GENERAL COMMENT NO XX ON THE AFRICAN CHARTER ON HUMAN AND PEOPLES’ RIGHTS: THE RIGHT TO FREEDOM OF MOVEMENT AND RESIDENCE (ARTICLE 12(1))

A. Objective and scope of this General Comment

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

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

2. While article 12(1) of the African Charter is part of article 12 which protects mobility into, within and from a state, this General Comment focuses specifically on article 12(1). It deals with mobility within the borders of the state. Positive developments on the right to freedom of movement and residence in Africa including their inclusion in the constitutions of all 55 African Union Member States, have been marred by a number of negative developments on the ground. Three reasons therefore justify the focus of this General Comment on article 12(1). First, it is often taken for granted that movement of persons within the borders of a state are without challenges. This is not always the case. In several African countries, the right to freedom of movement and residence of human rights defenders, members of opposition parties, internal displaced persons, migrants including children and refugees within the borders of states have been infringed upon by several forms of restrictions including detention and confinement. Although international human rights law provides for principles and standards in relation to restriction of the right to freedom of movement and residence without any ground for discrimination, these are hardly respected partly because states have developed different understanding of their obligation toward realising this right. This General Comment seeks to address this issue. Second, existing treaties at
the sub-regional and regional level mostly relate to cross-border mobility, but are not very elaborate on the human rights obligations of states with respect to intra-state mobility. Third, there are differences in national constitutions regarding the right to freedom of movement and residence within the borders of a state for which clarity, leveraging the provision of article 12(1), is important.

3. The right to freedom of movement and residence intersects with several other rights, including the right to liberty protected under article 6 of the African Charter. Any restriction on the right to freedom of movement amounts to deprivation of liberty and its legality should accordingly be assessed in light of the jurisprudence and interpretative guidance on article 6 of the African Charter and other international human rights law instruments. The right to freedom of movement and residence intersects also with other civil, political, socio-economic and cultural rights. The right to freedom of movement and residence is an indispensable condition for the exercise of human development.

4. This right is recognised in regional and sub-regional legal instruments and at the national level. In addition to the African Charter, the following African Union legal instruments protect the right to freedom of movement and residence: the 2006 African Youth Charter; the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons; the 2018 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities; and the 2018 Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment.

5. This General Comment aims to provide clarity to state parties to the African Charter on their obligations under article 12(1). It therefore focuses on the right to move freely and choose residence within the borders of a state. It is anticipated that greater clarity will foster a common understanding of this right and improve its implementation in practice. While the General Comment does not establish new rules, it sets out and builds on universally recognised standards related to the right to freedom of movement and residence under international human rights law. It is developed in line with the Resolution XX on the Elaboration of a General Comment on Article 12(1) of the African Charter on Human and
C. **The elements of article 12(1)**

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

‘**every individual**’

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

‘**the right to freedom of movement**’

8. The right to move freely within a state encompasses the prerogative to move around within a state without arbitrary confinement of movement. It imposes a duty on the state not to interfere with the enjoyment of the free movement of individuals. The right to move freely requires states to ensure that arbitrary distinctions on movement are not drawn between nationals and non-nationals. Non-nationals, unlawfully in the territory of a state, whose status become regularised either by becoming a refugee, permanent resident, holder of a temporary residence permit or any other equivalent document, are entitled to move freely in the state and benefit from the protection of that state. It is crucial that states afford the same standard of protection to everyone within its territory, including asylum seekers. The emphasis of this guidance is that national legislations that bifurcate protection on the basis...
of nationality must be revised to avoid indiscriminate and arbitrary interference with this right contrary to the object and purpose of the African Charter.

9. Domestic laws that seek to curtail the free movement and residence of refugees, migrant workers or internally displaced persons within the borders of a state must be reviewed. Freedom must be the rule and restriction the exception. States must prohibit unlawful and disproportionate exercise of stop-and-search powers by law enforcement officials. Laws that seek to restrict the movement of specific categories including persons with disabilities should also be revised. States must endeavour to ensure that young people move freely.

National legislation that grants the executive the power to banish or confine (including through house arrests and travel ban) certain persons, such as members of opposition parties and human rights defenders, to certain areas without judicial authorisation must be reviewed.

**the right of freedom to choose residence**

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

**‘within the borders of a state’**

11. The territorial component of article 12(1) of the African Charter requires state parties to protect the right to freedom of movement of every person primarily within their borders. The phrase ‘within the borders of a state’ contemplates the geographical areas of a state including airspace and maritime zones over which a state exercises control. The territory envisioned in the concept of ‘within the borders of a state’ includes, but is not limited to, the capital city of a state, the various regions, and provinces, including cities, towns, villages, precincts, divisions, communes, sectors and chiefdoms. The right to freedom of movement and residence must be guaranteed in the same way in every political and administrative subdivisions of states.
‘provided every individual abides by the law’

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

D. Limitations

General limitation

13. While limitation of rights is permissible under international human rights law, generally, and under the African Charter, specifically, such limitations must never render rights illusory. To be permissible, any limitation on the right to freedom of movement must serve a legitimate aim; and must be proportionate with and absolutely necessary for the advantages that are to be obtained in a free and democratic society.

14. A free and democratic society is a society where equality, human dignity, non-discrimination and freedom of expression prevail. Restriction on movements must also respect the right to equality and non-discrimination; and must not be exercised indiscriminately or targeted specifically at stigmatising a particular group. In extraordinary situations posing a fundamental threat to the country, restrictions on the right to freedom of movement and residence may be imposed. Restrictions may also occur for the purpose of public health in the case of national epidemics. However, states must ensure that limitation on the right to freedom of movement is only undertaken for the purposes under article 27(2) of the African Charter, which are due regard to the rights of others, collective security, morality and common interest.¹⁴

15. Potential grounds of limitation should not be vaguely construed so as to deprive the right to freedom of movement and residence of its essence. They should be construed with due respect to other rights in the African Charter taking into consideration the object and purpose of the Charter itself.

16. States must ensure that laws permitting limitation on the right to freedom of movement are not ambiguous or create room for discretionary restrictions. Where restrictions on movements are based on lawful detention, these restrictions must be in compliance with
the accepted limitation on the right to personal liberty under international human rights law. States must be aware that any deprivation of liberty resulting from a violation of a formal or substantive safeguard of the African Charter, including those based on discriminatory grounds or practices, are arbitrary and unlawful.

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

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

Armed conflict
19. In situations of armed conflict, the right to freedom of movement and residence must not be restricted unless for the safety of civilians or for military necessity such as clearing a combat zone or preventing the use of human shield.16 Parties to the conflict must refrain from arbitrary displacement of civilian populations. Displacement must not be used as a method of warfare and must not amount to war crimes, genocide, crimes against humanity or ethnic cleansing.17 The movement of the population must not violate international human rights and humanitarian law.
20. Where civilian populations are to be evacuated, the parties to the conflict must take all feasible precautions to protect them from the effect of hostilities.\textsuperscript{18} Parties to the conflict must ensure that families are not separated. Civilian populations must also not be moved to areas where abuse are likely to occur. Children must not be moved to areas where they may be conscripted. Women and girls must be protected from all forms of abuse including sexual exploitation.

21. The parties to the conflict must allow, ensure and enable the unimpeded passage of humanitarian relief and assistance as well as authorized humanitarian personnel to civilians in need. While the movement of authorized humanitarian personnel may be temporarily restricted in cases of military necessity,\textsuperscript{19} restrictions must not affect the exercise of their functions where the necessity ceases to exist.

22. The affected population must be allowed to voluntarily return to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.

E. State obligation for actions by state actors

23. States have the primary duty to protect and ensure the protection of the right to freedom of movement and residence provided for under article 12(1) of the African Charter. States must take measures to respect, protect, promote and fulfil the right to freedom of movement and residence. States are responsible for the violation of the right by their public organs including the police, armed forces, state security officials, national agencies and authorities at various tiers of government.

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

Obligation of the executive arm of the state

25. The executive arm of the state must ensure that laws and policies relating to the free movement of persons are implemented. The executive must also ensure that it ratifies international legal instruments on the right to freedom of movement and residence without
delay. Executive organs at state and sub-state level including members of the security forces must ensure that the right to freedom movement and residence is not arbitrarily deprived.

26. In respecting the right to freedom of movement and residence, the executive arm of the state must ensure that public officials refrain from acting contrary to international law standards including human rights and humanitarian law in the regulation of the right to freedom of movement and residence. The executive arm must also refrain from interfering with judicial processes and impeding access to remedies for victims of violations of the right to freedom of movement and residence. Conditions imposed on individuals to report to police services or immigration officers whenever they seek to change their residence, unless founded on reasonable grounds of suspicion, should be regarded as inconsistent with the exercise of the right to freedom of movement and residence.

27. In protecting the right to freedom of movement and residence, the executive arm must ensure that violations of the right by non-state actors are prevented, promptly investigated and adequately prosecuted. Security officials should be trained and effectively equipped to examine allegations on a case-by-case basis. The failure of the executive arm of the state to investigate perpetrators of acts of harassment and violence that create well-founded fear for individuals and prevent them from returning to their places of residence violates the right to freedom of movement and residence.

28. In the promotion of the right to freedom of movement and residence, the executive arm must ensure that public officials including law enforcement, members of the armed forces, emergency management authorities, border and immigration personnel are trained on international human rights and humanitarian standards for the furtherance of the right to freedom of movement and residence. The executive arm should also implement programmes that enable the furtherance of societal cohesion and support knowledge generation on the furtherance of social harmony. Such programmes include awareness-raising campaigns, training, education and knowledge-dissemination in the furtherance of the right. Laws for the furtherance of human rights including the right to freedom of movement and residence must be gazetted.
29. In the fulfilment of the right to freedom of movement and residence, the executive arm must ensure that public officials in various state agencies take measures that enable the realisation of the right to freedom of movement and residence. Such measures must include access to roads, pathways and means of transportation for all persons including persons with disabilities.

30. The executive of the state must strengthen its capacity including the capacity of other arms of government in the furtherance of the right to freedom of movement and residence. The executive arm must not negatively interfere with the activities of other arms of government in the realisation of this right. The executive arm must also execute judicial decisions in furtherance of the right to freedom of movement and residence. Xenophobic tendencies that may interfere with the enjoyment of the freedom to choose residence must be addressed.

Obligation of the legislative arm of the state

31. The legislative arm of the state must ensure that laws and policies are adopted in furtherance of the right to freedom of movement and residence. The legislative arm must repeal laws that are contrary to international standards including international human rights and humanitarian law. The legislature must domesticate international law standards for the furtherance of the right to freedom of movement and residence.

32. In the furtherance of the obligation to protect the right to freedom of movement and residence, the legislature must ensure that it adopts laws that enable the accountability of non-state actors including businesses and armed groups for violations of the right to freedom of movement and residence.

33. In the promotion of the right to freedom of movement and residence, the legislature must ensure that its members actively engage in supporting debates on the furtherance of this right in legislative debates, committee sessions and at constituency level.

34. In fulfilling the right to freedom of movement and residence, the legislature must pass laws that build societal cohesion and prohibit negative sentiments and xenophobia against non-nationals. Laws that create an environment of impunity or incite violations must be
reviewed. Such laws may include laws that permit police and army officers to supervise residences of nationals or foreigners without evidence that they might pose serious threat to the defence or national security of the country; laws that limit the movement of nationals and foreigners in certain area of the state and permit law enforcement officers to arrest and detain such persons who may have allegedly violated those restrictions, without due process of law.

**Obligation of the judicial arm of the state**

35. The judicial arm of the state should serve as a custodian for the right to freedom of movement and residence. The judiciary should interpret and apply laws on the right to freedom of movement and residence in line within international standards.

36. In respecting the right to freedom of movement and residence, the judicial arm of the state should ensure that it refrains from making orders or giving decisions that arbitrarily limit the right to freedom of movement and residence.

37. In protecting the right to freedom of movement and residence, the judiciary should ensure that justice is properly done where non-state actors violate the right to freedom of movement and residence. The judiciary should also ensure that perpetrators of violation of this right are sanctioned. In promoting the right to freedom of movement and residence, the judiciary should ensure that it elaborates on the value and significance of this right in its jurisprudence.

38. In fulfilling the right to freedom of movement and residence, the judiciary must ensure, through judicial writs, that public officials do not fail to carry out their duties. In any judicial review on legislative or executive action touching on freedom of movement and residence, the judiciary shall uphold the right to freedom of movement and residence.

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

39. The obligation to protect requires states to ensure that non-state actors do not violate the right to freedom of movement and residence. This duty requires states to ensure that due diligence measures are established. In general, these measures should seek to prevent
infringements, investigate allegations, prosecute perpetrators and punish violations by non-state actors.  

40. The duty to prevent infringement require states to establish safeguards for the actualisation of the right to free movement and residence for all persons within the state. Well-suited measures of protection must be adopted by states where there is factual evidence to suggest threats or restrictions to the exercise of the right to freedom of movement and residence by non-state actors.

41. Further, states should investigate allegations of violations of the right to freedom of movement and residence carried out by private actors. Threats to the right to freedom of movement and residence must also be investigated, as they constitute de facto deprivation of the right to freedom of movement. Efforts must be directed at investigating alleged threats, harassments and abuses by non-state actors.

42. States should prosecute and punish perpetrators of violation of the right to freedom of movement and residence. In addition, states must ensure accountability of armed groups for violation of the right to freedom of movement and residence.

43. Where business enterprises, including multinationals are involved, states must ensure that the responsibility to respect human rights is complied with. States must also ensure that businesses adopt human rights policy statements and internalise within their structures respect for human rights including the right to freedom of movement and residence of all persons within the area of their operations.

44. In the exercise of due diligence, states must also ensure that individuals are protected from violations of other African Charter rights ancillary to the exercise of the right to freedom of movement and residence.

G. Specific categories

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

**Internally displaced persons**

46. Internally displaced persons must be allowed to move freely and reside anywhere within the borders of a state. States must ensure that members of armed groups refrain from restricting the right to freedom of movement and residence of internally displaced persons within and outside their places of residence. Through laws and institutional measures, states must guarantee the right of internally displaced persons to exercise agency in their choice of residence. Where families are separated due to displacement, states must adopt measures to facilitate mobility for family reunification. States must ensure that internally displaced persons decide on integration, return or resettlement. Internally displaced persons must be protected against forced return or resettlement in places where their life, safety, liberty and health would be at risk.

**Asylum seekers**

47. States must ensure that asylum seekers are accorded the right to move freely and reside within the borders of a state. States must refrain from detention of asylum seekers and seek alternatives to detention in the treatment of asylum seekers. Alternatives to detention must not be alternative forms of detention. Asylum seekers must not be detained in maximum-security facilities. Restriction on the movement of asylum seekers must not be indefinite. States must facilitate and expedite the process of documentation for asylum seekers.

**Refugees**

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

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

**Migrant workers**

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

**Women**

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

**Children**

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

\textbf{Nomadic populations}

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

\textbf{Human rights defenders}

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

\textbf{Older persons}

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

\textbf{Persons with disabilities}

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

**Persons living with HIV**

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

**H. Access to justice and remedies**

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

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

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

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

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

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

As above.