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**SOUTH AFRICAN POSITION ON THE IMPLEMENTATION OF THE AFRICAN UNION (AU) AGENDA 2063 AS IT RELATES TO MIGRATION, REGIONAL INTEGRATION AND AFRICA PASSPORT**

**DEPARTMENT OF HOME AFFAIRS**

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# INTRODUCTION

In September 2015, the African Union Member States adopted Agenda 2063 as a robust framework for addressing past injustices (slavery, colonialism, apartheid, etc.) and the realisation of the Pan African vision of “an integrated, prosperous and peaceful Africa. The founding policy framework for the AU Agenda 2063 is the Abuja Treaty of 1991. In 1980, the OAU (predecessor of the AU) Extraordinary Summit adopted the Lagos Plan of Action as a major step towards the goal of regional integration. The commitments in this Plan and the Final Act of Lagos were translated into concrete form in Abuja, Nigeria in June 1991 when the OAU Heads of State and Governments signed the Treaty establishing the African Economic Community (AEC). The aim of the AEC is to promote economic, social and cultural development as well as African economic integration.

The AU Agenda 2063 underscores the importance of free movement of Africans in Africa for meaningful integration, and increased trade. South Africa fully supports the vision of an Africa where its citizens can move more freely across national borders, where intra-Africa trade is encouraged and there is greater integration and development of the African continent. The current status is untenable. For instance, on average Africans need visas to travel to 55 per cent of other African countries. They can get visas on arrival in only 25 per cent of other countries.

One of the seven overarching aspirations outlined in Agenda 2063 is “an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance”. The clauses that unpack this aspiration (22 and 23) mention free movement twice, locating it at the heart of political and economic regional integration. On clause 67(K) the AU Agenda 2063 goes on to call for action to introduce an African passport, issued by member states, capitalising on the global migration towards e-passports, and with the abolishment of visa requirements for all African citizens in all African countries by 2018.

# SOUTH AFRICAN POSITION ON THE AU AGENDA 2063

South Africa supports the development objectives and aims of Agenda 2063 in the context of strengthening the African cooperation, integration and for promoting inclusive development, peace and security. The support for the Agenda 2063is informed by the understanding that South Africa’s destiny is intricately linked to that of the continent. Regional and continental integration are the foundation for Africa’s socio-economic development and political unity, and essential for South Africa’s prosperity and security.

South Africa fully supports the principle of free movement on the Continent, including the need for the AU to conclude a protocol to facilitate such free movement. This is also in line with the National Development Plan which states that South Africa needs to adopt a much more progressive migration policy. The country recently adopted a new White Paper on International Migration which advocates for an Afrocentric migration approach.

# AU PROTOCOL RELATING TO FREE MOVEMENT OF PERSONS

## Background

The AU Draft Protocol is a Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment (Abuja Treaty). The Protocol is aimed at facilitating the free movement of persons in Africa, as well as the right of African citizens to the right of establishment and right of residence anywhere on the Continent. The right of entry includes that African citizens can travel without visas across the continent. The right of establishment includes the right of any African citizen to set up a business or be employed in any African country and the right of residence includes the right to become a resident in any African country.

## SADC Common Position

The SADC Secretariat was mandated to develop a draft SADC common position (Annex B) on the draft Protocol. The SADC Ministerial Committee on the Organ has since endorsed the draft common position which now serves as the negotiating position for all SADC Member States. The SADC common position focuses a great deal on the pre-conditions that are necessary if the AU Draft Protocol is to be successfully implemented. The SADC Common Position is that the Implementation of free movement of persons and the African Passport are by nature complex and should be informed by the following preconditions:

1. existence of Peace, security and stability in the continent;
2. convergence amongst countries with a view to reduce economic imbalances between Member States;
3. phased approach to free movement of persons;
4. effective civil registration systems;
5. reliable movement control systems;
6. machine readable passports compliant to international standards;
7. bilateral return agreements;
8. African Union legal instruments on extradition;
9. African Union legal instrument on legal mutual assistance;
10. African Union framework on African Passport and its relationship with free movement of persons;
11. interface of Movement Control systems with INTERPOL (red notice system) and individual Member States prohibition/undesirable person’s lists and the UN warning lists; and
12. compatibility of ICT systems at Ports of Entries to facilitate exchange of information.

The SADC Member States acknowledge, that movement of persons in Africa is relevant and critical for continental integration and Africa’s economic development, and in principle support its implementation. However, considering the prevailing identified challenges and preconditions, implementation of free movement of persons in Africa and the African Passport should be implemented through a phased approach in concord with a principle that safeguard the sovereignty of Member States.

## Cabinet decision on the Protocol

During the negotiations of the Protocol, the Department approached Cabinet for the endorsement of the SADC Common Position, which Cabinet indeed endorsed. The Cabinet Memorandum is attached for further information.

## Negotiations of the Protocol

The AU Commission convened **two meetings** of Member States’ Experts (in Accra, Ghana and Kigali, Rwanda) to discuss and make inputs on the Draft AU Protocol. **Furthermore,** a **Meeting** of the Regional Economic Communities (RECs) and the Ministerial Committee on Free Movement of Persons (of which South Africa is a member) was held in Addis Ababa, Ethiopia, and **followed** by a Members States Experts Meeting in Flic en Flac, Mauritius, to discuss the implementation Plan for the Draft Protocol. The Implementation Plan will be annexed to the Protocol.

First Member States Meeting – Accra, Ghana

The Member States engaged in robust debate and commented, made inputs and reviewed the draft Protocol, and amongst others―

1. indicated the need for the AU to appreciate that Member States are not at the same level of facilitating free movement of persons in Africa.
2. raised concerns and indicated challenges related to free movement of persons, amongst others, national security public order, public health and socio-economic disparities.
3. recommended the adoption of a gradual or phased approach in the implementation of free movement of persons, right of residence and right of establishment.
4. disagreed with the AU Commission on its interpretation of Assembly’s (Heads of State and Governments) decision 607 (XXVII) “*Put in place an implementation roadmap for the development of a Protocol on Free Movement of Persons in Africa by January 2018, which should come into effect immediately in member States upon its adoption.*” – the main issue was whether or not it is the Protocol or its Implementation Roadmap to be adopted in January 2018 – SA delegation led the charge on this aspect and was strongly supported by Egypt, Tunisia, Algeria and Kenya with Uganda and other SADC members on the marginal side.

## Issues of concern for South Africa

South Africa supports the majority of the provisions of the AU Draft Protocol as they balance the objective of facilitating the free movement of persons in Africa and securing policy space for AU Member States to determine how best to implement the Protocol taking into account national circumstances. However, there are a number of provisions in the AU Draft Protocol which present a challenge for not only South Africa but also other AU Member States.

South Africa submitted through, the Embassy in Addis Ababa, a *Note Verbale* with the enablers or preconditions to the African Union Commission. South Africa proposed the inclusion of enablers or preconditions in phase one of the Implementation Plan dealing with the “right of entry and the abolition of visa requirements” so that Member States could facilitate a smooth process for the abolition of visas.

The delegation of South Africa in AU Meetings has consistently argued (supported by Egypt and Algeria) that it is imperative to enhance civil registration, establish integrated border management systems, enter into bilateral return agreements and strengthen law enforcement at national level before the right of entry and abolition of visas could be implemented.

South Africa’s further concerns relate to some of the provisions of the AU Draft Protocol as they are contrary to the established international and AU practice on treaty making, as well as the Constitution of the Republic of South Africa. The established international practice is derived from the Vienna Convention on the Law of Treaties which provides that the consent of a state to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.

## Constitutional implications

The Protocol provides for its entry into force upon adoption by the AU’s Assembly contrary to Section 231(2) of the Constitution of the Republic of South Africa which provides that *“An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces…”* and the provisions of the Vienna Convention.Agreements requiring approval of the National Assembly and the National Council of Provinces are those having, among others, legislative or domestic implications (e.g. require new legislation or legislative amendments). Some provisions of this Draft Protocol obliges Member States to harmonise their national laws, policies and systems with the Draft Protocol (Article 26) and adopt legislative and administrative measures, review all laws, policies, agreements, immigration procedures and other procedures to ensure compliance with the Draft Protocol (Article 27). This will require approval of both the National Assembly and the National Council of Provinces to be carried out. Failing which, South Africa will be inconsistent with its Constitution.

A legal opinion was requested from the Office of the Chief State Law Advisers - International Law, which summarily indicated that South Africa should reject any attempt to give the Assembly the power to bind Member States to this Protocol without the Member States exercising their sovereign right to be bound. Therefore, South Africa should consider entering a reservation if the Assembly decides that the Draft Protocol will enter into force upon adoption. South Africa should support the retention of the text which provides for ratification of the Protocol which is the usual practice in not only the international treaty making but the AU practice as well.

# AFRICAN PASSPORT

As South Africa, our concern with the Passport is that it has no legal instruments that give rise to its issuance. The Protocol mentions the African passport; however, it cannot be the legal basis for its issuance by Member States.

# THE COMPREHENSIVE REFUGEE FRAMEWORK

A Draft African Common position on the comprehensive Refugee Response Framework was recently discussed in the AU Regional Consultative Meeting of the Global Compact on Migration in Addis Ababa. Unfortunately, South Africa was unable to attend the meeting. However, South Africa will argue for the adoption of a regional collaboration approach which will include burden sharing and application of a first safe country principle. This will require harmonization of policies and legislation.