicator/NY.GNP.FATLS.CD>.
18 World Bank Data viewed 31 January 2019, from <https://data.worldbank.org/indicator/NY.GNP.MKTP.CD>.

A disappointing reality of our time is widespread poverty, induced by economic crises in much of Africa, which acts as a push factor for irregular migration. According to the UN Office of the High Commissioner for Human Rights [OHCHR], ‘... that millions of people are living in poverty despite unprecedented economic development, technological means and financial resources is a moral outrage’.¹⁹ For Africa, economic development through better economic governance and adoption of international best practices of economic governance must be prioritised. Africa’s considerable wealth of natural resources sees it poised to develop and arguably move towards meaningful transformation of all societies through better governance.

To escape poverty, some people migrate in order to access the opportunity to earn more, especially where similar opportunities lack in their home countries. In doing so, they are exposed to unfortunate human rights abuses. Research by the United Nations High Commissioner for Refugees (UNHCR) records lived experiences by those who undertake the perilous journey to Europe via the northern parts of Africa.

A Somalian national fleeing drought and unemployment in his home country endured extremely cramped conditions during the trip from Sudan to Libya. An Eritrean woman was held captive for nine months, enduring beating and sexual abuse by smugglers demanding payment for the trip.²⁰ These accounts represent but a fraction of similar stories told by countless others.

The dignity of migrants is often undermined in transit countries.²¹ Research shows that when in transit, migrants experience discrimination, racism and stigmatisation from all levels of society.²² This includes treatment at policy level, through the media and at the hands of ordinary citizens in some instances.²³ Assaults on the civil and political rights of migrants include their rights to equality and dignity. Furthermore, slavery and exploitation are realities of the migrant experience.

The socioeconomic rights of migrants in transit countries are often contravened. They are commonly underpaid and exploited, poorly remunerated and work in the most dangerous jobs. Moreover, migrants often lack access to basic services such as healthcare, education and legal assistance. It is a concern that migrant children born in

transit countries may grow up without basic education and healthcare.²⁴

Given the above, the writer submits that the dignity of those migrants is undermined. Access to education, healthcare and good working conditions are just a few aspects of what determines human dignity. The continuation of such atrocities goes against AU treaties and protocols, especially the African Charter on Human and Peoples’ Rights. It also goes against *ubuntu* – a revered African philosophy that emphasises humanity and acting humanely towards the next person. It is therefore pertinent to address not only the experiences of migrants in transit but also the root causes of irregular migration. Arguably, governance is at the core of these socioeconomic problems.

3. POTENTIAL FOR IMPROVEMENT

Identifying governance at the core of the multilayered and multifaceted problem of irregular migration presents an opportunity to explore how this may improve for the betterment of most parts of Africa. Several questions arise to this end, such as: What is governance? Which type is better suited to address the issues discussed earlier? Who are the actors in the anatomy of governance? And, what is the role of regional and international organisations?

Put simply, governance is all processes of governing undertaken by a government of a state through laws and norms.²⁵ Through governance, power is exercised to manage a country’s political, economic and social resources for development.²⁶ The Mo Ibrahim Foundation define governance as ‘the provision of the political, social and economic public goods and services that every citizen has the right to expect from his or her state, and that a state has the responsibility to deliver to its citizens.’²⁷

Accordingly, governance has expanded to encompass a need to be ‘good’, thus, ‘good governance’. Good governance has eight characteristics: upholding the rule of law, participation, consensus, accountability, transparency, responsiveness, effectiveness and efficiency, equitable and inclusiveness.²⁸ With this in mind, it is noted that to achieve good governance the state, civil society, and regional and international communities-at-large must all play their part.

19 United Nations Office of the High Commissioner for Human Rights, 2012. Guiding Principles on Extreme Poverty and Human Rights.
 20 United Nations High Commissioner for Refugees 2019 ‘Desperate Journeys: January – December 2018’
 21 Browne, E., 2015. Drivers of irregular migration in North Africa. GSDRC Helpdesk Research Report 1271.
 22 Cherti, M. & Grant. P 2013. The Myth of Transit: Sub-Saharan Migration in Morocco, Institute for Public Policy Research; United Nations., 2017. Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance Issue Brief No.1.
 23 Ibid.

24 Ibid.
 25 Bevir, M., 2012. *Governance: A very short introduction*. Oxford University Press. Oxford.
 26 World Bank, 1992. *Governance and development (English)*. Washington, DC: The World Bank. <http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development>.
 27 Umar, Z. 2017 Defining governance, *Mo Ibrahim Foundation* <https://mo.ibrahim.foundation/news/2016/defining-governance>.
 28 United Nations Economic and Social Commission for Asia and the Pacific, 2009 ‘What is Good Governance?’ Viewed 31 January 2019 <https://www.unescap.org/sites/default/files/good-governance.pdf>.



Apart from good governance, there should be an appreciation of rights-based approach to governance or human rights-based governance. This is considered a governance practice that equality and freedom are necessary for everyone to fulfill their full potential in a life free from fear.²⁹ Furthermore, good governance requires political commitment of states through legislation and action plans to ensure the full compliance of all stakeholders in a transparent manner, in order to uphold human dignity as the foundation of fundamental human rights.³⁰

Of note, there is an appreciation of a human rights based approach to development in Africa by the African Union. This was discussed in 2017 at a policy forum on 'Strengthening Africa's Human Rights Based Approach to Development: the Nexus between Strong Human Rights Institutions and Development'. First, there is acknowledgment that there is a nexus between human rights and development.³¹ Second, the AU Commissioner highlights that the African Union continues to prioritise the promotion and protection of human rights. The prioritisation of human rights includes socioeconomic rights. These commendable efforts cast light on the issues at the core of push factors of migration indicated earlier.

Given that economic determinants are considered a significant driver for irregular migration, this too should be an area of prioritisation by governments. There is a need to prioritise well-functioning economies which will in turn provide the necessary conditions for better socioeconomic wellbeing of their citizens.³²

When good governance is prioritised by African governments, particularly those from which most migrants come, tangible results such as socioeconomic improvement of populations may result. Having done so, human dignity is upheld and the incidence of irregular migration can be significantly reduced.

29 Fundamental Rights Forum, 2016. Panel debate on rights based governance, viewed on 31 January 2019, from <https://fra.europa.eu/en/event/2016/fundamental-rights-forum-connectreflectact>.

30 Ibid.

31 African Union, 2017. Strengthening Africa's Human Rights Based Approach to Development: the Nexus between Strong Human Rights Institutions and Development. Policy Forum, 6 September 2017.

32 See generally Katsenga NN. 2018, A Case for a Justiciable Right to a Well-functioning Economy in Zimbabwe, University of the Western Cape, Unpublished Doctor of Laws Thesis.

Another area of prioritisation similar to the above, is the need to reduce poverty and inequalities. Pursuing the eradication of poverty and reducing inequalities is both moral duty and a legal obligation under existing international human rights law.³³ Norms and principles of human rights must therefore play a major part in all public policies affecting persons living in poverty.³⁴ For example, the way in which national governments formulate their fiscal policies must consider the goal of alleviating poverty. Moreover, States must create enabling environments to combat poverty and simultaneously protect human rights.³⁵ In doing so, States work towards significantly reducing the chances of irregular migration and its contingent risks.

Apart from the human rights discourse, one will also have an appreciation of the AU Agenda 2063. This is a framework for 'socio-economic transformation of the continent' which 'seeks to accelerate the implementation of past and existing continental initiatives for growth and sustainable development'.³⁶ Agenda 2063 also seeks to ensure that the continental endowments of its people and natural resources, among other things, are used to effect equitable and people-centred growth and development.³⁷ Therefore, the guiding policy that seeks to transform Africa is already available. It is the matter of implementation by the State that needs to be emphasised.

The State constantly finds itself at the epicentre of solving the multi-layered problem of unsafe and irregular migration from Africa to Europe. The State, usually through its executive arm, is the primary actor from whom the most action is required. Other non-state actors such as civil society and citizens, regional and international organisations, also play a role in governance through demanding accountability. However, the State remains central in ensuring and guaranteeing that civic spaces and participatory democracy are available for civil society and citizens-at-large to play their part.

4. OTHER EFFORTS TO ADDRESS IRREGULAR MIGRATION

There have been efforts to address irregular migration through the EU-Africa Declaration on Migration and Mobility of 2014. In the Declaration (2014), the EU and the AU bodies,³⁸ along with their member countries, noted aspects of migration, such as (i) the benefits of migration, (ii) the common goal to maximise the development impact of migration and (iii) providing employment opportunities for the youth at regional level, among other things. The action plan of this initiative was, however, only from 2014 to 2017. Its success is questionable given that irregular migration is still prevalent.

5. CONCLUSION AND RECOMMENDATIONS

The experiences of migrants travelling from their home countries en route to Europe are disappointing when viewed through a human rights lens. Moreover, it goes against *ubuntu*, an African philosophy that best captures what ought to be the norm within Africa. The socioeconomic status of the countries of origin must be addressed as a root cause. Good governance and human-rights-based approach to governance are governance fundamentals that will address some of the drivers of irregular migration.

33 See generally Katsenga NN. 2018, A Case for a Justiciable Right to a Well-functioning Economy in Zimbabwe, University of the Western Cape, Unpublished Doctor of Laws Thesis.

34 Ibid

35 United Nations Development Programme., 2003. 'Poverty Reduction and Human Rights. UNDP Practice Note p.8.

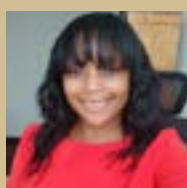
36 African Union Commission's overview of Agenda 2063, available at <https://au.int/pt/node/31456>.

37 Ibid.

38 President of the European Council, the President of the European Commission, the President of the African Union and the Chairperson of the African Union Commission were present, representing their respective bodies.

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20. United Nations Higher Commissioner for Refugees 2019 'Desperate Journeys: January – December 2018' viewed on 31 January 2019, from https://data2.unhcr.org/en/documents/download/67712#_ga=2.168860641.1131829030.1549531295-780502721.1549531295.
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22. United Nations Office of the Higher Commissioner for Human Rights 2012 'Guiding Principles on Extreme Poverty and Human Rights' viewed on 31 January 2019, from https://www.ohchr.org/Documents/Publications/OHCHR_ExtremePovertyandHumanRights_EN.pdf.
23. United Nations, Department of Economic and Social Affairs, Population Division, 2017. *International Migration Report 2017*.
24. United Nations. Human rights of all migrants, social inclusion, cohesion and all forms of discrimination, including racism, xenophobia and intolerance. Issue Brief No.1 from https://refugeesmigrants.un.org/sites/default/files/issue_brief_for_first_thematic_session.pdf.
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PAPER 5

MIGRATION AND HUMAN RIGHTS: EXPLORING KEY POLICY GAPS

AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

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ABSTRACT

The exponential increase in the number of international migrants has prompted global recognition of a migration crisis. Migration and human rights are inextricably linked, which reinforces the role of international law and policy to protect individuals at national level. African leaders too are urged to subscribe to the tenets of democracy, good governance and the rule of law and respect, promote and effect human rights in the governance of migration.

Although much has been written about migration and human rights in recent years the literature fails to fully generate insights on the linkages between basic principles of international human rights law and international law in the context of Africa's policy discourse with the European Union (EU), a major partner in migration governance.

This paper examines various policy issues that need to be reconciled for effective migration governance by exploring the principles of International Law and International Human Rights Law and specific legal instruments and various frameworks applicable to migration governance. The paper defines and explains concepts, such as return of migrants and reintegration, that will assist in an understanding of the complexities of migration. It goes on to pinpoint policy gaps with regard to governance and human rights and how they relate to differences in AU-EU policy positions on migration, and looks at how traditional values affect political will.

The paper concludes by advocating for reconciliation of policy positions and the involvement of civil society organisations through ECOSOCC and other channels to popularise a human rights approach to migration governance.

1. INTRODUCTION

A massive increase in the number of international migrants prompted recognition of a migration crisis,¹ awareness of migration and human rights has been heightened, reinforcing the role of international law and human rights in the protection of individuals at national level. The link between migration and human rights is undoubtedly compelling in contemporary discourse to the extent that the pursuit of one to the exclusion of the other is deemed to be a serious omission in the development–security nexus.

The terms ‘human-rights-based approach’² and ‘migration governance’³ are used in various global, regional and national policy documents aimed at enhancing cooperation on international migration in all its dimensions.

In September 2015, the UN General Assembly adopted Agenda 2030 for Sustainable Development, which places international migration and its multidimensional nexus with development on the global development agenda.⁴ In 2018 the Global Compact for Safe, Orderly, and Regular Migration was adopted. The compact covers all dimensions of international migration in a holistic and comprehensive manner.⁵ In a new development at continental level the AU revised its migration policy framework in the same year to reflect changes in the migration terrain.

The AU’s Agenda 2063, a continental development framework; the Economic and Social Cultural Council (ECOSOCC),⁶ an organ that serves as a platform for CSOs in Africa; the New Partnership for Africa’s Development (NEPAD) and the African Peer Review Mechanism (APRM), have seen many African countries subscribe to tenets of democracy, good governance and the rule of law, which call upon African leaders to respect, promote and effect human rights in the governance of migration. The Africa (Banjul) Charter on Human and Peoples’ Rights (Adopted 27 June 1981), which came into force on 21 October 1986, espouses various human and peoples’ rights under Article 12, including those relating to migrants.

Although promotion of and respect for human rights lie at the heart of global governance, Africa faces hurdles in their pursuit because cultural relativism creates loopholes in the design, processes and methods for applying international standards.

Much literature has examined migration and human rights in recent years. ECOSOCC (2017) provides recommendations on migration and human rights.⁷ Regan (2014) highlights the aspects of development and human rights in migration;⁸ both Regan (2014) and Molenaar (2018) examine several aspects of human rights and migration generally.⁹

However, these articles do not fully generate insights on the linkages between basic principles of international human rights law and international law in the context of Africa’s policy discourse with the EU, one of the major partners in migration governance.

This paper examines various policy issues that need to be reconciled for effective migration governance. It does not perform an in-depth analysis of certain concepts for the sake of brevity.

The first section explores those principles of International Law and International Human Rights Law that are applicable to migration governance, and highlights specific legal instruments and various frameworks including the African Union–European Union (AU–EU) partnership that also encompasses the AU–EU civil society partnership within the Joint Africa–Europe Strategy for Development (JAES).

- 1 Over the past four-and-a-half decades, the estimated number of international migrants has increased. In 2015, at least 244 million people were living in a country other than their country of birth – almost 100 million more than in 1990 (153 million) and over three times the number in 1970 (84 million) (IOM, 2018)
- 2 A human-rights-based approach is a conceptual framework for human development normatively based on international human rights standards and intended to promote and protect human rights. It seeks to analyse inequalities at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.
- 3 The [Migration policy framework for Africa and plan of action \(2018–2030\)](#) defines migration governance as the traditions and institutions by which authority on migration, mobility and nationality in a country are exercised, including the capacity of the government to effectively formulate and implement sound policies in these areas. In the [Migration Governance Framework \(MiGOF\)](#) migration policy is defined as the ‘law and policy affecting the movement of people’ and includes policy on ‘travel and temporary mobility, immigration, emigration, nationality, labour markets, economic and social development, industry, commerce, social cohesion, social services, health, education, law enforcement, foreign policy, trade and humanitarian’ issues (IOM, 2017).
- 4 Unlike the Millennium Development Goals (MDGs), which had no reference to migration issues, the Sustainable Development Goals (SDGs), which underpin the 2030 Agenda, include several targets directly related to migrants, migration and mobility, and human rights, and demand data to measure progress towards the achievement of numerically specified targets (UN, 2015a).
- 5 The [Global Compact](#) comprises 23 objectives for better managing migration at local, national, regional and global levels. One key objective is: ‘Intends to reduce the risks and vulnerabilities migrants face at different stages of migration by respecting, protecting and fulfilling their human rights and providing them with care and assistance’.

- 6 Article 22 of the Constitutive Act states: ‘The Economic, Social and Cultural Council shall be an advisory Organ composed of different social and professional groups of the Member States of the Union’.
- 7 ECOSOCC, 2017. *ECOSOCC Strategic Plan, Addis Ababa, Ethiopia*.
- 8 Regan, C. 2014, International migration: human rights and development dimensions, in O. Grech & M. Wohlfeld (Eds.), *Migration in the Mediterranean: human rights, security and development perspectives* (pp. 146-164). Msida: Mediterranean Academy of Diplomatic Studies.
- 9 Ibid; Molenaar, F., 2018. *Conflict-sensitive and humane migration management in the Sahel*. CRU Report, February. The Hague: Netherlands Institute of International Relations Clingendael.

Section two discusses migration complexities and overlaps in the migration conceptual framework to support an understanding of definitions in this field. Return of migrants and reintegration to their place of origin are also examined to present a complete migration cycle from entry, to return, and reintegration.

Section three unbundles gaps from a policy, governance and human rights perspective. This component examines divergent AU–EU policy positions on migration, including differences in their approaches to dealing with migration; the impact of traditional values on political will; the effect on migration as a result of lack of internalised democratic and human rights values.

The last section concludes by advocating for the need to reconcile various policy positions and involve more civil society organisations through ECOSOC and other channels to popularise human rights applicable to migration governance.

2. INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Article 1 of the African Charter on Human and Peoples' Rights (Banjul Charter) requires its member states to 'recognise the rights, duties and freedoms enshrined in the Charter' and to 'undertake to adopt legislative or other measures to give effect to them'.¹⁰ The African Charter and the African Commission's settled cases on African jurisdictions, as a guide to the interpretation and application of national law, are recognised in various literature, signifying a *prima facie* presumption that the legislature is never bent to act in breach of international law,¹¹ including treaty provisions' – as interpreted by relevant bodies.¹² Here the paper examines fundamental historical views and basic international law principles to fully appreciate policy issues in the application of human rights to migration.

International law concentrates primarily on the rights and duties of states, and the system of rules governing the relations between sovereign and independent states. In this legal regime it is an exception for individuals to be held responsible before national and international courts. However, in situations such as, *inter alia*, piracy, crimes

against peace, and crimes against humanity, individual responsibility falls under international law because traditionally, these crimes are deemed serious.

Individuals were not a concern of international law before the Charter of the United Nations was signed in 1945, and the protection of human rights of individuals became a primary purpose of the UN.¹³

It has been argued that the antecedents of international law rest predominantly on European tradition for it is a system developed at a time of European hegemony.^{14,15} From this perspective it could be argued that the international legal regime is Eurocentric in its methods and ideology because the ideological assumptions that reinforce international law do not only originate in the content but also in the actual process and procedure of the law.¹⁶ This is true for human rights in Africa and other developing countries.

Contrary views on the origins of human rights focus on human dignity and the processes for developing the concept of rights. It seems both the originality and coherence of Western civilisation is overestimated. Europe certainly did not invent human rights, any more than it invented the idea of human dignity. It was simply able to conduct – and this was its merit – systematic research on the theme in the form of an open progressive discussion'.¹⁷ Indeed, the political and ideological world that commands international law also defines the reality of human rights. As such, in modern times, difficulties in isolating the concept of human rights from international law remain. Seen from frameworks governing entry of migrant into a foreign land, the issues of jurisdiction, and the principle of *refoulement* in migration governance, the interface among regimes of international law, human rights law, and, to a certain extent, refugee law, underscores the need to promote human rights at member states level. At continental level, promotion of migrant rights is embedded in the following clauses in Article 12 of the Banjul Charter:

1. Every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.
2. 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.

10 Organisation of African Unity (OAU), 1981. African Charter on Human and Peoples' Rights (Banjul Charter). <https://www.achpr.org/legalinstruments/detail?id=49>

11 For example, in *Interights v Botswana*, the Commission relied on its resolution on the death penalty to urge 'all states party to the African Charter on Human and Peoples' Rights to take all measures to refrain from exercising the death penalty'. Later, in November 2015, the Commission specifically urged Botswana 'to take all measures to comply with the Resolution urging State Parties to observe a Moratorium on the Death Penalty' and 'to take steps to abolish the death penalty'.

12 Ssenyonjo, M., 2018. Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987–2018). *International Human Rights Law Review*, 7(1), pp.1-42.

13 Dixon, M., McCorquodale, R. and Williams, S., 2011. *Cases and materials on international law*. Oxford University Press.

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15 Cassese, A., 2005. *International law*. 2nd Edition, Oxford Press.

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17 Hountondji P. 'The Master Voice – Remarks on the Problem of Human Rights in Africa' in UNESCO and International Institute of Philosophy (eds.) *Philosophical Foundations of Human Rights* (Paris: Unesco and Institute of Philosophy, 1986) 323.

Article 12(2) above has an interesting qualification. The phrase ‘protection of national security, law and order, public health or morality’ may be used to justify breaching the rights of migrants; the elements of entry, jurisdiction and refoulement, which are examined later in this paper, attract careful application of such rights. As will be seen, linkages in principles of international law with other legal regimes such as Refugee Law and International Humanitarian Law shape the application of rights to migrants.

2.1 Entry, Jurisdiction, and Refoulement

Although the twenty-first century has witnessed changes in state sovereignty, legal frameworks continue to apply it to secure consensus among member states. State-centric international law has been changed to protect the rights of individuals at member-state level. It is significant that international jurisdictions have cemented this landmark achievement in pursuit of human rights.

In *Prosecutor versus Duško Tadić* (Jurisdictional Phase, 3511M35[1996], International Tribunal for Former Yugoslavia), the prosecution accused Tadić on the basis of individual criminal responsibility of crimes against humanity of acts of persecution, deportation, confinement, rape, murder, and inhumane acts; grave breaches for torture or inhuman treatment, willful killing, and willful causing of serious injury to body or health; and violation of the laws or customs of war for cruel treatment and murder. The Court declared that, ‘the impetuous development and propagation in the international community of human rights doctrines, particularly after the adoption of the Universal Declaration of Human Rights in 1948, has brought about significant changes in international law, notably in the approach to problems besetting the world community. A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach [...]’¹⁸ Protection of the individual has been placed at the heart of international law, with human rights-based approach and migration governance as beneficiaries.

2.1.1 Entry

Authority of the state on entry and jurisdiction in relation to a migrant setting foot on foreign land does not override strict observance of international human rights and general principles of international law. Moreover, it is settled law that granting entry to non-nationals is at the State’s discretion, noting that in exercising control of their borders, States must act in accordance with their international human rights obligations. Article 13(2) of the Universal Declaration of Human Rights states that

18 <https://casebook.icrc.org/case-study/icty-prosecutor-v-tadic>; Paragraph 95 ICTY, *The Prosecutor v. Duško Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, 2 October 1995.

everyone has the right to leave any country, including his own, and to return to his country. International law permits a migrant to enter or remain in a territory based on specific migrant categories, especially in situations such as where a migrant fulfils the criteria for refugee status, or complementary protection; or where entry to the territory is necessary for purposes of family reunification.

Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) states that no one shall be arbitrarily deprived of the right to enter his own country. Article 5d(ii) of the International Convention on the Elimination of All Forms of Racial Discrimination further provides the right to leave any country, including one’s own, and to return to one’s country.¹⁹ The force of these provisions should not be underestimated in line with principles of international law and international human rights law. The latter will continue to transform the migration terrain irrespective of the interpretation of the term jurisdiction – for issues of rights have transcended territorial borders.²⁰

2.1.2 Jurisdiction

International law recognises the applicability of human rights treaties to the exercise of jurisdiction, while the jurisdictional competence of a state is principally determined territorially.²¹ The basic principle in international human rights law, that States must guarantee, secure and protect the human rights of everyone within their jurisdiction, irrespective of nationality, requires a brief examination of whether a migrant has entered the territory or not.

The space or persons over which a State has authority²² and for which the State is therefore internationally responsible determines whether a person is subject to the jurisdiction. Crucially therefore, the first question is whether a migrant has ‘entered’ the State or has presented themselves at an ‘international zone’ or ‘*zone d’attente*’ in an airport.²³ Obviously, once a migrant has accessed a State’s territory, the response is in the positive, although recognising such jurisdiction solely on the basis of State

19 Borisevich, I., 2017, Presentation on Human Rights Dimension of Returns, Readmission and Reintegration, UNCHR, 25 Years in Armenia, June 2017.

20 The African Court has also found violations of other human rights instruments, including the UDHR and the ICCPR. For example, in *Anudo Ochieng Anudo v The United Republic of Tanzania*, Tanzania annulled the applicant’s passport (Tanzanian nationality), declared him an ‘illegal immigrant’ and expelled him from Tanzania, without the possibility of an appeal before a national court. The Court found that this constituted a violation of the applicant’s right not to be arbitrarily deprived of his nationality according to Article 15(2) of the UDHR.

21 Kanalan, I., 2018. Extraterritorial state obligations beyond the concept of Jurisdiction. *German Law Journal*, 19(1), pp.43-64.

22 *Cyprus v. Turkey* (dec., EurComm’n HR), App. Nos. 6780/74 and 6950/75, 26 May 1975, 136, para. 8.; *Loizidou v. Turkey*, App. No. 15318/89, Judgment (preliminary objections), 23 February 1995, para. 62.

23 The Court notes that even though the applicants were not in France within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law; see *Amuur v. France*, ECtHR, Case No. 17/1995/523/609, Judgment of 20 May 1996, para. 52.

territory fails to reflect a realistic legal position.²⁴ Certainly, jurisdiction has a wider meaning than the one relating to national territory and, in this regard, the European Court of Human Rights found that jurisdiction has extra-territorial reach in a number of distinct situations. This includes cases in which the State exercises effective control of an area outside its borders,²⁵ where agents of the State, acting either lawfully or unlawfully outside the State's territory, exercise authority or control over an individual, for example, where someone is held in detention, or is within firing range of the State's forces in a border zone.²⁶ States, therefore, have obligations to promote, protect and fulfil human rights beyond their borders.

2.1.3 Non-refoulement

The principle of non-refoulement is established in International Humanitarian Law (IHL), International Refugee Law and International Human Rights Law (IHRL), and has different scopes and conditions of application for each of these bodies of law.²⁷ It prohibits the return of any person to a place where the individual is at risk of death, inhumane or degrading treatment or punishment, torture and other cruel, or other irreparable harm.²⁸ It follows that under refugee law the principle of non-refoulement protects refugees against return to places of persecution, while in IHL it only applies to categories of persons affected by armed conflict.

Under human rights law, it can protect any person under a State's jurisdiction, provided a pertinent danger exists in the State to which the person shall be transferred.²⁹ As a result, it should be noted that authoritative bodies such International Committee of the Red Cross (ICRC) and the United Nations (UN) continue to apply a broad definition of 'migrant' that focuses on vulnerabilities rather than legal status and different regimes may emphasise specific targets of protection.

Violations of economic, social and cultural rights may fall within the scope of the prohibition of non-refoulement because they represent violations of the right to life or freedom from torture or other cruel, inhuman or

degrading treatment or punishment.³⁰ The principle of non-refoulement also prohibits transferring a person to an authority where there is a risk that the receiving authority might transfer the person to another authority.

It follows that all migrants are protected at all times from refoulement whether directly or indirectly. More importantly, the principle of non-refoulement is *jus cogens*, that is, it is a fundamental principle of international law accepted by the international community of states as a norm from which no derogation is ever permitted.³¹

2.2 Specific Legal Frameworks

2.2.1 International Human Rights Frameworks

Article One of the Universal Declaration of Human Rights, which is applicable to all human beings, states that 'all human beings are born free and equal in dignity and rights' and is enshrined the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR). Human rights are universal and apply equally to all persons, without exception, and every human being is entitled to them to the extent that no one acquires them because they are a citizen or a worker, or by virtue of any other status.³²

The ICESCR and ICCPR are complemented by the following regional human rights instruments:

- African Charter on Human and Peoples' Rights;
- Arab Charter on Human Rights;
- European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols;
- The Revised European Social Charter (ESC);
- The American Declaration on Rights and Duties of Man (ADRDM); and,
- The American Convention on Human Rights (ACHR) and its Additional Protocol in the Area of Economic, Social and Cultural Rights, for the Inter-American system.

As these core frameworks demonstrate, various regions of the world developed conventions to advance human rights in a manner that reflects the realities on the ground. Although a closer look at the provisions of the African Charter on Human and Peoples Rights reveals some

24 Milanovic, M., 2013. *The Concept of State Jurisdiction in Human Rights Treaties*.

25 In the case of military occupation where effective control of an area can be demonstrated.

26 See, *Issa and Others v. Turkey*, ECtHR, op. cit., fn. 46; *Öcalan v. Turkey*, ECtHR, GC, Application No. 46221/99, Judgment of 12 May 2005; *Ilich Sanchez Ramirez v. France*.

27 See for example refoulement (Art 33) of the 1951 Convention relating to the Status of Refugees prohibits a state from expelling or returning a refugee in any manner whatsoever to territories where she/he would be exposed to persecution.

28 International Committee of the Red Cross, 2018., Note on migration and the principle of non-refoulement, International Review of the Red Cross, Reports and Documents from <https://www.icrc.org/en/international-review/article/note-migration-and-the-principle-of-non-refoulement>.

29 Rodenhäuser T, 2018. The principle of non-refoulement in the migration context: 5 key points. Humanitarian Law and Policy blog. <https://blogs.icrc.org/law-and-policy/2018/03/30/principle-of-non-refoulement-migration-context-5-key-points/>.

30 For example, degrading living conditions, lack of medical treatment, or mental illness have been found to prevent return of persons.

31 Šebesta, J, 2010. *The principle of non-refoulement. What is its standing in international law?* <http://www.ksd.cz/>

32 Dixon, M., 2013. *Textbook on international law*. Oxford University Press.

significant departures from other universal standards, its conventions mimicked similar, if not same provisions to a certain extent.

Although the above treaties are our main reference for human rights standards, other human rights instruments that focus on different demographics or tackle human rights from a migrant perspective³³ further elucidate the framework for the respect, protection, promotion and fulfillment of human rights.³⁴ These instruments are the backbone of the analysis of the specific human rights issues in the migration framework.³⁵

Other key international law treaties that compel member state to apply rights of migrants in different situations should also be noted. The first of these is international refugee law embodied in the Geneva Convention Relating to the Status of Refugees of 1951 and its Protocol Related to the Status of Refugees of 1967 (together the Geneva Refugee Convention) but augmented by regional instruments and standards. The second is international criminal law related to human trafficking³⁶ and smuggling³⁷ and international maritime law governing those migrants who travel by sea. These two key bodies of law concern migrants in specific circumstances and specific rights applicable to different categories of migrants.

2.2.2 Migration Frameworks in Africa

Africa has several legal regimes developed to address the challenge of large numbers of refugees fleeing from various conflicts. The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, promulgated by the Organisation of African Unity (OAU), was a precursor to various legal frameworks on migration and the first convention with a binding effect. Of paramount importance in this convention is the fact that it expanded the definition of a refugee to include persons fleeing generalised violence. Although the convention has been a watershed in migration, other continental initiatives ought to be remembered. With objectives that included strengthening existing regional economic communities (RECs); establishing new RECs in regions without them; and harmonising their policies towards establishing the East African Community (EAC), the 1991 Abuja Treaty, which established the African Economic Community, addresses migration in Africa and as the first to promote the free movement of persons and capital to foster regional integration and development on the continent is an authoritative framework for migration (Ikome, 2007). It is important to note that as migration is being examined the same Abuja Treaty makes provisions for the inclusion of civil society in the programmes of the AU, which include migration activities.

In furtherance of framework processes on migration, the OAU Council of Ministers adopted Decision CM/Dec 614 (LXXIV) during the 74th Ordinary Session in Lusaka, Zambia in July 2001 to formulate a Strategic Framework for a Policy on Migration in Africa for consideration by African heads of state. Further, the AU adopted the African Common Position on Migration and AU Migration Policy (2006)³⁸ in recognition of existing migration problems, and defining broad strategies which were to be mainstreamed by various member states. Articulated in the AU's framework on migration is the notion that well-managed migration will bring substantial benefits to both origin and destination countries (AU, 2006). The African Common Position on Migration and Development also echoes Africa's broader agreements on issues of migration and development. Thus, harmonisation of legislation with international conventions, protection of the rights of migrants and enacting policies on preventing discrimination, racism and xenophobia are key actions African member states have been called upon to implement at domestic level. This may not be as easy as intended for Africa faces multiple challenges.

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- 33 International Convention for the Elimination of All Forms of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); International Convention for the Protection of All Persons from Enforced Disappearance (CPEd); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC) and its Protocols; Convention on the Rights of Persons with Disabilities (CRPD) and other global and regional standards for international protection. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) expounds particular standards for migrants.
- 34 The rights of all persons, irrespective of their migration status include: the right to life, liberty and security of the person and to be free from arbitrary arrest or detention, the right to be protected from abuse and exploitation, to be free from slavery, and from involuntary servitude, and to be free from torture and from cruel, inhuman or degrading treatment or punishment; and the right to seek and enjoy asylum from persecution; the right to be free from discrimination based on race, sex, language, religion, national or social origin, or other status; the right to a fair trial and to legal redress; the right to protection of economic, social and cultural rights, including the right to health, an adequate standard of living, social security, adequate housing, education, and just and favourable conditions of work.
- 35 See: Human Rights Council Report 39th Session 11-12 September, 2017 para.7 p.3 'The nine core international human rights instruments listed provide legal protection to everyone, including all migrants, regardless of their status. Accordingly, the core instruments are relevant to all areas of migration and to all aspects of safe, orderly and regular migration.'
- 36 The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation (Art. 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Organized Crime, 2000).
- 37 The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (Art. 3(a), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, 2000).

38 The AU revised this in 2018 in Migration Policy Framework for Africa and Plan of Action (2018 – 2030)

Given that most African countries are affected by internal displacement of people, the AU advanced a convention for the protection and assistance of internally displaced persons (IDPs).³⁹

The Convention for the Protection and Assistance of Internally Displaced Persons in Africa, adopted in 2009, is the world's first binding regional refugee convention. In 2009, the AU also propelled a continental campaign against human trafficking – the AU Commission Initiative against Trafficking – which focuses on prevention of trafficking, prosecution of traffickers and protection of victims.⁴⁰

Migration governance and the application of human rights has not spared internally displaced persons (IDPs) in the implementation of international human rights law. IDPs have been at the centre of contemporary discourse in migration governance and international human rights. Although much more needs to be done, it must be conceded that Africa has moved by adopting strong legal frameworks for its governance and engagement with other regions of the world.

1.2.3 The AU–EU Dialogue Frameworks

Beyond the African continent, multi-level dialogues have been initiated with the EU on the basis of its overarching framework of the EU external migration and asylum policy: the Global Approach to Migration and Mobility. Approaches to fight irregular migration are continental, regional and bilateral. They take the form of an AU–EU summit, dialogue processes such as the Rabat (policy dialogues with countries along the western migratory route) and Khartoum (the eastern migratory route) processes, and specific political agreements concluded with Tunisia, Morocco, Cape Verde and Nigeria.

These approaches aim to address all aspects of irregular migration, including prevention, strengthened migration and border management, smuggling of migrants, return and readmission, as well as addressing its root causes and enhancing cooperation to address trafficking of human beings, and offering international protection. Initiatives at global, continental, regional and bilateral level followed the opening up of democratic space at the end of the Cold War.

As we have seen, human rights issues have never taken centre stage in international law, which has influenced international dialogue on issues such as migration and IDPs. The involvement of CSOs ensures that their participation is not limited to meetings and conferences. They also interrogate issues such as migration in the AU–EU framework and feed recommendations into AU–EU Joint Summits. For instance, the declaration of the Africa–EU Civil Society Forum in Tunis in 2017 recommends that countries: ‘De-link development aid from migration flow management and stop securitising migration and delocalising borders, and fight all forms of human trafficking and smuggling of migrants.’ It also advocated for the promotion of governance structures and policies with the aim of building functional human-rights-based and inclusive social models that foster mobility and safe and regular circular migration at national and international levels.⁴¹

Despite efforts from Citizens and Diaspora Organizations Directorate (CIDO) and the Economic, Social and Cultural Council of the African Union (ECOSOCC), whose mission is: ‘An African citizenry platform for engagement on cultural and socio-economic issues, that serves a consultative and advisory role to the African Union for Africa’s inclusive development’, and counter to the AU Constitutive Act, the recommendations were never presented at the 5th AU–EU Summit in Abidjan, Cote d’Ivoire.

The framework on human rights, migration and AU–EU dialogue indicate that decision-making processes have become hierarchical and multileveled, incorporating various stakeholder roles, including civil society, to manage migration. With the upsurge of global migration since the end of the Cold War a new twist of continental governance in the democratic governance system has emerged. Attaining synergy between human rights and migration frameworks for result-oriented migration governance to overcome the complexities of migration will be a gradual process and levels of political will and capacities at regional, continental and global echelons to roll out migration initiatives will remain uneven.

39 The UN Guiding Principles on Internal Displacement defines IDPs as persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid, the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised border.

40 Achiume E.T and Landau L.B, 2015, Policy and Practice Brief (036), The African Union Migration and Regional Integration Framework, ACCORD.

41 Africa-EU Civil Society Forum Declaration Tunis, 12 July 2017.

2. MIGRATION: OVERLAPS AND STATUS

Defining migration is not a straightforward exercise despite the plethora of literature on the subject; data on the same is unsatisfactory. Migration is defined by some as a permanent shift or transition to a place far from the home country; others see it as the movement of individuals within a particular community from a particular local environment to another local environment, or a move from one society to another across political or international borders.⁴²

Isolating the causes of migration is complex. Attempts by international law to create distinctions as in most cases failed to mirror the reality on the ground. Several overlaps in grouping migrants have emerged as regards entry or attempted entry. Migrants who enter a foreign country after obtaining authorisation, either temporary or permanent, from the destination State are 'regular migrants' while those who enter a State in an irregular fashion, without the proper documentation; or those who entered in a regular fashion but whose authorisation has expired and have nonetheless remained in the national territory are 'undocumented migrants'.⁴³

The UN General Assembly recommends the use of 'undocumented or irregular migrant' interchangeably. The term 'irregular migrant' does not refer to a quality of a person but to their status of entry or residence.

Article 1A of the Geneva Refugee Convention categorises people entering a country, whether regularly or irregularly, to escape persecution in their country of origin as 'asylum-seekers' or 'refugees'.

Other categories include 'stateless persons'⁴⁴ victims of trafficking, and failed asylum-seekers or undocumented migrants who cannot be expelled because of the principle of non-refoulement.⁴⁵ Caution must be exercised in the classification of migrants. Migrants may belong to one or more categories and may move from one category to another during the migratory process.⁴⁶

As the above categories demonstrate, the status of a migrant may change and is a fluid concept in migration governance. For example, an economic migrant may become a refugee in their destination country or a refugee may lose their status and become an undocumented migrant if they fear persecution in their country of origin. A regular migrant may also be treated as undocumented if they outstay their residence permit.

Although there is no universally agreed upon definition of migration or migrant, several definitions are widely accepted and have been developed in different settings.⁴⁷

2.1. Return of a Migrant

Migrants deserve rights not only when they enter or stay in a transit or destination country but also on return to their country of origin and in the process of reintegration. Together with reception and integration, return migration plays a key role in addressing migration management and shaping migration flows.⁴⁸ International protection therefore needs to be upheld at all stages of the migration process in accordance with ICCPR (1966) and ICESCR (1966), which promulgate crucial rights from the 'above definition' be applied to migrants. 'Return migrants' include refugees whose status may have changed because of circumstances⁴⁹ and migrants categorised by various other instruments.⁵⁰

International protection also upholds the procedural character of rights for a return migrant. Procedural aspects of non-refoulement are a cardinal mechanism for protecting the rights of a return migrant; a State that intends to return a migrant must prudently assess whether or not that person runs the risk of being subjected to a violation of their rights. The policies and practices of the country of return and the environment of the individual migrant are crucial to an effective assessment prior a return of a migrant. A person shall not be returned if there is evidence that they may be subjected to a fundamental rights violation. The right to effective remedy under International Human Rights Law may be exercised to challenge the return or transfer before an independent

42 Osaki-Tomita K., 2017. Revisiting the Concepts, Definitions and Data Sources of International Migration in the Context of the 2030 Agenda for Sustainable Development; United Nations Expert Group Meeting on Sustainable Cities, Human Mobility and International Migration, New York 7-8 September 2017.

43 Horwood, C., 2009. *In Pursuit of the Southern Dream: Victims of Necessity: Assessment of the irregular movement of men from East Africa and the Horn to South Africa*. International Organization for Migration.

44 The Convention relating to the Status of Stateless Persons of 1954 (Statelessness Convention) defines as stateless 'a person who is not considered as a national by any State under the operation of its law'.

45 International Committee of the Red Cross, 2018., Note on migration and the principle of non-refoulement, International Review of the Red Cross, Reports and Documents.

46 International Court of Justice, 2014. Migration and International Human Rights Law, A Practitioners Guide.

47 International Organization for Migration, 2017. World Migration Report 2018. Geneva: International Organization for Migration.

48 Office of the United Nations High Commissioner for Human Rights (OHCHR), 2012. Training Manual on Human Rights Monitoring. <https://www.ohchr.org/Documents/Publications/training7part1112en.pdf>

49 It is tempting to construe refugees only in terms of the above definition. However, the OAU Convention on Refugees expands the definition of refugees to include persons fleeing generalised violence (international war, internal armed conflict, foreign aggression or occupation, severe disruption of public order, or massive violations of human rights) in the whole or part of the country of nationality.

50 Article 1 of the Convention relating to the Status of Refugees (modified by Article 1 of the Protocol relating to the Status of Refugees) as any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.'

and impartial body on the basis of non-refoulement. Two important terms: 'returnee' and 'reintegration', bring issues of human rights to the fore and are briefly examined below.

2.1.1 Returnees and Reintegration

Objective 21 of the Global Compact on Safe, Orderly and Regular Migration, like the Migration Policy Framework for Africa and Plan of Action (2018–2030), calls on governments to cooperate in facilitating safe and dignified return and readmission, and sustainable reintegration (UN, 2018). Although States manage exit and entry of a migrant in their territory at their discretion they are bound by International Human Rights Law to protect, respect and fulfil rights enshrined therein in the pursuit of migration processes. International legal principles define who they can expel and under what circumstances in line with the principle of non-refoulement. The international community identifies a refugee who has recently returned to their country of origin as a 'returnee'.^{51,52}

Emerging from the return process is the exercise of reintegration for which several definitions are proffered.

According to Kaun (2008:7), reintegration is 'a process that should result in the disappearance of differences in legal rights and duties between returnees and their compatriots and the equal access of returnees to services, productive assets and opportunities.' Reintegration also refers to re-inclusion or re-incorporation of a person into a group or a process, or of a migrant into their country of origin or habitual residence.⁵³

As the sending state undertakes its duties of ensuring international protection, the receiving state must outline a reintegration plan with a clear understanding of what is expected.

Reintegration processes vary according to circumstances.⁵⁴ However, the overarching goal of the reintegration mechanism must be the victim's safety, dignity and sustainable reconnection with society and ordinary life. Reintegration support should include shelter, medical and psychological care, counselling, grants, school reinsertion and training, with certain assistance rendered by the receiving organisation. CSOs and state partners may also render other short- or long-term

services. Reintegration services are provided with the victim's consent.

Several factors that allow returnees to cope with (re) migration drivers, such as levels of economic self-sufficiency, social stability within their communities, and psychosocial well-being are recognised by the UN system on migration. The realisation of sustainable reintegration leads to migration decisions based on choice, rather than necessity.

Different forms of migrant's return, either on a voluntarily basis or through the procedure of a forced return, have exposed migrants to vulnerable situations in their countries of origin. Settled positions by authoritative bodies, such as the International Organization for Migration (IOM) and the AU, support the view that reintegration should be needs-based and community and country specific, irrespective of the type of return. Individual assistance, community-based support and structural interventions are presented as ways to realise sustainable reintegration.⁵⁵

3. POLICY, GOVERNANCE AND HUMAN RIGHTS DEFICITS

3.1 AU–EU Relations

The divergent policy positions of continental bodies may affect the application of human rights to migration. The AU and EU's views on migration are at odds in that the EU concentrates on prevention of irregular migration, which is at variance with the AU's focus on the need to increase *legal* flows of migrants.

This is hardly surprising. The European crisis of migration and refugee governance that arose in 2015 has generated normative views that have shaped migratory concerns in parts of Africa. The populist right treats migration as a negative phenomenon in migrant-receiving countries. It represents a European-driven agenda and is dealt with by short-term measures such as short-term employment to enable refugees to earn an income for a certain period of time while acquiring further occupational skills.

51 The term 'returnee' is a descriptive word that recognizes the fact that returning refugees seek certain assistance, international protection, during an interim period until integration in the communities is secured.

52 Kaun A., 2008. *When the displaced return: challenges to 'reintegration' in Angola, New Issues in Refugee Research*. UNHCR. Policy Development and Evaluation Service. UN High Commissioner for Refugees, Research Paper No. 152.

53 International Organization for Migration, 2017. *World Migration Report 2018*. Geneva: International Organization for Migration.

54 European Parliament, 2017. Briefing on Reintegration of Returning Migrants.

55 Kaun A., 2008. *When the displaced return: challenges to 'reintegration' in Angola, New Issues in Refugee Research*. UNHCR. Policy Development and Evaluation Service. UN High Commissioner for Refugees, Research Paper No. 152. See also International Organization for Migration, 2017. *World Migration Report, 2018*. Geneva: International Organization for Migration.

The other normative position is a direct consequence of a pessimistic attitude towards migration that depicts facilitation of irregular migration as a criminal activity.^{56,57} In this scenario, which has largely been promulgated by negative terminology, migration is linked with illegal acts under criminal law to the extent that all immigrants are tainted with suspicion. People regard illegal migration with suspicion.

An example of this can be seen in the Sahel⁵⁸ region, which stretches from Senegal on the Atlantic coast, through parts of Mauritania, Mali, Burkina Faso, Niger, Nigeria, Chad and Sudan to Eritrea on the Red Sea coast.⁵⁹ Inconsistencies in language such as ‘illegal alien, illegal migrant’ or ‘migrant without papers’ and generally descriptive negative picture of migration make migration governance even more complex.

Pursuant to the above, policy formulation and implementation have failed to adequately entrench rights on migration governance and appear instead to focus on security and regulation. Unreconciled strategic interventions by the AU and EU on migration – one focusing on prevention of illegal and the other on increased legal flow – have driven an uncoordinated agenda that works counter to the enforcement and promotion of migrant’s rights.

Although both organisations are aware of this, policies that criminalise migration run counter to the spirit of the overarching goal of bringing human dignity to migrants and refugees fail to manage irregular migration and result in migration being forced underground as can be seen particularly in the Sahel region.⁶⁰

3.2 The Development and Security Nexus

African states generally perceive international migration in a more positive light than European states because of the direct and visible benefits accrued to the continent. Moreover, most developing countries are in agreement about the importance and growing source of foreign funds emanating from migrant economic remittances.⁶¹ Evidence shows that these flows are more than double the official aid received by developing countries, noting that if remittances transferred through informal channels are taken on board, total remittances could be as much as 50 percent higher than the official record.⁶² In 2010, officially recorded remittances to developing countries reached \$334 billion.⁶³ In 2017, according to the UN General Assembly, ‘an estimated \$596 billion was transferred in remittances globally, with \$450 billion going to developing countries.’⁶⁴ Injections of remittances to countries of origin have a direct positive bearing on the community because they go where the greatest need is. Following these benefits, it is apparent therefore that AU sees migration from a developmental point of view.

From a security point of view, although migrants may make a positive contribution to host societies, this is often eclipsed by negative perceptions of migrants which are magnified by notions of fear, racism and xenophobia. More significantly, challenges of change and diversity are perceived as a threat to national identities in destination states. Migrants bring religious, ethnic, cultural, racial and linguistic identities that differ from the existing dominant, homogenous or prevalent character of host countries, which requires accommodation and adaptation to new identities, new forms of diversity and multiculturalism.

Political discourse, and competition for power among state actors, may further distort the situation by presenting migration movements in the guise of ‘alien invasions’ that must be resisted by border walls, low tolerance and deportations. This creates and fosters social tensions that reinforce perceptions of threats to security and endangers social cohesion.

An evaluation of the above may help us appreciate how some factors have caused the EU to treat migration as a security issue, and have compelled Europe to devise mechanisms for the return of ‘illegal migrants’.

56 Admittedly, the terms ‘illegal immigrant’ and ‘illegal immigration’ are not compatible with international practice ‘as neither have the individuals necessarily committed a criminal offence under the laws of any member state nor is the term immigration legitimate when the individual is a national within his or her own territory and may or may not be considering travelling abroad’ (Commissioner for Human Rights, 2010:5).

57 Molenaar, F., 2018. Conflict-sensitive and humane migration management in the Sahel. CRU Report, February. The Hague: Netherlands Institute of International Relations Clingendael.

58 Geographic definitions of the Sahel region vary. Commonly, the Sahel stretches from Senegal on the Atlantic coast, through parts of Mauritania, Mali, Burkina Faso, Niger, Nigeria, Chad and Sudan to Eritrea on the Red Sea coast.

59 Molenaar, F., Tubiana, J. and Warin, C., 2018. *Caught in the Middle: A Human Rights and Peace-Building Approach to Migration Governance in the Sahel*. Clingendael, Netherlands Institute of International Relations.

60 Molenaar, 2018: ‘Criminalisation and controls generally do not stop migration movements but rather push the facilitation of migration underground. This usually results in the professionalisation of the business and concentrates the transport and lodging of migrants in the hands of seasoned criminals, making it more difficult for state actors and the international community to monitor human rights abuses and address migrants’ protection needs’

61 Mohapatra, S. and Ratha, D. eds., 2011. Remittance markets in Africa. World Bank Publications: ‘Remittance flows to developing countries have increased substantially during the past decade to reach \$325 billion in 2010 (World Bank 2011). Remittances sent by 31 million international African migrants reached nearly \$40 billion in 2010, equivalent to 2.6 percent of Africa’s gross domestic product (GDP)’.

62 Ibid

63 UN, 2010. Towards Human Resilience: Sustaining MDG Progress in an Age of Economic Uncertainty, file:///C:/Users/User/Downloads/Towards_Sustaining_MDGProgress_Ch4%20(1).pdf

64 UN General Assembly, 2017. Making Migration Work for All. Report of the Secretary-General, 12 December 2017.

3.3 EU Readmission agreements with non-EU countries

Countries of origin view Europe as an attractive destination for migrants seeking better living conditions, security or protection (pull factors).⁶⁵ Faced with a steady influx of non-EU nationals in different categories of migration, EU countries have devised a return mechanism – EU Readmission Agreements (EURAs) – that underscores the importance of respecting human right standards.

Consistent with the Valletta Action Plan⁶⁶ on the principles of human rights which intend to protect and promote human rights for all, including migrants and refugees, in countries of origin, transit and destination, EURAs are premised on reciprocal obligations concluded between the EU and non-EU countries to facilitate the return of irregular migrants to their country of origin or to a country of transit.⁶⁷

The application of human rights principles in these agreements has, however, been questioned. Although the agreements are not of themselves incompatible with refugee law or human rights law, they often raise refoulement concerns.

First, the requirement for non-EU countries to readmit people who transited their country but are not their nationals – a position Morocco and Turkey argued against and which derailed the conclusion of the readmission agreement – has been another difficulty.

Second, failure to review the situation of individual asylum seekers on a case-by-case basis opens opportunities for onward return to another country, implying that EU readmission agreements create the conditions for cases of removal whereby a country can return people to places where human rights are not guaranteed.⁶⁸

It has thus been observed that the protection capacity of countries of origin and their respect for human rights might not be sufficiently well grounded to safeguard the rights of returning migrants.⁶⁹ This is coupled with risks flagged by institutions such as the Parliamentary Assembly of the Council of Europe (PACE) and the European Council on

Refugees and Exiles (ECRE) which expressed concerns that readmission agreements may pose a threat to the rights of irregular migrants or asylum-seekers.⁷⁰

Regrettably, EURAs seem to conflict with the existing bilateral agreement in the facilitation of returnees. Member states continue to use bilateral readmission agreements, while the European Commission contends that EURAs are self-standing, directly operational instruments that do not necessarily require the conclusion of bilateral implementing protocols with the third country. It remains to be seen whether the UN Global Compact on Migration and the AU Revised Migration Policy Framework for Africa and Plan of Action (2018-2030) will overcome such gaps in the administration of EURAs.

3.4 Rhetoric on Democratic and Human Rights Values

The AU values as reflected in several agreements, charters and declarations,⁷¹ commits AU member states to uphold democratic values that will reduce the number of people leaving Africa for a better life on other continents. These values are a bedrock for managing the push factors of migration.⁷²

Coercive political factors such as power struggles, electoral violence, unconstitutional power seizures, and external military intervention contribute to the push factors in migration discourse and continue to drive external migration. According Amnesty International's State of the World's Human Rights report (2017/2018): 'Protracted conflicts, along with recurring humanitarian crises and persistent human rights violations, forced millions to flee their homes in search of protection. Refugees and migrants faced widespread abuses and violations.'⁷³

Indeed, gaps in democratic consolidation still remain in Africa although there have been improvements since the end of the Cold War. Amnesty International notes: 'The year (2017) [also] marked the 30th anniversary of the establishment of the African Commission on Human and Peoples' Rights, which – despite many challenges – made significant contributions towards the promotion and protection of human rights, including by formulating an impressive list of instruments and standards.

65 The real or perceived opportunity for a better life, higher income, greater security, better quality of education and health care influence the decision to migrate.

66 The Valletta Summit on Migration in Valletta, Malta, on 11-12 November, 2015, brought together European and African heads of state or government to strengthen cooperation in the area of migration and addressed the challenges and opportunities of migration.

67 Council of the European Union, 2015. Press Statement, Valletta Summit on Migration, 11-12 November.

68 Rais, M., 2016. European Union readmission agreements. *Forced Migration Review*, (51), p.45.

69 International Committee of the Red Cross, 2018., *Note on migration and the principle of non-refoulement*, International Review of the Red Cross, Reports and Documents from <https://www.icrc.org/en/international-review/article/note-migration-and-the-principle-of-non-refoulement>

70 See European Parliament, Briefing, EU Readmission Agreements Facilitating the return of irregular migrants, April 2015; They urged EU "to properly consider the human rights situation and the availability of a well-functioning asylum system in a country prior to entering into negotiations on readmission agreements with that country".

71 The Declaration on Democracy, Political, Economic and Corporate Governance (APRM); African Charter on Democracy, Elections and Governance (ACDEG); African Charter on Human and Peoples' Rights (Banjul Charter); African Peace and Security Architecture (APSA); AU Agenda 2063; UN Agenda 2030.

72 Political and social factors such as poor governance, nepotism and corruption, human rights violations, political instability, environmental factors, conflict and civil strife.

73 Amnesty International Report 2017/18: The State of the World's Human Rights. London: Amnesty International Ltd, 27.

True to general observations on democracy and human rights, Africa has improved as a continent although old challenges remain. Abdul-Raheem (2005) argued that: 'Despite its imperfections, the adoption of the African Charter was a significant milestone in the march towards protection of human rights in Africa. Human rights discourse today is laced with all kinds of hypocrisy, conditionality, selective enforcement.'⁷⁴

Deficits in enhancing and deepening democracy, respect for human dignity, human rights and good governance are challenges defined in the African Union Master Roadmap of Practical Steps to Silence the Guns in Africa by Year 2020, which the African Union Peace and Security Council developed as realistic, practical, time-bound implementable steps to silence the guns in Africa. More often than not, internalisation of democratic and human rights values, although not satisfactorily pursued, is championed as the main transmission belt for transforming and addressing migration problem in Africa. The general consensus still holds true, however, that human rights and democratic values have yet to be internalised, casting doubt as to whether the application of rights to migration will be an easy path. If such assertions remain true today, applying human rights to migration governance will still be a tall order.

3.5 Traditional values and political will

The African Charter on Human and Peoples' Rights uses the term 'traditional values' and states in Article 17.3 that 'the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State'. Interestingly, on 24 March 2011, the UN Human Rights Council adopted a resolution on traditional values and human rights that conformed with international human rights law.⁷⁵

Although this resolution is technically sound in its explanation and purpose, disregard for enforcement of rights based on respect for the abovementioned traditional values might be an option for some leaders. In this regard, application of rights to migration governance should be understood in light of two unreconciled views on international human rights law.

Firstly, the universalistic position, as presented in the western concept of human rights in global conventions, poses challenges for achieving rights in non-western societies, particularly those in Africa. Secondly, cultural relativism as debated in non-western countries, particularly in Africa, again where the belief that human rights must differ in different cultures, seems to be gaining momentum.

74 Abdul-Raheem, T., 2005, *Africa: The many Challenges to Human Rights in Africa*: <https://www.pambazuka.org/human-security/africa-many-challenges-human-rights-africa>

75 A/HRC/Res/16/3, Promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind

Consequently, some member states in the developing world prioritise development over human rights. Bennett⁷⁶ notes that, 'African governments tend to regard economic development as their overriding goal; they argue that individual rights and freedoms are a superfluous luxury that could impede national growth.'⁷⁷ Although the terms 'universal' and 'cultural relativism' are not well known in African societies, expression of human rights issues tends to bundle certain human rights practices into western philosophy.⁷⁸ Signing, drafting or adopting global compacts and various policies on migration is one thing but enforcing, and recognising them is another, even at global level. More significant is the failure of some member states to recognise the recently developed UN Global Compact for Migration adopted on 10 December, 2018.⁷⁹ The Global Compact, although not legally binding, suffered a backlash from some member states, which contended that it did not respect national sovereignty and that it contained unclear definitions on migration.

There is no doubt that the compact represents a holistic framework on rights of migrants. It states that 'refugees and migrants are entitled to the same universal human rights and fundamental freedoms, which must be respected, protected and fulfilled at all times'.⁸⁰ Furthermore, the fact that some member states withdrew their support for the compact casts doubt as to whether migration has an affinity for human rights or indeed whether the political will to deal with migration crisis exists or not.

The revised AU Migration Policy Framework (2018) brings a ray of hope for a human-rights-based approach in that it recommends strategies for reinforcing human rights at member-state level on the African continent.⁸¹

76 Bennett, T.W., 1991. *A Sourcebook of African Customary Law for Southern Africa*. Cape Town, Juta & Co.

77 Asante (1969), argues: 'The concept of human rights is by no means alien to indigenous African legal process; ... I reject the notion that human rights concepts are peculiarly or even essentially bourgeois or Western, and without relevance to Africans. Such a notion confuses the articulation of the theoretical foundations of Western concepts of human rights with the ultimate objective of any philosophy-of human rights. Human rights, quite simply, are concerned with asserting and protecting human dignity, and they are ultimately based on a regard for the intrinsic worth of the individual. This is an eternal and universal phenomenon ... p.102 "

78 Human Rights Council, Twenty-second session Agenda items 3 and 5, (2012), para 74, Study of the Human Rights Council Advisory Committee on promoting human rights and fundamental freedoms through a better understanding of traditional values of humankind states that: Increasing people's awareness, acceptance and implementation of universal human rights norms and standards at the grass-roots level has been a particularly difficult process;

79 Five nations voted against it – the United States, Hungary, the Czech Republic, Poland and Israel. Among the twelve abstaining countries were EU members Austria, Bulgaria, Italy, Latvia and Romania. Slovakia did not vote.

80 United Nations, 2018. Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration. Marrakech, Morocco, 10 and 11 December 2018.

81 AU Revised Policy (2018:71) states that safeguarding the human rights of migrants implies the effective application of norms enshrined in human rights instruments of general applicability, as well as the ratification and enforcement of instruments specifically relevant to the treatment of migrants.

Nonetheless, traditional values⁸² and cultural forces remain powerful in some societies and continue to erode political will in the enforcing human rights.⁸³

3.6 AU – ECOSOCC

The birth of ECOSOCC was a result of several decisions to actively engage civil society in the processes and work of the OAU and its successor, the AU, particularly with regard to the integration of Africa.⁸⁴ A number of declarations, charters and treaties under the auspices of the OAU and the AU were a precursor to its establishment.⁸⁵

Established under article 5(i) and 22 of the Constitutive Act, ECOSOCC is a statutory organ of the AU composed of various social and professional groups of member states of the union, and social and professional groups representing the African diaspora. With the goal of contributing to the development and integration of the continent, ECOSOCC serves as a window through which civil society organisations ventilate various opinions into the AU processes.

A key objective of the platform is to promote and defend a culture of good governance, democratic principles and institutions, popular participation and human rights and freedoms, as well social justice, which may also be applied to migrants. In this regard, the year 2017 saw the adoption by the AU summit of the first ECOSOCC strategic plan since its establishment.⁸⁶

Even with these milestones, there is evidence of the mistrust between civil society and member states in the admissibility provision in the ECOSOCC statute which states that CSOs admitted to ECOSOCC must be able to demonstrate that they have the capacity to locally generate at least 50 percent of their funding. It is couched in the following terms: ‘The basic resources of such an Organisation shall substantially, at least fifty per cent be derived from contributions of the members of the Organization’.

There are, however, holes in applying this provision. First, crucial CSOs at member-state level fail to qualify for ECOSOCC membership given that most CSOs receive funds from international agencies from the developed world. Second, it represents a fatal contradiction – the AU also receives more funds from similar agencies and yet limits accreditation of some CSOs using the levels of funds solicited from such development partners.

In spite of these contradictions, ECOSOCC has produced advisory opinion on peace and security, and migration and human rights – a development which, if replicated at member state level, could popularise the need for a human rights approach to migration.

Unfortunately, CSO interventions are often viewed through the lens of activism – such as organising demonstrations and presenting petitions to member states – which member states dislike.⁸⁷

According to Amnesty International’s 2018 report member states in Africa attempted to push for new laws to restrict the activities of human rights defenders, journalists and opponents. It states, ‘In over 20 countries, through unlawful bans, use of excessive force, harassment and arbitrary arrests, people were denied their right to peaceful protest. Widespread repression of dissent also manifested itself through attacks on human rights defenders, civil society organizations, and journalists’.⁸⁸ Irrespective of these negative developments, it must be appreciated that AU took a bold step to establish ECOSOCC and has continued to support CSO initiatives.

82 The African Charter on Human and Peoples’ Rights uses the term “traditional values” and states in its article 17.3 that “the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State” (OAU, 1981:5)

83 Ssenyonjo (2018:42) “ the non-implementation of the Africa Court’s decisions, including refusals to implement, failure to inform the Court of what measures have been taken, and the slow pace or ‘reluctance’ to comply limits the Court’s effectiveness.... However, the Assembly did not take any action. This shows that non-compliance and non-enforcement applies to both the Commission’s recommendations as well as the Court’s orders.” Ssenyonjo, M., 2018. Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples’ Rights (1987–2018). *International Human Rights Law Review*, 7(1), pp.1-42.

84 Adisa, J., 2003. *The African Union: the vision, programmes, policies and challenges*. SIPRI YEARBOOK, pp.79-86.

85 Ikome, F.N., 2008. *The African Union’s ECOSOCC: An Overview*.

86 ECOSOCC, 2017. *ECOSOCC Strategic Plan*, Addis Ababa, Ethiopia.

87 Abdul-Raheem (2005): ‘The ease with which various Western governments are ready to support human rights organizations in the third world while not doing the same in their own countries have also undermined many human rights NGOs domestically. The way in which many of them react and respond to foreign and donor driven agendas make them easy targets for governments who have no respect for the rights of their people. Many of our governments have also become very clever about dealing with Western governments on these issues. They take Western pressure off their backs by acceding to international instruments but delay or never domesticate such laws or conventions in their judicial system’.

88 Amnesty International, 2018. *The state of the world’s human rights*. Amnesty International Report 2017/18.

4. CONCLUSION

There is a growing demand for a human-rights-based approach to migration governance; member states have committed themselves to it by adopting the UN Global Compact on Migration and Africa's Revised Migration Policy Framework. The African Union 2019 theme of the year 'The Year of Refugees, Returnees and Internally Displaced Persons; Towards Durable Solution⁸⁹ to Forced Displacement in Africa' cements the need to promote human dignity in Africa.

Although these frameworks cast a ray of hope, despite their innovations in terms of goals, methods and orientation, they remain only declarations of intent until member states implement them, particularly in Africa; while Africa emphasises African ownership and leadership, practices clearly reflect external dependency and orientation.

There is no doubt that some basic principles of international law and human rights law have become central to a human-rights-based approach to managing migration. Human rights application to matters of entry, jurisdiction and the principle of *refoulement* have become a fulcrum upon which the commitment and political will of states ought to be judged in the advancement of migration governance.

Unless democratic and human rights values, which are so crucial to the adequate realisation of rights in migration governance as enshrined in the African Charter on Human Rights to 'protect national security, law and order, public health or morality'. Conversely, are internalised, efforts and resources at member state level will continue to be spent on security and regulation.

Since the end of the Cold War, civil society has become the lifeblood of democratic consolidation and any measure to stifle it makes it more relevant than ever. The reality, however, is that the AU may not be able to popularise human rights and migration issues without the ECOSOCC structures. On the other hand, ECOSOCC should reach out to member states to remove the myth that CSOs are bent on organising mass demonstrations at member state level. Popularisation of migrants' rights is better carried out through the effective involvement of CSOs and ECOSOCC in line with the whole-of-society approach in which the Global Compact promotes broad multi-stakeholder partnerships to address migration in all its dimensions.⁹⁰

Both regional blocks, AU and EU, must reconcile their strategies and policies if the war on migration is to be won through a human-rights-based approach. Human rights is still contentious in some parts of Africa and beyond. The relationship between the two continents should not be seen through a financial lens only. Mistrust between the continents, and between member states and civil society, especially in Africa must be addressed as it is the elephant in the room for the successful migration governance.

89 Durable Solution entails key principles: Voluntary: Free choice; The absence of physical, psychological and material pressure; Informed decision; Safety: Safe and favourable conditions (physical, legal, material). Both on the route and in return areas; Dignity : unconditional - At their own pace , not manhandled, no arbitrary family separation, respect for human rights, appropriate arrangements for persons with specific needs.

90 By including migrants, diasporas, local communities, civil society, academia, the private sector, parliamentarians, trade unions, national human rights institutions, the media and other relevant stakeholders in migration governance.

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PAPER 6

REIMAGINING AFRICA: STATE RESILIENCE AND GOVERNANCE IN A POST COVID-19 ERA

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ABSTRACT

Although Africa's decisiveness and coordination of its Covid-19 response, through its continental body, the African Union [AU], its structures and its member states, are noteworthy, the pandemic has revealed the vulnerability of some African countries to external shocks and pressures. Having witnessed how the Covid-19 has played out in the continent and the limitations thereof, the purpose of this study is to envision an Africa that is resilient and has strong governance mechanisms. The study bases its analysis in three dimensions, namely, healthcare, the economy (including debt) and the socioeconomic realm.

This study finds that Africa's resilience is strongly linked with strong institutions free of corruption and mismanagement, economic expansion and growth, decreased debt burden, careful interventions for accompanying socioeconomic problems that have been exacerbated by this pandemic and investment in science and technology.

1. INTRODUCTION

The African Union (AU) envisions a resilient Africa with influence in the geopolitical landscape, a prosperous Africa free of debt, and a people-centred Africa with strong institutions that strive to include their most marginalised groups. The AU envisages this diverse continent as one that is united, free of war and conflict with a high standard of living and quality of life. While these aspirations are to be realised by year 2063 as per the development blueprint Agenda 2063: The Africa We Want,¹ some might argue that the realisation of these aspirations and goals has become more urgent than ever with the advent of the Covid-19 pandemic.

State resilience as an aspiration is not unique to Africa; it is a necessity for the global system – states, regions and multilateral institutions. The developmental visions and plans of most countries include strong economies, sturdy domestic institutions, equality and the ability to withstand any and all external and internal shocks. The Covid-19 pandemic has devastated the resilience of many countries, including those in the African continent and in some instances has exposed a lack of resilience. Disaster risk reduction experts² define disaster resilience as the ability of organisations, communities and states to mitigate hazards, contain the effects of disasters once they occur, and efficiently execute recovery activities in ways that minimise disruption and further mitigate the disruptive and hazardous effects of similar events. This paper will focus predominantly on disaster resilience pertaining to institutions, countries and to some extent Africa as a region.

Resilience can be understood as a new step in framing and packaging the state and what international actors expect it to do particularly with the current shift in political discourse and scholarship from ‘failed states’ to ‘state building’ and ‘state fragility’. This places the state in the centre as the main player responsible for the development, implementation and enforcement of disaster reduction frameworks. More recently, resilience has been used as a tool to frame the international state-building agenda, a pertinent step given the importance of sustainable development articulated in the United Nations Sustainable Development Goals (UN SDGs).

Many African countries declared national states of disaster or emergency when Covid-19 was detected, which set in motion legal provisions that enabled states to rapidly adopt a particular set of regulations, without the usual checks and balances, to help mitigate the effects of the pandemic.

The Covid-19 pandemic arose against the backdrop of increasing global cooperation, particularly in the areas of health and economic diplomacy. However, what it lays bare are the negative implications particularly for developing countries, some fuelled by global injustice and a lack of global solidarity that runs contrary to rhetoric in multilateral platforms. In reality, the global milieu has, since the advent of Covid-19, been characterised not by equitable access to all, but rather by faster and increased access to essentials like testing kits, hospital equipment and vaccines for countries with greater purchasing power.

The Covid-19 response has required strong leadership and institutions at regional and national levels. While Africa is very vulnerable because it is a developing region with middle- to low-income countries and some governance deficiencies, it worked together during this time in an unprecedented manner and demonstrated leadership, even as nations such as the US struggled to respond with integrity.

The African Union Commission (AUC) Chairperson, Moussa Faki Mahamat, highlighted Africa’s strategic focus which prioritised economic, humanitarian and health dimensions of the Covid-19 pandemic. The issue of Africa’s external debt has also been recognised as an important component of the economic dimensions of the Covid-19 crisis.

This study begins by conceptualising resilience in the context of the Covid-19 pandemic. It then assesses where Africa locates itself across health, economic and socioeconomic dimensions, referring back to resilience as a benchmark and factoring in the significance of regionalism. This section includes practical examples across different sub-regions of the continent. The final section presents a forward-looking lens of a reimagined Africa by postulating key areas that need to be introduced or strengthened to bolster governance and resilience in a post Covid-19 era.

1 African Union. 2013. Africa We Want: Agenda 2063. African Union Framework Document, https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf, accessed 26 January 2021.

2 Tierney, K. and Bruneau, M., 2007. Conceptualizing and measuring resilience: A key to disaster loss reduction. TR news, (250).

2. THE SIGNIFICANCE OF RESILIENCE IN THE AFRICAN CONTEXT

There are clear linkages between resilience and governance with a demonstrable correlation. Resilience is partly a result of good governance; for example, countries that were able to respond quickly to the Covid-19 pandemic are those with strong institutions, well-managed resources, implementable frameworks and tools to respond to internal and external shocks, lack of corruption and mismanagement and respect for democracy and human rights. This is by no means an exhaustive list.

Before expanding on the assertion that governance and resilience are inextricably linked, it may be useful to expand on what constitutes a resilient state. Although the study of state resilience is more appropriated to the peace and security arena, past global events have similarly tested state resilience: the 1918 influenza epidemic, two World Wars, the Great Depression (1929-1933), and the financial crisis of 2008.

According to international development experts, Jan Pospisil and Florian Kuehn, resilient states are capable of 'absorbing shocks, transforming and channelling radical change or challenges while maintaining political stability and preventing violence'.³ Resilient systems also have the ability to diminish the probability and consequences of failure, such as deaths and injuries, physical damage, and negative economic and social effects and diminish the time for recovery. States that maintain and potentially improve the delivery of their core functions before, during, and after exposure to shocks and stresses can be considered resilient.⁴ De Boer, Muggah and Patel further state that:

*Resilience is enabled by activating protective qualities and processes at the individual, community, institutional and systems level to engage with hazards and stresses and cooperate with each other to maintain or recover functionality and prosper. It includes characteristics and actions that reduce exposure, limit vulnerability by minimizing the accumulation of pre-existing or additional risks, enhance coping and adaptive capabilities. These protective factors can be institutional in nature, including norms, standards, policies, programs, and organizations.*⁵

3 Pospisil, J. and Kühn, F.P., 2016. The resilient state: new regulatory modes in international approaches to state building? *Third World Quarterly*, 37(1), pp.1-16.
4 De Boer, J., Muggah, R. and Patel, R., 2016. Conceptualising City Fragility and Resilience. United Nations University Centre for Policy Research, Working Paper 5.
5 Ibid

A resilient state incorporates the following:

1. Functioning state institutions that prioritise rule of law, good governance, democracy, human rights and security;
2. Institutions that can cope with shock;
3. A social contract between government and citizens based on mutual trust;
4. Implementable development frameworks;
5. Provision for humanitarian relief; and,
6. Effective diplomatic channels.

Having outlined the significance of resilience, we can now ask: 'How does Africa fair in its response to Covid-19 across the health, economic and socio-economic dimensions?'

2.1 The health dimension

At the time of writing, of 329 million people infected by Covid-19 worldwide, over 269 million have recovered; about 5.5 million have died.⁶ Africa has recorded a total of 10.2 million infections, with 9 million recoveries and over 220 770 deaths. Southern Africa leads the number of reported cases (4.9 million), followed by North Africa (2.8 million), East Africa (1.3 million), West Africa (789 700) and Central Africa (335 800).⁷

Poor access to healthcare services in low-income countries is widely documented. A study undertaken by the Center for Disease Dynamics, Economics and Policy (CDDEP) reported that 31 of 50 countries in Africa⁸ (62%) do not have a sufficient number of hospital beds per 100,000 people if all patients with severe infections seek health services; if only 30% of patients seek health services then 10 of 50 countries (20%) do not have sufficient capacity.⁹ Shortages include hospital bed capacity and availability of ventilators. According to the World Health Organization (WHO), factors such as weak governance, lack of accountability, political instability, natural disasters, underdeveloped infrastructure, health system weaknesses, lack of harmonisation and alignment of aid and a lack of investment contribute to the slow progress in Africa's healthcare.¹⁰

6 Worldometer, <https://www.worldometers.info/coronavirus/>, accessed 5 February 2021.
7 Africa Centres for Disease Control. 2021. Coronavirus Disease 2019 (Covid-19): Latest Updates on the Covid-19 Crisis from Africa CDC. <https://africacdc.org/covid-19/>, accessed 02 February 2021.
8 The study was limited to 50 of 55 African countries because of a lack of data from some countries.
9 Craig, J., Kalanxhi, E., Osen, G. and Frost, I., 2020. Estimating critical care capacity needs and gaps in Africa during the COVID-19 pandemic. medRxiv.
10 World Health Organization, 2011. *Investing in Health in Africa: The Case for Strengthening Systems for Better Health Outcomes*. WHO, https://www.who.int/pmnch/media/membernews/2011/investing_health_africa_eng.pdf, accessed 03 February 2021.

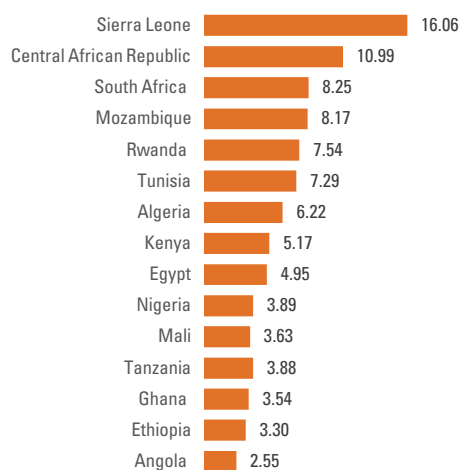


Fig. 1: Health expenditure of African countries (as percentage of GDP)

Source: World Bank. 2018. *Current Health Expenditure (% of GDP)- Sub-Saharan Africa, Egypt, Arab Rep., Tunisia, Morocco, Algeria, Sudan, Mauritania*. World Bank Data.

Figure 1 shows the ratio of healthcare expenditure to gross domestic product (GDP) of selected African countries across the sub-regions of the continent. Angola, Ethiopia and Ghana spent relatively small amounts on healthcare, while Tunisia, Rwanda, Mozambique, South Africa, Central African Republic and Sierra Leone allocate a higher percentage of GDP to their health sectors. It is noteworthy that, in nominal terms, although bigger economies such as Nigeria, South Africa and Egypt spend more on healthcare it constitutes a smaller percentage of GDP in comparison to other countries.

Without strong, well-managed health institutions with adequate funding free of corruption, healthcare will remain an Achilles heel for African countries in rapidly responding to health-related crises and adapting to pressure on public health facilities. It is imperative that African leaders strengthen healthcare sectors and invest in healthcare at home where the wider population will benefit than to rely on health facilities from abroad.

2.2 The economic dimension

Projections of the United Nations Economic Conference for Trade (UNCTAD) indicate that prior to the outbreak of Covid-19 in Africa, the continent was on track to maintain its economic expansion, with growth estimated to rise from 2.9 per cent in 2019 to 3.2 per cent in 2020, and 3.5 per cent in 2021.¹¹ However, as a result of the pandemic, Africa is seeing quite the opposite, to the detriment of its sustainable development. Public stimulus and relief packages to ease the burden of losses and constraints felt by businesses and ordinary citizens have been implemented because of production and trade owing

11 Gondwe, G., 2020. Assessing the impact of COVID-19 on Africa's economic development. In United Nations Conference on trade and Development. UNCTAD/ALDC/MISC/2020/3.

to Covid-19 restrictions and lockdown protocols (some countries went into full lockdown while others opted for partial lockdown). This has further constrained fiscal and monetary measures of many African countries and has led to increased borrowing to maintain public expenditure.

Covid-19 has severely impacted international trade and global value chains, the World Trade Organization (WTO) projected a decline in world trade of between 13 and 32 per cent in 2020 affecting key income-generating sectors such as tourism, textiles, oil and gas. The United Nations Economic Commission for Africa (UNECA) estimated at least 65 billion US dollars in revenue losses among Africa's top 10 fuel exporting economies owing to the decrease in the demand for oil and gas.¹²

According to UNCTAD, the International Air Transport Association (IATA) projected revenue losses of up to 113 billion US dollars. These projections signal a looming global recession that will devastate African economies and reverse many earlier gains. According to Albert Zeufack, Chief Economist for Africa at the World Bank, deteriorating fiscal positions and increased public debt, mean governments in the region do not have much room to manoeuvre in their deployment of fiscal policy aimed at addressing the Covid-19 crisis.¹³

A global recession could lead to a widening of the debt burden in Africa. South Africa recorded its third recession since 1994 after being downgraded to junk status by Moody in March 2020,¹⁴ which will increase the cost of borrowing and threaten its ability to attract much-needed investment. Sectors that have experienced contraction include trade, communication, retail sale trade, restaurant trade, manufacturing and construction.¹⁵

2.3 Debt Burden

Post Covid-19 economic recovery plans are underway in most parts of the world, and African countries are borrowing from global multilateral banks. For example, in July 2020, Egypt approached the International Monetary Fund (IMF) for funding and obtained 5.2 billion US dollars through the IMF Standby Arrangement¹⁶ framework to mitigate and cope with the effects of Covid-19.¹⁷

12 Ibid.

13 World Bank Group, 2020. For Sub-Saharan Africa, Coronavirus Calls for Policies for Greater Resilience. World Bank Online, <https://www.worldbank.org/en/region/afr/publication/for-sub-saharan-africa-coronavirus-crisis-calls-for-policies-for-greater-resilience>, accessed 3 February 2021.

14 Statistics South Africa, 2020. Economy Slips Into Recession. <http://www.statssa.gov.za/?p=13049>, accessed 3 February 2021.

15 Statistics South Africa, Ibid.

16 The SBA framework allows the Fund to respond flexibly to countries' external financing needs and to support their adjustment policies with short-term financing.

17 International Monetary Fund. 2020. Arab Republic of Egypt: Request for 12 Million 12-Month Standby Arrangement- Press Release; Staff Report; and Statement by the Executive Director for the Arab Republic of Egypt. IMF Country Report No. 20/66

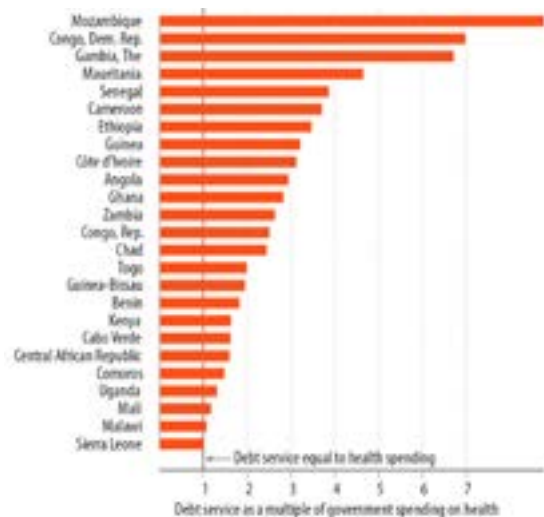


Fig. 2: Debt servicing to health expenditure in Africa

Source: Kevin Watkins. 2020. *Delivering Debt Relief for the Poorest*. International Monetary Fund.

Figure 2 illustrates Africa's debt servicing compared with its healthcare expenditure. Mozambique, which was already experiencing difficulties with repaying its 14 billion US dollar external debt when Covid-19 hit spends seven times more on debt repayment than on healthcare.¹⁸

According to the World Bank (WB), the total debt for sub-Saharan Africa climbed nearly 150 per cent to 583 billion US dollars between 2008 and 2018.¹⁹ Heavily indebted African countries include Angola, Cabo Verde, Congo, Djibouti and Egypt; all have an external debt-to-GDP ratio higher than 100 per cent. China, the second highest creditor after multilateral institutions and banks has shown a willingness to provide debt relief for a specific time frame but not necessarily debt forgiveness.

However, even with such measures, an AU study suggests that the continent could lose up to 500 billion US dollars during the pandemic and countries may be forced to borrow heavily to survive after the pandemic.²⁰

2.4 Socioeconomic dimension

Implications of Covid-19 for healthcare and the economy have exacerbated Africa's socioeconomic problems. While the African Union Commission (AUC) has highlighted the humanitarian fallout that has resulted; this study stretches this to assess the associated prevailing socioeconomic issues.

18 Watkins, K. 2020. *Delivering Debt Relief for the Poorest*. International Monetary Fund, <https://www.imf.org/external/pubs/ft/fandd/2020/08/debt-relief-for-the-poorest-kevin-watkins.htm>, accessed 3 February 2021.

19 World Bank Group, 2020. Op Cit.

20 African Union, 2020. *Impact of Coronavirus (Covid-19) on the African Economy*. https://au.int/sites/default/files/documents/38326-doc-covid-19_impact_on_african_economy.pdf, accessed 03 February 2021.

According to UNECA's assessment, the pandemic has the potential to push 27 million people into extreme poverty; other potential effects are: the breakdown of social services, widespread deprivation, increased inequality, marginalisation, societal unrest, increased unemployment, gender-based violence and femicide.

Gender-based violence, termed the 'shadow pandemic' given its persistence, increased during the Covid-19 pandemic. For example, Nigeria reported a spike in reported cases particularly in March and April 2020 when lockdown restrictions were initiated. Cases increased by 149 per cent in March and 297 per cent in April.²¹ In South Africa, ranked fourth worst in the world in terms of femicide, approximately 5 000 cases of gender-based violence were reported during its highest and second-highest lockdown levels (levels 5 and 4) in the province of Gauteng alone, between March and April 2020.²²

2.5 Africa's coordination – Areas of best practice

Africa demonstrated leadership and decisiveness in dealing with Covid-19. Country efforts have been in concert with regionalism vis-à-vis the AU and RECs and multilateralism through the WHO and UN, in particular through:

1. Strengthening of the Africa Centres for Disease Control and Prevention (Africa-CDC);
2. The Africa Medical Supplies Portal, a single marketplace where African countries can access medical supplies from regional and global manufacturers at competitive prices;
3. Appointment of Special Envoys to lobby for debt relief;
4. Covid-19 Regional Task Forces to oversee screening, detection and diagnosis, infection prevention and control, clinical management of infected persons, communication and community engagement; and,
5. The Africa Vaccine Acquisition Task Team (AVATT) to support Africa's vaccine strategy.

This level of coordination has been paramount for getting results in a world where there is strength in numbers. To date, AVATT has procured 1 billion vaccine doses for the continent.²³

21 Young, J.C. and Adib, C.A., 2020. The shadow pandemic: Gender-based violence and COVID-19. *International Growth Centre (IGC)*, May, 19.

22 Ndaba, B. Over 5000 Gender-Based Violence Reported in Gauteng Between March and April. *Independent Online*, 12 June 2020, <https://www.iol.co.za/news/politics/over-5000-gbv-cases-reported-in-gauteng-between-march-and-april-49291643>, accessed 03 February 2021.

23 South African Presidency. Statement by President Cyril Ramaphosa on progress in the national effort to contain the Covid-19 pandemic. Statement by President Cyril Ramaphosa 1 February 2021, <http://www.thepresidency.gov.za/speeches/statement-president-cyril-ramaphosa-progress-national-effort-contain-covid-19-pandemic>, accessed 08 February 2021.

According to Professor Anthoni van Nieuwkerk, Associate Professor, University of the Witwatersrand:

Regional cooperation can strengthen the voices of small nations that often face severe disadvantages in dealing with the rest of the world because of their low bargaining power and high negotiation costs.²⁴

This proposition rings true as the world witnesses gross vaccine nationalism by countries in the Global North, contradicting the global public–private health partnership such as Covax (with 172 participating countries) whose raison d’être is equitable access to vaccines. What Africa’s coordination of vaccine acquisition promises to do, is ensure that low-income countries have a means to access vaccines. In the face of the difficult task of vaccinating the African population the African continent advances the principle of leaving no one behind.

3. REIMAGINING AFRICA: WHERE TO FROM HERE?

While Africa has responded decisively to this pandemic, with high levels of leadership and coordination, it must nevertheless contend with prevailing challenges that undermine its progress. According to a UNECA assessment, even before the Covid-19 pandemic, Africa was not on track to achieve the UN Sustainable Development Goals (SDGs) or Agenda 2063. African countries struggle with weak governance and corruption, environmental degradation, human rights violations, lack of economic diversity, conflict and humanitarian situations that undermine progress.

This final section optimistically imagines an Africa that is able to remove hurdles that undermine its development and ensure that as far as possible, it is resilient to external and internal shocks arising from epidemics and pandemics.

Strong and agile state institutions support development and contribute to a country’s efficient and effective responses in times of crisis; the opposite leaves a country in disarray and renders it unable to attend to the needs of its citizens.

Health institutions must be prioritised, and free of corruption and mismanagement. What has emerged as an unintended consequence of travel restrictions is that African leaders have been prevented from seeking treatment outside their countries, which has forced them to reckon with the poor state of health institutions. Therefore, in a post-Covid era, leaders should invest in key state institutions to build resilience through necessary fiscal budgetary allocations, build capacity, upskill their workforce and invest in technology.

Not only has the Covid-19 pandemic revealed the limitations of public institutions, but also shortcomings in areas such as research, science, technology and innovation, inadequate information and communications technology (ICT) infrastructure for access to high-speed and stable internet particularly in remote and rural areas, and access to computers. Recent data from the International Telecommunication Union (ITU) shows that only 17.8 per cent of Africans have internet access in their homes and only 10.7 per cent have home-based computers.²⁵

According to Dr Naledi Pandor, Minister of International Relations and Cooperation in South Africa: ‘It is important for Africa to invest in science and technology so it is able to test innovation on its own terms’ particularly as the continent of 55 countries did not produce a vaccine candidate but relegated to partnerships in which it tested vaccine candidates from other countries. Should another health crisis hit, Africa should position itself to respond from a position of power and influence rather than be a pawn in geo-strategic interests.

The continent has its post Covid-19 recovery work cut out for it. Not all areas will be included in the immediate agenda, however, and it should leverage its partners for more investment in the areas of artificial intelligence and cloud computing, e-commerce, robotics and use of digital technologies to monitor the spread of infectious diseases. It should also negotiate better terms with countries such as China which has a significant technology investment footprint in Africa.

24 Van Nieuwkerk, A., 2020. *COVID-19 and Regional Integration in Southern Africa: South Africa’s Moment of Truth. SAIIA Policy Briefing 202*, <https://saiia.org.za/research/covid-19-and-regional-integration-in-southern-africa-south-africas-moment-of-truth/>, accessed 02 December 2020.

25 International Telecommunication Union, 2019. *Measuring Digital Development: Facts and Figures 2019*. ITU publications, <https://www.itu.int/en/ITU-D/Statistics/Pages/facts/default.aspx>, accessed 01 December 2020.

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12. Tierney, K. and Bruneau, M., 2007. Conceptualizing and measuring resilience: A key to disaster loss reduction. *TR news*, (250).
13. Van Nieuwkerk, A., 2020. COVID-19 and Regional Integration in Southern Africa: South Africa's Moment of Truth. SAIIA Policy Briefing 202, <https://saiia.org.za/research/covid-19-and-regional-integration-in-southern-africa-south-africas-moment-of-truth/>, accessed 02 December 2020.
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PAPER 7

SOCIAL PROTECTION FOR REFUGEE CHILDREN IN SOUTH AFRICA: A GOVERNANCE PARADOX

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ABSTRACT

In response to the UNHCR's reports of record numbers of people displaced in recent years by war, political and social conflicts and persecution, the African Union declared 2019 the Year of Refugees, Returnees, and Internally Displaced Persons to work towards solutions to this problem, particularly in Africa.

This paper focuses on the children among those refugees and asylum seekers in urban settings with no refugee camps who are the responsibility of the government of the host country – in this case South Africa. The challenges are twofold: firstly, most refugee households are asset scarce and often excluded from accessing social protection benefits intended for the poor in the host country and secondly, non-governmental organisations that work in this sector and are funded by private donors and international organisations can barely meet the basic needs of refugees let alone the social and educational needs of refugee children.

While this paper acknowledges the inroads of international protocols to protect refugee children and laws and policies to cater for their social and education rights, the Refugee Children's Project (RCP) has noted a governance paradox with regard to the social protection of refugee children in South Africa. This paper highlights an urgent need for the South African government to comply with its constitutional obligations and international commitments in the treaties, protocols, and conventions to which it has acceded and which it has ratified. The paper also emphasises the importance of a continental approach that will include refugees in policy- and decision-making processes on issues that affect them, through civil society and organisations that work with refugees, and through initiatives such as the African Union Year of Refugees, Returnees, and Internally Displaced Persons.

INTRODUCTION

The global population of forcibly displaced increased by 2.3 million people in 2018. By the end of the year, almost 70.8 million individuals were forcibly displaced worldwide as a result of persecution, conflict, violence, or human rights violations. As a result, the world's forcibly displaced population remained yet again at a record high.

– UNHCR. Global Trends 2018.

UNHCR High Commissioner Filippo Grandi remarked that these figures confirmed a 'longer-term rising trend in the number of people needing safety from war, conflict and persecution.'

The above quote introduces UNHCR's 2018 statistics and expresses the enormity of the global refugee crisis. However, it is not only the increase in the number of refugees that is a dilemma for UNHCR and the organisations that it works with; refugees also endure poor treatment in host countries where social protection is not provided by the UNHCR and basic needs of refugees cannot be covered by cash and resource-trapped non-governmental organisations (NGOs) such as the Refugee Children Project (RCP).¹ The biggest dilemma for the UNHCR and the concern of RCP is the increase in the number of vulnerable refugee children. According to the UNHCR report children under 18 accounted for about half the refugee population in 2018.²

South Africa has ratified international, continental and regional instruments that protect vulnerable children. As a signatory to the United Nations Charter of Human Rights, South Africa acknowledges through its Constitution the right of access to the same basic human rights to refugees, particularly children as to its citizens.³ Although this principle should enable access to basic services for refugee children, the inertia of government to adequately respond to their needs has resulted in a governance paradox that reveals the vulnerability and misery of refugees in general, and refugee children in particular

Refugees, asylum seekers and their dependants, as well as unaccompanied refugee children, face a multitude of obstacles exacerbated by South Africa's dysfunctional refugee protection system. From RCP's experience of working with refugees, there is evidence that access to proper documentation is difficult for most asylum seekers and refugees.

Whereas the South African government considers the provision of services to refugees as somebody else's problem, the UNHCR does not directly assist refugees or fund organisations that cater for them.

The focus of this paper is on children,⁴ who represent more than half the number of refugees worldwide and epitomise the deprivation of those outside the cover of a social security system. UNHCR Africa Online states '... governments normally guarantee the basic human rights and physical security of their citizens. But when people become refugees this safety net disappears.' Those fleeing war or persecution become even more vulnerable as a result. According to UNHCR Africa Online refugees have no protection from their own state; often it is their own government that is persecuting them. If other countries do not let them in or protect them, they may be condemned to an intolerable situation where their basic rights, security and even their lives are in danger.⁵

Across the world, efforts are being made to ensure that refugees are treated fairly and provided for. However, in many countries such as South Africa, the lack of portability of social protection benefits for refugees, who generally are not eligible for benefits as non-nationals, represents a challenge to offering them social protection.

The majority of people in South Africa are not only deprived of access to basic services but are also excluded from the mainstream activities and processes leading to the provision of such.⁶ These disparities in socioeconomic conditions across different population groups show that black Africans lag behind for all variables by a wide margin in terms of education, employment status, and living conditions.⁷

A conservative estimate by Statistics South Africa (Stats SA) states that there were over 1.5 million foreign nationals in South Africa at the end of 2016, which at the time represented approximately 2.8% of the total South African population of about 55 million.⁸ An online article by United Nations Children's Fund (UNICEF) – 'Africa's largest refugee crisis now a children's crisis' – points to the difficult conditions refugee children face in South Africa.⁹

1 The vision of the RCP is to facilitate integration of refugee children into South Africa and to prepare them to be worthy citizens in their host country as well as in their countries of origin upon their return. The term 'refugee children' includes asylum seeker children, recognised refugee children and unaccompanied asylum seeker and refugee children.

2 UNHCR. Global Trends 2018.

3 Article 14 stipulates: 'Everyone has the right to seek and to enjoy in other countries asylum from persecution.'

4 Those under the age of 18.

5 See UNHCR Africa Online: <https://www.unhcr.org/afr/protection.html>

6 Nnadozie, R. C., 2013. Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis. The African Statistical Journal, Volume 16, May 2013. p.85

7 Ibid. p.83.

8 Statistics South Africa, 2015. Documented migrants in South Africa. Statistical Release PO 351.4. Released December 2017. Pretoria: Stats SA.

9 <https://refugeesmigrants.un.org/africas-largest-refugee-crisis-now-childrens-crisis-%E2%80%93-unicef>

Considering that research into the lived experiences of vulnerable refugee children in Africa, and specifically South Africa, is limited, this paper builds on empirical evidence from a baseline study facilitated by RCP in 2018 which mapped the situation of refugee, asylum seeker, migrant, undocumented and unaccompanied children served by NGOs around South Africa that are funded by the MAMAS Alliance. The study concluded that children in this vulnerable category live in precarious situations because of a lack of good governance on refugee matters.

The paper begins by defining refugee children and in the second section unpacks the institutional framework on the protection of refugee children. This includes a discussion of the international and national frameworks that protect the rights of refugee children in South Africa.

The third section briefly explains the paper's conceptual and theoretical framework, which emphasises the use of the critical constructivism qualitative paradigm and highlights the social protection dilemma.

The fourth section highlights the findings of the research and the fifth analyses how the non-profit sector acts as rescuer of refugee children with an emphasis on RCP. The sixth section recommends ways to support refugee children in realising their rights in South Africa.

The paper concludes by offering an effective advocacy tactic and a policy review to promote social protection in South Africa and hold the South African government responsible and accountable for refugees, specifically refugee children, thus alleviating the burden of non-profit organisations overwhelmed by the unfulfilled basic needs of vulnerable refugee children.

Refugee children are vulnerable in two ways. As migrants, they lack the benefits afforded local children in terms of access to public goods and services; and as children, they need protection as stipulated in the Constitution.

Theoretically, South African legislation and international instruments provide solutions to the vulnerability of refugee children. The United Nations Convention Relating to the Status of Refugees (1951) deals with their vulnerability as both migrants and children.

South Africa's Refugees Act, 1998, cites both the UN and the OAU definitions to clarify and define who qualifies for refugee status in the country. A child is defined by the United Nations Convention on the Rights of the Child, as 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'.¹⁰ Section 28 (3) of the Constitution of the Republic of South Africa, 1996 defines a child as 'a person under the age of 18 years' and in section 28 (2) states: 'A child's best interests are of paramount importance in every matter concerning the child'.¹¹

The United Nations Protocol Relating to the Status of Refugees (1967)¹² defines a refugee as person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her origin or nationality and in unable, or owing to such fear, is unwilling to avail himself of the protection of that country or, not having a nationality and being outside that country of his or her origin or former habitual residence is unable or, owing such fear unwilling to return to it.'

Furthermore, these instruments consider a person to be a refugee in meeting the following conditions:

1. S/he must be outside his/her country of origin or nationality;
2. S/he must have a well founded fear of persecution;
3. His/her fear must be based on one of the five reasons: race, religion, nationality, social group, or political opinion; and,
4. S/he must be unable or unwilling to avail the protection of that country or return there.

10 United Nations, 1989. United Nations Convention on the Rights of the Child, Article 1.

11 Constitution of the Republic of South Africa, 1996.

12 United Nations, 1967. Convention and Protocol Relating to the Status of Refugees.

In addition to the above, a continental instrument, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa acknowledges the peculiarities in defining the concept 'refugee'. The convention considers a refugee someone who due to 'external aggression, occupation, foreign domination or events seriously disrupting public order in either part or whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his country of origin or nationality'.

The concepts 'refugee' and 'children' thus augment the severity of the implications and situations of vulnerability that refugee children find themselves exposed to, as discussed later in this paper.

The Institutional Framework on the Protection of Refugee Children

The objective of the UNHCR's guidelines on refugee children, first formulated in 1988, is to 'improve and enhance the protection and care of refugee children.'¹³ The guidelines were endorsed by the UNHCR executive committee in 1993 and revised in 1994 to include the Convention on the Rights of the Child as a point of reference for the action of the UNHCR. They emphasise the best-interest rule and further address issues such as refugee unaccompanied minors, physical security, psychosocial problems associated with trauma, education guidelines, community assistance and the protection of culture.

The South African government has legal frameworks in place that respect of human rights, equality and governance and, besides the 1996 Constitution, specific legislation and policies on refugees and migrants. National legislation complements the country's ratification of various international conventions, treaties and protocols that support human rights. Regarding the rights of refugees, South Africa has ratified and acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as other human rights instruments. The rights of refugee children in South Africa are enshrined in the Constitution, the Refugees Act, and several other pieces of legislation passed by Parliament, briefly described below.

13 United Nations High Commissioner for Refugees, 1994. Refugee children: Guidelines on protection and care. Preface.

The Constitution of the Republic of South Africa (Act 108, 1996)

The South African Constitution recognises and protects the rights of all children, including refugee children. The eight crucial rights of all children stipulated in Section 28 (1) of the Constitution are:

- Right to a name and nationality;
- Right to a family or parental care, or to appropriate alternative care;
- Right to basic nutrition, shelter, basic health care and social services;
- Right to protection from maltreatment, abuse, neglect or degradation and exploitative labour;
- Right not to be required or permitted to perform work that is inappropriate for a child or places the child's wellbeing at risk;
- Right not to be detained except as a measure of last resort, and in such cases to be kept separately from adults and only for the shortest appropriate time;
- Right to have a legal counsellor assigned by the State; and
- Right not to be used directly in armed conflict and to be protected in times of armed conflict.

Although section 28 (2) of the Constitution emphasises that 'a child's best interests are of paramount importance in every matter concerning the child',¹⁴ it is difficult to gather credible evidence on the application of this principle with regards to refugee children in South Africa. In many cases, refugee children are denied basic public services, and enjoyment of most of the rights of refugee children is limited.

Refugees Act (Act 130, 1998)

The Republic of South Africa assumes certain obligations to welcome and attend to refugees in its territory in accordance with internationally accepted standards and principles as outlined in accessed and ratified conventions, treaties or protocols. Section 27 (b) of the Refugees Act guarantees that a refugee should have 'legal protection, which includes the rights set out in the Bill of Rights'. The Refugees Act reflects the obligations of South Africa to:

- Give effect to relevant international legal instruments regarding refugees;
- Provide for the reception of asylum seekers in South Africa;
- Regularise applications for asylum; and,
- Meet the human rights and related needs of refugees.

14 Children's Act 38, of 2005.

With regard to their protection and rights, the Act stipulates that refugees:

- Are entitled to a formal written recognition of refugee status in the prescribed form;
- Should enjoy full legal protection, which includes the rights set out in the Bill of Rights in Chapter 2 of the Constitution, and the right to remain in the Republic in accordance with the provision of this Act;
- Are entitled to apply for an immigration permit in terms of the Refugees Act after five years' continuous residence in the Republic from the date on which they were granted asylum, if the Standing Committee certifies that they will remain refugees indefinitely;
- Are entitled to an identity document referred to in section 30;
- Are entitled to a South African travel document as contemplated in section 31;
- Are entitled to seek employment; and,
- Are entitled to the same basic health services and basic primary education that other inhabitants of the Republic receive from time to time.

The above rights are rarely enjoyed by refugees in general and refugee children in particular, which constitutes a governance paradox on refugee matters. As pointed out by Palmary (2009), the Refugees Act entitles refugees access to the same basic rights such as access to healthcare and basic education as South African citizens.¹⁵ However, because of discrimination, refugee children are excluded from enjoying access to the basic rights, putting the burden on NGOs which are unfortunately under-resourced.

The protection and service provision to refugees by the South African government are unsuccessful due to other reasons, such as corruption in the Department of Home Affairs, resulting in many cases of undocumented refugee children. There are also many cases of xenophobic behaviour by public servants meant to assist refugee children. Such public servants deny service to refugee children claiming that South African resources are meant for citizens only and not for refugees. Economic reasons partly explain the fact of refugee children not being assisted by the South African government as it be struggles to assist its own citizens and address the imbalances of the defunct apartheid system.).

15 Palmary, I., 2009. *For better implementation of migrant children's rights in South Africa*. Report for UNICEF, Forced Migration Studies Programme, Johannesburg, 11.

The Children's Act (Act 38, 2005)

The Children's Act is the main piece of legislation that governs the protection, rights and wellbeing of children in the Republic of South Africa. The definition of a child by the Act is inclusive. A child is 'any person under the age of 18, irrespective of nationality'. This means that any person younger than 18 living in the Republic of South Africa – irrespective of their country of origin – is regarded as a child and is thus a full beneficiary of the provisions of the Act.

The Act emphasises the best-interest principle, which governs all matters and decisions relating to the protection and wellbeing of children.

The Children Act requires that proceedings, actions or decisions in a matter concerning a child should:

- Respect, protect, promote and fulfil the child's rights as set out in the Bill of Rights and Chapter 3 of the Children's Act, subject to any lawful limitations;
- Respect the child's inherent dignity;
- Treat the child fairly and equitably; and
- Protect the child from unfair discrimination on any ground, including on the grounds of the health or HIV/AIDS status of the child or a family member of the child.

According to the Children's Act, all South African government departments and/or agencies should take the above-mentioned principles into account when considering matters affecting children. The Act creates supplementary rights for children to those contained in the Constitution. All children living in South Africa have the right:

- Not to be unfairly discriminated against, either directly or indirectly;
- To a name, nationality and identity;
- To a family and to have a relationship with their own family;
- To own property and to benefit from the proper administration of property;
- To protection from maltreatment, abuse, neglect, degradation, exploitation and other harmful practices;
- To protection from harmful social and cultural practices;
- To be protected from economic exploitation through administrative, social, educational, punitive and other suitable measures and procedures;
- To education, leisure, recreation, and access to court;
- To have confidential access to health related information on sexuality, reproduction and sexually transmitted diseases, including HIV/AIDS; and,
- To social security, including access to social assistance if the parent or care giver cannot or does not provide for the basic needs of the child.

In relation to refugee children, the Children's Act provides that every child who falls in the above categories in accordance with international or domestic laws is entitled to:

- The rights set out in the act, as may be appropriate in the circumstances;
- The right to be reunited with his or her parents or family if separated from his or her parents or family; and
- The right to receive humanitarian protection and assistance.

The act provides two additional rights for children with physical, intellectual or psychiatric disabilities, namely: the right to enjoy life in conditions which ensure dignity promote self-reliance and facilitate active participation in the community; the right to receive special care; and the right to receive fair financial assistance from the state. Therefore, the legal landscape presented here should act as a guarantee that refugee children falling in these vulnerable categories are protected and that their basic human rights such as education, health and housing are catered for by their host country. However, practically, vulnerable refugees categorised as children often find themselves in more extreme situations despite the laws that are meant to protect them.

CONCEPTUAL AND THEORETICAL FRAMEWORK

This paper uses a critical constructivist qualitative paradigm to examine the experiences of vulnerable refugee children seeking solace in South Africa, which is often hostile to migrants from Africa. The social protection approach assists in understanding the level of public goods and services provided by the government as well as the financial and material intervention of the UNHCR, which is mandated to provide social protection to refugees in general and refugee children in particular.

Critical constructivism qualitative paradigm

Critical constructivism asserts that nothing represents an objective and neutral perspective and encourages critical thinking and criticality in the research process. Critical constructivists argue that knowledge is temporally and culturally situated, and that knowledge and phenomena are therefore socially constructed in a dialogue between culture, institutions, and historical contexts. The plight of refugee children in South Africa can be explained by the fact that knowledge of the world is an interpretation crafted between people in a contextualised space.

The research leading to this paper therefore questions why a country with an armour of internal policies, guidelines and regulations and a plethora of international treaties, protocols and conventions it has acceded to and ratified, is not able or willing to assist vulnerable children who are provided for in its Constitution?

Part of the answer to this question is that historical, social, cultural, economic, and political contexts construct our perspectives on the world, self, and other. In this case, it could be argued that political unwillingness, local economic realities, and social and cultural beliefs and limitations have excluded refugees and refugee children from mainstream service delivery. A critical constructivist approach explains how socio-historic dynamics influence and shape the behaviour of the South African government and its public servants to refuse services to refugee children while formulating recommendations on policy reforms and corrective practices to include refugees and refugee children in mainstream service provision.

The critical constructivist research perspective of this paper debates how South Africa has reproduced systems of class, race, cultural, and gender oppression in which exclusion of refugee children is a reality. The paper aims to encourage reflexivity to repair the negative consequences of government's failure to fulfil its continental mandate through the New Partnership for Africa's Development (NEPAD) and African Union (AU) to cater for refugee children.

The paper presents a participatory approach whereby refugees participate in policy and decision-making processes on matters affecting their lives as well as an African mechanism on managing the refugee system in response to the critical constructivism recommendation on establishing dialogues to achieve mutual understanding on the misery of refugee children between refugees, the government, the UNHCR and the AU.

Social protection dilemma

Refugee children are a vulnerable social group in South Africa because they are not beneficiaries of a social protection system. Social protection systems help the poor and vulnerable cope with crises and shocks, find jobs, invest in the health and education of their children, and protect the aging population.¹⁶

The United Nations Research Institute for Social Development (2010) defines social protection as measures to prevent, manage, and overcome situations that adversely affect people's wellbeing;¹⁷ the World Bank defines it as those policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, and enhancing their capacity to manage economic and social risks, such as unemployment, exclusion, sickness, disability and old age.¹⁸

Refugees and asylum seekers require special protective measures due to their vulnerability and should enjoy all rights on the same basis as citizens of the State. However, they are excluded from the social protection systems of both the South African government and the UNHCR and are therefore left to the mercy of non-governmental organisations, such as RCP, which have limited resources. The governance system of South Africa on refugee matters is not only weak but also discriminatory.

SUMMARY OF RESEARCH FINDINGS

Research into the lived experience of refugees and refugee children specifically in Africa is limited, and African countries with large refugee populations the focus is often on work to support the refugee community as a whole; children are viewed as a constituent of this community rather than a sector.¹⁹ This predicament is illustrated in South Africa as an example (Landau, 2006; Crush & Tawodzera, 2014; Van der Burg, 2006).^{20 21 22}

A baseline study conducted by RCP in 2018 concluded that the lives of refugee children in South Africa remains precarious. The RCP study which was done with support from partner organisations in the MAMAS ALLIANCE, looked at the status of refugee, asylum seeker and undocumented migrant children in South Africa. The study found that these children were mostly girls, undocumented, not attending school yet they were of school-going age, and what is more disconcerting is that many of these vulnerable children did not have caregivers.²³

The study, which was qualitative in nature, used data from media reports, direct observation of the children as well as interviews with available caregivers and officials working within the Mamas Alliance.

Although a broader sample of vulnerable children was studied, a significant majority of these were refugee and undocumented migrant children. The study confirmed the obstacles to accessing health, education and documentation, which should be freely accessible to refugee children.

16 www.worldbank.org/en/topic/socialprotection

17 UNRISD. 2010. *Combating Poverty and Inequality: Structural Change, Social Policy and Politics*.

18 World Bank, 2001. *Social protection sector strategy: From safety net to springboard*. The World Bank.

19 Uppard, S. and Birnbaum, L., 2017. Field handbook on unaccompanied and separated children. Inter-agency Working Group on Unaccompanied and Separated Children.

20 Landau, L.B., 2006. Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy. *Journal of refugee studies*, 19(3), pp.308-327.

21 Crush, J. and Tawodzera, G., 2014. Exclusion and discrimination: Zimbabwean migrant children and South African schools. *Journal of International Migration and Integration*, 15(4), pp.677-693.

22 Van der Burg, A., 2006. Legal protection of undocumented foreign migrant children in South Africa: Reality or myth? *Law, Democracy & Development* 10 (2), pp 82-100.

23 Mama's Refugee and Unaccompanied Minors Business Unit, 2018. *The status of refugee, asylum seeker and undocumented migrant children in South Africa*. Baseline Study., p. 72.

MEDIA REPORTS ON THE PLIGHT OF REFUGEE CHILDREN IN SOUTH AFRICA

- On 27 October 2017, a *Times Live* report with the headline 'Child refugees: SA's invisible children' tells the story of a Rwandan-born girl and baby who are just two of thousands of child refugees in South Africa without legal status.
- Under the headline, 'South African youth want more action on refugees', *Independent Online* (IOL) reported on 20 June 2017 that 68% of young people in South Africa believe that the government is doing too little to help solve the global refugee crisis, while only 5% believe it is doing too much. From a service provider's point of view, RCP argues that the South African government is not providing appropriate services to refugees, asylum seeker and migrants, especially children.
- The *Mail & Guardian* reported on how 'Refugee children win right to learn' on 14 July 2014, which stressed how many undocumented families struggle to register their children at public schools.
- The online edition of ENCA reported on 7 February 2017 that migrant children experienced xenophobia and could not go to mainstream schools as they have been beaten up, assaulted and deprived of food (see the newspaper article 'A rare lifeline for migrant children in South Africa').

Meda's (2017) work on the trans-migratory experiences of Zimbabwean refugee children reiterates the trauma refugee children face during the journey to South Africa. Many are ill-prepared because they leave Zimbabwe abruptly and endure maltreatment from immigration and police officials and extortionists who abuse them along the way. This trauma is aggravated in the host country upon arrival because they find a system that ignores refugee welfare, including that of children.²⁴

Crush and Tawodzera (2014) documented the experiences of Zimbabwean migrant children in South African schools. Like Meda they observed that children had negative experiences in spite of South Africa's adoption of international protocols and impressive human rights laws. Access to basic education is problematic for these children because schools act as agents of immigration control by requesting birth and immunisation certificates as a form of exclusion. Furthermore, when the children eventually do gain admission, they face discrimination and xenophobic attacks from peer students and teachers.²⁵ The authors above as well as the 2018 RUMS / RCP study confirm the experiences of NGOs that work for and with refugee children as documented in the above baseline study.

Non-profit organisations at the rescue of refugee children: the Refugee Children's Project (RCP)

RCP is a non-profit organisation that has served refugee and migrant women and children for over 17 years. RCP works beyond its core service of child protection services by focusing on the principles of unity and ubuntu²⁶ in the community through services like early childhood development, psychological support, vocational skills training, intermediary tutorial and afterschool programme, and advocacy and lobbying. RCP engages government institutions at local and national levels to advocate for access to education, health and documentation for migrant minors.

Refugee children remain vulnerable because of the limited capacity and resources of RCP, as well as other organisations that assist refugee children, coupled with the non-direct involvement of the UNHCR and lethargy of the government on providing services.^{27 28 29}

24 Meda, L., 2017. A journey without planned destination: traumatic transmigration experiences of refugee children. *Journal of International Migration and Integration*, 18(1), pp.131-142.

25 Crush, J. and Tawodzera, G., 2014. Exclusion and discrimination: Zimbabwean migrant children and South African schools. *Journal of International Migration and Integration*, 15(4), pp.677-693.

26 Ubuntu is an ancient African word meaning "humanity to others"? It is often described as reminding us that "I am what I am because of who we all are" (<https://ubuntu.com>)

27 Crush, J., Chikanda, A. and Tawodzera, G., 2012. *The third wave: Mixed migration from Zimbabwe to South Africa*.

28 Rugunanan, P., and Smit, R. (2011). Seeking refuge in South Africa: challenges facing a group of Congolese and Burundian refugees. *Development Southern Africa*, 28(5), 705-718.

29 Steenkamp, C., 2009. Xenophobia in South Africa: What does it say about trust? *The Round Table*, 98(403), pp.439-447.

Supporting refugee children to realise their rights in South Africa

1. A participatory approach

In his book, *Pedagogy of the Oppressed*, Paulo Freire theorises that individuals and communities can act as active agents of their development. Nnadozie (2013) advocates similarly for a participatory community development approach to reverse the exclusion of refugee children in South Africa.³⁰ Rather than perpetuating the status quo in which refugees and their children are passive, which leads to their suffering, efforts should be made to transform them into co-actors together with the government and civil society, to become agents of their own destiny.

The first important recommendation put forward by this paper is therefore a participative approach in policy and decision-making processes on matters affecting the life of refugees. Supporting refugee children to realise their rights is an enormous task that requires a multi-dimensional approach or a combination of various strategies involving various role players interacting around the population of concern, being refugees in general and refugee children in particular. Nnadozie says a more proactive development approach is essential not only to improve basic living conditions of the poor (refugees in this case) but also to empower them as active stakeholders and responsible individuals within engaged communities to actively participate in shaping their future.

Refugees who have lost all their possessions and sources of income commonly require specific measures. While NGOs have tirelessly sought to keep the rights of refugee children firmly on the agenda for service delivery, there has been limited research to explore how successful they have been in the African context. In South Africa, an African state with commendable human rights legislation, and a signatory to relevant international and regional instruments that protect vulnerable children which it has ratified.

Van der Burg (2006) leverages the legal mandate used by the judiciary to compel the South African government to offer grants to parents of undocumented foreign children. Building on the adoption of the Children's Act in 2005, Van der Burg (2006) reveals the obstacles these children face, which includes arrest, detention and deportation which are in contravention of children's basic human rights.

30 Nnadozie, R.C., 2013. *Access to basic services in post-apartheid South Africa: What has changed? Measuring on a relative basis*. African Development Bank Group, Statistical Department.

Further reflection on refugee policies reveals that South Africa's intention for integration does not necessarily create a conducive statutory and policy implementation environment that can 'always translate into requisite entitlements' that refugees and migrants can utilise for 'accessing jobs, social services and avoiding abuse'.³¹

2. The role of government

The second recommendation concerns the South African government. With the support of the international community, the social protection needs of refugees are increasing in visibility on the policy agenda; policy reform is thus crucial. There are a number of international social protection policy responses to the needs of refugee populations which offer a basis for distilling policy lessons to facilitate the development of good practice. Contextual issues dictate the choice of policies and practices in different national settings.

If not correctly implemented and enforced, the South Africa's Constitution, the Refugees Act, the Children Act, as well as the other local regulations and policies and international treaties, protocols and conventions do not suffice to fix the great harm South Africa has caused to refugee and particularly refugee children. A renewed commitment of the government to the cause of refugees in general and particularly refugee children is urgently needed. Additionally, a political willingness, through a clear policy orientation and the establishment of committed structures to deal the refugee governance and the provision of basic rights and constitutional obligations to refugee children are needed thus the restructuring of the whole refugee governance.

The example of Uganda, which has a refugee population of almost a million, can serve as a lesson to South Africa. Rights afforded to refugees include the right to work, the donation of a piece of land to cultivate and access to elementary education for refugee children.

The government should also design strategies to involve refugees in the policy- and decision-making processes on matters that affect their lives.

31 Landau, L.B., 2006. Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy. *Journal of refugee studies*, 19(3), pp.308-327.

3. A continental strategy

The final recommendation is to develop a continental structure with strategies, guidelines and mechanisms for a governance system that prioritises the rights of refugee children, and monitors, evaluates and reviews compliance. This structure should include AU member countries and should be launched through a special session of the AU with the participation of high ranking officials from across the continent, and representatives of organisations such as the UHCR and the African refugee community. The gathering should recognise the refugee crisis on the continent and acknowledge that host countries are remiss in their duty to assist fellow Africans. Continent-based research into the reasons for this lethargy and into the feasibility of AU-based funding is also needed.

The views and participation of the children must be considered when determining their well-being. International agencies like the United Nations Children's Fund (UNICEF), the United Nations Refugee Agency (UNHCR) and government agencies should work within a global framework to ensure that vulnerable children including refugee children, receive social support to protect and enjoy their human rights. The AU should develop and lead structures and programmes that deal with refugee matters.

In Africa, the instrument that addresses the crisis of vulnerable children is the African Charter on the Rights and Welfare of the Child, adopted in 1990.³² This legal document provides the basis for the protection of all children in Africa should support national laws to protect children, including refugee children. The charter should be promoted by the AU.

The use of best practices on refugee governance is also an important recommendation of this paper. Programmes such as the ZOA Uganda and Street Child programme in Uganda, which includes education for refugee children in their special portfolio, must be documented and piloted in other African countries. In South Africa, organisations such as the Jesuit Refugee Services, the Consortium for Refugees and Migrants in South Africa (CoRMSA) and the RCP, which work directly with refugee communities, should be funded by the South African government and international organisations in their efforts to support vulnerable refugee children.

CONCLUSION

The rights of refugee children are protected by international instruments intended to ensure that their vulnerability does not impede their well-being. Furthermore, the global framework, in particular the UN Convention on the Rights of the Child, works for children who find themselves displaced from their country of origin with or without their parents to ensure that decisions and actions by international agencies and governments are always in the best interests of the children.

The right to life, development and survival of the child should always be protected, regardless of the child's origin. Although South Africa has a commendable legislative framework guided by international treaties, protocols, and conventions to protect refugee children, most of these children have been unable to access public health, education, and documentation services from the government in the absence of social protection from the UNHCR. The few non-governmental organisations working with refugees and refugee children have limited resources, infrastructure and capacity to address all their issues.

The experiences reported by RCP affirm that refugee children are subject to harsh conditions in South Africa that calls for urgent remedial action.

At local level this should include participation of refugees on policy and decision-making processes on matters affecting their lives and at national level there should be a recommitment of the South Africa government to its constitutional and international obligations on the protection of refugee children.

At international level, the involvement of the AU is crucial to create a structure and a governance system on refugees in general and refugee children in particular. African heads of state should be involved and engaged on refugee children issues. Continental initiatives such as the *African Union Year of Refugees, Returnees, and Internally Displaced Persons: Towards durable solutions to forced displacement in Africa* need to be maintained so that member states can work towards the protection of refugee children and the realisation of their full rights.

³² African Union, 1990. African Charter on the Rights and Welfare of the Child. Addis Ababa: African Union.

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