



STUDY ON THE ROLE OF HUMAN RIGHTS DEFENDERS IN THE AFRICA CONTINENTAL FREE TRADE AREA

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List of Acronyms and Abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
AEC	African Economic Community
AfCFTA	African Continental Free Trade Area
AfBC	Africa Business Council
AGA	African Governance Architecture
AMI	African Multinational Institutions
AU	African Union
AUC	African Union Commission
APRM	African Peer Review Mechanism
CFTA	Continental Free Trade Area
CCU	Continental Customs Union
COMESA	Common Market for Eastern and Southern Africa
CSSDCA	Conference on the Security, Stability, Development and Cooperation in Africa
ECA	Economic Commission for Africa
ECOSOCC	Economic, Social & Cultural Council
ECOWAS	Economic Community for West Africa
EAC	East African Community
EC	European Community
EPAAPS	Eminent Persons & AfCFTA Ambassadors from the Private Sector
FTA	Free Trade Area
GATT	General Agreement on Trade and Tariffs
GATS	General Agreement on Trade in Services
HRDs	Human Rights Defenders
LDCs	Least Developed Countries
MFN	Most Favoured Nation
MSMS	Micro, Small and Medium Size Business
MNCs	Multinational Corporations
NAFTA	North American Free Trade Agreement
NAPS	National Action Plans
NEPAD	New Partnership for Africa's Development
NT	National Treatment
NTBS	Non-Tarif Barriers
PTA	Preferential Trade Agreement
RECs	Regional Economic Communities
RoO	Rules of Origin
RTA	Regional Trade Agreements
SADC	Southern African Development Community
SDPAR	Solemn Declaration on Pan-Africanism and African Renaissance
SDGs	Sustainable Development Goals
TFTA	Tripartite Free Trade Area
UDHR	Universal Declaration on Human Rights

UN.	United Nations
UNECA	United Nations Economic Commission for Africa
UN GPS	United Nations Guiding Principles on Business and Human Rights
UNECA	United Nations Economic Commission for Africa

Foreword

The Institute for Human Rights and Development in Africa (IHRDA) has been following with keen interest developments regarding the negotiations and implementation of the African Continental Free Trade Area (AfCFTA) Agreement, which is a major milestone in economic and regional integration processes in Africa, in line with the aspirations of the flagship “Agenda 2063” of the African Union for inclusive and sustainable development. The Agreement establishing the AfCFTA was signed in March 2018 and entered into force in May 2019, while Member States began trading under the Agreement in January 2021.

In many respects, the AfCFTA has been described as a game changer for the continent. When fully operationalized, the AfCFTA will create the second largest trading bloc, after the World Trade Organization, with a single market connecting 1.3 billion people in 55 countries with a combined GDP of US\$3.4 trillion. It is expected that, by 2035, implementation of the AfCFTA will help move about 30 million people from extreme poverty and 68 million people from moderate poverty, as it will significantly counter one of Africa’s largest economic banes – that is, low level of intra-African trade. Besides massive economic and financial gains envisaged, the AfCFTA is also envisaged to boost the economic potential of women, youths and unskilled workers, with better wages and employment opportunities, as well as increased production, transformation and marketing capacity.

Despite these anticipated gains of the AfCFTA, the focus on human rights within its guiding framework and philosophy has been quite muted, albeit the potential risk factors present and expected. The synergies between the AfCFTA, Agenda 2063 and the SDGs have a necessary bearing on the African Human Rights System, which is designed and functions to ensure the promotion, protection, respect and fulfilment of human rights. It has however been observed that trade agreements and economic integration do not always lead to fair and sustainable outcomes. The drive for accelerated industrialization may have consequential effects in widening the wage gap, as low-skilled workers may be exploited, environmental pollution may increase and the gender gap in skills development and access to economic opportunities widened, all of which will impact negatively on the well-being of the most vulnerable persons on the continent. Women, for example, account for about 70% of cross-border trade in Africa; yet, in carrying out their economic activities, they are prone to violence and harassment. Limitations in property rights also tend to affect female farmers, as they are unable to maximize their investment and export-led growth. Together with youth, they are also met with barriers to accessing finance, productive resources and other assets in the agricultural sector. In its seminal [study on “Children on the Move Within Africa”](#), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) found that child labour migration was a principal feature of contemporary economic migration in Africa. Much of this migration involved low-skilled workers and was concentrated in the agricultural, informal trade and domestic service sectors. Children on the move for economic reasons were motivated by factors such as poverty.

As has been observed, placing human rights at the centre of economic policy enhances the quality of economic growth. Thus, commitments made by AU Member States to Agenda 2063, SDGs and the principal human rights instruments of the AU, place an obligation on African States to ensure that the AfCFTA achieves the whole gamut of economic, social and cultural rights in the main, as well as civil and political rights. Safeguarding human rights within the AfCFTA is therefore a *sine qua non* to the success of the development agenda of the AU. Thus, the [Pretoria Declaration on Economic, Social and Cultural Rights in Africa](#) sums it all up when it states that, “the AU, its Member States, international and national organizations and non-state actors should fully recognize human rights as a fundamental objective of development and that development has to achieve the full realization of all human rights. Economic, social and cultural rights should therefore be integrated into development planning and implementation, so that African needs and aspirations are fully addressed.”

Although civil society in Africa, broadly, and Human Rights Defenders (HRDs), in particular, have played a pivotal role in the advancement of human rights and holding States accountable in Africa, their level of involvement and voice in the negotiations leading up to the AfCFTA and the early steps towards implementation of the framework Agreement has not been encouraging, besides their conspicuous absence in the structures established to oversee implementation of the framework Agreement. This may be due in part to the fact that the actors steering the AfCFTA agenda do not fully appreciate the relevance of human rights to the AfCFTA agenda, and also the fact that human rights defenders have capacity and resource limitations to engage on trade issues.

Against this backdrop, in November 2021, IHRDA began partnering with the Deutsche Gesellschaft für Internationale Zusammenarbeit GmbH (GIZ) to boost the protection of human rights in the AfCFTA agenda. This collaboration tries to explore avenues for human rights protection in the AfCFTA, and to sensitize human rights defenders on the roles they can play in advancing the protection of socio-economic rights in the AfCFTA.

This study is a product of the IHRDA-GIZ partnership. It provides an assessment of the human rights stakes in the AfCFTA, and the legal framework for mainstreaming human rights in the AfCFTA; it brings out the role HRDs defenders should play in the AfCFTA processes, and highlights the challenges to an effective and efficient participation of HRDs, as well as a way forward and opportunities for more effective and efficient participation of HRDs and human rights mainstreaming in the AfCFTA.

In the hope that this instrument will significantly contribute to strengthening the knowledge and engagement of HRDs vis-à-vis the AfCFTA, IHRDA expresses gratitude to GIZ for its support towards the realisation of this project.

Gaye Sowe
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IHRDA

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Chapter 1: Introduction and Background

Africa is home to at least 19 regional and subregional organizations with varying differences both in their substance and objectives. In the 2006 African Union (AU) Summit, held in Banjul, The Gambia, African Heads of State signed a moratorium on the creation of Regional Economic Communities (RECs) and recognized eight while urging them to “coordinate and harmonize their policies among themselves and with the Commission with a view to accelerating Africa’s Integration”.¹ The Treaty Establishing the African Economic Community, (“the Abuja Treaty”) of 1991 superseded all prior coordination mechanisms toward the economic, social, and cultural integration of the continent by establishing the African Economic Community (AEC).² It reflects various resolutions and declarations adopted by the Organisation of African Union (now African Union) in September 1986 in Algiers; August 1970 and May 1973 in Addis Ababa; July 1977 in Libreville; in December 1976 in Kinshasa; and the Lagos Plan of Action and Final Act of April 1980 respectively.³ The Africa Continent Free Trade Area (AfCFTA), therefore, drew its inspiration from continental accords such as the Lagos Plan of Action and Final Act of Lagos and the Abuja Treaty, which mandates the RECs to establish free trade areas and customs unions by the end of 2017.⁴

As a frontrunner to the AfCFTA, the AEC envisaged a six-stage roadmap for achieving continental integration within a period of 34 years beginning in May 1994 when the Abuja Treaty came into force.⁵ Within this period, the AEC shall ensure the following:

- a. Strengthens existing RECs and establish others where they do not exist;
- b. Concludes agreements that harmonize and coordinate policies amongst existing and future RECs;
- c. Promotes and strengthens joint investment programs in the production and trade of major products and inputs within the framework of collective self-reliance;

¹ AU Assembly, “Decision on the Moratorium on the Recognition of Regional Economic Communities (RECs), (AU Assembly, 7th Ordinary Session, 1-2 July 2006, Banjul, The Gambia) available: https://au.int/sites/default/files/decisions/9555-assembly_au_dec_111-133_vii_e.pdf (last accessed 29 May, 2022); Note that the same 8 RECs are stated in the Preamble of the AfCFTA Agreement as building blocks for the implementation of the AfCFTA; see also the Monrovia Declaration of Commitment on Guidelines and Measures for National and Collective Self-reliance on Economic and Social Development for the Establishment of a New International Order, which called for the establishment of an African Common Market as a prelude to the AEC.

² Art. 2, Abuja Treaty, 1991

³ See Preamble, Lagos Plan of Action, 1991

⁴ Dawn Nagar and Fritz Nganje, “The African Union and its Relations with Sub-regional Economic Communities”, in Tony Karbo and Tim Murithi (eds), *The African Union: Autocracy, Diplomacy and Peace Building in Africa*, (2018), p. 211.

⁵ As Above, p. 207

- d. Liberalizes trade through the abolition of customs duties on imports and export and abolish non-tariff barriers and establish an FTA within each REC;
- e. Harmonizes national policies in promoting community activities in the areas of Agriculture, Industry, transport and communication, energy, natural resources, trade, money and finance, human resources, education, culture, science, and technology;
- f. Adopts a common trade policy with non-AEC members;
- g. Establishes and maintains a common external tariff;
- h. Establishes a common market;
- i. Gradually removes any obstacle to free movement of persons, goods, services, capital, and the right of residence and establishment, amongst members;
- j. Establishes a Community Solidarity, Development, and Compensation Fund;
- k. Grants special treatment, and adopt special measures in favour member States classified as LDCs, land-locked, semi-landlocked, and island countries;
- l. Harmonizes and rationalizes, the activities of existing AMIs and establish new AMIs when and where necessary and possibly transforms them into AEC organs;
- m. Establishes appropriate organs for trade in agriculture, cultural products, minerals, metals, and manufactured and semi-manufactured goods within the AEC;
- n. Establish and promote the flow of information, through contacts established for this purpose, among trading organizations that include, State commercial enterprises, export promotion and marketing bodies, chambers of commerce, associations of businessmen and women, and business advertising agencies;
- o. Harmonizes and coordinates environmental protection measures; and
- p. Any other activity that maybe undertaken, jointly or otherwise, in furtherance of the objectives of the AEC.

The relationship between the AU (OAU at the time) and RECs as stated in the Abuja Treaty is complemented by an implementation Protocol on Relations between AEC and the RECs of February 1998. The Protocol committed the RECs to review their treaties and establishing FTAs where none existed to avoid duplication and “the spaghetti bowl effect,” and identify “the establishment of the AEC as their final objective and make provision for their eventual absorption into the African Common Market as a prelude to the full establishment of the AEC.”⁶ In the year 2000, the AU became a successor to the AOU. The Heads of State and Governments, numbering 53 at the time, in the year 2000, adopted the AU Constitutive Act (Constitutive Act), setting out a broad spectrum of objectives, measures, and institutions for the economic, social, and cultural integration of the African Continent. Accordingly, the Constitutive Act was promulgated in consideration of the principles and objectives stated in the OAU Charter and the Abuja Treaty, and the need to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, ensure good governance, the

⁶ Nagar and Nganje (n 4); see also art. 5, Protocol on Relations between the AEC and the RECs, 1998

rule of law, and promote peace, security, and stability as a prerequisite for the implementation of socio-economic development and the AU's integration agenda.⁷

Thus, Constitutive Act, in principle, made the AU become “the primary integration organization in Africa, with all other integrating mechanisms, notably the RECs, expected to assume subordinate status to the AU, and being required to rationalise their agendas and operations to bring them in line with the common continental agenda driven by the AU.”⁸ The Act acknowledges that:⁹

The Transformation of the OAU into the AU added a new dynamic to the economic integration aspirations embodied by the AEC, and by extension relations between the EAC and RECs. With its overarching goal of fostering the Pan-African ideals of political unification, and economic integration, and in addition to adopting an ambitious, socio-economic integration, and in addition to adopting an ambitious socio-political and economic agenda for Africa's development, the AU took over the regional integration programme of the Abuja Treaty, including the responsibility to strengthen, coordinate and harmonise the RECs for gradual continental integration organization.

On 1 January 2022, about six years since the official launch of negotiations, trading officially started under AfCFTA. As a flagship project of the AU's Agenda 2063, the AfCFTA is premised on the broad objective of achieving inclusive and sustainable development on the continent within a 50-year period.¹⁰ The AfCFTA agreement and implementation Protocols, recognise the importance of international security, democracy, human rights, gender equality, socio-economic development, free movement of persons, capital, goods, and services, and the rule of law for the development of trade and cooperation in Africa.¹¹

The AfCFTA framework agreement and implementation Protocol are currently signed by 54 and ratified by 41 AU member States¹². The State Parties undertake under art. 27 (2)(d) of

⁷ See Preamble, AU Constitutive Act, 2000

⁸ Nagar and Nganje (n 4), pp. 207-208

⁹ As Above

¹⁰ Agenda 2063: The Africa We Want, available at: <https://au.int/en/agenda2063/overview>

¹¹ See Preamble, Agreement Establishing the Continental Free Trade Area, available here: <https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area>

¹² As per art. 23, Agreement Establishing the African Continental Free Trade Area, the Agreement came into force after the deposit of the 22nd instrument of ratification; the list of countries that have ratified the Agreement include, Angola, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Cape Verde, Chad, Côte d'Ivoire, Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Eswatini, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Mali, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Sao Tome and Principe, Tanzania, Togo, Seychelles, Uganda, Tunisia, Algeria, Zambia, Malawi, Zimbabwe. See also African Union, “the Republic of Cape Verde became the forty-first (41st) to deposit the Agreement Establishing the African Continental Free Trade Area (AfCFTA), (Press Release, 6 February, 2022), available at [The Republic of Cabo Verde became the forty-first \(41st\) to deposit the Agreement Establishing the African Continental Free Trade Area \(AfCFTA\) | African Union \(au.int\)](https://au.int/en/press-releases/20220206-republic-of-cape-verde-becomes-41st-to-deposit-afcfta)

the Protocol on Trade in Services, to collaborate with their development partners in mobilizing resources and in implementing measures designed to support domestic efforts in improving the export capacity of both formal and informal MSMS, women, and youth in the service industry.

The AfCFTA trading regime is governed by a framework agreement and implementation Protocols. Article 5 of the framework agreement sets out the fundamental principles that regulate the implementation of the AfCFTA trading regime. These principles are:

1. That the AfCFTA shall be driven by AU membership;
2. That the Regional Economic Blocs (RECs) shall be the building blocks for the implementation of the AfCFTA trading regime;
3. Variable geometry;
4. Flexibility and special and differential treatment;
5. Transparency and disclosure of information;
6. Preservation of the *acquis*;
7. Most Favoured Nation (MFN);
8. National Treatment;
9. Reciprocity;
10. Substantial liberation;
11. Consensus in decision making;
12. Application of best practices in the RECs, State Party national jurisdiction, and other binding international legal instruments;

The above principles epitomize the great flexibility that is inherent in African trade and economic integration measures. As Gathii argues, African regional trade agreements (RTAs) demonstrate a classic departure when compared to other free trade areas (FTAs) like the European Union (EU) and the North American Free Trade Agreement (NAFTA), which have adopted the neo-classical or comparative advantage, in favour of the classic vinerian customs union model with multiple objectives “demonstrating a particular preference for functionally specific objectives” and allow members “different speeds towards meeting time-tabled and other commitments” and “equitable distribution of gains” of member States.¹³ He further noted that in view of the collapse of the first wave of African RTAs:¹⁴

the role of treaty commitments became that of providing a framework for initiatives such as joint ventures or initiatives around an entire series of areas including trade, investment, and capital, but also extending further into transport, security, water, electricity supply, labour

¹³ James T. Gathii, ‘African Regional Trade Agreements as Flexible Legal Regimes’, (2009) 35(2) *North Carolina Journal of International Law* 571, p.577

¹⁴ As above, p. 576

movements as well as agreements for the management of common resources such as river basins.

The rationale for the establishment of RECs in Africa was mainly to “address the imbalance of weaker economies against stronger ones within regional clusters.”¹⁵ Indeed, the United Nations Economic Commission for Africa (UNECA) was a deliberate mechanism under the UN system designed to “force the pace of cooperation among African states in trade, transport, and industry through the mechanism of sub-regional coordinating bodies.”¹⁶

Notwithstanding, the reality remains that across the many Africa States “rapid and sustainable urbanization has led to increased poverty and inequality. Children and youth face challenges to their well-being due to increased vulnerability, hunger, disease, ignorance, lack of access to land, weak educational systems, energy crisis, poor road networks, poor healthcare systems, and gender discrimination in most AU member States. In addition, the external dependency, a situation in which the ‘world’s poorest region overall’ is disproportionately reliant on donors, is evident. Exemplified in “visible off-shoots of unstable economies to the existence of a survivalist mentality, retrogressive cultural and traditional practices, absence of skills, presence of corruption and lack of political will.”¹⁷ As further noted:¹⁸

the [sustainable development goals], which include a heavy dose of pro-poor, pro-women, pro-equality, pro-development targets, are expected to turn things around for Africa and revive efforts for wealth accumulation and development. [...] Agenda 2063 is currently at the heart of AU leaders’ desire for integration, prosperity, and peace, emphasising the importance of capable, inclusive and strong States.

Human rights implications of trade and investment agreements have attracted critical attention from a broad spectrum of players, including the UN High Commissioner for Human Rights, research institutions, civil society, and advocacy groups. The generic nature in which trade and investment agreements are drafted with little or no reference to human rights principles, the lack of transparency in investment and trade disputes and the lack of access to justice and remedies for victims have intensified calls for human rights provisions to be made integral in these agreements.¹⁹ This has led to the formulation and adoption of the human rights-based approach to development.

¹⁵ Nagar and Nganje (n 4), p. 209.

¹⁶ Douglas G. Anglin, ‘Economic Liberation and Regional Cooperation in Southern Africa: SADCC and PTA’ (1983) 37(4) *International Organization* 681, p.684.

¹⁷ Terrence Corrigan, ‘Socio-Economic Problems Facing Africa: Insights from Six APRM Country Review Reports’, (2009) *South African Institute of International Affairs Occasional Paper No. 34*, p.4.

¹⁸ Nagar and Nganje (n 4), p.187.

¹⁹ Amnesty International, “Human Rights, Trade and Investment Matters”, (May 2006) available at <https://www.amnestyusa.org/files/pdfs/hrtradeinvestmentmatters.pdf>

According to article 12(3) of the UN Declaration on the Rights and Responsibilities of Individuals, Groups, and Organs of Society to Promote and Protect Universally Recognized Rights, and Fundamental Freedoms (UN Declarations) of 1998:

Everyone is entitled, individually and in association with others, to be protected effectively under national law in reacting against or opposing, through peaceful means, activities, and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms, as well as acts of violence perpetrated by groups or individuals that effect the enjoyment of human rights and fundamental freedoms.

The UN Declaration is considered the “basic matrix from which the legal rights of human rights defenders was born and inaugurates a collective consciousness that has since then had an impact both nationally and internationally.”²⁰ The AU has also concluded legal instruments and mechanisms that recognise the rights and role of human rights defenders (HRDs) in Africa and they include, Resolution 69 of 2004 and Resolution 273, respectively on the mandate and extension of the mandate of the Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa, the 1999 Grand Bay Declaration and Action Plan, the Kigali Declaration of 2008 and the Guidelines on Freedom of Association adopted in 2017.²¹ The Marrakech Declaration of 2018 on “expanding the civic space for and promoting and protecting human rights defenders, with a specific focus on women: the role of national human rights institutions”, reaffirms “the principle of self-identification of human rights defenders in line with the UN Declarations on Human Rights Defenders that includes anyone working for the promotion and protection of human rights.” These include professional as well as non-professional human rights workers, including those working for women’s rights and gender equality, rights of ethnic, linguistic, sexual, or religious minorities; persons with disabilities; environmental and land issues, indigenous rights and can be volunteers; journalists; lawyers; and everyone else carrying out, even on an occasional basis, a human rights activist.²²

The Special Rapporteur on the situation of HRDs “considers that effectively addressing human rights abuses caused by or linked to business enterprises is contingent upon access to information, is deeply concerned at the many appeals of defenders indicating that obtaining information that is crucial for revealing direct links or operational connections

²⁰ Special Rapporteur on Human Rights Defenders and Focal Person Reprisal in Africa, Centre for Human Rights, Compendium on the Legal Protection of Human Rights Defenders in Africa, (PULP, 2018)

²¹ As above

²² Art. 10. See also the Marrakech Declaration on Expanding the Civic Space and Promoting and protecting Human Rights Defenders, with a specific focus on women: the role of National Human Rights Institutions (2018), available at https://ganhri.org/wp-content/uploads/2019/11/Marrakech-Declaration_ENG-12102018-FINAL.pdf

between companies and violations remains a major challenge and that companies seek to block public access to information by arguing that doing so would force them to disclose trade secrets. It has been acknowledged that the effective and meaningful participation of HRDs in monitoring human rights violations in trade is difficult, given the absence of legislation requiring companies to publicly disclose the origins of imported products.²³

1.1 Rationale of the study

The immense contribution of HRDs in promoting human rights protection and holding States accountable in Africa is acknowledged. While the AfCFTA has been described as a game-changer with unprecedented, anticipated gains for the continent, the process and negotiations have been exclusionary with minimal involvement of HRDs. Moreover, the focus on human rights within its guiding framework and philosophy has been relatively muted, albeit the potential risk factors present and expected. Accordingly, this study aims to provide a rallying point for HRDs to play a more concerted role in mainstreaming the promotion, protection, respect and fulfilment of human rights in the AfCFTA.

There is no existing study on the role of HRDs in promoting the respect and protection of human rights in the AfCFTA. However, there is evidently high human rights stakes for the implementation of the AfCFTA. According to evidence gathered during the ex-ante HRIA on the AfCFTA, many fundamental rights and freedoms are at risk of violations in the implementation of the AfCFTA processes due to pre-existing conditions across African borders that continue to serve as stumbling blocks to fundamental rights and freedoms. UNECA, in its report, analysed the CFTA from a human rights perspective and illustrated that “Africans overwhelmingly showed that they suffered various forms of abuse and harassment at the hands of State authorities and agents such as police, as well as other actors.”²⁴ Further noted that:

This corroborates findings on the challenges faced by informal cross-border traders across the continent. Most border officials do not treat informal cross-border traders with respect or in the same manner that they deal with the so-called formal economic actors. Informal traders were regularly treated like criminals and illegals, insulted and at some border posts, told to go back to their countries of origin. Informal cross-border traders’ precarious conditions result in some having to pay bribes to corrupt officials. This also suggests a positive correlation between the perception of illegality of informal cross-border traders’ activities and the way they are treated by State agents. Some border officials ask informal cross-border traders to pay duties on commodities, especially agricultural, that should not

²³ See United Nations General Assembly, Report of the Special Rapporteur on the situation of human rights defenders - Note by the Secretary-General, A/72/170 (19 July 2017)

²⁴ UNECA & Friedrich Ebert Stiftung, “Report: Continental Free Trade Area in Africa- A Human Rights Perspective,” pp. 63-64

attract any levies. Such officers abuse their authority and take advantage of the informal cross-border traders' limited understanding of the law and customs requirements and procedures. In some instances, authorities deliberately imposed delays on completion of formal procedures for the informal cross-border traders in order to force the informal cross-border traders to pay bribes.

In 2011, the UN Human Rights Council in Resolution 17/4 of 16 June 2011 endorsed the "Guiding Principles on Business and Human Rights (UNGPS): Implementing the United Nations 'Protect, Respect and Remedy' Framework" on the issue of human rights and transnational corporations and business enterprises and of general applications to both State and corporation irrespective of ownership, size, location, sector, or structure. The UNGPS states:²⁵

These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

The "Protect, Respect and Remedy" framework of the UN GPS does not create new legal obligations for States; neither does it serve as a derogation from pre-existing human rights obligations of States. However, it is to be implemented by States, domestic corporations, and Multinational Corporations (MNCs) of whatever size, location, structure, or ownership without discrimination, and based on the needs of individuals or groups (especially women) or communities and women at risk of vulnerability and marginalization.²⁶

The UNGPS resonates with calls by Amnesty International for "establishing a strong international regulatory framework for the effective protection of human rights in the context of corporate activity" and the criminalization of corporate-related human rights violations.²⁷ The European Union (EU), the United States, and other wealthy nations have, since the 1970s, begun to include human and labour rights provisions in their non-reciprocal

²⁵ UN Human Rights, Office of the High Commissioner, "Guiding Principles on Business and Human Rights", (UN, 2011) available at https://www.ohchr.org/sites/default/files/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessH_R.pdf.

²⁶ See General Principles, Guidelines and Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework, (UNHRC, 2011)

²⁷ Amnesty International, "Elements for the draft of legally binding instrument on transnational corporations and other business enterprises with respect to human rights: Amnesty International's Preliminary Observations and Recommendations", (20 Oct. 2017), available at: <https://www.amnesty.org/en/documents/ior51/7323/2017/en/>; see also Amnesty International, "Contracting out of Human Rights: the Chad Cameroon Pipeline Project", (Sept. 2005), available at <https://www.amnesty.org/en/documents/POL34/012/2005/en/>

preferential market access agreements with developing countries within the framework of the WTO GPS.²⁸

Thus, this Study assesses the human rights stakes in the AfCFTA and the level of involvement of HRDs in the negotiations leading to the conclusion of the AfCFTA framework agreement. The Study will highlight the opportunities for effective HRD participation in preventing, mitigating, and addressing human rights violations in the AfCFTA implementation process. It will state the business case for protecting corporations (State-owned and private), the obligations of AfCFTA Member States, and the responsibilities of relevant businesses in protecting human rights within the AfCFTA structures and processes. The Study based on the human rights framework and tools reflects the interlinkages between human rights and the AfCFTA. It also spotlights mechanisms such as human rights due diligence, human rights policy and disclosure, human rights impact assessment, human rights reporting and monitoring, community and stakeholder engagements, and the use of grievance mechanisms against companies operating within the AfCFTA.

1.2 Research methodology

The primary purpose of the exploratory research methodology is to understand the role HRDs can play in effectively mainstreaming the protection and respect for human rights in the AfCFTA. It includes a review of the relevant legal and institutional framework of the AfCFTA and international and regional human rights instruments in which African states have undertaken human rights commitments.

Primary data sources included Key Informant Interviews (KII) with human rights defenders and members of national human rights institutions, academics, and researchers working within the African human rights system. The FGD participants are members of the African Coalition for Corporate Accountability (ACCA) from Uganda, Nigeria, and Madagascar.²⁹ The following were interviewed:

1. Joseph Bikanda, Pan African Human Rights Defenders Network (PAHRDN)
2. Michelle R. Maziwisa, Dullah Omar Institute
3. Jonathan Kabre, University of Pretoria, Business and Human Rights
4. Dr. Chairman Okoloise, ACHPR
5. Hannah Forster, African Centre for Democracy and Human Rights Studies
6. Opal Sibanda, ACERWC
7. Emolot Allan David, AfCFTA Youth Advisory Council

²⁸ Sandra Polaski, "Linking Trade and Investment Agreements to Improvements in Labour Rights", in Amnesty International, *Human Rights, Trade, and Investment* (May 2006), pp. 36-41

²⁹ Attempts were made to conduct FGDs with members of the Pan-African Human Rights Defenders Network and regional networks of Women human rights defenders

Chapter 2: AfCFTA Conceptual, Legal, Institutional and Administrative Framework

On 21 March 2018, in Kigali, Rwanda, the AU Assembly adopted the AfCFTA Agreement and Protocols on Trade in Goods, Services and on the Rules and Procedures on Dispute Settlement. The Protocol on Rules and Procedures on Settlement of Disputes and the Annexes to the following Protocols on Trade in Goods, namely:

- (1) Schedule of Tariff Concessions;
- (2) Rules of Origin;
- (3) Customs Cooperation and Mutual Administrative Assistance;
- (4) Trade Facilitation;
- (5) Non-Tariff Barriers;
- (6) Technical Barriers to Trade;
- (7) Sanitary and Phytosanitary Measures;
- (8) Transit; and
- (9) Trade Remedies

Annexes 1, 2 and 3 to the Protocol on the Rules and Procedures on Dispute Settlement, respectively on the Working Procedures of the Panel, on Expert Review, and the Code of Conduct for Arbitrators and Panelists.³⁰ Per art. 28 of the Protocol on Trade in Services, it is expected that State Parties would further negotiate Annexes on; (a) schedules of specific commitment; (b) MFN exemptions; (c) Air Transport Services; (d) list of priority sectors³¹; and (e) framework on regulatory cooperation.

Immediately following the adoption of the AfCFTA Agreement in 2018, Phase II negotiations immediately commenced on the Protocols on Investment, Intellectual Property Rights, and Competition Policy, in the successive round,³² the AU Assembly of Heads of State and Government on during the thirty-third session of the AU Assembly, resolve to negotiate and adopt a Protocol on E-commerce as part of Phase III negotiations within the scope of the AfCFTA Agreement. All Protocols, Annexes, and their associated Appendixes, and any additional instruments that are negotiated and adopted within the scope of the AfCFTA

³⁰ Per art. 3 of the Protocol on Goods, these Annexes shall upon adoption by State Parties form and integral part of the trade in goods under the AfCFTA Agreement, as a single undertaken.

³¹ AU Heads of State and Governments adopted as the five priority areas for the Trade in Services; (1) Transport; (2) Communication (3) Finance (4) Tourism; and (5) Business Services; See African Union Commission Report, "Report to the Specialised Committee on Trade, Industry and Minerals: Progress on the AfCFTA for the Period 2016 to December 2018, available at https://au.int/sites/default/files/newsevents/workingdocuments/35970-wd-ti23937_e_progress_report_on_the_afcfta-_may_2016_to_dec._2018.pdf, (last accessed 21 May 2022)

³² Art. 7, AfCFTA Agreement

Agreement shall constitute a single undertaken and upon entry force, forms an integral part of the AfCFTA legal framework.³³

AfCFTA Agreement entered into force on 30 May 2019, upon the receipt of the twenty-second instrument of ratification on 29 April 2019, per the requirements of article 23 of the AfCFTA Agreement. At the time of writing this Report, the AfCFTA Agreement stands signed by fifty-four (54) and ratified by forty-one (41) AU member States.³⁴ By May 2022, forty-five (45) of the 54 signatories, about 80% of the signatories deposited their instruments of ratification.³⁵ By order of date of deposit of the instrument of ratification, the forty-three (43) countries are: Ghana, Kenya, Rwanda, Niger, Chad, Eswatini, Guinea, Cote d'Ivoire, Mali, Namibia, South Africa, Congo, Republic of Djibouti, Mauritania, Uganda, Senegal, Togo, Egypt, Ethiopia, The Gambia, Sahrawi Arab Democratic Republic, Sierra Leone, Zimbabwe, Burkina Faso, Sao Tome and Principe, Equatorial Guinea, Gabon, Mauritius, Central African Republic, Angola, Lesotho, Tunisia, Cameroon, Nigeria, Malawi, Zambia, Algeria, Burundi, Seychelles, Tanzania, Cabo Verde, Democratic Republic of Congo and Morocco.³⁶ Eritrea remains the only AU member country yet to sign. While approval or confirmation of Somalia's instrument of ratification is pending, Botswana, Comoros, Liberia, Libya, Mozambique, Madagascar, Sudan, South Sudan, and have not yet ratified at the time of writing this Report.³⁷

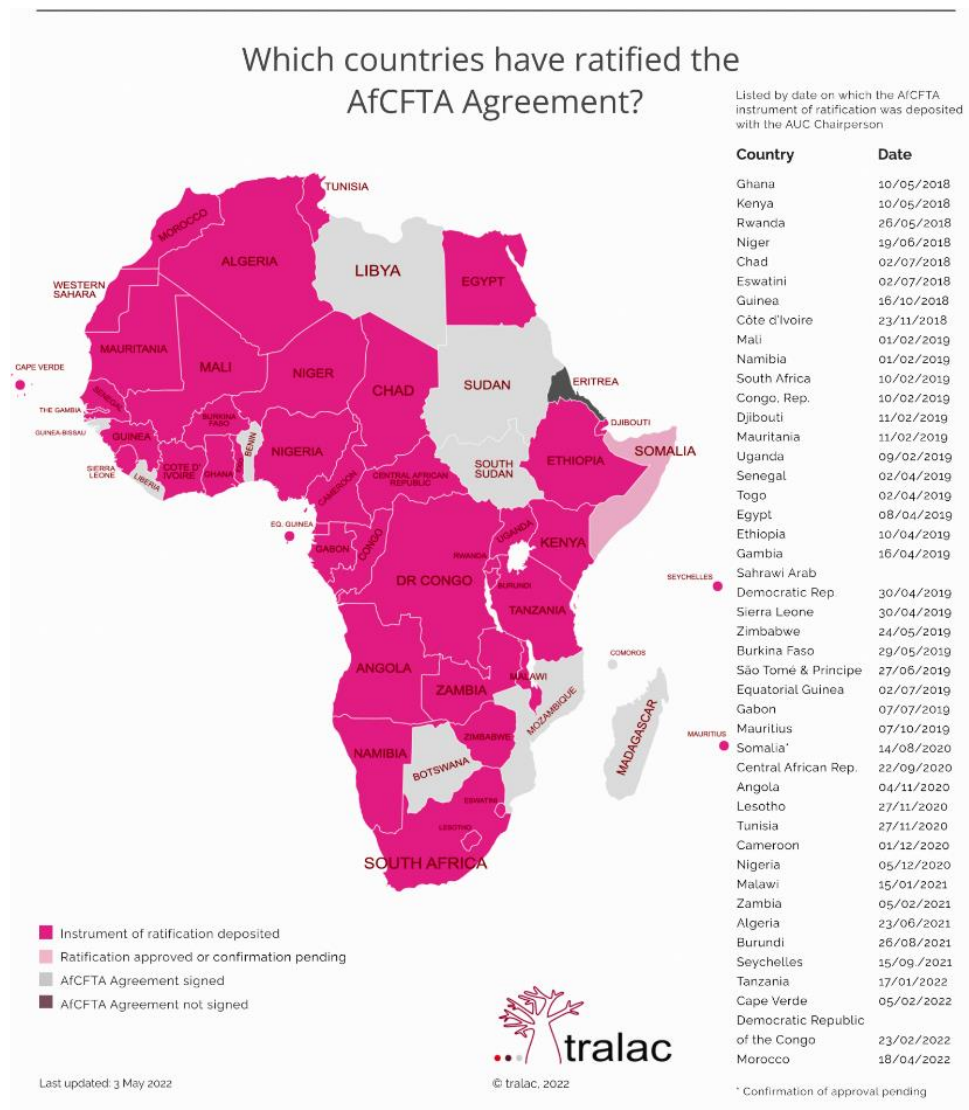
³³ Art. 8, AfCFTA Agreement

³⁴ As per art. 23, Agreement Establishing the African Continental Free Trade Area, the Agreement came into force after the deposit of the 22nd instrument of ratification; the list of countries that have ratified the Agreement include, Angola, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Cape Verde, Chad, Côte d'Ivoire, Congo, Djibouti, Egypt, Equatorial Guinea, Ethiopia, Eswatini, Gabon, Gambia, Ghana, Guinea, Kenya, Lesotho, Mali, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Sierra Leone, Sao Tome and Principe, Tanzania, Togo, Seychelles, and Uganda

³⁵ Tralac, "African Continental Free Trade Area: Which Countries Have Ratified the AfCFTA Agreement", available at: <https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification/file.html>, (last updated, 3 May 2022)(last accessed, 20 May 2022)

³⁶ Ibid.

³⁷ Tralac, as above. See also List of Countries that have ratified the AfCFTA [https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT ESTABLISHING THE AFRICAN CONTINENTAL FREE TRADE AREA 1.pdf](https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%201.pdf) (last accessed 21 May 2022)



AU Members that have not become State Parties have no rights or duties under the AfCFTA as the lower preferential tariffs are available for goods originating in the jurisdictions of State Parties (i.e. those AU Member State who ratified the AfCFTA Agreement) trade under MFN rates.³⁸

Currently, Phase II of the negotiations is ongoing on Intellectual Property Rights, Investment Protection, and Competition Policy, “as well as deciding on the rules governing trade in digital platforms.”³⁹ Furthermore, “a Pan-African Payment and Settlement System (PAPSS),

³⁸ Gerhard Erasmus, Trudi Hartzenberg, “the ABC of the AfCFTA- As it Stands”, (tralac blog, 11 Dec. 2020

³⁹ Virusha Subban, “Africa: AFCTA Update-the Streamlining of intra-African Trade Gains Momentum”, (28 Feb. 2022), available at: <https://www.globalcompliancenews.com/2022/02/28/africa-afcfta-update-the-streamlining-of-intra-african-trade-gathers-momentum140222/> (last accessed 21 May 2022)

a platform that facilitates free trading, was launched in January 2022, with the African Export-Import Bank providing liquidity for the settlements and the technology.”⁴⁰

At the 33rd Ordinary Session of the AU Assembly of Heads of States and Governments, Mr. Wamkele Mene was appointed for a four-year period as the Secretary General of the AfCFTA Secretariat, hosted in Accra, Ghana.⁴¹ The Assembly further “urged that all outstanding work on Rules of Origin be finalized by the end of March 2020 to enable the finalization of tariff offers and to submit this work on Rules of Origin...and to finalize and submit; (i) their Schedules of Tariff Concessions of 90%; and (ii) their schedules of Specific Commitments on the five priority areas” of Transport; Communication; Finance; Tourism; and Business Services and the Regulatory Cooperation Framework for Trade in Services.”⁴²

In January 2022, the AfCFTA Secretary-General stated that negotiations on rules of origin are completed. He stated that “now that we have 87.7 percent of rules of origin agreed, we are now in the position for members States to gazette these legal instruments at the national level so that countries can apply these rules of origin from a customs point of view.”⁴³

2.1 Juridical basis for establishing AfCFTA

Although the AfCFTA is deliberately designed, inter alia, to “resolve the challenges of multiple and overlapping memberships and expedite the regional integration processes”, its aim is to establish both the Continental Customs Union (CCU) and a CFTA. To this end, the AfCFTA is established pursuant to articles XXIV and X of GATT and GATS respectively, of the WTO-regulated multilateral trading system. Suffice to say, without such an exception, the AfCFTA Agreement would have violated the MFN principle under the WTO.⁴⁴ Essentially, the CCU shall eliminate or substantially reduce all internal tariffs and barriers within the State Parties to the AfCFTA Agreement.⁴⁵ On the other hand, the CFTA (as an FTA) shall eliminate or substantially reduce tariffs and trade barriers between State Parties to the AfCFTA but

⁴⁰ Ibid

⁴¹ 33rd Ordinary Sessions of the Assembly of the Union, 9-10 February 2020, Addis Ababa, Ethiopia, “Decision on the AfCFTA” available at: https://au.int/sites/default/files/decisions/38180-assembly_au_dec_749-795_xxxiii_e.pdf

⁴² Ibid

⁴³ Mr. Wamkele Mene, AfCFTA Secretary General as quoted in, Xinhua, “AfCFTA Members conclude rules of origin to enhance free trade”, (30 January, 2022), available at: <https://english.news.cn/africa/20220130/fc286d5fb2dd405980a48f06ca489019/c.html> (last accessed 21 May 2022)

⁴⁴ Simon Lester, Bryan Mercurio, and Arwel Davies, *World Trade Law: Text, Materials and Commentary*, 2nd ed (2012.), p.329

⁴⁵ Ibid

shall not affect each State Parties' external trade policy.⁴⁶ Collectively, both the CCU and the CFTA make the AfCFTA a PTA.⁴⁷ Article XXIV(4) provides as follows:

Members recognized the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economics of the countries parties to such agreement. They also recognize that the purpose of a customs union or of a free trade area should be to facilitate trade between the constituent territories and not to raise barriers to the trade of other contracting parties with such territories that are not members of the FTA.

By implication, article XXIV above imposes on AfCFTA State Parties both an external and an internal obligation in the establishment of the AfCFTA. The external requirement is “not to raise the overall level of protection and make access for products and services” from non-AfCFTA Member States; and (2) the duty to “liberalize substantially all trade among members” of the AfCFTA.⁴⁸

Furthermore, based on the Understanding on the Interpretation of Article XXIV of GATT 1994, and article V:7(a) of GATs, AfCFTA State Parties are required to notify the Council for Trade in Goods and Services, which forwards the same notification to the Committee on Regional Trade Agreements (CRTA). Per the provisions of the Decision Establishing the CRTA, the CRTA has the power, once a notification is forwarded by the Council for Trade in Goods and Services, respectively, to examine, in this case, the CCU and the CFTA established by the AfCFTA Agreement and consider its systemic implications on the world trade as regulated by the WTO.

As virtually all State Parties to the AfCFTA are members of the WTO-led multilateral trading system, the onus is on AfCFTA State Parties to ensure that the CFTA and CCU established pursuant thereto follow the requirements for establishing same under the WTO rules of multilateral trade. As a result, article 26 of the AfCFTA requires State Parties to notify the WTO of the establishment of the CFTA, collectively or individually, in fulfilment of the procedural requirement. PTAs, like the AfCFTA, have come to be regarded as complementary to multilateralism and not mutually exclusive of each other. In sum,⁴⁹

the feeling among many WTO Members now is that, because multilateralism is stalled, the momentum created by PTAs is needed to underpin the multilateral environment. Therefore, they do not view PTAs as mutually exclusive of the multilateral negotiations, but rather as a

⁴⁶ As Above

⁴⁷ For comparison purposes, EC and NAFTA, are two of the well-known CU and FTA, respectively. Also, note that the provisions of XXIV and X of the GATT and GATS Agreements are materially similar

⁴⁸ Lester et al (n 44), p. 338

⁴⁹ Lester et al (n 44), p. 333

tool to influence the multilateral agenda positively by going beyond what is achievable at the present time. Put simply, they feel that PTAs have the ability to establish prototypes for liberalization in a wide range of trading areas, including services, e-commerce, intellectual property, transparency in government regulations and procurement and better enforcement of labour and environmental protections that are simply not possible on the multilateral stage.

Of great relevance to understanding the AfCFTA Agreement is its Rules of Origin (RoO). RoO “is designed to prevent a product being exported from a non-member country to a member country before being re-exported to another member country, and thus gaining the reduced tariff rate.”⁵⁰ Per the terms of the AfCFTA Agreement, only “originating products”, that fulfil the RoO requirements under Annex 2 to the Protocol on Trade in Goods.⁵¹ Generally, RoOs are determined by an examination of the product sought to be accorded MFN treatment by ensuring that the said products were wholly produced within the FTA, in this case, the AfCFTA, without any value addition. Per the WTO Agreement on Rules of Origin (the Common Declaration) RoO are a set of laws, regulations, and administrative determinants of general application applied by member States of a PTA, to determine the country of origin of the product (s). therefore, RoOs constitute regulations and administrative determinants that determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to preferences beyond MFN.⁵²

Article 13 of the Protocol on Trade in Goods, states that:

Goods shall be eligible for preferential treatment under this Protocol, if they are originating in any of the State Parties in accordance with the criteria and conditions set out in Annex 2 on Rules of Origin, and in accordance with the Appendix to be developed on General and Product Specific Rules.

In addition to the Protocol on Trade in Goods, all trade in goods within the AfCFTA shall be regulated in accordance with the terms and provisions of Annex 1 on Schedules of Tariff Concessions; Annex 2 on Rules of Origin; Annex 3 on Customs Cooperation and Mutual Administrative Assistance; Annex 4 on Trade Facilitation; Annex 5 on Non-Tariff Barriers; Annex 6 on Technical Barriers to Trade; Annex 7 Sanitary and Phytosanitary Measures; Annex 8 on Transit and Annex 9 on Trade Remedies, which shall be binding on State Parties and shall form an integral part of the AfCFTA Agreement as a single undertaking.⁵³

⁵⁰ Lester et al (n 44), p. 336

⁵¹ Article 1(f)(i), AfCFTA Agreement, 2018

⁵² Annex II to the Agreement on RoO (Common Declaration with Regard to Preferential Rules of Origin)

⁵³ As Above

Accordingly, State Parties shall undertake successive rounds of negotiations based on the principle of progressive liberalisation accompanied by the development of regulatory cooperation, and sectoral disciplines, per the 1991 Abuja Treaty, in strengthening integration at the regional and continental levels in all fields of trade in accordance with the general principle of progressively achieving the fundamental ideals of an African Economic Community.⁵⁴ Towards this end, AfCFTA State Parties shall negotiate sector-specific obligations based on the development of sector-specific regulatory frameworks for every identified sector, “taking into account the best practices and the *acquis* from the RECs, as well as the negotiated agreement on sectors for regulatory cooperation.”⁵⁵

AU Heads of State and Governments have adopted the five priority areas for the Trade in Services: Transport, Communication, Finance, Tourism, and Business Services.⁵⁶

2.2 Institutional and Administrative Framework

a. The Assembly

As the highest decision-making body of the AU, the Assembly provides oversight and strategic guidance on the AfCFTA.⁵⁷ It has the exclusive authority, on the recommendations of the Council of Ministers, to adopt interpretations on the AfCFTA Agreement.⁵⁸

b. The Council of Ministers

The AfCFTA Agreement establishes a Council of Ministers constituted by Trade Ministers or other Ministers designated by the State Party.⁵⁹ The Council of Ministers reports to the AU Assembly on all AfCFTA matters through the Executive Council.⁶⁰ The Council of Ministers is reposed with the responsibility to make decisions in furtherance of the objectives of the AfCFTA Agreement, on any of the following issues:⁶¹

- (a) To ensure the effective implementation and enforcement of the AfCFTA Agreement;
- (b) Measures necessary for the promotion of the objectives of the AfCFTA Agreement and such other instruments made within its scope;

⁵⁴ Art. 18(1) of the Protocol on Trade in Service, AfCFTA Agreement, 2018

⁵⁵ Article 18(2) of the Protocol on Trade in Services, AfCFTA Agreement, 2018

⁵⁶ As Above (n 54)

⁵⁷ Art. 10(1), AfCFTA Agreement, 2018

⁵⁸ Art. 10(2), AfCFTA Agreement, 2018

⁵⁹ Art. 11(1), AfCFTA Agreement, 2018

⁶⁰ Art. 11(2), AfCFTA Agreement, 2018

⁶¹ Art. 11, AfCFTA Agreement, 2018

- (c) Work in collaboration with the relevant organs and institutions of the AU;
- (d) Promote the harmonization of appropriate policies, strategies and measures for the effective implementation of the AfCFTA Agreement;
- (e) Establish and delegate responsibilities to ad hoc or standing committees, working groups or expert groups;
- (f) Prepare its rules of procedures and those of the subsidiary bodies created for the implementation of the AfCFTA Agreement and submit same for approval by the Executive Council;
- (g) Supervise the work of all committees and working groups it may establish under the scope of the AfCFTA Agreement;
- (h) Consider the report and activities of the Secretariat and take appropriate action
- (i) Make regulations, issue directives and make recommendations in accordance and propose for adoption by the Assembly, the Staff and financial regulations of the Secretariat;
- (j) Consider the budgets of the AfCFTA and its institutions and submit them to the Assembly through the Executive Council;
- (k) Make recommendations to the Assembly for the adoption by the Assembly through the Executive Council;
- (l) Consider the Budgets of the AfCFTA and its institutions and submit them to the Assembly through the Executive Council;
- (m) Make recommendations to the Assembly for the adoption of authoritative interpretation for the Agreement; and
- (n) Perform any function consistent

The Council of Ministers is expected to meet twice a year in Ordinary Sessions and where possible, in Extra-Ordinary Sessions.⁶² Decisions made by the Council of Ministers within the scope of the AfCFTA Agreement are binding on State Parties.⁶³ However, decisions by the Council of Ministers within the framework of the AfCFTA Agreement that “have legal, structural or financial implications” shall only become binding on State Parties only when approved by the AU Assembly. State Parties are obliged to adopt such measures that allow them to implement the decisions of the Council of Ministers.⁶⁴

c. The Committee of Senior Trade Officers

The Committee of Senior Trade Officers (“the Committee”) consists of Permanent Secretaries and other designated officials of the State Parties. This Committee is the implementing authority of the decisions of the Council of Ministers. Its functions include;

⁶² Art. 11(4), AfCFTA Agreement, 2018

⁶³ Art. 11(5), AfCFTA Agreement, 2018

⁶⁴ Art. 11(6), AfCFTA Agreement, 2018

- (a) Implement the decisions of the Council of Ministers as may be directed;
- (b) Be responsible for the development of programmes and action plans for the implementation of the AfCFTA;
- (c) Monitor and keep under constant review and ensure proper function and constant development of the AfCFTA in accordance with the provisions of the AfCFTA Agreement;
- (d) Establish committees and other working groups as required;
- (e) Oversee the implementation of the provisions of this Agreement and for that purpose, may request the Technical Committee to investigate any matter;
- (f) Direct the Secretariat to undertake specific assignments; and
- (g) Undertake the performance of any assignment consistent with the AfCFTA Agreement or such other assignments as may be requested by the Council of Ministers.

The Committee is expected to meet twice a year and its operations shall be in accordance with the Procedure established by the Council of Ministers.⁶⁵ The RECs are represented on the Committee in an advisory capacity and are required to reports and recommendations to the Council of Ministers.⁶⁶

d. The Secretariat

The Secretariat, currently headquartered in Accra, Ghana, is a functionally autonomous institution within the AU framework, including the AU Commission, and has a separate legal personality. ⁶⁷ the Secretariat is funded from the AU budget and its detailed roles and responsibilities are to be established by the Council of Ministers.⁶⁸

e. Dispute Settlement Mechanism

Art. 20 of the AfCFTA Agreement established a Dispute Settlement Mechanism, known as the Dispute Settlement Body (“DSB”) administered in accordance with the provisions of the Protocol on Rules and Procedures for Dispute Settlement (Protocol on Dispute Settlement). For the purposes of the AfCFTA, a dispute refers to any disagreement between two or more State Parties regarding the interpretation and/or application of the AfCFTA Agreement. Accordingly, “the dispute settlement mechanism shall preserve the rights and obligations of State Parties under the Agreement and clarify existing provisions of the AfCFTA Agreement in accordance with customary rules of interpretation of public international law.”⁶⁹

⁶⁵ Art. 12(3), AfCFTA Agreement, 2018

⁶⁶ Art. 12(4), AfCFTA Agreement, 2018

⁶⁷ Art. 13(2)(4), AfCFTA Agreement, 2018

⁶⁸ Art. 13(5)(6), AfCFTA Agreement, 2018

⁶⁹ Art. 4(1), Protocol on the Rules and Procedures for Dispute Settlement,

The Protocol on Dispute Settlement further requires engaging in amicable resolution of their disputes and that the “use of dispute settlement procedures should not be intended or considered as contentious acts”. If a dispute arises, State Parties are required as a first instance effort, to engage in good faith negotiations to resolve such a dispute.⁷⁰ The Protocol on Dispute Settlement does not allow “complaints and counter complaints in regard to separate matters should not be linked.”⁷¹ Furthermore, the Dispute Settlement Protocol does not allow neither the Panel nor the Appellate Body to “add or diminish the rights and obligations of State Parties” but “shall preserve the rights and obligations of State Parties under the AfCFTA Agreement and clarify the existing provisions of the Agreement in accordance with customary rules of interpretation of public international law.”⁷²

The DSB is composed of representatives of State Parties and is headed by a chairperson. The organs of the DSB consist of a Panel (as the first instance) and an Appellate Body as the final arbiter of disputes between State Parties.

2.3 Principles Governing the AfCFTA

a. Preserving the *Acquis* and Best Practices in the RECs

The AfCFTA Agreement recognizes the following RECs, as the building blocks for the implementation of the AfCFTA:⁷³

- (i) Arab Maghreb Union (UMA);
- (ii) Common Market for Eastern and Southern Africa (COMESA);
- (iii) Community of Sahel-Saharan States (CEN-SAD);
- (iv) East African Community (EAC); (v) the Economic Community of Central African States (ECCAS);
- (vi) Economic Community of West African States (ECOWAS);
- (vii) Intergovernmental Authority on Development (IGAD); and
- (viii) Southern African Development Community (SADC).

In addition, article 5 of the AfCFTA Agreement provides, as the core governing principles regulating the AfCFTA, the preservation of the *acquis* and best practices in binding AU legal instruments.

⁷⁰ Art. 4(5), Protocol on the Rules, and Procedures for Dispute Settlement,

⁷¹ Ibid

⁷² Ibid

⁷³ Art. 1(t), AfCFTA Agreement, 2018

The AfCFTA Agreement, however, fails to define what is meant by “preserving the *acquis*”. Notwithstanding, ‘*acquis*’ is a French term denoting “that which has been agreed.”⁷⁴ Claimed to have been borrowed from the EU’s model of regional integration, a concept that emerged during the negotiations that established the Tripartite Free Trade Area (TFTA).⁷⁵ The term eventually became part of the African regional integration when it was adopted as a Guiding Principle, Within the context of the TFTP, preserving the *acquis* meant that “the negotiations should start from the point at which COMESA, EAC, and SADC trade negotiations have reached. Tariff negotiations and the exchange of tariff concessions would be among Member or Partner States for the TFTA that have no preferential arrangements in place between them. This will both preserve the *acquis* and build on it.”⁷⁶ Furthermore, the principle of preserving the *acquis*, means that “State Parties that are members of other regional economic communities, regional trading arrangements, and customs unions, which have attained among themselves higher levels of regional integration than under this Agreement, shall maintain such higher levels among themselves.”⁷⁷

Although by the clear provisions of article 19(2) of the AfCFTA Agreement, the AfCFTA Agreement shall prevail over the agreements establishing the 8 RECs identified as the building blocks for the implementation of the AfCFTA, in case of any conflict between the agreements establishing the RECs agreements and the AfCFTA Agreement. By preserving the *acquis* built by the 8 RECs-cum-AfCFTA building blocks, as mentioned above, the AfCFTA Agreement presupposes, in the absence of any definition of the term in the agreement, a body of common laws, rights, and obligations that bind all the State Parties to the AfCFTA Agreement, developed by the said RECs and such other principles and obligations binding on all AU member States, who are also the State Parties to the AfCFTA Agreement. This would suggest that there is an *acquis Communautaire*, that is built by the AU and the RECs-cum-building blocks of the AfCFTA. The EU Community *acquis* or otherwise, the *acquis Communautaire* of the EU includes the following:

⁷⁴ Gerhard Erasmus, “AfCFTA Parallelism and the Acquis” (10 Feb. 2011), available at: <https://www.tralac.org/blog/article/15085-afcfta-parallelism-and-the-acquis.html> (last accessed 1 June 2022)

⁷⁵ As Above

⁷⁶ See ‘The Institutional Arrangements of the Tripartite Free Trade Area’ *Tralac Blog* 13 September 2019 <https://www.tralac.org/blog/article/14248-the-institutional-arrangements-of-the-tripartite-free-trade-area.html> (last accessed 1 June 2022)

⁷⁷ Gerhard Erasmus ‘AfCFTA Parallelism and the Acquis’ *Tralac Blog* 10 February 2021 <https://www.tralac.org/blog/article/15085-afcfta-parallelism-and-the-acquis.html> (last accessed 1 June, 2022)

1. The content, principles, and political objectives of the EU Treaties;
2. The legislation adopted in application of the EU Treaties and the case law of the Court of Justice of the EU;
3. The declarations and resolutions adopted by the EU;
4. Measures relating to the common foreign and security policy;
5. Measures relating to the common foreign security policy;
6. International agreements concluded by the EU and those concluded by the member states between themselves in the field of the EU's activities.⁷⁸

Thus, considering that the AfCFTA Agreement does not accept reservations, and all Protocols, Annexes, and Appendices once adopted shall form a single undertaking, presupposes that all AfCFTA legal instruments, including the RECs-cum-AfCFTA building blocks and the corpus of AU Law, shall be binding on the State Parties to the AfCFTA Agreement.⁷⁹

By implication, therefore, the principle of preserving the Acquis built by the 8 RECs means that State Parties to the AfCFTA Agreement who are members of the existing RECs, do not have to re-negotiate anything anew among themselves”.⁸⁰ Furthermore, the preservation of the acquis under the AfCFTA Agreement suggests that the drafters intended for the CCU and the CFTA to be built upon and consolidated by principles and practices that constitute the community law of the 8 RECs. It has been observed that:⁸¹

[This] constitutes a binding bottom line, but what does it mean in terms of a measurable benchmark? The term ‘acquis’ is not defined in the AfCFTA Agreement. It should, therefore, be given the generally accepted meaning borrowed from European Community Law, where it is interpreted as the equivalent of the ‘total body of EU Law’. However, the extent of the acquis of the 8 RECs could be very wide but it is doubtful whether this concept has been sufficiently developed through the jurisprudence of the community courts and tribunal to be sufficiently clear. Some of the 8 RECs identified as the building blocks for the AfCFTA, have not had enough opportunity and far less supranationality to develop a comprehensive *acquis Communautaire*’ doctrine. Even if this were possible, it would still be necessary to integrate the jurisprudence and doctrine of 8 different organizations at different stages of integration.

As argued by Nagar and Nganje, achievements in regional integration through FTAs and CU's have varied in Africa. They have, however, been envisioned to be the catalysts for the

⁷⁸ Thomson Reuters, Practical Law, “Aquis (EU”, (2022), available at [https://uk.practicallaw.thomsonreuters.com/3-503-0298?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-503-0298?transitionType=Default&contextData=(sc.Default)&firstPage=true)

⁷⁹ T Hartzenberg et al, *The Tripartite Free Trade Area: Towards a New African Integration Paradigm*, (Tralac, 2012), p. 30

⁸⁰ As Above

⁸¹ As Above

effective implementation of the AfCFTA Agreement.⁸² In fact, “four of the eight RECs-cum-building blocks for the AfCFTA, including, COMESA, the EAC, ECOWAS, and SADC have been declared FTAs. In addition, the EAC and ECOWAS are recognized as CUs.⁸³

Irrespective of the numerous FTAs that have been negotiated and established, including the 8 RECs-cum-AfCFTA building blocks, there is still great difficulty in inter-State relations on the continent. The impact on the pace of Africa’s economic integration is evident:

On its part, South Africa’s stringent rules of origin have been viewed as an impediment to intra-regional trade for Southern Africa. As an illustration, Tshwane (Pretoria) has prohibited the importation of live animals from Namibia. As a result, costs to Windhoek government were estimated at 30 billion South African Rands (US \$2.2 billion) in establishing agro-processing schemes such as feed-lots and abattoirs to create an environment conducive to trade.

ECOWAS has adopted its customs union in January 2015, and by the end of April 2015, eight of its member states had started the scheme’s liberalization process. It includes a ‘common external tariff of zero percent on essential goods of primary necessity such as raw materials, capital goods, and specific inputs. Progress in other regional schemes has also varied. The five-member Arab Maghreb Union is finalizing negotiations for an AMU FTA, and in December 2014 the group created an intra-African trade initiative and readied itself for the AfCFTA negotiations.”⁸⁴

b. Variable Geometry and Consensus Building

The AfCFTA trading regime imposes obligations on State Parties, however, it must be understood that these “obligations are assumed on the understanding that compliance would not be stringently enforced because the commitments are balanced off against a variety of safety valves such as principles of variable geometry and the equitable sharing of the benefits of regionalization.”⁸⁵ Article 5 of the AfCFTA Agreement focuses on variable geometry as part of the principles governing the AfCFTA Agreement, in recognition of the different levels of development among the State Parties and the need to provide flexibilities, special and differential treatment, and technical assistance to State Parties with special needs.⁸⁶

The AfCFTA Agreement provides the following forms of decisions:

⁸² Nagar and Nganje (n 4), p. 211

⁸³ Nagar and Nganje (n 4), p. 211

⁸⁴ Nagar and Nganje (n 4)) p. 211-212

⁸⁵ Gathii (n 13), p. 577

⁸⁶ See Preamble, AfCFTA Agreement, 2018

Decisions to be made by consensus:

- (1) Decisions of the Assembly in the exercise of its exclusive authority to adopt interpretations on the AfCFTA on the recommendations of the Council of Ministers;⁸⁷
- (2) Decisions by the AfCFTA Council of Ministers, and the Committee on all substantive issues;⁸⁸
- (3) A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting State Party has not performed by the end of the relevant period shall be taken only by consensus.⁸⁹

Decisions to be made by a three-fourth (¾) majority:

- (1) Decision in the absence of consensus in exceptional circumstances by the Council of Ministers to grant a State Party waiver from commitments assumed by it under the AfCFTA Agreement;⁹⁰
- (2) Decision where consensus is not reached within 90 days of the request for grant of a waiver of commitment by a State Party.⁹¹

Decisions to be made by a simple majority:

- (1) Decisions on matters of the procedure are by a simple majority of State Parties eligible to vote;⁹²
- (2) Decisions on whether a matter is one of procedure or substance is by a simple majority of State Parties eligible to vote;⁹³

Generally, any decision of the Council of Ministers granting a State Party a waiver shall state the exceptional circumstances justifying the waiver and the date on which the waiver should terminate.⁹⁴ AfCFTA Agreement further provides that any waiver granted to a State Party shall be reviewed by the Council of Ministers not later than one (1) year after the grant and thereafter annually until the waiver terminates.⁹⁵ In each review, the Council of Ministers shall examine whether the exceptional circumstances justifying the waiver still exist and

⁸⁷ Art. 10(1), AfCFTA Agreement, 2018

⁸⁸ Art. 14(1), AfCFTA Agreement, 2018

⁸⁹ Art. 15, AfCFTA Agreement, 2018

⁹⁰ Art. 15(2), AfCFTA Agreement, 2018

⁹¹ Art. 15(2), AfCFTA Agreement, 2018

⁹² Art. 14(3), AfCFTA Agreement, 2018

⁹³ Ibid.

⁹⁴ Art. 15(3), AfCFTA Agreement, 2018

⁹⁵ Ibid

whether the terms and conditions attached have been met, and thereafter may extend, modify or terminate the waiver.⁹⁶ The application of the variable geometry in African RATs has attracted criticism for the seemingly slowing down effect on the enforceability of African RTAs. Dagne notes that:⁹⁷

Flexible geometry seeks to minimize the short-term cost of liberalization by accommodating the different levels of industrial development and commitment towards the integration agenda. In a continent with more than 55 countries, the existence of these differences and challenges are unquestionable. However, variable geometry comes with its tradeoffs. It for example is unclear that accommodating too many countries from the full liberalization commitments will realize the predicted increases in intra-African trade or in Foreign Direct Investment. In short, notwithstanding the fact that variable geometry will accommodate the participation of many countries in the AfCFTA, it will also limit the full potential of realizing the AfCFTA goals.

In 2009, vide a decision dated 13 September 2008, the EAC Secretariat requested on behalf of the EAC Council of Ministers, requested an Advisory Opinion on the following:

- (a) The application of the principle of variable geometry as provided in the Treaty Establishing the EAC; and
- (b) The application of the principle of variable geometry viz-a-viz the requirement for consensus in decision making.

The purpose for seeking the Advisory Opinion was to enable the EAC, its organ, institutions, and partners to have a clear interpretation of the Treaty Establishing the EAC (“EAC Treaty”) which provides as one of the operational principles, “the principle of variable geometry which allows for progression in cooperation among groups within the Community for wider integration schemes in various fields and at different speeds.”⁹⁸ Apparently, the understanding by the relevant bodies of the EAC regarding the application of the principle of variable geometry was that (a) the principle allows flexibility in the progression of integration activities; and (b) the progression of such activities, projects, and programmes in cooperation by some of the Partners States as opposed to all the Partner States.⁹⁹ The Application further states that “this interpretation is contestable on the basis of the

⁹⁶ Ibid

⁹⁷ Sewagegnehu Dagne, “Variable Geometry of African Integration and AfCFTA” *Afronomics Law* (June 2019), available at: <https://www.afronomicslaw.org/index.php/2019/06/28/variable-geometry-of-african-integration-and-afcfta> (last accessed 22 May 2022)

⁹⁸ In the Matter of a Request for by the Council of Ministers of the East African Community, East African Court, (App. No.1 of 200), available at https://www.eacj.org/wp-content/uploads/2012/11/advisory_opinion_1_of_2008.pdf

⁹⁹ Ibid.

fundamental requirement, under the Treaty and relevant annexes, for consensus as a basis for decision-making by the Summit of Heads of State and the Council of Ministers.”¹⁰⁰

In the submissions by Counsel on behalf of the EAC, the EAC formulated for the EAC Court of Justice’s Advisory Opinion, the following issues;

- (1) Whether the principle of variable geometry is in harmony with the requirement for consensus in decision making;
- (2) Whether the principle of variable geometry can apply to guide the interpretation process, the requirement on consensus in decision-making notwithstanding;
- (3) Whether the requirement on consensus in decision-making implies unanimity of the Partner States.

In what has become the locus classicus on the unidentical twin concepts of variable geometry and consensus building as core features of the African RTAs, the EAC Court of Justice took a reconciliatory approach in its Advisory Opinion. Citing the famous quote from Tanaka J, “that to treat unequal matters differently according to their inequality is not only permitted but required” stated as follows:¹⁰¹

Simultaneous implementation is impracticable in some circumstances and Partner States cannot be expected to operate within such strait jacket or one size fits all situations. Variable geometry is, therefore, intended, and actually allows those Partner States who cannot implement a particular decision simultaneously or immediately to implement it at a suitable certain future time or simply at a different speed while at the same time allowing those who are able to implement immediately to do so.

c. Transparency and Disclosure of Information

AfCFTA Agreement requires each State Party to promptly publish or make available through official media (Gazette, newsletter, Hansard, or website, in one of the AU languages) its laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relative to any issue under the scope of the AfCFTA Agreement.¹⁰² The AfCFTA Agreement identifies transparency in the implementation of the AfCFTA Agreement and disclosure of relevant information as one of the core principles governing the AfCFTA.¹⁰³ However, the principle of disclosure of information and transparency under the AfCFTA regime is not without a caveat. Article 16(2) provides that:

¹⁰⁰ As above, p.2

¹⁰¹ As above, p. 34

¹⁰² Art. 16(1), AfCFTA Agreement, 2018

¹⁰³ Art. 5, AfCFTA Agreement, 2018

The provisions of the AfCFTA Agreement shall not require any State Party to disclose confidential information which would prejudice law enforcement or otherwise be contrary to public interests or will prejudice the legitimate commercial interests of particular enterprises, public or private.

Notwithstanding the foregoing caveat, each State Party is further required to notify other State Parties through the AfCFTA Secretariat, in any of the AU official languages on the following matters;

- (a) All laws, regulations, procedures, and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by the AfCFTA Agreement adopted after the entry into force of the AfCFTA Agreement.
- (b) Each State Party shall notify, through the Secretariat, in accordance with this Agreement, the other State Parties of any actual or proposed measure that the State Party considers might materially affect the operation of this Agreement or otherwise substantially affect the operation of the AfCFTA Agreement or otherwise substantially affect the other State Party's interests under the AfCFTA Agreement;
- (c) At the request of another State Party, a State Party, through the Secretariat, shall promptly provide information and respond to questions pertaining to an actual or proposed measure, irrespective of whether the other State Party was previously notified of that measure;¹⁰⁴

The State Parties are required to provide the above notification to other State Parties without prejudice to whether the measure is consistent with the AfCFTA Agreement or otherwise.¹⁰⁵

d. Most Favoured Nation (MFN)

One of the principles governing the AfCFTA regime is MFN. According to Article 4 of the AfCFTA Agreement, State Parties shall accord MFN treatment to another in accordance with global safeguard measures which “shall be in accordance with Annex 9 on Trade Remedies and Guidelines on Implementation of Trade Remedies, Article XIX of GATT 1994, and the WTO Agreement on Safeguard.”¹⁰⁶ MFN rules or principles of the AfCFTA denote that no State Party shall confer on a third party (non-AfCFTA member States) any advantage,

¹⁰⁴ Art. 17(1)(2) and (3), AfCFTA Agreement, 2018

¹⁰⁵ Ibid

¹⁰⁶ Art. 18, AfCFTA Agreement, 2018

concession, or privilege that is granted to an AfCFTA State Party. Art. 4 of the AfCFTA Agreement states:

1. State Parties shall accord Most-Favoured-Nation Treatment to one another in accordance with Article 18 of the Agreement.
2. Nothing in this Protocol shall prevent a State Party from concluding or maintaining preferential trade arrangements with Third Parties, provided that such trade arrangements do not impede or frustrate the objectives of this Protocol, and that any advantage, concession, or privilege granted to a Third Party under such arrangements is extended to other State Parties on a reciprocal basis.
3. Nothing in this Protocol shall prevent two or more State Parties from extending to one another preferences which aim at achieving the objectives of this Protocol among themselves, provided that such preferences are extended to the other State Parties on a reciprocal basis.
4. Notwithstanding the provisions of paragraphs 2 and 3 of this Article, a State Party shall not be obliged to extend to another State Party, trade preferences extended to other State Parties or Third Parties before the entry into force of the Agreement. A State Party shall afford the opportunity to the other State Parties to negotiate the preferences granted therein on a reciprocal basis, considering levels of development of State Parties.

e. Dispute Settlement Mechanism

The African regional integration agenda, as evidenced by the AfCFTA Agreement closely, follows the EU.¹⁰⁷ The dispute settlement mechanism envisages the establishment of regional trade areas and customs unions and followed by the Continental Customs Union (CCU), then an African Common Market (ACM), and finally, an African Economic and Monetary Union (AEMU).¹⁰⁸ As once noted by Dube, the current Head of Regional Integration of the African Development Bank:¹⁰⁹

EU [which] began in the 1950s and contemporary Africa is characterised by a different political, economic and social ethos from the Europe of that time – differences in economic development, infrastructure, human capital, governance systems and political leadership. The motivation for integration is also different. Europe's regional integration agenda has largely been driven by economic 'functional' approach. The political agenda in Africa is so dominant, and most resources are dedicated to security issues, divergent domestic policies and priorities make it difficult to implement deeper integration commitment.

It is debatable whether Africa needed to follow the European Regional Integration Model.

¹⁰⁷ M Dube, 'Traditional and Emerging Partners' Role in African Regional Economic Integration: Issues and Recommendations' South African Institute of International Affairs,' (2013) *SAIIA occasional paper No 158*, p.6.

¹⁰⁸ As above

¹⁰⁹ As above

Chapter 3: Legal Framework for Mainstreaming Human Rights in the AfCFTA

3.1 Regional Human Rights Instruments

African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (African Charter) was drafted taking into consideration 'the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights.'¹¹⁰ Under article 10 of the African Charter, every individual shall have the right to free association provided that he abides by the law and that subject to the obligations of solidarity provided for in Article 29 no one may be compelled to join an association.

Article 12(1) provides that 'every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law.' This right includes the right to leave any country including his own and to return to said country. This right may be limited subject to laws protecting national security, law, and order, public health, or morality. Consequently, the expulsion of an individual who is not a national of a state party to the Charter may only be done by virtue of a decision taken in accordance with the law.

Article 14 of the Charter guarantees the right to property providing that the rights "may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.' Article 19 further protects the right to equality before the law. There is no justification for a group of people dominating another. This provision lays the foundation for availing individuals from all nationalities equal access to the law when aggrieved.

Article 20 protects the right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. Even though this article is principally targeting the liberalization of states from colonization, its application extends to protecting states from the usurpation of their economic, political, and cultural sovereignty. Under article 21, 'all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.'

¹¹⁰ Preamble to the African Charter

The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange, and the principles of international law. The exercise of this right may be done collectively by state parties, and they shall endeavor to eliminate all forms of foreign economic exploitation, particularly that practiced by international monopolies to enable their peoples to fully benefit from the advantages derived from their national resources.

Article 24 provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development.’

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)

This is the principal instrument specifically protecting the rights of women in the African continent. It builds on the provisions of the African Charter on Human and Peoples’ Rights on anti-discrimination against women. The Maputo Protocol prohibits all discrimination against women and puts an obligation on state parties to take policy and legislative measures to counter discrimination against women.¹¹¹

Article 3 of the Protocol protects the right to dignity of women and respect for their person. The article also requires states to adopt and implement appropriate measures to prohibit any exploitation or degradation of women. The implementation of the AfCFTA, therefore, requires states to align the implementation of the agreement in accordance with the Maputo Protocol.

Article 9 of the Protocol also provides for the right of women to participate in the political and decision-making process of state parties further, article 13 of the Protocol protects economic and social welfare rights. these include the rights to equality of access to employment, equal remuneration for jobs of equal value for women and men, and equal application of taxation laws to women and men. It is important in the context of integration of states to not lose sight of the rights that may be affected by policy changes to businesses and the livelihoods of people. since women are at the core of the trading sector, especially in informal businesses, it is important to implement policies that do not run counter to the rights of women as a vulnerable group.

Article 15 protects the right to food. It provides that ‘States Parties shall ensure that women have the right to nutritious and adequate food.’ States Parties are therefore required to take appropriate measures to provide access to water and a sufficient supply of food and ensure

¹¹¹ Article 2 of the Maputo Protocol.

food security. Similarly, article 19 provides for the right to sustainable development which falls within the ambition of the AfCFTA. The article requires states to ensure women's access and control over productive resources. To secure the intended goals of the Protocol, article 25 of the Protocol provides for the right of women to access remedies.

African Youth Charter

Africa boasts one of the most youthful populations in the world. This population can be a catalyst not only for economic development but also for the protection and enjoyment of human rights. The Youth Charter outlines some important commitments of states to provide protection of youth interests at domestic levels.

Like many international instruments preceding the Youth Charter, the principle of non-discrimination is embedded in article 2 of the African Youth Charter. The enjoyment of the rights guaranteed in the Charter is irrespective of race, ethnic group, colour, sex, language, religion, political or other opinions, national or social origin, fortune birth, or other status.

Article 3 of the Youth Charter protects freedom of movement of all young persons to leave any country including their own, and to return to his/her country. This right is usually affected by barriers to both intra and inter-state movement of people and goods. The implementation of the AfCFTA has the potential to minimise the barriers to the enjoyment of this right.

Article 5 of the Youth Charter protects the right to free association and freedom of assembly in conformity with the law. This right is fundamental in the protection of the formation and operation of interest groups and labour unions which are key setups in the trading sector.

The right to property is also protected under article 9 of the Youth Charter to ensure that no person is arbitrarily deprived of their property. This right covers the right to intellectual and innovation rights of inventors and copyright holders. Connected to the development aspirations of the SDGs and the AfCFTA is the right to development embedded in article 10 of the Youth Charter. It provides that 'every young person shall have the right to social, economic, political, and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. The article binds state parties to this Charter to provide access to information, education, and training for young people to learn their rights and responsibilities.

Article 11 protects the right to youth participation in all spheres of society and should ensure that measures are put in place to protect this right. Some of the measures recommended under this article include participation in parliament, law and policy-making, access to

information, technical and financial reports, and including female youths in the development agendas. This is further strengthened by article 12 which provides for the states to put in place a comprehensive and coherent national youth policy.

Article 14 of the Youth Charter provides for poverty eradication and socio-economic integration of youth. This includes the right to be free from hunger and shall individual and collective measures to enhance youth development, capacity, and participation. Article 14(3) recognises the right of every young person to benefit from social security, including social insurance. Article 15 provides for sustainable livelihoods and youth empowerment. This includes the right to gainful employment, protection from economic exploitation, and performance of hazardous jobs. To achieve this right, states are obliged to take all appropriate measures such as job creation, regulation of informal economies, prevent unfair labour practices, etc.

Article 16 of the Charter provides for the rights of persons to the best attainable state of physical and mental health and provides measures to be taken to make available equitable and ready access to medical assistance and health care, especially in rural and poor urban areas, strengthen local, national, regional, and international partnerships to fight supply and demand of drugs. Article 18 provides for the right to be treated with humanity and with respect for the inherent dignity of the human person. This covers instances where youth are accused of infringing the penal laws of a state party. Accused and convicted persons are also entitled to the services of a lawyer. The article can play an important role in the protection of persons involved in informal illegitimate cross-border trade.

State parties are also under an obligation to ensure the use of methods to improve the lives of young people and to foster the protection of the environment. Corporations and multinational companies' activities may play an important role in the stimulation of growth and development of economies, but their activities may pose threat to the environment.

All forms of discrimination against girls and young women are prohibited in accordance with national, regional, and international human rights obligations.

African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (African Children's Charter) is the first comprehensive regional children's rights treaty specifically dedicated to the protection of children in Africa.

The Charter provides a clear and concise definition of a child as 'someone below the age of 18 years.' Article 3 of the African Children's Charter guarantees the equal enjoyment of the

rights and freedoms enshrined without discrimination on any basis, including sex. States are also enjoined to ensure that in all actions concerning children undertaken by any person or authority, the best interests of the child are the primary consideration.

In addition, states additionally guarantee the rights of children to life, freedom of expression, freedom of thought, conscience, and religion, and the right to privacy. The Charter has an elaborate provision on the right to education, including a stipulation, among others, that the education of the children has to be directed to the promotion of their understanding of primary health care. States are also required to take special measures in respect of girls to ensure equal access to education for all sections of the community. The Charter also provides protection for internally displaced children, protection of the rights of children living under apartheid, and protection from harmful social and cultural practices.

AU Convention on Preventing and Combating Corruption

Premised on the need to respect human dignity and to foster the promotion of economic, social, and political rights in conformity with the provisions of the African Charter on Human and People's Rights and other relevant human rights instruments and cognizant of the negative effects of corruption on development on the continent, member states of the continent agreed on this convention.¹¹² The convention seeks among other things to strengthen the development of anti-corruption mechanisms on the continent. It also seeks to prevent, detect, and punish corruption and ensure accountability. In so doing, state parties undertake to respect human rights, the rule of law, transparency, and the promotion of social justice.

The Convention is applicable to a broad number of corruption acts and practices and Article V of the Convention requires states to take legislative and other measures to combat corruption and protect informants. This can be achieved by the enactment of penal laws to punish the laundering of proceeds of corruption in public offices. This will help fight practices detrimental to human rights-based enforcement of the AfCFTA. The Convention also requires states to adopt legislative measures to protect access to information and punish offences committed by the private sector and for the sector to participate in the fight against corruption.

The Convention also provides for the jurisdiction of states to try offences,¹¹³ minimum guarantees of a fair trial,¹¹⁴ for extradition of suspects and convicts between states,¹¹⁵ and general cooperation between states.

¹¹² Preamble to the Anti-corruption Convention

¹¹³ Article XIII

¹¹⁴ Article xiv

¹¹⁵ Article xv

3.2 Relevant UN treaties

International Covenant on Economic, Social and Cultural Rights and Optional Protocol (ICESCR)

The ICESCR puts an obligation on states to take steps to ‘the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’¹¹⁶ The Covenant went on to provide protection for several socio-economic and cultural rights. Article 3 of the Convention puts an obligation on states to ensure the equal rights of men and women to the enjoyment of all economic, social, and cultural rights in the Convention. This lays the foundation for the enjoyment of these rights regardless of sex.

The Convention recognizes the right to work including the opportunity to earn a living by freely chosen work.¹¹⁷ Article 7 further recognizes the right of everyone to the enjoyment of just and favourable conditions of work which ensure, fair remuneration, safe and healthy working conditions, equal opportunity for meritorious promotions, and reasonable limitation of working hours and periodic public holidays. This right is complemented by the right to form trade unions under article 8 of the Convention which allows workers to form these groups to represent the interests of the workforce.

Article 9 of the Convention recognizes the right of everyone to social security, including social insurance. Article 12 protects the right of everyone to an adequate standard of living for himself and his family, and freedom from hunger. The Covenant further protects the right to the enjoyment of the highest attainable standard of physical and mental health and for states to take appropriate measures to realise this right.¹¹⁸ The right to education and to take part in one’s culture is also respectively protected under articles 14 and 15 of the Covenant. HRDs can mainstream all these rights into the operationalization of the AfCFTA since the member states have largely ratified the Convention and vowed to respect the provisions therein.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW is the primary UN instrument protecting women from discrimination and bringing women into focus. The Convention provides for a broad definition of discrimination and

¹¹⁶ Article 2(1) of the ICESCR.

¹¹⁷ Article 6(1) of the ICESCR.

¹¹⁸ Article 12 of the ICESCR.

prohibits the same on different grounds against women. The Convention gives positive affirmation to the principle of equality by requiring States parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".¹¹⁹

In addition to the protection of reproductive rights, articles 10, 11, and 13, respectively, affirm women's rights to non-discrimination in education, employment, and economic and social activities. Further emphasis on these demands is made regarding the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning. Article 15 asserts the full equality of women in civil and business matters, demanding that all instruments directed at restricting women's legal capacity "shall be deemed null and void". Finally, in article 16, the Convention returns to the issue of marriage and family relations, asserting the equal rights and obligations of women and men with regard to choice of spouse, parenthood, personal rights, and command over property. This Convention, therefore, presents unique and comprehensive protection of women from discrimination and affirms several rights of women. These protections apply at all times and are subject to national restrictions on citizen privileges apply across African states that are parties to the CEDAW.

Convention on the Rights of the Child (CRC)

The CRC embodies the general obligations of states toward the protection of the rights of the child. Article 3 puts an obligation on states to put the best interest of the child first in all public and private undertakings. States are also obligated to undertake the necessary legislative and policy measures to realise the rights of the child protected under the CRC. These rights include the right to life and survival and development,¹²⁰ the right to preserve identity,¹²¹ Protection from forceful separation with parents,¹²² protection from illicit transfer and non-return of children abroad,¹²³ protection from unlawful interference with privacy,¹²⁴ the right to education,¹²⁵ and protection from economic exploitation under article 32 of the CRC.

¹¹⁹ Preamble, CEDAW

¹²⁰ Article 6 of the CRC

¹²¹ Article 8 CRC

¹²² Article 9 CRC

¹²³ Article 11 CRC

¹²⁴ Article 16 CRC

¹²⁵ Article 28 CRC

Article 34 of the CRC protects the child from all forms of sexual exploitation and sexual abuse. States are required to take measures including bilateral and multilateral steps to measures to realise this protection. These rights can be harnessed and used to protect the rights of the child in the implementation of the AfCFTA and used as tools by HRDs.

International Convention on the protection of the Rights of All Migrant Workers and Members of their Families

With globalisation and the elimination of movement barriers come significant movements in labour force. Consequently, a risk of abuse of migrant workers in foreign jurisdictions. This Convention provides protection for these migrants and members of their families. The Convention provides for non-discrimination, and protection of undocumented migrants from being employed under less favourable conditions. Article 7 of the Convention provides that states parties undertake to ensure migrant workers and members of their families enjoy the rights provided in the Convention without any distinction. Part III of the Convention protects the human rights of migrant workers and members of their families. Article 8 gives them the right to leave a state including their state of origin and also the right to return to their state of origin.

Article 8 of the Convention puts an obligation on state parties to provide for the protection of the right to life of migrants in their laws. Article 10 of the Convention prohibits torture or cruel, inhuman, or degrading treatment or punishment. Article 11 prohibits enslavement and servitude of migrants or being subjected to forced labour. Article 12 protects migrant workers' freedom of conscience, thought, and religion. The privacy,¹²⁶ property rights,¹²⁷ right to liberty and security of the person,¹²⁸ and right to dignity under article 17 are all protected by this Convention. Access to justice for migrant workers and members of their families on equal footing with nationals of state parties is also protected. This includes all fair trial requirements and timely delivery of justice.

Article 21 of the Convention prohibits the destruction, or confiscation of migrant documents by public officials while article 22 prohibits the collective expulsion of migrant workers and their families. Migrant workers shall also have the right to access consular or diplomatic authorities of their states. These rights are indispensable for the peaceful stay of migrants in foreign lands. These may be mainstreamed into the enforcement of the AfCFTA. HRDs can therefore rely on this Covenant to advocate for more protection of migrants. Pursuant to

¹²⁶ Article 14 of the Convention

¹²⁷ Article 15 of the Convention

¹²⁸ Article 16 of the Convention

article 64 of the Covenant, states are obliged to cooperate in the protection of migrant workers.

ILO Conventions on Migration for Employment Domestic Workers Convention, and Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers

From its very inception, the ILO has resolved to protect “the interests of workers employed in countries other than their own”¹²⁹ and pioneered the development of specific international standards for the governance of labour migration and protection of migrant workers to ensure equality of treatment. The ILO promotes a rights-based approach to the management and governance of labour migration. This is reflected in the International Labour Standards (ILS) that set out the basic principles and rights at work. The ILS bind member states to the ILO as they peg international standards for the respect of human rights as a measure for the regulation of migrant workers handling.

The legal framework of the ILO has several instruments. These instruments recognize non-discrimination against migrant workers, equality of opportunity of treatment, social protection, and fair recruitment among others. The adoption of a rights-based approach to migration places the migrant at the centre of migration policies and management and pays particular attention to the situation of marginalized and disadvantaged groups of migrants. These approaches and standards can play crucial roles in protecting human rights.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children

This Protocol supplements the United Nations Convention Against Organised Crime. The Protocol is aimed at combatting trafficking in persons with particular attention to women and children, protecting and assisting victims of human trafficking, and promoting cooperation among state parties. The Protocol under article 35 of the Convention puts an obligation on states to take measures criminalising trafficking. States are also obligated to share information to ensure and cooperate with other states. This Protocol can go a long way in protecting women and children’s victims of trafficking.

¹²⁹ ILO Constitution, 1919, Preamble, recital 2

Chapter 4: Role of HRDs in the AfCFTA

“Human rights defender” (HRD) is a term used to describe people who, individually or with others, act to promote or protect human rights in a peaceful manner. Human rights defenders are identified above all by what they do, and it is through a description of their actions (...) and of some of the contexts in which they work (...) that the term can best be explained.’¹³⁰ The term “human rights defender” has been used increasingly since the adoption of the Declaration on human rights defenders in 1998. Until then, terms such as human rights “activist”, “professional”, “worker” or “monitor” had been most common. The term “human rights defender” is seen as a more relevant and useful term. They seek the promotion of civil and political rights as well as the promotion, protection, and realization of economic, social, and cultural rights.

The Declaration on Human Rights Defenders refers to all “individuals, groups and associations contributing to the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals” as human rights defenders.¹³¹ As such ‘human rights defenders can be any person or group of persons working to promote human rights, ranging from intergovernmental organizations based in the world’s largest cities to individuals working within their local communities.’¹³² HRDs can be government officials, civil servants, members of civil society, or members of the private sector. HRDs are a crucial link in the chain of human rights protection, from campaigning on behalf of victims of human rights violations to lobbying at the highest levels for improved mechanisms for human-rights protection. Their roles in the development and implementation of policy and legal instruments have consistently paved the way for the incorporation of human rights perspectives in the drafting and subsequent implementation of instruments.

In the process, they support the rule of law and the institutions and principles of democracy around the world. By publicizing human-rights instruments and lobbying state authorities and regional bodies, they raise awareness of human rights entitlements and help to mobilize victims of abuses to fight against them.¹³³

¹³⁰ OHCHR ‘About human rights defenders’ <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/about-human-rights-defenders>

¹³¹ As above

¹³² As above

¹³³ H Sheikh & ors ‘Human-rights defenders in need of defense: A field report on the protection and effectiveness of Human-rights defenders in West and East Africa and the Horn’ (undated) <https://www.defenddefenders.org/wp-content/uploads/2017/05/Human-rights-defenders-in-need-of-defense-A-field-report-on-the-protection-and-effectiveness-of-Human-rights-defenders-in-West-and-East-Africa-and-the-Horn-.pdf>

As mentioned earlier, there is no existing study on the role of HRDs in promoting the respect and protection of human rights in the AfCFTA. Thus, this Study attempts to fill this gap.

4.1 Knowledge or experience engaging with the AfCFTA

All respondents have some knowledge about the AfCFTA, including its objectives, scope, and mandate, but some have not engaged with it. Those who have engaged in any process are usually by virtue of their roles in their respective organizations, including at least one researcher at the ACHPR.¹³⁴ One Respondent also indicated that her institute, the Dakar-based UN Institute for Development Planning, has held annual training on the gender dimensions of the AfCFTA Agreement.

Ms. Michelle R. Maziwisa of the Dullah Omar Institute stated that she is co-Chair of the Gender and Trade Coalition as seconded by the African Women's Development and Communications (FEMNET) based in Nairobi, Kenya, as part of the latter's Economic Justice Project. In these roles, she engages with the AfCFTA in training women's civil society organizations and businesswomen on the AfCFTA.¹³⁵ However, the African Centre's Executive Director acknowledged participating in at least two consultative meetings following the adoption of the AfCFTA Agreement by the Assembly of AU Heads of State and Government, in Kigali, Rwanda, 2018.¹³⁶ She added that the African Centre has not led any consultations in the negotiations and drafting stages of the AfCFTA Agreement.¹³⁷

According to African Defenders, the Pan-African Lawyers Union (PALU) was actively involved in the negotiations leading to the drafting of the AfCFTA Agreement.¹³⁸ Joseph Bikanda further stated that his organization had engagements with two of the RECs (ECOWAS and EAC) recognized as building blocks for the implementation of the AfCFTA Agreement. He further stated that his organization had further multiple engagements with President Paul Kagame-led Committee of Experts on the AfCFTA.¹³⁹

The Chairperson of the AfCFTA Independent Youth Advisory Council (IYAC) stated that the IYAC engages with the AfCFTA. He further stated that the IYAC was set up in 2021. He added that the IYAC has the vision of facilitating the institutionalization of youth participation in the AfCFTA decision-making processes. To this end, IYAC intends to mobilize and empower

¹³⁴ Interview with Dr. Chairman Okolois, Senior Researcher, ACHPR

¹³⁵ Interview with Michelle R. Maziwisa, Dullah Omar Institute and Co-Chair, Gender, and Trade Coalition

¹³⁶ Ibid

¹³⁷ Interview with Ms. Zo Randriamo, UN Institute for Development and Planning

¹³⁸ Interview with Joseph Bikanda, African Defenders

¹³⁹ As Above

young people in Africa to effectively participate in and take advantage of the potential contribution of the AfCFTA towards intra-African trade.¹⁴⁰

Institutions such as the Thabo Mbeki Institute have written extensively on the AfCFTA.¹⁴¹ Generally, all the Respondents agreed that there were no broad consultations of HRDs in the negotiations leading to the drafting and coming into force of the AfCFTA Agreement. Most of the HRDs that were interviewed in this assignment believed that AfCFTA negotiations were based on the economics and not the human rights implications of the AfCFTA Agreement. As a result, explicit HRD participation was very minimal.

4.2 AfCFTA and Human Rights

The immediate aftermath of World War II witnessed the establishment of the current global economic and international order, between 1944 to 1948, through the promulgation of chiefly, the UN Charter, the UDHR, the Bretton Woods Agreements, GATT, and the Havana Charter for International Trade Organization. Accordingly, these international agreements were “aimed at protecting liberty, non-discrimination, the rule of law, social welfare, and other human rights values through a rules-based international order and ‘specialized agencies’ committed to the economic principle of ‘separation of policy instruments.’”¹⁴²

The AfCFTA does not, beyond its preambular reference to human rights, rule of law, gender equality, the empowerment of youth and women entrepreneurs, and sustainably inclusive growth and structural transformation in the implementation of the AfCFTA Agreement, the legal implications of preserving the *acquis* and applying best practices, standards, and principles in its governing framework, provide a legitimate basis for HRDs to mainstream human rights in the AfCFTA. This is because regional integration law has come to adopt an ‘integration paradigm’ that links economic integration with “constitutional guarantees of human rights, democracy.”¹⁴³

In view of their ‘constitutional functions’, international guarantees of freedom, non-discrimination, the rule of law, and human rights should be seen- within the EC-as integral parts of the constitutional limitations on abuses of foreign policy powers. Joseph Petersmann argued that “national constitutional law and human rights cannot achieve their objectives

¹⁴⁰ Interview with Emolot Allan David, AfCFTA Youth Advisory Council

¹⁴¹ Interview with Prof Serges Djoyu, Thabo Mbeki African Leadership Institute, the University of South Africa (UNISA)

¹⁴² EU Petersmann, “Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from the European Integration”, (2002) 13(3) European Journal of International Law, 621 cited in Lester et al (n 44), p. 882

¹⁴³ Ibid

unless they are supplemented by *international constitutional law* and by effective protection of human rights in the economy no less than in the polity.”¹⁴⁴

As noted by Prof Serges, “Understandably, the primary motive of trade agreements is to improve the living standards of the people. We need therefore to evaluate the extent to which the AfCFTA Agreement advances the right to work, health, social security and welfare, women’s rights, rights of rural women.”¹⁴⁵ However, the perception of most of the HRDs that have been engaged in the execution of this assignment has one way or the other associated the lack of express provisions for human rights monitoring of the AfCFTA Agreement with the lack of adequate participation of the average African person and mainly designed by economists.¹⁴⁶ Furthermore, other HRDs have expressed concern that whilst free movement of persons, goods, and capital across Africa will be a successful contribution to the success of the AfCFTA, it can also create avenues for child rights violations, (including child trafficking and commercial sex exploitation and threats to the rights of migrant workers and children.¹⁴⁷

Responding to the question of whether human rights principles are adequately mainstreamed in the AfCFTA Agreement, Ms. Maziwisa stated:

*“The jury is out on this. In principle, there is a Gender Protocol on the way to shield women’s rights but will have to be reviewed. There are also national processes in place, but it’s not clear how inclusive this process is, which may push out human rights defenders from engaging with the processes. AU Member States bound to the AfCFTA are most likely to be bound by the AU human rights framework but there are complications because of what is described ‘as the spaghetti bowl effect’ of African RTAs, centered on the WTO framework including its overarching trade rules and dispute settlement mechanism. This could easily make it more complicated to resolve conflicts arising out of the AfCFTA if there are foreign elements involved especially countries that are highly dependent on foreign aid and countries that do have strong courts.”*¹⁴⁸

HRDs are generally concerned that human rights provisions have not been expressly provided for in the AfCFTA Agreement. This apprehension is perhaps best explained by the seeming lack of effort by the AU to promulgate the “AU Policy Framework on Business and

¹⁴⁴ As above, p.338

¹⁴⁵ Interview with Prof. Dyojo Serges, (6 May 2022)

¹⁴⁶ As Above

¹⁴⁷ Interview with Opal Sibanda, 4 May 2022

¹⁴⁸ Interview with Michelle R. Maziwisa, Dullah Omar Institute and Co-Chair, Gender, and Trade Coalition

Human Rights.¹⁴⁹ As recent as January 2022, a Business and Human Rights (BHR) Africa Project was launched by the East African Regional Office and UN Human Rights offices in Liberia, Mozambique, and Uganda. To this end. The East Africa Regional Office is leading the implementation of National Action Plans on Business and Human Rights (NAPS) across the region, including through the organization of sub-regional dialogues on NAPs.

Furthermore, in Liberia and Mozambique, the UN Human Rights is supporting the development of a roadmap toward a NAP through capacity-building activities on the UNGPS and focus on access to remedy development of a NAP.¹⁵⁰

The extent to which human rights and fundamental freedoms may be mainstreamed in the AfCFTA would be based on a proper construction of the meaning of ‘preserving the acquis and applying best practices in Conventions binding on the AU’. In 1962, Italy nationalized the production and distribution of electricity and transferred the asset to its national electricity board, ENEL.¹⁵¹ One of the shareholders of the affected corporations, Mr. Coasta “considered he had been deprived of his dividend and consequently refused to pay an electricity bill for the amount of ITL 1 926.” In the ensuing arbitration proceedings in Milan, Mr. Coasta argued that the nationalization activities violated several provisions in the EEC Treaty. As a result, the CJEU was requested to interpret the applicable provisions of the EEC Treaty. The CJEU stated as follows in its Judgment:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which...became an integral of the legal systems of the Member States and which their courts are bound to apply.

The CJEU further held that:

it follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign

¹⁴⁹ AU, “Validation Workshop of the African Union Policy on Business and Human Rights”, (31 March 2017) available at <https://au.int/web/en/pressreleases/20170321/validation-workshop-african-union-policy-business-and-human-rights> (last accessed 8 Dec. 2022)

¹⁵⁰ UN Human Rights, Office of the High Commissioner, “Business and Human Rights (BHR) Africa Project”, available at: <https://www.ohchr.org/en/business/bhr-africa> (last accessed 2 May, 2022); note that Uganda is the only country with a NAP on BHR, published in July 2021

¹⁵¹ Costa v ENEL (case 6/64) [1964] ECR 585 - ECJ, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A61964CI0006>.

rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.

It, therefore, follows that the EU, as an autonomous entity, has its “own sovereign rights and a legal order that is independent of member States and to which both EU Member States and their nationals are subject to”. The EU Law, otherwise, the “EEC Constitution” is expressed through the following established structures:

- a. An institutional mechanism that is effectively characterized by EEC Law;
- b. Supranational organization to which is acceded greater powers than individual member States, especially on areas where member States would normally retain sovereign rights in;
- c. An established legal order, independent of the legal order of member States.

Therefore, supranationalism, as elucidated in the EU and jurisprudence, is underscored vide a distinction between ‘normative’ and ‘decisional supra-nationalism’.¹⁵² Normative supranationalism denotes hierarchy-based relations that exist between the EU legal and policy measures, and the competing legal measures and policies of member States.¹⁵³ On the other hand, ‘decisional supranationalism’ refers to the “institutional framework and decision-making processes by which community policies and measures are, in the first place, initiated, debated and formulated, then promulgated and finally executed.”¹⁵⁴

Members of the EU have therefore limited their sovereignty by creating a self-sufficient corpus of law that is binding on the Member States, their citizens, and their courts. On the contrary, per the art. 10 of the AfCFTA Agreement, the highest decision-making body for the AfCFTA remains the AU Assembly, the AU Assembly “shall have the exclusive authority to adopt the interpretation of the AfCFTA Agreement.”¹⁵⁵ Suffice to say, supranationalism constitutes the “existence of a *sui generis* international organization which acts independently of the Member States; takes binding decisions and is responsible for the supervision and implementation of such a decision and constitutes a separate legal order.”¹⁵⁶

¹⁵² Babatunde Fagbayibo, “A Supranational African Union? Gazing through the Crystal Bowl”, (2008) 41 *De Jure* 493

¹⁵³ As above

¹⁵⁴ Joseph Weiler, “the Community System: the dual character of supranationalism,” 1981 *Yearbook of European Law* 271 cited in Babatunde Fagbayibo, and Udoka Ndidiamaka Owie, “Crisis as Opportunity: Exploring the African Union's Response to COVID-19 and the Implications for Its Aspirational Supranational Powers.” (2021) 65(S2) *Journal of African Law*, pp. 181–208.

¹⁵⁵ Art. 10, AfCFTA Agreement. 2018

¹⁵⁶ See Lenaerts and Van Nuffel Bray (eds) *Constitutional Law of the European Union* (1999) 16-22 cited in Fagbayibo (n 152).

It is, therefore, self-evident that the AU is far off being a supranational organization that “acts as a single bloc on the international plane...especially, on issues relative to trade and aid negotiations at the WTO and EU, the AU should be empowered to negotiate in close coordination with representatives of member States and RECs on certain issues. It is suggested that as a matter of principle and in pursuance of implementing a common agenda, the AU should be empowered to negotiate in close coordination with representatives of member States and RECs on issues. It is suggested that as a matter of principle in pursuance of implementing a common agenda, the AU should have an observer role when the RECs are negotiating multilateral trade agreements. Initiatives like this have the potential of placing the AU in the driving seat of multilateral negotiations.”¹⁵⁷

Although AU member States are “grappling with the idea of transferring a modicum of sovereignty to the idea of transferring a modicum of sovereignty to the AU”¹⁵⁸ it is essential to interrogate the possibility of mainstreaming human rights in the AfCFTA by:

- (1) Examining the AfCFTA legal, institutional structures, processes and jurisprudence that are suggestive of an “AU Community Law”, including the *acquis* built by the 8 identified RECs, and sought to be consolidated by the AfCFTA, to protect nationals (corporations and individuals) and imposing human rights obligations on State Parties, as a means of facilitating market transactions; and
- (2) By adopting mechanisms that allow HRDs to effectively participate in promoting the protection and respect for human rights by AfCFTA State Parties, and non-State actors, including businesses in the implementation of the AfCFTA processes.¹⁵⁹

Apart from the preambular reference to human rights, democracy, rule of law, gender equality, sustainable and inclusive socio-economic development, and food security on the continent, State Parties further agree under art. 27 of the Protocol on Trade in Services, to mobilize resources in undertaken measures to improve the export capacity of women and youth entrepreneurs and other MSMEs in the five (5) identified service sectors of, Transport; Communication, Finance, Tourism; and Business Services.¹⁶⁰

¹⁵⁷ As Above

¹⁵⁸ As Above

¹⁵⁹ Brenda K. Kombo, “Emerging Voices: Doing Regional Integration Better? The Possibility of Reinvigorating the Relationship between International Human Rights and International Economic Law through the African Continental Free Trade Area,” *Opinio Juris* 12 August 2019 <http://opiniojuris.org/201908/12/emerging-voices-doing-regional-integration-better-> (last accessed 5 June 2022)

¹⁶⁰ Article 18(2) of the Protocol on Trade in Services, AfCFTA Agreement, 2018

AfCFTA Agreement does not have any further provisions on human or environmental rights, thus the criticisms from some of the human rights defenders interviewed in this Report.¹⁶¹ However, the human rights implications of trade and investment agreements have attracted critical attention from a broad spectrum of players, including the UN High Commission for Human Rights, research institutions, civil society, and advocacy groups. The generic nature in which trade and investment agreements are drafted with little or no reference to human rights principles, absence of transparency in investment and trade disputes, and lack of access to justice and remedies for victims, have intensified calls for human rights provisions to be inserted into these agreements.¹⁶² This also includes the adoption of soft law mechanisms like the Equator Principles which do not specifically mention human rights, but includes IFC “Safeguard Policies” and Performance standards and references to international law.¹⁶³ They require Equator banks to undertake social impact assessments that include “compliance with the requirements of host country laws and regulations; applicable international treaties and agreements; socio-economic impacts; and impact on indigenous peoples and communities”, an environment management plan and broad consultation with indigenous people and NGOs.¹⁶⁴

Similar principles are adopted by OECD Countries and Export Credit Agencies, for taking safeguards and proactive efforts against corruption, human rights violations, and preventing environmental harm through the Working Group on Export Credits and Credit Guarantees (ECG)¹⁶⁵, the OECD Guidelines for Multinational Enterprises and OECD Due Diligence Guidance.¹⁶⁶ The AU has also begun an effort to establish an “AU Policy Framework on Business and Human Rights.”¹⁶⁷ These international guidelines, regional initiatives, soft law, and industry practices serve as norms and principles, “addressing the risk of adverse impacts of human rights

The African Commission on Human and People’s Right (African Commission), like other regional human rights courts such as the European Court on Human and People’s Rights, had occasion to hear communications on the liability of non-State actors for human rights

¹⁶¹ See interviews below

¹⁶² Amnesty International, “Human Rights, Trade and Investment Matters”, (May 2006) available at <https://www.amnestyusa.org/files/pdfs/hrtradeinvestmentmatters.pdf>

¹⁶³ Ibid

¹⁶⁴ Paul Watchman, “The Equator Principles: Raising the Bar on Social Impact Assessments?”, in Amnesty(ed) *International, Human Rights, Trade and Investment* (May 2006)

¹⁶⁵ Korinna Horta, “Export Credit Agencies: Not-so-Innocent Bystanders in Environmental and Human Rights Abuse”, (in Amnesty International Edit), *International, Human Rights, Trade and Investment*, (May 2006)

¹⁶⁶ Clare Connellan, Business and human rights in Africa: Companies and investors in African countries need to be conscious of the growing focus on human rights”, White and Case, 27 Sept. 2018), available at [Business and human rights in Africa | White & Case LLP \(whitecase.com\)](https://www.whitecase.com/insights/publications/business-and-human-rights-in-africa) (last accessed 8 Dec. 2022)

¹⁶⁷ AU, “Validation Workshop of the African Union Policy on Business and Human Rights”, (31 March 2017) available at: <https://au.int/web/en/pressreleases/20170321/validation-workshop-african-union-policy-business-and-human-rights> (last 6 May 2021).

violations. In *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*¹⁶⁸, where the Commission found violations of articles 4, 5, 6, and 7 on the basis that,¹⁶⁹

Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.

Similarly, in *Amnesty International and other v Sudan*¹⁷⁰, the Commission held, in response to the Sudan government's argument that over 90 percent of the rights violations complained of were committed in areas under the control of the Sudanese People's Liberation Army, that "even if (thousands of other executions in Sudan) are not the work of forces of the government, the government has a responsibility to protect all residing under its jurisdiction."¹⁷¹ The African Commission's most comprehensive decision regarding abuse of rights by non-State and business corporations was in the *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*. The communication alleged violations of articles 2, 4, 14, 16, 18(1) 21, and 24 of the African Charter on the basis of the Nigeria military government's direct involvement through the Nigeria National Petroleum Company (NNPC) which was the majority shareholder in a joint venture with Shell Petroleum Development Company (SPDC) and that by virtue of the operations of the venture immense environmental degradation health complications of the Ogoni people resulted from the environmental contamination of the environment among the Ogoni people. The Commission in finding that Nigeria has violated articles 2, 4, 14, 16, 18(1), 21, and 24 of the African Charter on Human and Peoples' Rights (African Commission), held: ¹⁷²

The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples' Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights

¹⁶⁸ *Commission Nationale des Droits de l'Homme et des Libertes v. Chad*, ACHPR, Décision (18th Ordinary Sessions, 2-11 Oct. 1995)
<http://www.worldcourts.com/achpr/eng/decisions/1995.10.11 CNDHL v Chad.htm>

¹⁶⁹ Ibid, para. 22

¹⁷⁰ *Amnesty International v. Sudan, Amnesty International v. Sudan*, African Commission on Human and Peoples' Rights, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

¹⁷¹ Ibid

¹⁷² *Social and Economic Rights Action Ctr. v. Nigeria*, Comm. 155/96, 15th ACHPR AAR Annex V (2000-2001), para. 68

contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian government did not live up to the minimum expectations of the African Charter.

By preserving the *acquis* and applying best practices in the RECs as building blocks for the implementation of the AfCFTA Agreement, State Parties undertake to be bound by an accumulated body of AU laws and obligations from since OAU, including treaties, laws, (directives, regulations, decisions, declarations and resolutions, international agreements, and judgements of the African Court on Human and Peoples' Rights and other regional and continental human rights treaty bodies on the African continent and binding on the State Parties to the AfCFTA Agreement.

The EAC has similar objectives to the ECOWAS bloc. It is established on the principles of cooperation for mutual benefit, equitable distribution of benefits, and peaceful settlement of disputes among other things. Article 76 of the Treaty Establishing the EAC provides for the operation of a single market within the sub-region, and this market shall respect the free movement of labour, goods, services, capital, and the right of establishment.

The Southern African Development Community was established in accordance with among other things solidarity, peace and security, human rights, democracy, and the rule of law.¹⁷³ The ultimate objectives of SADC include to:¹⁷⁴

- (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
- (b) promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;
- (c) consolidate, defend and maintain democracy, peace, security and stability;

In accordance with article 29 of the SADC Treaty, member states shall co-operate in food security, land and agriculture, infrastructure and services, trade, industry, finance, investment and mining, social and human development and special programmes. The SADC Charter of Fundamental Social Rights provides for the specific protection of several rights. these include freedom of association and collective bargaining,¹⁷⁵ equal treatment of men

¹⁷³ Article 4 of the SADC Treaty

¹⁷⁴ Article 5(1) of the SADC Treaty

¹⁷⁵ Article 4 of the SADC Social Charter

and women,¹⁷⁶ protection of children and young people,¹⁷⁷ and social protection¹⁷⁸ among others.

Similarly, COMESA was established to replace the former Preferential Trade Area. It was established by states to co-operate in developing their natural and human resources ‘for the good of all their people.’¹⁷⁹ with its ultimate objective to provide a harmonized and more competitive market, reliable transport and communications infrastructure, and greater agricultural and industrial productivity, COMESA has the potential to improve livelihoods in the state parties. COMESA has a Free Trade Area, Customs Union, and Trade Promotion.¹⁸⁰ Article 6 of the COMESA Treaty outlines the fundamental principles on which the block operates. These include recognition, promotion, and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights, recognition and observance of the rule of law, and the promotion and sustenance of a democratic system of governance in each Member State.

There is also established within the framework a Court of Justice to interpret and apply the treaty.¹⁸¹ Chapter 28 of the Revised COMESA Treaty provides for the free movement of persons, labour, services, right of establishment, and residence. With the protection of human rights and the rule of law as founding principles, the COMESA treaty provides the avenue to protect HRDs, labour force, and migrants within the member states.

4.3 Mainstreaming Human Rights in the AfCFTA

4.3.1 African Human Rights System

Major OAU/AU normative frameworks recognize the pivotal role of democratic governance and sustainable peace to sustainable human development.¹⁸² Some of these frameworks include the 1981 African Charter on Human and Peoples’ Rights; the 200 Solemn Declaration on the Conference on Security, Stability, Development, and Cooperation in Africa (CSSDCA); the 2000 Constitutive Act of the AU; the 2003 African Peer Review Mechanism (APRM); the 2007 African Charter on Democracy, Elections and Governance (ACDEG); the 50th

¹⁷⁶ Article 6 of the SADC Social Charter

¹⁷⁷ Article 7 of the SADC Social Charter

¹⁷⁸ Article 10 of the SADC Social Charter

¹⁷⁹ <https://www.comesa.int/what-is-comesa/> accessed 6 June 2022.

¹⁸⁰ As above.

¹⁸¹ Article 19 of the Treaty

¹⁸² Khabele Matlosa, “The Evolving African Governance Architecture”, in Tony Karbo and Tim Murithi (eds), *The African Union: Autocracy, Democracy, and Peacebuilding in Africa* (2018), p.78

Anniversary Solemn Declaration on Pan-Africanism and the African Renaissance; and the 2013 Agenda 2063- the Africa We Want.¹⁸³

In 2011, the AU adopted a declaration on the theme of “Towards Greater Unity and Integration Through Shared Values” and endorsed the establishment of the AGA through the Governance Platform “as a mechanism to (a) foster the exchange of information; (b) facilitate the elaboration of common positions on governance; and (c) strengthen the capacity of Africa to speak with one voice.”¹⁸⁴ The Declaration further expressed the need to establish a Pan-African Architecture on Governance as a “framework for dialogue between various stakeholders.”¹⁸⁵

Furthermore, African leaders underscored their commitment to “anchor their societies, governments and institutions on respect for the rule of law, human rights, and dignity, popular participation, the management of diversity, as well as inclusion and democracy.”¹⁸⁶ The core mandate of the AGA is chiefly to leverage the gains made on the continent on “building democratic, participatory and developmental governance as an integral part of the AU vision of an integrated, united, prosperous, and peaceful continent driven by its citizens and playing a dynamic role in the international arena”.¹⁸⁷

Arguably, considering the apparent need to cloth the AU with powers that are characteristic of a supranational organization, it is argued that:¹⁸⁸

it seems more urgent than before to endow and capacitate the AU with a mechanism which ensures the full implementation of the decisions taken by its relevant organs, through the formulation and enforcement of a Community law. The Community law formulated should comprise specific norms ranked according to their levels of enforcement by Member States, RECs and other organs of the Union. These may be in the form of decisions, regulations, directives as well as resolutions. In order to build an integrated Community which addresses divergent and specific interests of the parties involved, as is currently the case, Member States have to accept unconditionally, the supremacy of Community Law, in the event of conflict between national and Community law, the former must be set aside.

¹⁸³ As Above

¹⁸⁴ As above, p. 90

¹⁸⁵ As above

¹⁸⁶ AU, The 50th Anniversary Declaration, cited in Khabele Matlosa, “The Evolving African Governance Architecture”, in Tony Karbo and Tim Murithi (eds), *The African Union: Autocracy, Democracy, and Peacebuilding in Africa* (2018), p.91

¹⁸⁷ As Above

¹⁸⁸ AU, “Governance of Integration in Africa: Challenges and a Way Forward”, available at https://au.int/sites/default/files/newsevents/workingdocuments/26630-wd-issue_paper_on_governance_of_integration_en.pdf (last accessed 5 June 2022)

As the AfCFTA Agreement is driven by AU members and governed by principles and best practices that are not only established in the 'community law' of each of the 8 recognized RECs, it is also therefore imperative to highlight the legal, and institutional frameworks that underpin the AEC and their potential interaction with the African human rights law and jurisprudence.

a. AU Constitutive Act of 2000

As outlined by art 5(1) of the Constitutive Act, the AU has 9 organs, including the AUC. Each of these organs has its specific roles and responsibilities within the overall AU framework.¹⁸⁹ The organs are (a) AU Assembly Union; (b) Executive Council; (c) PAP; (d) Court of Justice; (e) AUC; (f) Permanent Representatives Committee (PRC); (g) Specialized Technical Committees; (h) ECOSOCC; and (i) Financial Institutions. The AU's primary objectives include, 'the promotion of sustainable development at the economic, social, and cultural levels and the integration of African economies. It further seeks to coordinate the harmonization of all existing policies between the RECs and ensure the promotion and the protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and relevant human rights instruments.¹⁹⁰ The AU is governed by the following principles:

- (a) Sovereign equality and independence among member States of the AU;
- (b) Respect of borders existing on achievement of independence;
- (c) Participation of the African peoples in the activities of the AU;
- (d) Establishment of a common defense policy for the African Continent;
- (e) Peaceful resolution of conflicts among member States of the AU through such appropriate means as may be decided upon the Assembly;
- (f) Prohibition of the use of force or threat to use force among member States of the AU;
- (g) Non-interference by any State in the internal affairs of another;
- (h) The right of the AU to intervene in member State pursuant to a decision of the Assembly in respect of grave circumstances, namely, war crimes, genocide and crimes against humanity;
- (i) Peaceful co-existence of member States to request intervention from the Union in order to restore peace and security;
- (j) The right of member State to request intervention from the Union in order to restore peace and security;
- (k) Promotion of self-reliance within the framework of the AU;
- (l) Promotion of gender equality;
- (m) Respect for democratic principles, human rights, the rule of law and good governance;
- (n) Promotion of social justice to ensure balanced economic development;

¹⁸⁹ Haphina Rukato, "The African Union: Regional and Global Challenges," in Tony Karbo and Tim Murithi (eds), *The Africa Union: Autocracy, Diplomacy and Peacebuilding in Africa* (2018), p.112

¹⁹⁰ Art. 3

- (o) Respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism, and subversive activities;
- (p) Condemnation and rejection of unconstitutional changes of governments.

Although the objectives of the AU and its governing principles are many, however, “a decade-and-a-half since the inception of the AU, it’s become increasingly clear that there needs to be better prioritization, implementation and coordination of activities if the AU is to succeed in achieving its mission.”¹⁹¹

b. AU Assembly

The AU Assembly, (“the Assembly”) is composed of the Heads of States and Government of the various Member States. As the supreme organ of the AU, it determines the common policies of the AU and considers reports, and receives recommendations from other members of the AU.¹⁹² In addition to monitoring the implementation of the policies and decisions of the AU, and ensuring compliance by member States, the Assembly is responsible for the appointment or termination of the services of the Judges of the Court of Justice. As the highest decision-making body of the AU, the Assembly provides oversight and strategic guidance on the AfCFTA.¹⁹³ It has the exclusive authority, on the recommendations of the Council of Ministers, to adopt interpretations of the AfCFTA Agreement. Article 23 of the AU Constitutive Acts provides:

- (1) the Assembly shall determine the appropriate sanctions to be imposed on any Member State that defaults in the payment of its contributions to the budget of the Union in the following manner: denial of the right to speak at meetings, to vote, to present candidates’ activity or commitments, therefrom;
- (2) Furthermore, any Member State that fails to comply with the decisions and policies of the Union may be subjected to other sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.

c. Executive Council (“the Council”)

The Council, as the ‘foreign affairs arm’ of the AU, is composed of the Ministers of Foreign Affairs or such other officers as may be designated for that role by a member State.¹⁹⁴ The

¹⁹¹ As Above, pp. 110-112

¹⁹² Art. 9, AU Constitutive Act, 2000

¹⁹³ Art. 10(1), AfCFTA Agreement, 2018

¹⁹⁴ Art. 10, AU Constitutive Act, 2000

Council decides on and coordinates all AU policies “on areas of common interests” to member State and more particularly, on the following key areas’

- (a) foreign trade;
- (b) energy, industry and mineral resources;
- (c) food, agricultural and animal resources, livestock production and forestry;
- (d) water resources and irrigation;
- (e) environmental protection, humanitarian action and disaster response and relief;
- (f) transport and communications;
- (g) insurance;
- (h) education, culture, health and human resources development;
- (i) science and technology;
- (j) nationality, residency and immigration matters;
- (k) social security, including the formulation of mother and childcare policies, as well as policies relating to the disabled and the handicapped;
- (l) establishment of a system of African awards, medals and prizes.

It must be noted that the Council of Ministers contemplated in the AfCFTA Agreement is fundamentally different from the AU Executive Council as established under the AU Constitutive Act.¹⁹⁵ Whilst the AfCFTA Council of Ministers is composed of Trade Ministers, the AU Executive Council is composed of Foreign Affairs Ministers, of Member States. Whilst the AU Executive Council remains the decision-making body of the AU, all Reports by the AfCFTA Council of Ministers are submitted to the AU Assembly through the Executive Council.¹⁹⁶

In its 2018 Decision recommending the adoption of the Draft AfCFTA Agreement by the AU Assembly, the Executive Council the launch of the Single Air African Air Transport (SAATM) and the Protocol on the Free Movement of Persons, as an important catalytic addition to the AfCFTA Agreement’s ultimate objective of facilitating the free movement of people, goods and services and establish a conducive investment environment in Africa.¹⁹⁷ The Executive Council further requested the AU Commission to strengthen collaborations with the PAP, ECOSOCC, African Private Organizations, and with the Boosting Intra-African Trade (BIAT) Action Plan.¹⁹⁸ The Council called on the Member States to hasten the establishment of the following AfCFTA complementary structures:

¹⁹⁵ See art. 10, AU Constitutive Act, 2000

¹⁹⁶ See As Above (n 59)

¹⁹⁷ Executive Council, AU, Decision on the Draft Agreement Establishing the Continental Free Trade, 19 March 2018, (Ext/Ex.CL/Dec.1 (XVII), available at: https://au.int/sites/default/files/decisions/34054-ext_ex_cl_dec_1-2xviii_e26_march.pdf (last accessed 6 June 2022)

¹⁹⁸ As Above

The AfCFTA Business Forum

The Business Forum is intended to provide a platform for debate and exchange of perspectives on the economics of trade and investment on the African Continent. It is expected to be composed of all the relevant stakeholders. The Forum shall be attended by African Heads of State and Government, Ministers of Trade, Investment, and opinion leaders in business, civil society, academia, lawmakers, RECs, international partners, and the media. The maiden edition of the Forum was held on 21 March 2018 and was deliberately designed to coincide with the adoption of the AfCFTA Agreement. The Forum was intended to “bring together African Business Leaders, Civil Society stakeholders, and African policymakers to map out a strategy for broad stakeholder engagement for accelerated and inclusive sustainable development of the African continent in line with the aspirations and vision of the African Union Agenda 2063: The Africa We Want.”¹⁹⁹

Figure 1: Table of aims and expected outcomes of the AfCFTA Business Forum

AIMS OF THE FORUM	EXPECTED OUTCOME
1. Further the agenda for effectively implementing the AfCFTA and the Boosting Intra Africa Trade (BIAT)	To develop a clear understanding of the AfCFTA and its role as a vehicle for increased intra-African trade, poverty eradication, and the deepening of integration;
2. Build on synergies, linkages, and complementarities between the stakeholder groups with interests in the AfCFTA.	To establish a symbiotic linkage between the AfCFTA and trade facilitation, with emphasis on trade facilitation as a key tool for ensuring successful implementation of the AfCFTA;
(3) Ensure that parliamentarians, private sector, and civil society have a better understanding of the AfCFTA and its coherence with the African structural transformation agenda.	To Mobilize the power of the African Private Sector as a driver for Africa's integration

Thus, considering that African governments have obligations to mobilize resources for human rights purposes, and the need to treat with caution, “the implications of tariff reduction and liberalization especially for vulnerable groups and on food security”, HRDs could potentially spearhead the business and human rights discussions in the annual AfCFTA

¹⁹⁹ AU, AfCFTA Business Forum: Leveraging the Power of Business to Drive Africa's Integration, 20 March 2018, (Final Draft as at 17/03/2018, available at <https://www.tralac.org/images/docs/12858/afcfta-business-forum-draft-programme-17-march-2018.pdf> (last accessed 6 June 2022)

Business Forum as a means to promoting the protection against the implementation of “AfCFTA provisions that could undermine their ability to implement future measures to ensure human rights, including the right to development, are protected, respected and fulfilled” by all the .../g holders across the AfCFTA value chain.²⁰⁰ HRDs may therefore adopt the AfCFTA Business Forum as a platform to “highlight the human rights implications of the AfCFTA, and map key stakeholders, and identify entry points and further raise awareness on a host of human rights implications of trade and investment in Africa.

The AfCFTA Business Forum, therefore, provides a potential platform for mainstreaming human rights in the AfCFTA discourse. HRDs could ensure to facilitate the participation of “agricultural producers, and farming associations, consumer bodies, chambers of commerce and industry, specific-industry associations, professional associations, standard-setting bodies, parliamentarians, the media, as well as NGOs, particularly those working in the field of environment, labour rights, gender or youth-related issues, and academia” and ensure that “some vulnerable and disadvantaged actors, small private sector operators, women and rural populations” are given a platform to be heard.²⁰¹

As remarked by the Secretary General of EAC, “there is urgent need for citizen sensitization and regular capacity building activities at national and regional levels, to inform African Citizens on issues around the AfCFTA Agreement, and how they can benefit from it. Establishing structured dialogue frameworks while engaging the private sector, civil societies, and other groups at different levels of policy formulation, will ensure the AfCFTA Agreement is embraced and its gains trickled down to Africans.”²⁰²

Eminent Persons & AfCFTA Ambassadors from the Private Sector (EPAAPS)

It is not clear at the time of writing this Report the rationale or composition for this AfCFTA complementary structure. However, with a market coverage of 1.2 billion and a GDP of \$2.5 trillion, the AfCFTA is poised to be the largest FTA in the world.²⁰³ Thus, with tariff line

²⁰⁰ UNECA, Friedrich Ebert Stiftung, Report: The Continental Free Trade Area in Africa- A Human Rights Perspective, available at https://www.ohchr.org/sites/default/files/Documents/Issues/Globalization/TheCFTA_A_HR_ImpactAssessment.pdf (last accessed 6 June 2022), p. 15

²⁰¹ As Above

²⁰² Dr. Peter Mathuki, EAC Secretary General, as quoted in, “EAC Secretary General urges AfCFTA Secretariat to adapt a private sector-led and people-centred approach to boost intra-African trade,” (21 Sept. 2021), available at: <https://www.eac.int/press-releases/157-trade/2207-eac-secretary-general-urges-afcfta-secretariat-to-adapt-a-private-sector-led-and-people-centered-approach-to-boost-intra-african-trade> (last accessed 6 June 2022)

²⁰³ AU, UNECA, AfCFTA: Questions and Answers, available at: https://knowledge.uneca.org/ATPC/sites/default/files/PDFpublications/qa_cfta_en_230418.pdf (last accessed 6 June 2022)

expected to be reduced or eliminated to at least 90%, and with a population project to reach 2.5 billion people by 2050, African businesses are expected to scoop big on the gains promised by the AfCFTA with such a dynamic market.²⁰⁴ Creating the EPAAPS, therefore, the AfCFTA presents “great opportunities for trading enterprises, business, and consumers across Africa the chance to support sustainable development in the world’s least developed region.”²⁰⁵

Furthermore, industrial development is forecasted to improve the diversification of the African economy and move the continent “away from extractive commodities, such as oil and minerals, which have traditionally accounted for most of Africa’s exports, towards a more balanced and sustainable export base”, as over 75% and 40 of Africa’s exports outside the continent and within the continent, respectively, from 2012 to 2014.²⁰⁶

HRDs interested in advancing gender equality in the business sector and those working on ensuring business compliance for human and people’s rights in Africa may engage EPAAPS and encourage their adoption of normative frameworks and standard principles for monitoring business actors within the AfCFTA processes. To this end, HRDs may engage the EPAAPS to address “gender inequality which is quite widespread in Africa because the economic opportunities available to women are not proportionate to those available to men.”²⁰⁷ HRDs could further utilize engagements with EPAAPS to highlight the dire labour rights issues, including the right to social security for their employees, and those of migrant workers, environmental rights.”²⁰⁸

Africa Business Council (AfBC)

Established in 2012, the African Business Council (AfBC) is an independent AU body for the promotion and lobby of Pan-African Business interests. Its membership is open to national, regional, and African private sector organizations.²⁰⁹ AfBC believes that the AfCFTA is the ultimate driver of the African economic agenda, noting that:²¹⁰

The AfCFTA gives us an opportunity to drive our agenda. For many years, the African business community has been individualistic in driving the continent’s agenda. It is an opportunity for us as the African Business Council to come together and support the implementation of the

²⁰⁴ As Above

²⁰⁵ As Above

²⁰⁶ As above

²⁰⁷ Interview with Dr. Chairman Okolois, Senior Researcher, ACHPR, (date)

²⁰⁸ Interview with Prof. Dyojo Serges, (6 May 2022)

²⁰⁹ AU, “African Business Council Applauds the Start of Trading on the Basis of the AfCFTA”. (4 January, 2022), available at: <https://au.int/en/pressreleases/20210104/african-business-council-applauds-start-trading-basis-afcfta> (last accessed 6 June 2022)

²¹⁰ As Above

AfCFTA. We are a united voice, and we can do this together”, Dr. Amany Asfour, Interim Chair Person of the African Business Council.

Dr. Ahmed Mansur, the Interim Vice-Chairperson of the AfBC, described it as follows:²¹¹

It is a new year, and new opportunities are emerging. As manufacturers, traders, farmers, transporters, shippers, Women Business Associations and Youths, here is our time. Let us go out there and grab the opportunities. It is time to feed Africa through agriculture, manufacturing and promoting value chains. It is only through a united voice that we can have transformation in Africa.

The AfBC “as the Voice of the African Private Sector, is the premier advocacy arm and platform for private sector cooperation and engagement at the African continental level and outside the continent with the main objective of realizing the AfCFTA and opening International Markets for Value-added African products.”²¹² The AfBC “advocates for the African business interests of the private sector in the African region, provide a platform of engagement between policymakers at the AU level and the private sector, promote trade, industrialization, and investment amongst the African private sectors, and between Africa and the rest of the world and foster cooperation and collaboration between the African private sector, business organizations.”²¹³

There is no evidence that AfBC has a human rights mandate. Thus, in light of AU’s commitment to the “promotion of human rights in the continent through its Development roadmap, Agenda 2063 which envisages ‘an Africa of good governance, democracy, respect for human rights, justice and the rule of law’, and further explained by the AU Assembly of Heads of State and Government at Kigali, declaring 2017 -2026 as the “Human and People’s Rights Decade in Africa” In essence, it is argued that the AfBC could be the forerunner for the AU’s Policy on Business and Human Rights.²¹⁴

The AfCFTA Agreement has the potential to adopt a human rights corrective approach to regional trade.²¹⁵ AfCFTA State parties have already undertaken a wide range of human and peoples’ rights commitments in the African Charter, ICESCR, CRC, CEDAW, Abuja Treaty ECOWAS, SADC, and EAC RECs treaties.²¹⁶

²¹¹ As Above.

²¹² AfBC, Hunting for Africa’s Unicorns, available at <https://www.africanbusinesscouncil.org/Events/AfUnicorns/index.html> (last accessed 5 June 2022)

²¹³ As Above.

²¹⁴ See Kombo (n 159)

²¹⁵ Ibid

²¹⁶ Ibid

D. Pan-African Parliament (PAP)

Art.17 of the AU Constitutive Act establishes PAP. However, its detailed functions and legislative mandate under the AU are further elucidated under the Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament. PAPs objectives, include, ensuring effective implementation of AU policies, and promoting the principles of human and people's rights, rule of law, good governance, and democracy in Africa. It has the power to discuss any matters of relevance to the AU, including drafting Model Laws on any areas of it may decide on.

f. Court of Justice

Art. 18 of the AU Constitutive Act establishes the African Court of Justice as the principal judicial organ of the AU.

g. ECOSOCC:

Art. 22 of the AU Constitutive Act envisages ECOSOCC as an advisory organ of the AU and composed of social and professional groups of Member States.

h. AU Financial Institutions

Within the broader framework of the AEC, the AU envisages the establishment of Pan-African financial institutions that include, (a) an African Central Bank; (b) an African Monetary Union; and (c) an African Investment Bank.

i. NEPAD AND THE APRM

The New Partnership for Africa's Development (NEPAD) is the Pan-African Strategic Framework for the socio-economic development of the continent.²¹⁷ In recognition of the dire situation of human rights and socio-economic status of the continent, its primary objective is to provide a new mechanism, spearheaded by African leaders, to:

- a. Eradicate poverty;
- b. Place African countries, both individually and collectively, on a path of sustainable growth and development;
- c. Halt the marginalisation of Africa in the globalisation process;
- d. Accelerate the empowerment of women;
- e. Fully integrate Africa into the global economy.

²¹⁷ <https://au.int/en/organs/nepad> accessed 26 May 2022

The 2001 NEPAD Declaration identifies several conditions for sustainable development and to reverse the scourge of underdevelopment on the continent.²¹⁸ Among these conditions is the recognition that peace, security, good governance, human rights, and sound economic management are conditions for sustainable development.²¹⁹ The Peace and Security Initiative of NEPAD covers the development of policy measures to address the political and social vulnerabilities by using Political and Economic Governance Initiatives, Capital Flows and Market Access Initiatives, and Human Development Initiative.²²⁰

The Declaration recognizes the indispensable role of democracy, respect for human rights, peace, and good governance in development,²²¹ hence the commitment to live and govern by these principles. All these commitments have significant impacts on human rights on the continent as achieving them will strengthen the enjoyment of human rights on different levels.

The Declaration recognizes the indispensable role of democracy, respect for human rights, peace, and good governance in development,²²² hence the commitment to live and govern by these principles.

4.3.2 Regional Economic Communities (RECs)

The RECs are regional groupings of AU member States. The RECs have developed individually and have different roles and structures. Generally, the purpose of the RECs is to facilitate regional economic integration between members of the individual regions and through the wider African Economic Community (AEC), which was established under the Abuja Treaty (1991). The 1980 Lagos Plan of Action for the Development of Africa and the Abuja Treaty proposed the creation of RECs as the basis for wider African integration, with a view to regional and eventual continental integration. The relationship between the AU and the RECs is established by the Abuja Treaty and the AU Constitutive Act, and guided by the: 2008 Protocol on Relations between the RECs and the AU; and the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa.²²³

²¹⁸ NEPAD Declaration 2001 para 5.

²¹⁹ As above para 71.

²²⁰ As above para 73.

²²¹ As above para 79.

²²² As above para 79.

²²³ AU, "Regional Economic Blocks", available at: <https://au.int/en/organs/recs> (last accessed 5 June 2022)

Furthermore, the principle of preserving the *Acquis* built by the 8 RECs, means that State Parties to the AfCFTA Agreement who are members of the existing RECs, do not have to re-negotiate anything anew among themselves”.²²⁴ In addition, the preservation of the *acquis* under the AfCFTA Agreement suggests that the drafters intend for the CCU and the CFTA to be built upon and consolidated by principles and practices that constitute the community law of the 8 RECs.

4.4 Human Rights at Stakes in the AfCFTA

African states have a wide range of human rights obligations based on the African Charter on Human and Peoples’ Rights and other international human rights instruments ratified by these states. Commitments to human rights have also been made in the AU Constitutive Act and RECs.²²⁵ Any agreement entered by states parties to these obligations needs to be aligned with the existing human rights obligations of states. The implementation of the AfCFTA should therefore be done in accordance with the human rights principles enshrined in the existing human rights instruments.

The imposition of the obligations to respect, protect and fulfil human rights on states must be respected in the preparation and implementation of conventions and multilateral treaties. The implementation of the AfCFTA has the potential of impacting various human rights on the continent. These rights may include the rights to ‘self-determination, non-discrimination, health, food, development, to benefit from scientific progress, to access information, to participate in decision-making and many more. It could focus on workers’ rights, farmers’ rights, the rights of women, of children, of minorities and of indigenous groups, or the human rights obligations of private business actors.’²²⁶

Whilst specific rights may be affected by the implementation of the AfCFTA, it is important to remember some of the general principles underpinning human rights such as interdependence, interrelatedness, and non-discrimination. Further, while some human rights can be realized immediately, others may be realized gradually by ensuring respect for ‘minimum core’ elements.

Human rights norms prohibit discrimination on any grounds, including race, ethnic group, color, gender, language, religion, political opinion, national and social origin, economic status, or birth. Discrimination on any of these grounds is a violation of the African

²²⁴ As Above (n 82)

²²⁵ United Nations Economic Commission for Africa Report: The Continental Free Trade Area (CFTA) in Africa- A human rights perspective p 45.

²²⁶ The report p47

Charter.²²⁷ This may be direct or indirect discrimination. Cross-border trade and interstate engagements easily bring into question the nationality and origins of individuals crossing borders during trading visits. Sometimes these individuals are subjected to dehumanizing and degrading treatment that may fall under the prohibited grounds of discrimination. The right to security of the person as enshrined in the ICCPR, the African Charter on Human and People's Rights, and the Maputo Protocol are at stake, especially for informal cross-border traders. This is because this category is subject to abuse and harassment by border officials and some women are subject to sexual abuse. The AfCFTA is geared toward eradicating these unfortunate encounters, but the lack of proper implementation will give border officials the opportunity to physically abuse vulnerable groups.

The right to an adequate standard of living is protected by the ICESCR²²⁸ and the CRC requires that at a minimum everyone shall enjoy adequate food and nutrition, clothing, housing, and the necessary conditions of care when required.²²⁹ Even though the African Charter does not set out a separate right to an adequate standard of living, Article 4 of the Charter which protects the right to life envisages broader protection, and articles 14-18 include commitments by states to achieve an adequate standard of living. The right embodies the state's efforts to improve the standards of living above the poverty line and the need to pay attention to the situation of women, children, and other vulnerable groups living in extreme poverty. The CFTA can also adversely impact the ability of informal cross-border traders to enjoy an adequate standard of living, as actors risk being squeezed out of the cross-border trading space.

The right to work and social security is also important right that may be affected by the implementation of the AfCFTA. Article 15 of the African Charter guarantees that every individual shall have "the right to work under equitable and satisfactory conditions and shall receive equal pay for equal work." The corresponding provisions at the global level are Articles 6 – 9 of the ICESCR. Even though this right does not entail an absolute right to obtain work, it includes the state's obligation to adopt and implement a national employment strategy and plan of action based on and addressing the concerns of all workers and the unemployed. It goes hand in hand with the right to social security which is recognized by the African Commission.

The implementation of the AfCFTA can affect facilitating employment both positively and adversely and the creation of a conducive environment for employment, compromise coping strategies and reinforce work-and income related discrimination against informal cross-border traders. In its seminal study on 'Children on the Move Within Africa', the African

²²⁷ As above p 49

²²⁸ Article 11

²²⁹ Report 51.

Committee of Experts on the Rights and Welfare of the Child (ACERWC) found that child labour migration was a principal feature of contemporary economic migration in Africa.²³⁰ Much of this migration involved low-skilled workers and was concentrated in the agricultural, informal trade, and domestic service sectors. Children on the move for economic reasons were motivated by factors such as poverty.

The right to food, which is inseparably linked to the right to dignity of human beings and an essential requisite for the enjoyment of other rights such as health, education, and work, is protected by various instruments. These are in line with the elimination of hunger, and food insecurity and poverty, which are encompassed in Agenda 2063. The SDGs also reflect right to food concerns, in particular goal 2 calls for an end to hunger by 2030 and includes a mandate for sustainable agricultural production. Several women's rights are also protected under the African Human Rights system due to the fact that 'women are the poorest and most disadvantaged group in many countries, the promotion and protection of women's rights is central to achieving fair and sustainable development'.²³¹

One of the groups that will be most affected by the strict implementation of the AfCFTA may be the informal cross-border traders. 'The informal trade sector and the actors therein are often obscured from mainstream views and operate in a sphere that generally falls outside the State's gaze and outside of the official statistics that are analysed in academic and official trade literature.'²³² This trade which is mostly carried out by the most vulnerable groups of society particularly youth and women contributes to the livelihoods of these vulnerable groups. The AfCFTA may therefore impact on the rights of these individuals. The impact of the AfCFTA on informal traders may be difficult to measure as they are not pronounced in official statistics of states. It is estimated that the informal sector contributes about 55 percent of Sub-Saharan Africa's GDP and 80 percent of the labour force.²³³

Despite the significant contribution of informal trade to the African economy, this form of trade is considered illegal and is usually met with stern control and various forms of abuse and harassment at the hands of state authorities and agents such as the police and border control in different states across the continent. Consequently, they are treated as criminals, abused, and in some instances asked to return to their countries and pay bribes to officials.

²³⁰ African Committee of Experts on the Rights and Welfare of the Child 'Mapping Children on Move in Africa' (2018).

²³¹ ActionAid. 'What women's farmers need: a blue print for action' (2011), p. 4 as cited in UNECA (n 200), p. 57

²³² UNECA (n 200), p.61

²³³ UNECA (n 200), p.65

There are also reports of these individuals having to stay in unhealthy conditions and the possibility of acute child labour.²³⁴ It is believed that by recognizing Informal Cross-Border Traders and adapting its rules to this economic reality, 'the AfCFTA has the potential to ease the work of informal cross-border traders and help protect their human rights and help enhance economic activities.' On the other hand, inadequate attention in the AfCFTA to the informal trade sector could have a range of negative impacts on their human rights.

Trade agreements also tend to favor the formal economy over informal trade. This is largely due to national policies, which are not supportive of informal cross-border trading and women engaged in the informal sector face stiff competition from male counterparts who are favored economically and socially

Under the AfCFTA members are permitted to adopt measures that may be inconsistent with its governing principles including MFN and NT, provided that "such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between State parties where same conditions prevail or a disguised restriction on international trade" to protect human health or life²³⁵ or remedy a member's balance of situation,²³⁶ for export controls,²³⁷ or to prevent the disclosure of "confidential information which would impede law enforcement or otherwise be contrary to public interest or will prejudice the legitimate commercial interests of particular enterprise, public or private."²³⁸ Article 27 of the Protocol on Trade in Goods states that: ²³⁹

Nothing in this Protocol shall be construed to:

- (a) Require any State Party to furnish any information the disclosure of which it considers contrary its essential security interest; or
- (b) Prevent any State Party from taking any action which it considers necessary for the protection of its essential security interests:
 - i. Relating to fissionable materials or the materials from which they are derived;
 - ii. Relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials taking place either directly or indirectly for the purpose of supplying a military establishment; and
 - iii. Taken on time of war or other emergencies in international relations; or
- (c) Prevent any State Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

²³⁴ Ibid

²³⁵ Art. 26(b), Protocol on Trade in Goods, Agreement Establishing the Continental Free Trade Area

²³⁶ Art. 28 of the Protocol on Trade in Goods, Agreement Establishing the Continental Free Trade Area; see also art. 14, Protocol on Trade in Services, Agreement Establishing the Continental Free Trade Area

²³⁷ Art. 26(i), Protocol on Trade in Goods, Agreement Establishing the Continental Free Trade Area

²³⁸ Art. 16(2), Agreement Establishing the Continental Free Trade Area; see also art. 6, Protocol on Trade in Services, Agreement Establishing the Continental Free Trade Area,

²³⁹ See also art. 16, Protocol on Trade in Services, Agreement Establishing the Continental Free Trade Area

The above provisions of the CFTA legal regime are materially similar in construct to articles XX and XIV of GATT and GATS respectively. The application of the provisions of this *chapeau* raises concerns about whether the “WTO members and bodies are legally required to interpret and apply WTO rules in conformity with human rights with human rights violations of WTO members under international law and if it can be read to the exclusion of other rules of international law”.²⁴⁰ Only one out of 40 cases brought decided by the WTO’s dispute settlement body resulted in a successful finding against these “self-judging exceptions”.²⁴¹ African states have a wide range of human rights obligations based on the African Charter and other international human rights instruments ratified by these states. Commitments to human rights have also been made in the AU Constitutive Act, and RECs.²⁴² Any agreement entered by states parties to these obligations needs to be aligned with the existing human rights obligations of states. The implementation of the AfCFTA should therefore be done in accordance with the human rights principles enshrined in the existing human rights instruments.

4.5 Challenges to HRDs Participation in the AfCFTA

Generally, HRDs continue to face an increasingly restricted civic space and the African Commission noted that the environment within which the HRDs cooperating with the African human rights system work.²⁴³ They continue to face violations of their fundamental rights ‘such as arbitrary arrests and detentions, acts of torture, cruel, inhuman and degrading treatment, summary and extrajudicial killings, acts of harassment of all kinds, including judicial harassment, threats and other forms of intimidation, miscarriage of justice and denial of access to medical attention during detention.’

In terms of the implementation of the AfCFTA, HRDs especially the non-state actors face some monumental challenges. Capacity issues continue to affect the roles of HRDs. The majority of the actors lack the capacity such as knowledge to adequately participate and engage regional and sub-regional institutions such as ECOWAS, SADC, and AU on integration.

²⁴⁰ Stefan Lorenzmeier, “WTO and Human Rights”, (5 Oct. 2015) available at: <https://lawexplores.com/wto-and-human-rights/>; see also WTO Appellate Body Cases in US Gasoline,

²⁴¹ Public Citizen, “only one of 40 Attempts to Use the GATT Article XX/GATS Article XIV “General Exception” Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TTP General Exception”, available at: <https://www.citizen.org/wp-content/uploads/migration/general-exception.pdf>; see also US v. Brazil, WT/DS2/AB/R, available at: <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True>

²⁴² United Nations Economic Commission for Africa Report: The Continental Free Trade Area (CFTA) in Africa- A human rights perspective p 45.

²⁴³ African Commission on Human and Peoples’ Rights Fact Sheet No. 1 on Reprisals in Africa p 3.

This challenge will continue to affect HRDs in their attempts to capture sufficient feedback to create necessary solutions.

In addition, the shrinking space of civil society participation across the continent is hindering their effective participation.²⁴⁴ CSOs across the continent have called for greater access to continental institutions such as the AU and the RECs. While CSOs could have the capacity to reach across borders on pertinent issues, they would need functioning channels through which to engage with institutions such as the AU and RECs which were stated to not always be available.²⁴⁵ 'While the AU aspires to transform itself into a people-centered organization – a principle contained in Agenda 2063 – civil society is often relegated to a secondary role'.²⁴⁶

The lack of regional and sub-regional coordination of HRDs on trade issues also continues to affect their effectiveness. This situation makes it difficult to work with RECs who must deal with the different groups of actors who may not all be familiar with the operations of RECs. This lack of knowledge on how RECs operate and how they are structured impacts negatively on CSOs' intervention strategies. Therefore, there is an urgent need for more collaborations and link strengthening among CSOs and HRDs in the region to have a common approach when dealing with the AfCFTA in this case which will make it easier for engagements.

A. What Interventions and strategies can HRDs Adopt in Promoting the Protection of Human Rights in the Implementation of the AfCFTA Processes?

Although the primary responsibility for the promotion and protection of human rights lies with states, the AU recognizes that individuals, groups, and organs of society all play important parts in furthering the cause of human rights.²⁴⁷ HRDs can also adopt strategies to enhance the implementation of the AfCFTA in line with existing human rights obligations of states. Hence, it goes without emphasizing that a valuable addition to the AfCFTA strengthening is the building of an environment where policies and regulations are formulated from sufficient consultation premised on the inclusion of HRDs and the public.²⁴⁸ Thus, there is a need for robust consultative mechanisms and structures that capture the voices of HRDs and cover all trade areas.

The activities of human rights defenders include documenting violations; seeking remedies for victims of such violations through the provision of legal, psychological, medical, or other

²⁴⁴ CUTS International 'Magnifying the role of non-state actors in the continental free trade area' p 5.

²⁴⁵ As above.

²⁴⁶ As above.

²⁴⁷ See the Charter

²⁴⁸ CUTS International 'Magnifying the role of non-state actors in the Africa free trade area' p1.

support; and - combating cultures of impunity that serve to cloak systematic and repeated breaches of human rights and fundamental freedoms.²⁴⁹

On accountability and access to remedies, since human rights are inseparable from the notion of accountability, HRDs can facilitate ensuring accountability and ensuring attainment of the rights to remedy. Institutions such as human rights institutions, human rights NGOs, etc can serve as a watchdog to the state implementation (or lack of it) of the AfCFTA. Investigation units/departments of states can also be pivotal in pressing charges and prosecuting persons found in breach of the human rights norms during the implementation of the AfCFTA. Governments must also be transparent in their engagements and ensure to fulfil commitments in relation. Non-State actors and in particular, civil society organizations can advocate for an adequate legal and institutional framework and also try to ensure that government actors respect the principles of equality and non-discrimination by guaranteeing effective transparency, public participation, and overall accountability when treading in the AfCFTA waters.²⁵⁰

HRDs can also advocate for ‘facilitated measures for small-scale cross-border traders.’ This can be in the form of advocacy for legislation and practice that facilitates the ability of informal cross-border traders to derive a livelihood from their work, their right to freedom of movement, and to be protected from the risks to which they are exposed in terms of abuse, discrimination, or lack of social protection. HRDs can also carry out studies, data collection, and sensitization on informal cross-border trading. This will greatly help inform states of the status of cross-border traders and their experience. The data collected can then be used to map out strategies for intervention in this area. HRDs can also be crucial in ensuring that adequate dialogue and consultation processes are included in any institutional or structural mechanisms entrusted with CFTA implementation is essential to ensure that implementation is not inconsistent with states existing human rights obligations. It is envisaged that the engagement with civil society and

HRDs, in general, will improve understanding among the public about the AfCFTA, and the requirements for its successful implementation increase stakeholders’ participation in national, regional, and international trade policy formulation, negotiations, and implementation required for the successful operationalization of the AfCFTA. This can be taken further to ensure policy analyses and recommendations to improve the implementation framework. The following may be some of the roles that HRDs can play in the implementation of the AfCFTA.²⁵¹

²⁴⁹ European Union Guidelines on human rights defenders

²⁵⁰ CUTS International p.5.

²⁵¹ As suggested by WACSI on Implementing the agreement establishing the AfCFTA

Chapter 5: Conclusion and Recommendations

Whilst the AfCFTA has the potential to catalyse economic development in Africa, it presents a great opportunity for the effective participation of HRDs in mainstreaming human rights in its processes. The principle of preserving and building on the emerging AU Community law would allow for the human rights monitoring of trade and investment activities in Africa.

The AfCFTA Agreement, therefore, reflects the position of the UN Special Rapporteur on Business and Human Rights, that trade and investment agreements should be accorded a human rights dimension. This perception is expected to not only galvanize the creation of more trade unions but also to create the potential to have cross-border jurisdiction on trade issues.

General recommendations

- Human rights mechanisms should be integrated into the monitoring process since the agreement has already been drafted. This will help the implementers to see the baseline indicators.
- Training of HRDs on what trade liberalisation and the disaggregated effects of trade measures are and how these can impact human rights. Otherwise, the framework would be very theoretical and abstract.
- HRDs have a role in building the capacity of customs officers on the borders and cross-border traders
- HRDs need to conduct a lot of fieldwork and engagement with grassroots on the AfCFTA and embedded rights
- Continuous research by HRDs to ensure proper monitoring and implementation of the processes
- Continuous updating of tools used by HRDs to be able to address emerging violations
- Disseminate the AfCFTA, localise it, and ensure it fits into the context of the location where it is being disseminated
- Community education is valuable because sometimes corporate acts of violence towards HRDs are perpetrated by local community members
- To think beyond the traditional human rights violations of land and water by investors and consider the digital space, employment, and reduced access to public services as a result of corporate conduct

- Get comparative information from across borders to ensure HRDs have up to date data on violations and implementation of the AfCFTA
- Setting up specialized groups that work in this area of trade and human rights and can quickly advice and provide guidance to both states and HRDs
- HRDs need to factor in their engagement with the AFCFTA in their institutional budgets and planning
- Knowledge sharing should be encouraged amongst human rights defenders
- Security officers and army officers at the borders should undergo continuous training on human rights
- States should engage their ministries of trade in their respective countries around the AfCFTA to ensure that they are aware of their obligations

Specific recommendations

To enhance the role of HRDs in the implementation of the AfCFTA the following recommendations are advanced

Strengthening the platforms of the RECs as free trade area: The role of these entities in the economic integration efforts of the continent is acknowledged by the AfCFTA agreement. Consequently, it is important to strengthen their existing platforms and structures in a quest to further strengthen the AfCFTA. Improving participation at the national level is important in capturing pertinent issues around poverty alleviation and further improving NSA engagement mechanisms.

Enhance HRDs' collaboration: There are multiple HRDs with mutual concerns, but there may be challenges in receiving intervention from the AFCFTA administration in a space devoid of coordination. HRDs should therefore develop a collaborative web and present common positions to the AfCFTA secretariat and the RECs. This will not only present a stronger voice, but it will also be more cost-effective. In addition, the collaboration will also limit the possibilities of overwhelming the AfCFTA as a common approach will deem efficient and hence smooth handling for the AfCFTA.

Scheduled engagements: There must be a stipulated timeline of engagements from the AfCFTA Secretariat to allow stakeholders adequate time to plan prior to meetings. This will facilitate quality engagements and sustainable solutions in the AfCFTA. Further, these engagements must not only exist at the discretion of the AfCFTA. It will be important to hold engagements at the request of HRDs to allow solution provision on matters that may need

immediate intervention. These engagements must ensure the information flow from both AfCFTA and HRDs.

Reduction of bureaucracy within HRDs setup: HRDs should ensure they have flexible structures that capture and represent the various voices of HRDs working on the same issue. All decision-making must be done after consultations with everyone to ensure a concise representation of the HRDs. RECs, on the other hand, must complete this cycle by limiting any form of politicking that may exclude some HRD voices.

Capacity building for HRDA's: HRDs are an integral constituency for the work of national and regional human rights bodies. However, the study observed that many times HRDs lack the capacity to undertake advocacy and other human rights work. Furthermore, most HRDs have in their activism demonstrated a lack of understanding of the UN Declaration on Human Rights Defenders and most of them do not have sufficient training or understanding of matters of laws of the country in question and the applicable convention of protection. This pits HRDs against the State particularly the law enforcement agencies who normally arrest them for allegedly violating the law. Thus, to address this problem, there is a need to build the capacity of HRDs both at individual and institutional levels through trainings, seminars, conferences, and consultative meetings.

Training of law enforcement agencies: there exists a misunderstanding between HRDs and law enforcers leading to the occasional victimization of HRDs. consequently, the work of HRDs is derailed due to unnecessary conflict between them and law enforcers. To address this challenge, IHRDA should endeavour to further build the capacity of law enforcement officers throughout the AfCFTA member countries through trainings, seminars, conferences, and consultative meetings.

In addition, HRDs can find avenues to

- Participate in sessions of the AfCFTA secretariat:
- Encourage, support, and follow up on the ratification of AfCFTA by countries that are yet to ratify
- Raise visibility and engagement of AfCFTA with community citizens
- Conduct needs assessment on the application of the Agreement in national frameworks and programmes and identifies any difficulties on the implementation of the Agreement
- Demand accountability from governments on the extent to which they are fostering intra-African trade.

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