

THE AFCFTA AND HUMAN SECURITY: MAXIMIZING THE HUMAN RIGHTS POTENTIALS OF ECONOMIC INTEGRATION IN AFRICA

Chief Tony Ojukwu, OFR, SAN, FICMC.

Executive Secretary, National Human Rights Commission, Nigeria

PROTOCOLS

1. Introduction

I am deeply honored to be invited to deliver this paper at this esteemed gathering. This is a gathering of foremost lawyers in Africa. Everyone important to the practice of law in the continent is here. And it is the right place to be for lawyers with Pan-African vision in their practice. I thank the Leadership of the African Bar Association, ably led by Bar Hannibal Uwaifo, for extending this invitation to me.

I bring felicitations from the National Human Rights Commission (NHRC) of Nigeria, established in 1995 to promote and protect human rights in Nigeria and create an enabling environment for the quasi-judicial recognition and enhancement of the respect for, and enjoyment, protection, and enforcement of, human rights. In carrying out its protective mandate, the NHRC receives and investigates complaints on all aspects of human rights violations or abuses, as well as assisting victims in seeking redress. In 2022 alone, the Commission received a total of 2,314,440 complaints covering alleged violations by state and abuses by non-state actors. Such a high number of complaint indicates that human rights remain at risks in our country and, I suspect, in other African countries as well.

The emerging African Continental Free Trade Area (AfCFTA) offers potentials for enhanced human freedoms, likewise risks of violations and abuses. I commend the organisers of this forum for creating an opportunity for us to reflect on these emerging

issues in the continent as the legal profession strives to contribute towards achieving the 'Africa We Want', as reflected in Agenda 2063. Incidentally, the African Union Theme of the Year 2023 is: 'Acceleration of AfCFTA Implementation'. The Bar undoubtedly has a role to play in facilitating the AfCFTA's implementation.

Based on the above premise, I crave the indulgence of the organizers to modify the topic of discussion to read: "THE AFCFTA AND HUMAN SECURITY: MAXIMIZING THE HUMAN RIGHTS POTENTIALS OF ECONOMIC INTEGRATION IN AFRICA".

2. The AfCFTA, a Milestone in Africa's Quest for Sustainable Development and Human Security

Collective Africa has had a zigzag journey in its quest for continental economic integration. The journey has hitherto been one step forward but two steps backward. The landmark Treaty Establishing the African Economic Community (AEC) was adopted in 1991 as a strategic framework for delivering on Africa's goal for inclusive and sustainable development. One of the principles enshrined in Article 3 of the AEC Treaty is "recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights". This suggests that collective Africa is conscious of the link between economic integration, sustainable development, and human rights. However, many states were unwilling to limit aspects of their sovereignties in order to meet the demands of economic integration. Several tariff and non-tariff barriers have hobbled intra-African trade and economic development for decades.

The adoption, in 2018, of the Agreement to establish the AfCFTA was a historic development in Africa's long quest for self-sustaining economic development. As one of the flagship projects of the AU's sustainable development strategy, the AfCFTA creates a continental economic zone where goods and services will trade freely. Its primary goal is to boost intra-African trade through the elimination of trade barriers. More specifically, states parties "seek to establish clear, transparent, predictable and mutually-advantageous rules to govern Trade in Goods and Services, Competition Policy,

Investment and Intellectual Property among State Parties by resolving the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relations with third parties”.¹

The AfCFTA’s establishment fulfills, in part, the African Union’s (AU) primary objective to promote Africa’s political and economic integration, as enshrined in Article 3 of its Constitutive Act. It moves Africa closer to the pan-African vision of the Founders of the Organization of African Unity (OAU), as expressed in the AEC Treaty and similar instruments. This vision is also reflected in *Agenda 2063: The Africa We Want*, which is the regional equivalent of the United Nations’ (UN) Sustainable Development Goals (SDGs).

The AfCFTA has enormous potentials for Africa and its citizens in the political, economic and social spheres. There is a close relationship between trade, sustainable development and human rights. A robust intra-African trade will definitely advance sustainable development. The purpose of development is to advance ‘human security’, which the AU Non-aggression Pact 2005 defines as:

the security of the individual in terms of satisfaction of his/her basic needs. It also includes the creation of social, economic, political, environmental and cultural conditions necessary for the survival and dignity of the individual, the protection of and respect for human rights, good governance and the guarantee of each individual of opportunities and choices for his/her full development.²

‘Human security’ is a shorthand for what the International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees as ‘the right to an adequate standard of living’: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing

¹ AfCFTA Agreement 2018, pmb1.

² AU Non-Aggression Pact 2005, Art. 1(k).

and housing, and to the continuous improvement of living conditions”.³ This right incorporates such basic needs as food, health, clothing, transport, conditions of work, housing, social service and security.⁴

Some commentators have argued that Africa’s economic integration regime serves as framework for developing political consensus among their members around regional challenges, among them development, politics, and security.⁵ Numerous provisions of the AfCFTA attest to this connection between trade, development, and human security. State parties to the Agreement, recognize, for example, that a continental market with free movement of persons and services is crucial for promoting agricultural development and food security.⁶ It stresses “the importance of international security, democracy, human rights, gender equality and the rule of law, for the development of international trade and economic cooperation”.⁷

The Protocol on Trade in Goods, annexed to the AfCFTA Agreement, acknowledges that a deepening of economic efficiency and linkages will “improve social welfare”.⁸ It also stresses the necessity for “cooperation in the area of quality infrastructure, science and technology”.⁹ The Protocol on Trade in Services, also annexed to the AfCFTA, seeks “to create, on the basis of progressive liberalization of trade in services, an open, rules based, transparent, inclusive and integrated single services market which *provides economic, social and welfare-enhancing opportunities across all sectors for the African peoples*”.¹⁰ Its specific objectives include promoting sustainable development in accordance with the

³ ICESCR 1966, Art. 11(1).

⁴ Nsongurua Udombana, *Social and Economic Rights in Africa: International and Public Law Perspectives* (Routledge, 2023) at 71.

⁵ Jame Gathii, *African Regional Trade Agreements as Legal Regimes* (2011) at 24; Nsongurua Udombana, “A Step Closer: Economic Integration and the African Continental Free Trade Agreement” (2021) 31(1) *Duke J. Int’l & Comp. L.* 1 at 39.

⁶ AfCFTA Agreement, *op. cit.* pmb. & Art. 3.

⁷ *Ibid.* pmb.

⁸ Protocol on Trade in Goods 2018, pmb.

⁹ *Ibid.*

¹⁰ Protocol on Trade in Services 2018, pmb. (emphasis mine).

SDGs.¹¹ Of course, it is common knowledge that the SDGs aim at realizing human security.

Like the SDGs, Agenda 2063 seeks to advance human security. It aspires “for shared prosperity and well-being, for unity and integration, for a continent of free citizens and expanded horizons, where the full potential of women and youth are realized, and with *freedom from fear, disease and want*”.¹² This provision mimics the Universal Declaration of Human Rights (UDHR), which states, unequivocally, that “a world in which human beings shall enjoy . . . freedom from fear and want” is the “the highest aspiration of the common people”, and that the peoples of the UN are “determined to promote social progress and better standards of life in larger freedom”.¹³ The African Charter also states that “the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.¹⁴ All of this fits in nicely with the AfCFTA regime. Hopefully, African states will take full advantage of the potentials of economic integration to create jobs, enhance income, and improve the living standards of their peoples. Women, youth, small-scale farmers, and informal cross-border traders will be particularly impacted by AfCFTA, for better or worse.

It is important to mention, before signing off on this segment, that Nigeria’s NHRC Amendment Act of 2010 empowers the NHRC Commission to apply all the regional and global human rights instruments to which Nigeria is a party, in addition to the Nigerian Constitution and other relevant national instruments.¹⁵ In effect, all the instruments that implicate on human security, as highlighted above, are of concern to the NHRC. They should also be of concern to other human rights protection and enforcement institutions in Africa.

¹¹ *Ibid.* Art. 3(2)(b).

¹² Agenda 2063 Framework Document 2015, para. 6 (emphasis mine).

¹³ UDHR 1948, pmb.

¹⁴ African Charter 1981, pmb.

¹⁵ NHRC (Amendment) Act 2005, S. 5(a).

3. Protecting Human Rights in the AfCFTA ERA

It is common knowledge that the AfCFTA took off in January 2021, after initial delays caused by the outbreak of *Covid-19* pandemic. With its operationalization, Africa joins the club of regional economic integration regimes. Europe leads that club, the European Union (EU) being the most advanced among existing regimes. Notwithstanding its late arrival, the AfCFTA presently is the world's largest continental free trade area by size. It brings on board 55 African countries and eight regional economic communities (RECs), with a combined population of 1.4 billion by 2023 estimate. That is a huge market!

The AfCFTA is a revolutionary economic regime with enormous human rights implications. It aims, among others, at realizing the right to development guaranteed in Article 22 of the African Charter. It therefore challenges existing institutional frameworks for protecting human rights in Africa. Institutionally, the AfCFTA is designed along the usual structure of international instruments or Treaty bodies, with the Assembly, Council of Ministers, and Secretariat as the main organs. The first task is to get these organs, in particular the Council of Ministers and Secretariat, to mainstream human rights principles in their policy and administrative functions. Human rights-consistent design of the AfCFTA mechanisms will contribute to accountability of governments and other economic actors under trade and investment agreements.

The AfCFTA Agreement, in Article 7, stresses the benefit of participation in the operationalization of AfCFTA; likewise Agenda 2063, which, in Aspirations 1, 3 and 6, emphasizes inclusion and participation. Consequently, Africa's regional and national human rights institutions or mechanisms, of which the NHRC is a part, should coalesce to amplify their voices in the AfCFTA arena to ensure that a human rights-based approach guide its implementation. In specific terms, they should monitor the roll-out of national strategies by states to ensure respect they respect human and peoples' rights. All human rights institutions should join the African Commission on Human and Peoples' Rights (ACHPR) to:

collaborate with AU Member States and relevant AU Organs, as applicable, to ensure in particular the recognition and protection of the roles of workers, women, people living with disabilities, youths and other vulnerable groups, including but not limited to those engaged in micro, small and medium-size enterprises, in the context of trade in Africa and the impact of the AfCFTA Agreement on them, and to ensure the promotion and protection of their rights within the framework of implementing the AfCFTA, including through the adoption of necessary supplementary instruments; [and]

conduct a human rights impact assessment of the AfCFTA Agreement, in line with its established best practices, focusing on the human rights implications and the proffering of recommendations to address any governance or other gaps and issues that detract from compliance with the standards under the African Charter.¹⁶

They should also monitor future AU trade and investment instruments and decisions to ensure that they fully capture and support human rights principles, Agenda 2063 aspirations, and the SDGs.¹⁷ They should open up channels for regular consultations with the Secretariat to ensure that human rights are reflected future policies. In this regard, I call on the AfCFTA Executive Secretary to create a 'Human Rights Desk' at the Secretariat with a competent officer to serve as a liaison with relevant human rights mechanisms.

Existing human rights mechanisms in Africa were designed when states were the main human rights predators. But times have changed! In an age of globalization, the private sector is the engine of trade and will certainly play a critical role in the AfCFTA regime. Already, leading African businesses—from healthcare to textiles, banking, consumer

¹⁶ Resolution on a Human Rights-Based approach to the Implementation and Monitoring of the African Continental Free Trade Area Agreement, ACHPR/Res.551 (LXXIV) (21 Mar. 2023), para. 1, *available at* <https://achpr.au.int/en/adopted-resolutions/resolution-human-rights-based-approach-implementation-monitoring-achprres551>.

¹⁷ See Jamie MacLeod, *Human Rights and the African Continental Free Trade Area Taking Stock and Navigating the Way Forward* (Friedrich-Ebert-Stiftung, 2022) at 129.

goods, and digital technology—are forming coalitions to unify and amplify their voice in the new trade regime. In the light of the increasing human rights abuses by private business, national human rights institutions should put their searchlights on these actors to hold them accountable for any adverse human rights impact that their actions or those of their suppliers. They should create platforms to sensitize business enterprises on the ‘Guiding Principles on Business and Human Rights’, developed by the Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises.¹⁸ The Principles, *inter alia*, commit business enterprises to respect all human rights. They should not only avoid infringing on human rights, but should address adverse human rights impacts with which they are involved.

Some human rights may be at greater risks than others in particular industries or contexts, and therefore should be the focus of heightened attention. Some economic rights will be particularly at risks in the foreseeable future as Africa’s manufacturing sectors begin to experience a boom arising from increased intra-African trade, all things being equal. The responsibility on business enterprises to respect the Guiding Principles therefore includes those set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work. Human rights institutions must be alert to prevent the elimination of existing decent work or failure to produce good quality and secure jobs that provide just and reasonable wages to individuals and give social protection to families.

Core labour rights are the cornerstones of development. They are necessary to ensure that all men and women are able to obtain decent and productive work in conditions of equality, security and human dignity. Human rights institutions must ensure that labour

¹⁸ The Special Representative annexed the Guiding Principles to his final report to the Human Rights Council (A/HRC/17/31). The Council endorsed the Guiding Principles in its Resolution 17/4 of 16 June 2011.

rights, among them freedom of association and collective bargaining, are a central consideration in trade negotiations.¹⁹ As Gathii writes:

Labour rights are achievable only when there are strong and independent trade unions and employers organizations that are sufficiently positioned to engage in social dialogue; they cannot meaningfully contribute to poverty alleviation in a prohibitive atmosphere. In this connection, dialogue between social partners is essential if working conditions are to improve and principles of decent work satisfied. These partners promote development by contributing and representing the views of their members on economic and social policy issues.²⁰

Africa's regional human rights institutions should further develop soft laws to guide state and non-state actors as they navigate the contours of the new trade regime. The ACHPR, in the exercise of its mandate under Article 45 of the African Charter, should develop General Comments on the right to development, as guaranteed in Article 22 of the Charter, and related themes. The Commission should also consider appointing a 'Special Rapporteur on Trade and Human Rights'. The Rapporteur's responsibility should monitor and report on the impact of businesses on human rights concerns. S/he should also work with civil society to collect data for dissemination to the major stakeholders.

At the domestic levels, national human rights institutions should intensify their efforts to get their governments to ratify regional instruments that facilitate intra-African trade without which the AfCFTA will be stunted. As an illustration, free movement of persons, goods, and residence remains a theoretical construct and mere aspiration in Africa, notwithstanding that the Protocol to the AEC Treaty Relating to the Free Movement of Persons, Right of Residence and Right of Establishment 2018. It is odd that several state parties to the AfCFTA Agreement are yet to ratify the Protocol. It does not speak well for

¹⁹ James Thuo Gathii, *Designing the Continental Free Trade Area (CFTA): An African Human Rights Perspective* (Economic Commission for Africa, 2016) at 2.

²⁰ *Ibid.*

Africa's commitment to economic integration that only four states—Mali, Niger, Rwanda, and Sao Tome and Principe—have ratified the Protocol, as per the statistics available on the AU website. I wished I could boldly inform this esteemed audience that Nigeria, my own country, has ratified the AEC Protocol, but it has not! The NHRC is working with other relevant government agencies to ensure that Nigeria ratifies this Protocol in the immediate future. For a country that accounts for about a quarter of Africa's population, its ratification of the Protocol will have a catalytic effect on other African states.

Free movement of persons and residence, which the African Charter also guarantees,²¹ requires states not to draw arbitrary distinctions between nationals and non-national. It is a cross-cutting right. It facilitates the enjoyment of other rights, such as the rights to education and work. It is also "an indispensable condition for the exercise of human development".²² The ACHPR encourages an expansive interpretation of this right in ways that "further intra-regional trade, promote regional integration and advance the aspiration outlined in the African Union Agenda 2063".²³ National human rights institutions, of which I stand in a representative capacity, must also ensure that "[n]ational laws on free movement must foster active participation of individuals in their socio-economic development and must not place arbitrary restrictions on individual freedoms".²⁴

Thankfully, there have been some progress at the level of some RECs, such as the Economic Community of West African States (ECOWAS) Protocol Relating to Free Movement of Persons, Residence and Establishment 1979; Southern African Development Community (SADC) Protocol on the Facilitation of Movement of Persons (2005); Protocol Relating to the Free Movement and Right of Establishment of Member States within the Economic Community of Central African States (ECCAS) 1983, to mention just a few. But despite these REC treaties, the AfCFTA, the African Charter and the protocols, which all

²¹ African Charter, Art. 12(1).

²² ACHPR, General Comments No. 5 on the African Charter on Human and Peoples' Rights: The Right to Freedom of Movement and Residence (Article 12(1), para. 4, *available at* <https://achpr.au.int/en/node/905>.

²³ *Ibid.* para. 61.

²⁴ *Ibid.*

underline the principle of free movement of persons, goods and services, it is saddening to note that immigration laws of the member states have not changed much. Many states still require visa for entry to provide goods and services. Africans are still arrested and detained at point of entry for violations of entry requirements. They cannot pass freely from one country to other without being tagged traffickers and arrested. Work permits are hardly granted to fellow African. Residence permits are still herculean. Even Africans going to Europe through fellow African countries are arrested and detained, as it is currently happening in parts of North Africa.

We cannot have the 'Africa We Want' where Africans do not feel at home anywhere in the continent. Member states must therefore put in place legislative, policy and administrative measures, to make the AfCFTA a reality for all Africans, where human security and human rights of all Africans can be guaranteed and respected. Such measures would stem the tide of exodus of African manpower to Europe and America.

Before concluding, I must briefly remark on the role of African judiciaries in advancing human and peoples' rights in the AfCFTA era. The judiciary is perhaps the most important institution in protecting human rights and providing redress for their violations in Africa. It is the institution that human rights litigants and lawyers are most familiar with. It is also the institution to which members of the ABA will continue to relate with on a regular basis. As noted earlier, many of the AfCFTA implementing legislations by national governments will have implications on human and peoples' rights, including the right to freedom of movement and residence, rights to work and to non-discrimination on the basis of nationality. The manner our courts interpret these trade-related domestic legislations and other instruments will impact on the social and economic goals in the AfCFTA. I call on our judges to adopt a human rights-based and liberal interpretation and application of these instruments. A restrictive, conservative interpretation will hinder the enjoyments of these rights and indirectly cause states to violate their human rights treaty obligations.

4. Conclusion.

I commend the AU and its member states for negotiating and adopting the AfCFTA Agreement and for the speed of ratifications that saw its early entry into force. The AfCFTA heralds good tidings for impoverished Africans. It has the prospect of lifting millions out of grinding poverty. It deserves the support of all state and non-state actors, including human rights institutions. The NHRC calls on all state parties to the AfCFTA Agreement to take all necessary measures to make the AfCFTA effective, including the ratification of the AEC Protocol on the Free Movement of Persons. As intra-African trade proceeds in earnest, African human rights institutions must keep an eye on the ball to see that it delivers on its human rights goals. Mainstreaming human rights into the AfCFTA Agreement provides an opportunity to develop Africa with African manpower, goods, services and resources, in dignity and respect. It provides the platform to achieve “the Africa we want” by instrumentalizing the rights-based Agenda 2063.

I thank you for listening.

Chief Tony Ojukwu OFR, SAN, FICMC.
Executive Secretary/CEO, National Human
Rights Commission of Nigeria.