

**'HUMAN RIGHTS DO NOT STOP AT THE BORDER': A  
CRITICAL EXAMINATION OF THE FUNDAMENTAL RIGHTS OF  
IRREGULAR MIGRANTS IN SOUTH AFRICA**

**Submitted in partial fulfilment of the requirements of the degree LLM  
(Human Rights and Democratisation in Africa)**

**By**

**Johannes Buabeng-Baidoo**

**Student number: 26132428**

**Prepared under the supervision of Prof GNK. Vukor-Quarshie and Ms  
Annette Lansink, at the School of Law, University of Venda**

**31 October 2011**

## DECLARATION

I, Johannes Buabeng-Baidoo, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references have been provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

**Signature:** .....

**Date:** .....

**Supervisors:**

**Signature:** .....

**Date:** .....

## **DEDICATION**

I dedicate this dissertation to my Lord and Saviour Jesus Christ, in whom I find refuge, and to my parents who have traversed great boundaries in search of a better future for their children.

## **ACKNOWLEDGEMENTS**

To the Centre for Human Rights, University of Pretoria, I will forever be grateful for this life changing experience. The same appreciation goes to my supervisors Prof GNK. Vukor-Quarshie and Mrs Annette Lansink and to members of staff at the School of Law, University of Venda, for the constant support during my stay in Venda.

My undying gratitude goes to my family for their love, understanding and support throughout my life. My eternal gratitude goes to my parents (Victor and Rosemond Buabeng-Baidoo) for their unwavering support and love. Special thanks go to my siblings, Cephas, Esther, Stephen, Bettina who have made every second of life worth living and to my colleagues on the LLM program.

# TABLE OF CONTENTS

<b>DECLARATION</b> .....	i
<b>DEDICATION</b> .....	ii
<b>ACKNOWLEDGEMENTS</b> .....	iii
<b>TABLE OF CONTENTS</b> .....	iv
<b>LIST OF ABBREVIATIONS</b> .....	vii

## **Chapter one - Introduction**

1.1	Background to the study .....	1
1.2	Study objective .....	2
1.3	Significance of the study .....	2
1.4	Research questions .....	3
1.5	Research methodology .....	4
1.6	Literature review .....	4
1.7	Limitations of study .....	6
1.8	Definitions .....	6
1.9	Overview of chapters .....	7

## **Chapter two - The protection of irregular migrants under international and regional law**

2.1	Introduction .....	8
2.2	Rights and obligations of states .....	8
	2.2.1 State sovereignty .....	8
	2.2.2 The nature of state obligations .....	9
	2.2.3 International human rights law .....	10
2.3	The right to life .....	11
	2.3.1 Introduction .....	11
	2.3.2 Legal content of the right to life .....	11
2.4	Non-discrimination .....	13

2.4.1	Introduction.....	13
2.4.2	Legal content of the principle of non-discriminati.....	13
2.4.3	The African regional legal system .....	15
2.4.4	The Inter-American regional system .....	16
2.6	Non-discrimination and labour rights .....	17
2.6.1	The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families .....	17
2.6.2	ILO Standards .....	18
2.7	The theory of non-discrimination .....	18
2.8.	Cruel, inhumane or degrading treatment .....	19
2.8.1.	Introduction .....	19
2.8.2.	International prohibition .....	20
2.9	Deprivation of liberty.....	21
2.9.1	Introduction.....	21
2.9.2	International standards.....	22
2.10	The right of access to justice and effective remedy .....	23
2.10.1	Introduction .....	23
2.10.2	International standards .....	23
2.11.	Conclusion .....	24

### **Chapter three - South African legal and policy framework for the protection of irregular migrants**

3.1	Introduction .....	25
3.2	General background: The migration phenomenon in South Africa.....	26
3.3	Pre-constitutional legislation and policy.....	27
3.4	The Constitution and irregular migration.....	27
3.5	Legislative and policy framework .....	28
3.5.1	Introduction.....	28
3.5.2	The Right to life .....	29
3.5.3	Non-discrimination.....	30
3.5.4	Deprivation of liberty .....	31
3.5.5	Access to justice.....	32
3.6	Gaps in law and policy.....	32

3.6.1	Policy of control, exclusion and expulsion.....	32
3.6.2	Criminalization of irregular migrants employment.....	33
3.6.3	Lack of effective reporting mechanism.....	34
3.6.4	Detention conditions.....	35
3.6.5	Lack of capacity and confidence to access justice.....	36
3.7	Conclusion.....	36

**Chapter four - Conclusions and recommendations**

4.1	Summary and findings .....	37
4.2	Conclusion.....	37
4.3	Recommendations.....	38
4.3.1	Ratification of the MWC .....	38
4.3.2	Domestic laws and policies .....	39
4.3.3	Creating awareness about the rights of irregular migrant in South Africa	39
4.3.4	Establishment of visible and accessible mechanisms for reporting violation of fundamental rights.....	40
4.3.5	Judicial oversight over detention of irregular migrants awaiting deportation .....	40
4.3.6	Adoption of regional immigration policy .....	40
	<b>BIBLIOGRAPHY .....</b>	<b>42</b>

## LIST OF ABBREVIATIONS

ACA	Aliens Control Act 96 of 1991
ACHPR	African Charter on Human and Peoples' Rights
CAT	Convention Against Torture
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
ECHR	European Court of Human Rights
HRC	Human Rights Committee
HRW	Human Rights Watch
IA	Immigration Act of South Africa Act 13 of 2002
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICERD	International Covenant on the Elimination of Racial Discrimination
ILO	International Labour Organisation
MWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
OAU	Organisation of African Unity
UN	United Nations



# CHAPTER ONE

## INTRODUCTION

### 1.1 Background to the study

In Africa, the fight against poverty has a great deal in common with the struggle for political and economic security. For many migrant workers around the continent and elsewhere, the need for socio-economic security serves as the underlining motive for migration to boundaries beyond their own, in search of 'greener pastures' - a life of dignity, respect and socio-economic security. The high level of infrastructure, economic and political stability remains an attractive incentive for irregular migrants to migrate to South Africa.<sup>1</sup> Thousands of migrant workers make annually the journey to South Africa with the hope of finding a better life. However, their arrival in South Africa marks the beginning of an even more tenacious struggle against unimaginable odds. For many irregular migrants, the dream of a better life soon becomes a nightmare highlighted by constant struggle against xenophobia, police brutality, exploitation by unscrupulous employers, marginalisation and disregard for fundamental human rights by the state.<sup>2</sup>

According to Human Rights Watch (HRW) irregular migrants occupy a precarious space in society and are the most vulnerable to human rights abuses.<sup>3</sup> There are many factors that contribute to the vulnerability of irregular migrants in South Africa including:

inadequate legal protection, illegal actions of unscrupulous employers or state officials, and lack of state capacity or political will to enforce legal protection and to hold abusive employers and officials to account.<sup>4</sup>

Despite the deplorable conditions under which irregular migrants live in South Africa, current immigration policies and legislation demonstrates no definitive attempt by the government to safeguard the fundamental human rights of irregular migrants. Irregular migrants lack the basic protection guaranteed under international and South African law.<sup>5</sup> This had led some authors to

---

<sup>1</sup> See K Tessier 'The challenge of immigration policy in the new South Africa' (1995) 3 *Global Legal Studies Journal* 255.

<sup>2</sup> See TF Hicks 'The Constitution, Aliens Control Act, and xenophobia: the struggle to protect South Africa's Pariah – the undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies* 393.

<sup>3</sup> See Human Rights Watch report *Keep your head down: unprotected migrants in South Africa* (2007) 19 Summary.

<sup>4</sup> As above.

<sup>5</sup> B Hanekom & Al Webster 'The role of South Africa's government in the xenophobic violence of May 2008' (2010) 13 *University of Pennsylvania Journal of Law and Social Change* 104.

argue that apart from the right to life, irregular migrants are denied all human rights in South Africa.<sup>6</sup>

This study asserts that certain human rights are so fundamental that they are inherent in all human beings and should not be subjected to arbitrary limitation.

## **1.2 Study objective**

The main objective of this study is to examine the legislative and policy framework for the protection of irregular migrants in South Africa, and to explore whether the current policy and legislative framework is in accordance with international norms and standards recognised for the protection of the fundamental human rights of everyone including irregular migrants. The study will also address the gaps in the South African legal and policy framework by identifying international best practices and recommending palliatives. In essence the study aims to investigate the extent to which universally recognised standards and norms for the protection of every human being translates at the domestic level in laws and policies of state focusing specifically on the position of irregular migrants in South Africa. This study therefore seeks to show through international law, domestic cases and legislation that there are certain fundamental rights to which every human being is entitled to, regardless of their migration status.

## **1.3 Significance of the study**

Despite the glaring human rights implication of the issue of irregular migration, the South African government has failed to address it as a human rights issue. Current immigration laws and policies do not seem to recognize the importance of the human rights implication of the issue and have exacerbated the violations of fundamental human rights of irregular migrants.<sup>7</sup> This is because of the incorrect assumptions that underline government policies towards irregular migration.<sup>8</sup> Despite the relative economic and political stability that South Africa enjoys in a region plagued by political unrest and economic decline, the state has opted for an exclusionist immigration policies and laws aimed at eradicating irregular migration in all its forms and guises. This study is therefore significant for the following reasons:

Firstly, it recognizes that, human rights are a set of minimum standards that reflect the inherent dignity, equality, and inalienable rights of all members of the human family, regardless

---

<sup>6</sup> A Mosselson “‘There is no difference between citizens and non-citizens anymore’: Violent xenophobia, citizenship and the politics of belonging in post-apartheid South Africa’ (2010) 36 *Journal of Southern African Studies* 645.

<sup>7</sup> As above.

<sup>8</sup> n 6 above.

of nationality and immigration status.<sup>9</sup> They are regarded as the foundation of justice and an indispensable element of a democratic society. The Constitution of South Africa contains a Bill of Rights that entrenches the basic essence of humanity and human rights including, political, civil, socio-economic and group rights of all who live in South Africa. It is an instrument crafted to redress past injustices and seeks to establish a new democratic society based on the values of human dignity, the achievement of equality and the advancement of human rights, freedoms and the rule of law.<sup>10</sup> At its core is the well being of the human person and recognition that everyone is entitled to human rights protection. It is therefore pertinent that government policies and laws on irregular migrants be in line with the Constitution.

Secondly, existing immigration laws and policies have contributed to a host of human rights violations of irregular migrants that require immediate governmental and civil society attention. The study, therefore seeks to identify where immigration laws and policies have lost sight of the values and principles that are entrenched in the Constitution and proffer possible solutions. The paper recognises that, there are certain rights that a citizen enjoys over and above those that are guaranteed to all within a state. Participation in political life of the nation is clearly reserved by the Constitution for citizens of the state. The study asserts that, over and above these obvious and necessary exceptions, irregular migrants should be entitled to all the rights guaranteed under the Constitution.

Thirdly, it is believed that this paper will contribute to the development of knowledge on the unexplored jurisprudence on rights of irregular migrants in South Africa. It will demonstrate that by adopting a human rights approach to immigration the South African government can break away from a system of exclusion and marginalisation.

## **1.4 Research questions**

The main research questions central to this study are:

- a. To what extent do international, regional and domestic laws protect the fundamental rights of irregular migrants?
- b. How do South African laws and policies reflect international norms and standards recognised for the protection of irregular migrants?
- c. What obstacles militate against the protection of fundamental rights of irregular migrants in South Africa?
- d. What are the possible remedies for the removal of these obstacles?

---

<sup>9</sup> C Brink 'On minorities' (2005) 24 *South African Journal of Philosophy* 155.

<sup>10</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) para 179.

## **1.5 Research methodology**

The research involves a comprehensive review of relevant international, regional and national standards. In addition, the South African Constitution, relevant legislation, case law, and state policy will be reviewed with a view to determine the extent to which the fundamental rights of irregular migrants are protected in South Africa. The research methodology is in the main, library-based and carried out through review of literature sourced from the internet, conventions, articles and reports on the main thematic issues. A core part of the research is carried out through analysis of statute and case studies.

## **1.6 Literature review**

The literature on the protection of refugees and asylum seekers is wide and includes books, articles and international conventions on the plight of refugees. However, this literature is limited to one group of migrants within a wide paradigm of migrants found in South Africa. Though it constitutes a good starting point, it does not adequately answer the questions that this dissertation raises.

Chris Brink (2005 *On minorities*) draws a useful distinction between natural rights and social rights. He comes to the conclusion that natural rights are rights that the state cannot take away from a person. A person acquires natural rights at birth and their enjoyment may only be limited in the legitimate protection of an individual against another individual or the state. Natural rights are inherent in an individual, not in consequence of any particular merit or deficiency. He makes a clear distinction between social rights and natural rights in the paradigm of the rights and obligations of the state and the individual. Brink regards natural rights as absolute rights and asserts that one should enjoy those rights regardless of one's status in a state. In modern human rights law, the concepts of natural rights has been translated and recognised as fundamental human rights in various international human rights instruments.

Jason H. Lee (2008, *Unlawful status as constitutional irrelevancy?: the equal protection of rights of illegal immigrants*), stresses the same point. Lee argues that irregular migrants should have legal recourse for the violation of their basic rights by the state and individuals. Given the inherent nature of certain human rights he argues that unlawful status should not be a barrier to equal protection under human rights law. He suggests a 'participation model approach' to the human rights protection for irregular migrants. He goes on to point out that,

Irregular migrants are morally entitled to the same benefits and services provided by states to legal migrants which is accomplished through articulation and application of a participation model of rights that stresses the moral significance of an individual's membership within a society rather than his or her status as a citizen or legal immigrant.

Accordingly, over and above the fact that fundamental rights are inherent human entitlements, the active participation of irregular migrants in a state can serve as the basic theoretical framework upon which the rights of irregular migrants can be protected by the state.

Hussein Solomon (2005, *Turning back the tide: Illegal immigration in South Africa*), holds a contrary view to that held by Lee and Brink. He argues that irregular migrants pose a threat to the economic development of South Africa. He does not subscribe to the view that immorality of enforced deportation should be the basis for relaxing South African immigration policy of enforced deportation. According to him South Africa owes no moral obligation to protect irregular migrants but rather, the government owes a moral debt to its own citizens. He justifies his thesis by referring to the large poverty and unemployment figures in SA.

The study contends however, that Hussein's approach to irregular migrants is a cardinal example of the line of thinking that typified the apartheid regime – 'exclusion instead of inclusion'. In addition, the concept of *ubuntu*, which reverberates in political, religious and social rhetoric in South Africa, is all-embracing and not exclusionary. *Ubuntu* calls for a truly humane society which accords dignity to every individual regardless of his/her status.

Desmond Tutu (1999, *No future without forgiveness*) observes that *ubuntu* speaks to the very essence of humanity. He argues that we are connected together within a web of interconnectedness. 'We belong in a bundle of life. We say a person is a person through other people'. *Ubuntu* is the philosophical bedrock on which the Truth and Reconciliation Commission pardoned thousands of white and black South Africans for atrocities and gross human rights violations that occurred under the apartheid regime. It recognises the very essence of human being and accepts essential humanity of all persons.

Braam Hanekom & Leigh Ann Webster (2010, *The role of South Africa's government in the Xenophobic violence of May 2008*), undertook an analysis of some leading South African cases in which the Constitutional Court deliberated upon the rights of Irregular migrants in South Africa. They conclude that all individuals present in South Africa, regardless of their legal status, have the right to human dignity. They point out that section 2(2)(e) of the South African Immigration Act 2002 provides the same.

The literature recognises that certain fundamental human rights are so essential that everyone is entitled to them regardless of his/her status. This paper however, seeks to examine

whether the foregoing is respected by South Africa in its immigration laws and policies on irregular migrants.

## **1.7 Limitations of study**

The international, regional and domestic instruments do not deal explicitly with the rights of irregular migrants. On the one hand this may be as a result of lack of recognition accorded by states to irregular migrants. On the other hand it may be assumed that the fundamental human rights internationally recognised and accepted apply to all vulnerable groups in society. The study, therefore, had to navigate a careful course between describing the legal system in general terms, and highlighting the relevance and application of these provisions to irregular migrants. Only in exceptional cases was it possible to refer to laws specifically targeting irregular migrants. Traditionally, human rights are grouped into three categories, Civil and Political rights, Social and Cultural rights and Group rights. The study is however, limited by time and scope and therefore, the right to life, non-discrimination, deprivation of liberty, cruel, inhumane or degrading treatment and right to justice will form the basis of the human rights analysis. The study recognises further that, there is a wide range of non-citizens in South Africa including, permanent residents, temporary residents, refugees and asylum seekers. The study is, however, limited to the rights of irregular migrants.

## **1.8 Definitions**

Wide arrays of terms are used to refer to foreign nationals who do not possess the necessary documents to enter and/or stay in a country. The terms generally used include ‘undocumented immigrants’, ‘illegal alien’, and ‘clandestine workers’’. The Immigration Act of South Africa for example uses the term ‘illegal foreigner’ and defines an illegal foreigner as a ‘foreigner who is in the Republic in contravention of [the] Act and includes a prohibited person’.<sup>11</sup>

The study uses the term ‘irregular migrant’ to refer to foreign migrants who do not have the proper legal permission to work and/or stay in the country.<sup>12</sup> Although the term ‘irregular’ as used in the context of immigration discourse is not without its challenges, the study prefers the term ‘irregular’ to the term ‘illegal’. The term ‘illegal’ has been subjected to harsh criticism for many reasons. According to Koser, the term ‘illegal’ is problematic because of its connotation of

---

<sup>11</sup> Section 1(1)(xviii) of the Immigration Act 13 2002.

<sup>12</sup> See E Guild ‘Who is an irregular migrant’ in Bogusz et al *Irregular migration and human rights: Theoretical European and international perspectives* (2004) 3.

criminality.<sup>13</sup> In addition, defining a person as ‘illegal’ undermines the human dignity inherent in every person.<sup>14</sup> Accordingly, the study uses the term ‘irregular migrant’ to refer to the broad range of foreigners who are in the country without proper documentation. Although this may include asylum seekers and refugees the study does not cover asylum seekers and refugees who are entitled to legal protection in terms of international refugee law.<sup>15</sup> Accordingly the term ‘irregular migrants’ as used in the study excludes asylum seekers and refugees.

## 1.9 Overview of chapters

Chapter one provides the context to the study, it analysis the main thematic topics that will be dealt with in the paper. It also presents an overview of the existing relevant literature, research methodology. In addition, Chapter one includes the necessary definitions. Chapter two deals with the international legal framework. It sets out the international standards and norms recognised for the protection of irregular migrants. Chapter three examines the extent to which South African laws and policies are in line with international and South Africa’s human rights obligations. The obstacles and challenge that inhibit the effective enjoyment of basic human rights by irregular migrants would be identified in the South African context. Chapter four summarises the study and provides concluding remarks and recommendations on how the obstacles can be remedied.

---

<sup>13</sup> K Koser *Irregular migration state security and human security* Paper prepared for the Policy analysis and research Programme of the Global Commission on International Migration (2005) 5.

<sup>14</sup> As above.

<sup>15</sup> Article 31 of the Convention Relating to the Status of Refugees – prohibits state parties from imposing sanctions on refugees for their illegal entry or presence, who come directly from a territory where their life or freedom are threatened.

## CHAPTER TWO

# THE INTERNATIONAL LEGAL FRAMEWORK FOR THE PROTECTION OF IRREGULAR MIGRANTS

### 2.1 Introduction

Over the last few decades, the plight of irregular migrants has received increasing attention throughout the world.<sup>16</sup> It is now generally agreed by the international community that irregular migrants are among the poorest and most vulnerable.<sup>17</sup> Violation of state immigration regulations together with misconceptions about the impact of irregular migration on state sovereignty, national security and economic development have resulted in perceptions across the world that irregular migrants are not deserving of fundamental human rights protection. Numerous states have adopted stricter immigration laws and policies aimed at restricting and eradicating irregular migration.<sup>18</sup> Irregular migrants are subjected to various abuses including, arbitrary deprivation of liberty, cruel, inhumane or degrading treatment, arbitrary arrest, detention and deportation without the right to a fair hearing and violation of fundamental labour rights.

This chapter examines the extent to which the international legal framework impacts on and protects the rights of irregular migrants. The analysis below will synthesise the international human rights framework covering irregular migrants.

### 2.2 Rights and obligations of states

#### 2.2.1 State sovereignty

The concept of state sovereignty is a fundamental governing principle of international legal and political systems.<sup>19</sup> It denotes the power of a state to exercise absolute powers and authority

---

<sup>16</sup> P Oberoi 'Empowering migrants: Implications for law, policy and human rights' in A Edward & C Fertman (eds) *Human security and non-citizens law, policy and internal affairs* (2010) 228.

<sup>17</sup> See Preamble of the MWC.

<sup>18</sup> Report submitted by J Bustamante Special Rapporteur on the human rights of migrants, 'Human rights of migrants' A/65/222/2010, para 9-13.

<sup>19</sup> LS Bosniak 'Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers convention' in B Bogusz et al (eds) *Irregular migration and human rights: Theoretical, European and international perspectives* (2004) 311.



within its territory.<sup>20</sup> In the context of migration, sovereignty implies the broad freedom and authority of a state in determining admission, conditions of stay and the removal of non-citizens from its territory. All states possess the sovereign authority to adopt measures to protect national security and to determine the conditions upon which nationality is to be granted.<sup>21</sup>

The power of states to exercise sovereign authority over non-citizens in its territory is however not an absolute principle of international law.<sup>22</sup> Limitations on state sovereignty in this regard can either be by way of express ratification or accession to a treaty or by virtue of universal acceptance of certain international human rights norms as peremptory norms. The power of states to regulate admission and expulsion of non-citizens has to therefore be exercised in full respect for international human rights and freedoms of non-citizens.<sup>23</sup>

### **2.2.2 the nature of state obligations**

Under human rights law, states bear the primary obligation of realising the rights of all persons found within their territorial boundaries, including irregular migrants. It is generally accepted under international law that all human rights generate at least four levels of obligations for a state.<sup>24</sup> These are the obligations to respect, protect, promote, and fulfil all human rights. The obligation to respect connotes that the state should refrain from interfering in the enjoyment of all rights; the obligation to protect implies that a state is obliged to protect right-holders against unlawful violation of the rights through legislative and other measures; the obligation to promote obliges the state to promote the enjoyment of all human rights; and the obligation to fulfil requires states to fulfil all rights through effective measures aimed at actual realisation of rights.<sup>25</sup> These obligations arise out of the contractual obligations of the state towards the international community through the ratification or accession to international instruments as alluded to above.

Article 27 of the Vienna Convention on the Law of Treaties provides that states may not invoke the provisions of their domestic law to frustrate any obligation they assume under international law.<sup>26</sup> Although the effect of ratification of a treaty and domestic application may differ between legal systems (i.e. *monist or dualist*), article 26 of the Vienna Convention on the Law of Treaties requires states to fulfil their legal obligations under international law in good

---

<sup>20</sup> Report submitted by J Bustamante Special Rapporteur on the human rights of migrants, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/7/12/2008, para 13.

<sup>21</sup> As above.

<sup>22</sup> Report of the Global Commission on International Migration *Migration in an interconnected world: New Directions for actions* (2005) 32.

<sup>23</sup> Koser (n 13 above) 13.

<sup>24</sup> *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 44 – 47.

<sup>25</sup> CESCR General Comment 14: The right to the highest attainable standard of health para 33.

<sup>26</sup> Article 27 of the Vienna Convention on the Law of Treaties.

faith.<sup>27</sup> In addition to this there is a general obligation on states to refrain from the violations of peremptory international law, irrespective of ratification or accession to a treaty.<sup>28</sup>

In line with the obligation on states to respect obligations arising from international law, article 2(1) of the ICCPR imposes a general obligation on state parties to respect and to ensure the rights in the Covenant to everyone within the territory of the state.<sup>29</sup> Article 2(2) follows by prescribing a non-exhaustive list of measures, which states can adopt to fulfil their obligation under article 2(1) above.<sup>30</sup> These include legislative, judicial and administrative measures.

In its General Comment 15, the Human Rights Committee (HRC) commented on the position of non-citizens under the covenant.<sup>31</sup> The HRC concluded that the duty on a state to ensure respect for the rights arising from the Covenant to all persons within the territory of the state extends to all non-citizens irrespective of reciprocity, and irrespective of nationality or statelessness.<sup>32</sup> Although states have a legitimate interest in regulating immigration, these concerns cannot alone and indeed, as a matter of law, trump the obligation of the state to respect the internationally guaranteed rights of all persons, to protect those rights against abuses, and to fulfil the rights necessary for them to enjoy a life of dignity and security.<sup>33</sup>

Having established the nature of the obligation that international law imposes on states and the rights of states under international law we now proceed to examine the legal content of some of the fundamental rights that everyone should enjoy regardless of where he/she may be.

### **2.2.3 International human rights law**

Although none of the core UN human rights treaties deals specifically with the rights of irregular migrants, a number of these treaties, notably the International Covenant of Civil and Political Rights (ICCPR), the Covenant on the Elimination of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child, Convention Against Torture (CAT), contain human rights standards relevant to irregular migrants. In addition to this, the MWC, which came into force on 1 July 2003, states in explicit terms that most of the civil and political rights that are found in the above general human rights instruments apply to all migrants irrespective of their immigration status.<sup>34</sup>

---

<sup>27</sup> Article 26 of the Vienna Convention on the Law of Treaties.

<sup>28</sup> Article 53 of the Vienna Convention on the Law of Treaties.

<sup>29</sup> Article 2(1) of the ICCPR.

<sup>30</sup> Article 2(2) of the ICCPR.

<sup>31</sup> HRC General Comment 15: The position of aliens under the Covenant.

<sup>32</sup> n 31 above, para 1.

<sup>33</sup> n 31 above, para 3.

<sup>34</sup> See article 1 of the MWC; to date only 45 states are parties to the MWC <http://www2.ohchr.org/english/law/cmw.htm> (accessed 31 October 2011).

The above instruments contain a wide array of human rights that can be used to protect irregular migrants under international law. These includes among others: human dignity, personal freedom and security, privacy, due process of law, freedom of expression and association, fair labour practices, adequate housing, health care, sufficient food and water, and social security. The following analysis will however, concentrate on the most fundamental of these rights that have become accepted as part of customary international law. The discussion of the international legal framework will therefore concentrate on the following fundamental rights that every human being is entitled to regardless of immigration status. These include the right to life, non-discrimination, deprivation of liberty, cruel inhumane or degrading treatment and access to justice. Some of these rights such as the rights to life, some forms of discrimination and the prohibition against cruel, inhumane and degrading treatment have become crystallised as peremptory international norms. Although it is less clear whether deprivation of liberty and access to justice in the context of irregular migrants has acquired such a status, they are however key to the protection of the fundamental rights of irregular migrants. The most fundamental of all rights is the right to life and for this reason, the starting point of any investigation into the fundamental rights of irregular migrants under international law.

## **2.3 The right to life**

### **2.3.1 Introduction**

The right to life is the most important of all human rights. It is from this right that all other human rights inherent in every human being originate. Unlike other rights the right to life cannot be limited, withdrawn and restated again. In essence, respect for the right to life is recognition of the human dignity and value inherent in every human being. Accordingly, respect for the right to life is not limited or dependent upon the status of a person in a state.

### **2.3.2 Legal content of the right to life**

Article 6 of the ICCPR provides that every human being has the inherent right to life and requires absolute protection by law.<sup>35</sup> Arbitrary deprivation of life is accordingly prohibited. The HRC in General Comment 6 on the right to life expressed concern for the restrictive manner of

---

<sup>35</sup> Article 6 of the ICCPR.

interpretation of the term ‘inherent right to life’ and proposed a broader interpretation that required both negative and positive measures from the state.<sup>36</sup>

The negative obligation in this regard refers to the prohibition against arbitrary deprivation of life by the state. In other words deprivation of life should only take place in accordance with due process of law and principles recognized by the international community. The nature and ambit of the positive obligation implies essentially that it is not sufficient for states to only refrain from arbitrary deprivation of life but should promote a system of justice that effectively respect the right to life and deter those who might deprive people of their lives.<sup>37</sup>

The European Court of Human Rights (ECHR) in the Case of *Osman v UK*<sup>38</sup> confirmed the positive and negative nature of the obligation on states to respect, fulfil, promote and protect the right to life.<sup>39</sup> The positive obligation was extended further by the ECHR in the case of *Kaya v Turkey*<sup>40</sup> where the court found that the failure of a state to investigate the murder of an individual amounted to the violation of its positive obligation to respect and promote the right to life.

Article 4 of the ACHPR provides that

human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.<sup>41</sup>

In the Case of *Forum of Conscience v Sierra Leone* the African Commission reiterated the importance of the universal respect and recognition of the right to life in the following words:

The right to life is the fulcrum of all other rights. It is the fountain through which other rights flow, and any violation of this right without due process amounts to arbitrary deprivation of life.<sup>42</sup>

The negative and positive obligations on states to safeguard the right to life of everyone within the territory of a state as enshrined in international instruments and reiterated in international jurisprudence do not arise from the legal status of a person. Rather, the right to life is an inalienable human right the existence of which is not dependent on the political trends, the ideology and will of those in position of powers and influence.<sup>43</sup> Irregular migration status is

---

<sup>36</sup> HRC General Comment 6: Right to life para 1.

<sup>37</sup> N Blake & R Husain *Immigration asylum & human rights* (2003) 67.

<sup>38</sup> *Osman v UK*(2000) 29 EHRR 245 para 115 and 116.

<sup>39</sup> As above para 115 and 116.

<sup>40</sup> *Kaya v Turkey* (1999) 28 EHRR 1.

<sup>41</sup> Article 4 of the ACHPR.

<sup>42</sup> *Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000) para 19.

<sup>43</sup> M Kalpakgian ‘The right to life and the natural law’ in W Joseph & SJ Koterski (eds) *life and learning IX:*

therefore not a barrier for states to refrain from upholding the right to life of migrants. As stressed above, the right to life obligations on states include a positive duty to ensure that it identifies and adopts measures to protect irregular migrants in life-threatening situations. In addition the state is under an obligation however, to ensure that in the exercise of its positive obligation to protect the right to life it does not discriminate between citizens and non-citizens, regular or irregular.

The study contends that if the twin pillars of the rights to equality and non-discrimination were adequately protected and embraced by all states, other species of rights would be subsumed under them and irregular migrants would find effective protection under international human rights law. For this reason we proceed to examine the legal content of the principle of non-discrimination under international human rights law.

## **2.4 Non-discrimination**

### **2.4.1 Introduction**

The principle of non-discrimination is fundamental to the protection of irregular migrants against exploitation and marginalisation in society. Irregular migrants are among the most vulnerable to discrimination. National immigration laws and policies further exacerbate their vulnerable position by directly or indirectly excluding irregular migrants from the enjoyment of rights on equal footing with citizens and legal migrants.

### **2.4.2 Legal content of the principle of non-discrimination**

The principle of non-discrimination is entrenched in international, regional and national instruments and provides a framework on the basis of which irregular migrants can seek protection against prejudice, abuse and marginalisation.<sup>44</sup> This principle is generally accepted as a rule of customary international law.<sup>45</sup> This is due to its incorporation and acceptance in major international, regional and domestic instruments.<sup>46</sup> According to General Comment 18 of the HRC, non-discrimination together with equality before the law and equal protection of the law without discrimination form the foundation for the protection of human rights.<sup>47</sup>

---

*Proceedings of the Ninth University Faculty for Life Conference, June 1999, at Trinity International University, Deerfield, III. (2000).*

<sup>44</sup> HRC General Comment 18: Non-discrimination para 1.

<sup>45</sup> A Lansink 'Migrant workers and non-discrimination in the workplace: an international law perspective' in O Dupper & C Garbers (eds) *Equality in the workplace: reflections from South Africa and beyond* (2009) 274.

<sup>46</sup> As above.

<sup>47</sup> n 20 above.

Article 26 of the ICCPR provides for the right to equality before the law without discrimination.<sup>48</sup> The right to equality and non-discrimination permeates the entire Covenant and serves as a powerful tool to ensuring respect and protection of irregular migrants against marginalisation, neglect and exploitation. Although the term discrimination is not defined, articles 2(1) and 26 list a number of grounds on which discrimination is expressly prohibited. The HRC has elucidated in General Comment 18 that,

the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.<sup>49</sup>

The importance of the General Comment can be traced to the nature of the obligation, which the principle of non-discrimination imposes on a state. Essentially it calls on a state to take positive legislative or other measures to protect any section of the state’s population from discrimination based on nationality.<sup>50</sup>

Prior to the adoption of General Comment 18, the HRC in General Comment 15, considered the position of aliens under the Covenant. According to the HRC, states must ensure that everyone within the territory of the state receives the benefits of the provisions of the Covenant without discrimination between citizens and non-citizens and regardless of a person’s immigration status.<sup>51</sup> In this manner, the HRC emphasised the importance of the principle of non-discrimination for the enjoyment of all other human rights of non-citizens.<sup>52</sup>

In addition to the general non-discrimination provision entrenched in the ICCPR, there are several core international instruments that protect specific vulnerable groups against discrimination, neglect and marginalisation. Article 2(1) of the CRC for example calls upon state parties to ensure that the right of every child within the territory of the state is respected without discrimination of any kind.<sup>53</sup> In a similar vein, CEDAW entrenches several principles and standards, which seek to protect women and eradicate all forms of unfair discrimination against women.<sup>54</sup> In addition, the ICERD deals specifically with the elimination of all forms of racial discrimination. Article 1(1) defines racial discrimination as,

---

<sup>48</sup> Article 26 of the ICCPR.

<sup>49</sup> HRC General Comment 18 para 7.

<sup>50</sup> HRC General Comment 18 para 5.

<sup>51</sup> HRC General Comment 15 para 1.

<sup>52</sup> As above.

<sup>53</sup> Article 2(1) of the CRC.

<sup>54</sup> See generally CEDAW.

any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>55</sup>

In General Recommendation 30 the Committee on the Elimination of Racial Discrimination (CERD) called upon states to ensure that laws and policies of states on immigration do not discriminate on the basis of race, colour, descent, or national or ethnic origin and to take all appropriate measures to address instances of discrimination.<sup>56</sup> According to the CERD differentiation between citizens and non-citizens constitutes discrimination if,

the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.<sup>57</sup>

In this vein the CERD has underlined the importance of the principle of non-discrimination in protecting migrant workers from discrimination in relation to employment opportunities.<sup>58</sup>

In addition to standards and norms identified in the above international human rights instruments and guidance of the treaty bodies, regional human rights systems provide further clarity on emerging international norms and standards on the protection of all migrants.<sup>59</sup> The discussion below considers the jurisprudence of the African and Inter-American human rights systems on non-discrimination.

### **2.4.3 The African international legal system**

The twin principles of equality and non-discrimination are reinforced in African human rights jurisprudence, including the African Charter on Human and Peoples' Rights (ACHPR), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>60</sup> and the African Charter on the Rights and Welfare of the Child.<sup>61</sup> The African Charter states that every

individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex,

---

<sup>55</sup> Article 1(1) of the ICERD.

<sup>56</sup> CERD General Recommendation 30: Discrimination Against Non-Citizens para 1(1) & 1(2).

<sup>57</sup> As above para 1(4).

<sup>58</sup> Oberoi (n 16 above) 261.

<sup>59</sup> As above.

<sup>60</sup> Article IV.

<sup>61</sup> Article 3.

language, religion, political or any other opinion, national and social origin, fortune, birth or other status.<sup>62</sup>

The reference to the term ‘without distinction’ logically suggests that these rights are available to everyone including individual members of communities who are of irregular status. In the case of *Purohit and Another v the Gambia* the African Commission on Human and Peoples’ Rights stressed the importance of the principle of equality and non-discrimination as the foundation of the protection of the rights articulated in the Charter.<sup>63</sup> It stressed further that the principle of non-discrimination is essential to eradicating discrimination in all its guises.<sup>64</sup>

#### **2.4.4 The Inter-American regional system**

In 2003 the Inter-American Court of Human Rights gave a decisive opinion on the duties of states to respect and ensure the application of the principle of non-discrimination to irregular migrants. The Court stated unequivocally that:

[a] person who enters a state and assumes an employment relationship, acquires his [or her] labour human rights in the state of employment, irrespective of his [or her] migratory status... the migratory status of a person can never be a justification for depriving him [or her] of the enjoyment and exercise of his [or her] human rights.<sup>65</sup>

Therefore, a state should not use the irregular status of a migrant as a reason to deny respect for their basic human rights.<sup>66</sup> In addition, the Court stated decisively that ‘the fundamental principles of equality and non-discrimination have entered the domain of [peremptory norms]’.<sup>67</sup>

The duty on states to protect non-citizens against discrimination demands that states identify and address discrimination in specific areas of society. As indicated earlier on, the need for socio-economic security serves as the primary underlining motive for irregular migration. Irregular migrants are vulnerable to all forms of discrimination including, exclusion from access to health services, education, housing, banking and employment. Their presence in the state is usually regarded as a threat to the economic and state security.

The study contends, however, that although there is no clear duty on states to provide work or other socio-economic rights to irregular migrants, they have a duty to ensure that they

---

<sup>62</sup> Article 2 of the ACHPR.

<sup>63</sup> *Purohit and Others v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 49.

<sup>64</sup> As above.

<sup>65</sup> Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants* (2003) para 106.

<sup>66</sup> As above.

<sup>67</sup> Lansink (n 45 above) 275.



apply the principle of non-discrimination to ensure that irregular migrant workers enjoy the full benefits of fundamental labour rights. This will in the long run remedy the incidents of abuse, exploitation and marginalisation suffered by irregular migrants in employment.

We now proceed to examine the international principles and standards recognised for the protection of the rights of all workers including migrant workers.

## **2.6 Non-discrimination and labour rights**

### **2.6.1 The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (MWC) entered into force on 1 July 2003. The MWC deals specifically with the human rights of all migrant workers including irregular migrant workers and members of their families. According to the MWC, all migrant workers are entitled to labour rights regardless of their status rights without distinction of any kind such as ‘sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status’.<sup>68</sup> The MWC defines a ‘migrant worker’ to mean: ‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’.<sup>69</sup>

The principle of non-discrimination as articulated in this Convention is further incorporated into recruitment and employment procedures involving irregular migrant workers.<sup>70</sup> In this vein article 25 provides for equality in terms of remuneration, equitable conditions of work and terms of employment including overtime, hours of work, weekly rest, holidays with pay and other conditions of work with nationals.<sup>71</sup> Recognising the vulnerable position in which irregular migrant workers in private contracts find themselves, the convention calls upon state parties to adopt all appropriate measures to ensure an end to the practice of deprivation of rights derived from employment by reason of irregular status.<sup>72</sup> According to Oberoi, the MWC ‘is a key standard for the protection of migrants’ rights’.<sup>73</sup>

---

<sup>68</sup> See Article 7 of the MWC; Lansink (n 45 above) 266.

<sup>69</sup> Article 2(1) of the MWC.

<sup>70</sup> See Lansink (n 45 above) 266.

<sup>71</sup> See Article 25 of the MWC.

<sup>72</sup> Article 25(3) of the MWC.

<sup>73</sup> Oberoi (n 16 above) 260.

## 2.6.2 ILO Standards

The International Labour Organisation (ILO) is an international and inter-governmental organisation that promotes labour rights and standards. Amongst its objectives is the protection and promotion of the human rights of all migrant workers in employment and related issues. In the context of irregular migrant workers the ILO has been active in establishing standards and norms aimed at protecting all migrants against exploitation and discrimination.<sup>74</sup> These standards and norms are embodied in both binding and non-binding instruments of the ILO. These include two major conventions on migrant workers, the Migration for Employment (Revised) (No 77) of 1949 and the Migrant Workers (supplementary provision) Convention (No 143) of 1975. The two major conventions are supplemented by a number of recommendations establishing standards. These include the Recommendation Concerning Migration for Employment (No 86) and Recommendation Concerning Migrant Workers (No 151).

There are four main principles that the ILO has recognised as the pillars of the promotion of labour rights. These four core labour principles are: freedom of association, freedom from forced labour and child labour, and non-discrimination in employment.<sup>75</sup> The ILO asserts that these core labour principles are universal and apply to all member states regardless of whether they have ratified its conventions or not.<sup>76</sup> Under article 9(1) of the ILO Migrant Workers (supplementary provision) Convention (No 143) of 1975 concerning migrations in abusive conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, adopted in 1977, state parties are required to respect the right to social security, remuneration, social security and other benefits where a dispute with regard to the status of a migrant arises.<sup>77</sup>

## 2.7 The theory of non-discrimination

The prohibition against discrimination does not necessarily, bar the state from differentiating between citizens, non-citizens and irregular migrants.<sup>78</sup> The prohibition against discrimination only requires that such discrimination should be based on grounds that are reasonable, objective, proportionate and does not infringe upon recognised rights.<sup>79</sup>

Viewed from the perspective of the nature of the ‘discriminator’ discrimination may take two forms: Vertical and horizontal discrimination. Vertical discrimination is discrimination by

---

<sup>74</sup> See Lansink (n 45 above) 272.

<sup>75</sup> As above.

<sup>76</sup> PG Alston ‘Labour rights as human rights: the not so happy state of the Art’ in Alston, PG (ed) *Labour Rights as Human Rights* (2005) 20.

<sup>77</sup> Article 9(1) of ILO Migrant Workers (supplementary provision) Convention (No 143) of 1975.

<sup>78</sup> See HRC General Comment 18 para 13.

<sup>79</sup> As above.

the state against individuals, and takes the form of discriminatory laws policies or programmes. An example of this will be in the form of legislation or policy that unfairly differentiates between citizens and irregular migrants without a legitimate objective or where that objective is not proportionate with the rights infringed upon. In this respect the HRC observed legislation drafted in terms of citizens only might serve to undermine the rights of non-citizens recognised under international law.<sup>80</sup> Horizontal discrimination occurs between non-state actors (such as individuals or private companies), and takes the form of discriminatory attitudes, perception or behaviour against an individual or groups by other individuals or groups.

In summary it should be pointed out that the right to be protected against discrimination and the right to equal treatment for all persons found within the state's territorial area, have crystallised into customary international law. The effect of this is that states do not have to be a party to an international treaty to observe the non-discrimination for the protection of irregular migrants.

Once irregular migrants enter the host state they face a wide array of discriminatory practices including, exploitation by unscrupulous employers, xenophobia, marginalisation and neglect. State policies and law aimed at control, detention and expulsion often result in the treatment of irregular migrants that is in conflict with the prohibition of cruel, inhumane or degrading treatment.

This paper argues that the obligation on a state to protect everyone against cruel, inhumane or degrading treatment is a norm customary international law and should accordingly be observed by states.

## **2.8. Cruel, inhumane or degrading treatment**

### **2.8.1. Introduction**

Inhumane treatment consists of, but not limited to, conduct that causes physical mental or suffering not amounting to torture.<sup>81</sup> This form of transgression often occurs in the manner of discrimination, exclusion, exploitation or abuse at the hands of authorities and citizens. Given their vulnerable position in society, irregular migrants are often afraid or unable to seek protection and relief from state authorities. These practices therefore lead to massive abuse without redress.

---

<sup>80</sup> HRC General Comment 15 para 3.

<sup>81</sup> Blake (n 37 above) 73.

## 2.8.2. International prohibition

The prohibition of cruel, inhumane and degrading treatment is entrenched in article 7 of the ICCPR, according to which ‘no one shall be subjected to torture or cruel, inhumane or degrading treatment or punishment’.<sup>82</sup> The HRC in General Comment 20 extended the scope of article 7 of the ICCPR to include protection of both dignity and the physical and mental integrity of the individual.<sup>83</sup> Acts which qualify as cruel and inhumane include acts that cause mental suffering to the victim. The same guarantee can be found under article 16 of CAT which imposes an obligation on state parties to undertake appropriate measures to prevent within their territories any acts of cruel, inhumane or degrading treatment or punishment.<sup>84</sup>

Under the African international human rights system, article 5 of the ACHPR in a similar vein proscribes all forms of exploitation and degradation of man, which are not in accordance with his/her inherent dignity.<sup>85</sup> Cruel, inhumane or degrading punishment and treatment is also prohibited under the Charter.<sup>86</sup> In *Amnesty International and Others v Sudan* the African Commission pronounced on the obligation of state parties to protect individuals from cruel, inhumane or degrading treatment.<sup>87</sup> According to the Commission even where such acts are carried out not by the state but private actors, the primary responsibility still remains on the state to fulfil this right.<sup>88</sup> This right is non-derogable, and as the Commission observed,

Even if Sudan is going through civil war, civilians in areas of strife are especially vulnerable and the state must take all possible measures to ensure that they are treated in accordance with international humanitarian law.<sup>89</sup>

In the Case of *Doebler v Sudan*, the African Commission stated unequivocally that the prohibition against cruel, inhumane and degrading treatment extends beyond actions that cause serious physical or psychological suffering, and includes acts that serve to humiliate a person.<sup>90</sup>

Cruel, degrading or inhumane treatment can be in the form of the conditions under which irregular migrants are held while awaiting deportation. Where such conditions are overcrowded and not in accordance with international standards it may amount to a further violation of the right not to be subjected to cruel, inhumane or degrading treatment. In this regard the African Commission articulated in *Achuthan and Another (on behalf of Banda and Others) v Malawi* that

---

<sup>82</sup> Article 7 of the ICCPR.

<sup>83</sup> HRC General Comment 20: Prohibition of torture and cruel treatment or punishment para 5.

<sup>84</sup> Article 16 of CAT.

<sup>85</sup> Article 5 of the ACHPR.

<sup>86</sup> As above.

<sup>87</sup> *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) .

<sup>88</sup> As above, para 73.

<sup>89</sup> As above.

<sup>90</sup> *Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003) 36.

cruel, inhumane or degrading treatment includes: excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care.<sup>91</sup> In the *Purohit case* the Commission did not provide a conclusive list or definition of cruel, inhumane or degrading treatment and stated that the particular circumstances of each case is determinate.<sup>92</sup> The African Commission found in *Institute for Human Rights and Developments in Africa v Angola* that the transportation of migrants in overcrowded cargos, detention centres with no roof or walls and constant exposure to the elements of weather for five consecutive days and improper bathroom facilities all amounted to a violation of the prohibition against cruel, inhumane or degrading treatment.<sup>93</sup>

As stressed above, the principle of state sovereignty grants states the broad freedom and authority to determine admission conditions of stay and the removal of non-citizens. Accordingly, national immigration laws and regulations require non-citizens to seek permission from the state before entry and stay. Where a person stays in a country without consent of the state he/she violates the sovereignty of the state and may therefore be subjected to arrest, detention and deportation. State immigration laws and policies often grant immigration officials and police officers wide powers and discretion in the arrest and treatment of irregular migrants in detention.<sup>94</sup>

The study contends that the duty on states to ensure the rights of everyone within its territory requires states to respect international principles and standards for the protection of all detainees.

## **2.9 Deprivation of liberty**

### **2.9.1 Introduction**

Writing on the conditions of migrants in detention, the Special Rapporteur on Migrants voiced his concern about the considerable number of measures adopted by states aimed at stopping irregular migration.<sup>95</sup> The legal grounds for detention of irregular migrants are often too broad and discretionary and time limits are not always legally determined or respected.<sup>96</sup> Lack of procedural safeguards such as access to interpreters and appeal mechanisms and the right to have

---

<sup>91</sup> *Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995) para 7.

<sup>92</sup> *Purohit case* para 58.

<sup>93</sup> *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008) para 51.

<sup>94</sup> See Report submitted by G Rodriguez Pizarro Special Rapporteur on the human rights of migrants, 'Specific groups and individual migrant workers' E/CN.4/2003/852002, Executive Summary.

<sup>95</sup> As above.

<sup>96</sup> As above.

consular embassy representatives informed are all challenges that continue to undermine recognized international standards.<sup>97</sup>

### **2.9.2 International standards**

Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.<sup>98</sup> This implies not only the right not to be subjected to torture or to cruel, inhumane or degrading treatment and punishment, but also that migrants deprived of their liberty should be subjected to conditions of detention that take into account their circumstances and needs.<sup>99</sup> The HRC stated in General Comment 15 that ‘if lawfully deprived of their liberty, aliens shall be treated with humanity and with respect for the inherent dignity of their person’.<sup>100</sup> Despite their non-binding nature, General Comments reflect internationally recognized principles.

The General Assembly in Resolution 43/173 adopted a body of principles for the Protection of All Persons under any Form of Detention or Imprisonment. Principle 1 reiterates article 10(1) of the ICCPR by emphasizing the importance of humane and dignified treatment for those deprived of their liberty. In her submission to the General Assembly the former Special Rapporteur, Gabriela Rodriguez Pizarro voiced her concern about the lack of observance of international standards adopted for the protection of all those who are deprived of their liberty.

Article 9 of the ICCPR further entrenches the fair procedural rights of persons deprived of their liberty. Article 9(2) provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of his charge(s) and be brought promptly before a competent court or tribunal. Article 9(2) is reiterated in the body of principles. According to the body of principles, persons under any form of detention or imprisonment shall be informed at the time of arrest of the reason(s) for their arrest, as well as of their rights and how to avail themselves of those rights in a language they understand. Also, detained persons should have the assistance, free of charge, of an interpreter in connection with legal proceedings subsequent to arrest. Furthermore, a detained person is entitled to have the assistance of a legal counsel, to be informed of that right and to be provided with facilities for exercising it. Detained persons should also have the right to be visited by and correspond with members of their families. In addition, deprivation of liberty should last only for the time necessary for the deportation/expulsion to become effective. Deprivation of liberty should therefore never be indefinite.

---

<sup>97</sup> As above.

<sup>98</sup> Article 10(1) of the ICCPR.

<sup>99</sup> Principle 1 of the Body of principles for the Protection of All Persons under Any Form of Detention or Imprisonment *Adopted by General Assembly Resolution 43/173* (1988).

<sup>100</sup> HRC General Comment 15 para 7.

Although developments in international human rights law have raised awareness about the importance of empowering victims of violations to demand the protection of their rights, this factor alone has not been sufficient to address the needs of irregular migrants. This is due to many factors including lack of familiarity with mechanisms available for their protection and fear of arrest, detention and lack of political will on the part of states.

The study contends that, irregular migrants will continue to face exploitation, discrimination and marginalisation if states do not make it a priority to create avenues for redress. The discussion to follow will examine the right of access to justice and effective remedy for violations of human rights.

## **2.10 The right of access to justice and effective remedy**

### **2.10.1 Introduction**

The possession of fundamental rights is meaningless without mechanisms for their effective vindication. Access to justice goes beyond the mere existence of an independent judiciary that has the power to oversee and adjudicate rights. It encompasses the ability and capability of those whose rights are violated to vindicate their rights through the judicial system, should they choose to do so, without the barriers imposed by nationality or marginalisation. However, without knowledge about human rights and legal rights and without the confidence to exercise those rights and without the capacity or capability to seek protection, it is unlikely that irregular migrants will realise their rights and access to justice is accordingly placed in question.

### **2.10.2 International standards**

Article 16 of the ICCPR provides that ‘everyone shall have the right to recognition everywhere as a person before the law’. The right of everyone to be protected by law is entrenched in article 17(2) of the ICCPR. Article 2(3)(a) of the ICCPR imposes obligations on state parties to ensure an effective remedy to victims of violations of fundamental rights provided for in the Covenant. Article 2(3)(b) imposes a duty on all state parties to the Covenant,

To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system, and to develop the possibilities of judicial remedy.

Where irregular migrants have been subjected to unlawful arrest or detention article 16(9) of the MWC provides that they shall have an enforceable right to compensation. Articles 83 and 84 of the MWC are identical to article 2(3) of the ICCPR and entrench the right of irregular migrants to an effective remedy for violations of their fundamental human rights. According to the HRC the obligation imposed on states to provide effective protection of Covenant rights includes access to effective remedies to vindicate those rights. The HRC notes in this regard that, the enjoyment of rights can be effectively assured by the judiciary in different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law.

## **2.11. Conclusion**

The above analyses have synthesised the international human rights framework applicable to irregular migrants in general. It has clearly been established that, contrary to popular assumptions and practices, irregular migrants are indeed holders of rights. The instruments analysed above, unless expressly stated otherwise, are applicable to all persons regardless of status. The international assumption is clear – certain fundamental rights such as the right to life, non-discrimination, the protection against cruel, inhumane or degrading treatment, detention conditions in accordance with human dignity are fundamental and do not accrue to a person by virtue of citizenship but are inherent in every human being. The extent to which South African national legislation and policy reflect these international standards will form the basis of the discussion in the next chapter.



## CHAPTER THREE

### South African legal and policy framework for the protection of irregular migrants

#### 3.1 Introduction

This chapter examines the extent to which international norms, principles and standards discussed in chapter three above are applicable under the South African legal system. The obligation on South Africa to ensure respect for fundamental rights of everyone in its territory primarily arises from either the ratification of a treaty or out of a general obligation on states to refrain from violation of peremptory norms recognised and accepted by the international community. South Africa has ratified the ICCPR, CERD, CEDAW, CRC and CAT. Although South Africa has not ratified the CESC, it serves as a persuasive source of law. Unfortunately, South Africa has not ratified the MWC. The rights of irregular migrants are now crystallised under international law. The MWC protects a host of civil and political rights. Under the African human rights system, South Africa is a party to the African Charter, the African Women's Charter, OAU Refugee Convention and the African Children's Charter.

The 1996 Constitution of South Africa guarantees fundamental rights to everyone, including irregular migrants, in the Bill of Rights. These rights include the rights to life, dignity, equality, freedom and security of the person, protection against cruel, inhuman or degrading treatment and access to courts and effective remedy. In addition, section 7 identifies the Constitution as the cornerstone of democracy in South Africa.<sup>101</sup> It states unequivocally, without drawing a distinction between citizens and non-citizens that,

The Bill of Rights is [the] cornerstone of democracy in South Africa. It enshrines the rights of **all people in our country** and affirms the democratic values of human dignity, equality and freedom (emphasis added).<sup>102</sup>

Section 7(2) goes on to provide that the state bears the primary constitutional duty to ensure respect, promote, protect and fulfil the rights contained in the bill of rights.<sup>103</sup>

In addition to the constitutional guarantees in the Bill of Rights, the 2002 Immigration Act (IA) deals specifically with regulation of immigration including irregular immigrants in

---

<sup>101</sup> Section 7(1) of the Constitution.

<sup>102</sup> Section 7(1) of the Constitution.

<sup>103</sup> Section 7(2) of the Constitution.

South Africa.<sup>104</sup> Although, the IA aims to promote ‘a human rights based culture in both governmental and civil society’ in immigration control, the extent to which this is incorporated throughout the Act is less visible. Nonetheless the Act sets out the rights and duties of the state in the regulation and control of irregular migration.

Before embarking on examining the South African legal and policy framework, a general background to the migration phenomenon in South Africa and a general overview of the impact of the constitution on irregular migration follows below.

### **3.2 General background: The migration phenomenon in South Africa**

Irregular migration to South Africa is not a new phenomenon, and for decades before the new democratic state, it remained a large source of labour for mining, commercial and the agricultural industries.<sup>105</sup> The policy and regulations of the state on irregular migration was generally determined by the labour needs of the time.<sup>106</sup> In this regard the government entered into bilateral and multilateral agreements with neighbouring countries in terms of which migrant labourers were recruited through governmental agencies.<sup>107</sup> This form of migration for work to South Africa was tightly regulated. On the other side of this development were a largely unregulated section of labourers who did not qualify for recruitment through government agencies and therefore found their way to the country on their own accord. These migrants filled positions in the mines, as domestic workers on farms and factories. Although the government’s policy on irregular migration had always been one of strict control and expulsion, it at times sanctioned irregular migration to cater for its labour needs.<sup>108</sup>

However, in the dying years of apartheid the government’s policy on irregular migration became harsher and enforcement mechanisms completely disregarded any form of human rights of irregular migrants.

---

<sup>104</sup> See The Immigration Act 13 of 2002.

<sup>105</sup> See N Trimikliniotis et al ‘Globalisation and migrant labour in a “Rainbow Nation”’: A fortress South Africa? (2008) 29 *Third World Quarterly* 1324. B Dodson & J Crush ‘report on gender discrimination in South Africa’s 2002 Immigration Act: Masculinizing the migrant’ (2004) 77 *Feminist Review* 100.

<sup>106</sup> B Maharaj *Immigration to post-apartheid South Africa* Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (June 2004) [www.gcim.org](http://www.gcim.org) (accessed 4 August 2011).

<sup>107</sup> n 105 above.

<sup>108</sup> B Dodson & J Crush ‘Report on gender discrimination in South Africa’s 2002 Immigration Act: Masculinising the migrant’ (2004) 77 *Feminist Review* 100.

### 3.3 Pre-constitutional legislation and policy

The Aliens Control Act (ACA) was dubbed the last draconian piece of legislation of the apartheid regime.<sup>109</sup> The ACA consolidated different legislation, regulations and policies that had regulated migration in South Africa for nearly a century.<sup>110</sup> Immigration policies of the apartheid government rested on four main pillars: racist policy and legislation; the exploitation of migrant labour from neighbouring countries; tough enforcement legislation; and the repudiation of international refugee conventions.<sup>111</sup> None of these policies reflected respect for fundamental human rights and dignity of irregular migrants, resulting in decades of abuse, marginalisation and exploitation.<sup>112</sup>

The new constitutional state however, envisages a new state based on human dignity and respect for fundamental rights and freedoms.

### 3.4 The Constitution and irregular migration

The Constitution seeks to break away from a history of injustice, racial discrimination, and blatant disregard for human dignity and life.<sup>113</sup> Mahomed J described this break as ‘a ringing and decisive break with the past’.<sup>114</sup>

There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is justifiable in an open and democratic society based on freedom and equality. It is premised on a legal culture of accountability and transparency.<sup>115</sup>

The Constitution of South Africa has expressly committed herself to the establishment of a new state based on the principles of justice, freedom and equality.<sup>116</sup> The inequality and repression that pervaded political and social life in South Africa impacted significantly on the fundamental rights of irregular migrants. At the very least, the constitutional obligation on the state to

---

<sup>109</sup> Tessier (n 1 above) 257.

<sup>110</sup> The Immigration Regulation Act of 1913; the Aliens Act of 1937.

<sup>111</sup> J Crush & DA McDonald ‘Introduction to special issue: Evaluating South African immigration policy after apartheid’ (2001) 48 *Africa today* 4.

<sup>112</sup> S Peberdy & J Crush ‘Rooted in racism: The origins of the Aliens Control Act’ In J Crush (ed) *Beyond control: Immigration and human rights in a democratic South Africa* (1998) 18.

<sup>113</sup> I Currie & J Waal *The bill of rights handbook* (2010) 153.

<sup>114</sup> *S v Mhlungu* 1995 3 SA 391 (CC) 8.

<sup>115</sup> *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC) para 26.

<sup>116</sup> Hicks (n 2 above) 405.

eradicate all past injustices includes ameliorating the plight of irregular migrants by ensuring respect of their fundamental human rights.

It is therefore argued in this dissertation that the extent to which government policy, legislation and conduct reflect a decisive break from past immigration policies of racism, discrimination and exploitation, should be seen in the standard of living and treatment of irregular migrants in South Africa today.

The next part of the paper will briefly examine the legal framework regulating irregular migration in South Africa at the present. This is done in order to determine the extent to which immigration laws and policies reflect the principles embodied in the Constitution and established under international law. In addition, the gaps in the present immigration laws and policies are identified.

### **3.5 Legislative and policy framework**

#### **3.5.1 Introduction**

South Africa has a satisfactory legal framework in place for the protection of the rights of irregular migrants. Section 7(1) of the Constitution states unequivocally that the Bill of Rights ‘enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom’.<sup>117</sup> The Constitutional Court in the case of *Lawyers for Human Rights v Minister of Home of Affairs* affirmed the foregoing where it stated unequivocally that ‘when the constitution intends to confine rights to citizens it says so’.<sup>118</sup> In principle therefore the rights in the Constitution applies to everyone in South Africa including irregular migrants.

Research conducted by HRW on the position of irregular migrants in South Africa reveals that irregular migrants continue to face exploitation and marginalisation.<sup>119</sup> Different factors have been identified as the root cause for the marginalisation and exclusion. In this regard, Mosselson identifies state immigration laws and policies as one of the major causes of exploitation and marginalisation of irregular migrants in South Africa. According to him, irregular migrants continue to suffer exploitation and marginalisation because state policy and legislation portray them as ‘right-less’.<sup>120</sup> They exist in a *de facto* space, which has resulted in multiple cases of abuse, harassment and basic deprivations of human rights.<sup>121</sup>

---

<sup>117</sup> Section 7(1) of the Constitution; see also section 1 of the Constitution.

<sup>118</sup> *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) 27.

<sup>119</sup> n 3 above.

<sup>120</sup> Mosselson (n 6 above) 645.

<sup>121</sup> As above.

The examination of the legal framework below is an attempt at synthesising the domestic legal framework with international norms and standards discussed in chapter two above. The fact that everyone is entitled to fundamental human rights protection at all times is clear under international law. Whether domestic legislation and policy on irregular migrations recognise and implement this principle is not always that clear.

### 3.5.2 The Right to life

The legal protection of the right to life under South African law is extensive and goes beyond that which is internationally prescribed. Section 11 of the South African Constitution provides unconditionally that ‘everyone has the right to life’. In *S v Makwanyane* the Constitutional Court of South Africa dealt extensively with the meaning of life under the new constitutional dispensation.<sup>122</sup> The court found the death penalty to be a degrading and inhuman punishment and inconsistent with the spirit of human dignity. Hence the court found the death penalty to be in violation of section 11 of the constitution.<sup>123</sup> The abolition of the death penalty and the unqualified stipulations of section 11 of the constitution bear testimony to the deep entrenchment of the right to life under South African law.<sup>124</sup>

The theoretical and practical application of the right to life is generally respected by South Africa. The government generally observes it both in principle and in practice to everyone regardless of their legal status. According to Kaaja Ramjathan-Keogh, the National Co-ordinator for Human Rights’ of Refugees and Migrants Rights Programme:

Even though on a theoretical level all who are in the country have basic human rights including the right to dignity, to life, and to equal treatment before the law, in practice illegal immigrants are denied almost all forms of rights. For example they are denied access to education, social services, courts of law in cases of police harassment and even medical care.<sup>125</sup>

From this quotation it may be logically deduced that practically the only rights that is not denied to irregular migrants is the right to life.

We have stressed above that the government has the constitutional duty to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>126</sup> The protection of human life however, goes beyond the mere abolition of the death penalty and requires the state to take

---

<sup>122</sup> See *Makwanyane* case.

<sup>123</sup> n 115 above, para 127.

<sup>124</sup> Currie (n 113 above) 281.

<sup>125</sup> n 8 above.

<sup>126</sup> Section 7(2) of the Constitution.

positive measures to safeguard everyone in the state from life-threatening situations.<sup>127</sup> It is submitted that the duty on the South African government to safeguard the right to life of citizens is equally applicable to irregular migrants. It is an accepted principle under international law that the right to life is the most important fundamental right without which other rights cease to be relevant.<sup>128</sup> In this context the right to life vests in a person regardless of his/her actions.<sup>129</sup> To buttress this point, one may quote the following sentiments of Chaskalson P in the *Makwanyane* case,

Constitutional rights vest in every person, including criminals convicted of vile crimes. Such criminals do not forfeit their rights under the Constitution and are entitled, as all in our country now are, to assert rights, including the right to life.<sup>130</sup>

### 3.5.3 Non-discrimination

Section 9 of the South African Constitution contains the equality provision. Section 9(1) of the Constitution guarantees equality of everyone in the country without discrimination. Section 9(2) goes on to provide that 'equality includes full and equal enjoyment of all rights and freedoms'. The main provision regarding the prohibition of discrimination is section 9(3). It provides that,

the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture language and birth.

Although citizenship or non-citizenship is not amongst the listed grounds upon which discrimination is prohibited, it has been accepted that it falls under 'other status' or analogous grounds upon which discrimination may be prohibited. The Constitutional Court made this position clear in *Larbi-Odam v MEC for Education (North-West Province)* when it ruled that citizenship or non-citizenship is a ground on which discrimination is prohibited.<sup>131</sup> In this case the court found that a law that prevented all non-citizens from being appointed into permanent teaching positions amounted to unfair discrimination.<sup>132</sup> Although the decision concerned those non-citizens with permanent residence, it is important in that it highlighted the fact that discrimination on the basis of status as a citizenship or non-citizenship may be unfair. The court pointed out further that where the state differentiates between citizens and non-citizens it is

---

<sup>127</sup> See Blake (n 37 above) 67.

<sup>128</sup> HRC General Comment 14: Right to life.

<sup>129</sup> Currie (n 113 above) 282.

<sup>130</sup> *Makwanyane* (n 10 above) para 137.

<sup>131</sup> See *Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC).

<sup>132</sup> As above, para 16.

usually based on the attributes and characteristics of the person, which may potentially impair the fundamental dignity of non-citizens. It therefore follows that if there is a discriminatory application of rights to a person who is already in the country based on the attributes and characteristics of the person such laws and policies can be deemed discriminatory if it does not serve a legitimate purpose.

### **3.5.4 Deprivation of liberty**

South Africa has satisfactory laws that guarantee the right to liberty and stipulates the right to test the legality of detention before a competent and impartial tribunal. Section 35(2) of the Constitution provides the following rights to those who are held in detention. Everyone who is detained has the right: to be informed promptly of the reason for being detained; to choose and consult with a legal practitioner and to be informed of this right promptly; to have a legal practitioner assigned to him at state expense; to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

Section 34 of the IA together with the Immigration Regulations (IR) promulgated in pursuant to the IA, deal specifically with the detention of irregular migrants and reiterate the provisions of section 35(2) of the Constitution. According to section 34(1), an Immigration Officer has the power to arrest and detain an irregular migrant without a warrant for the purposes of deportation. It requires the conditions under which an irregular migrant is detained to be in accordance with human dignity, human rights standards and the prescribed minimum standards for detention. The IR stipulates the minimum standards for accommodation, nutrition and hygiene in detention. The IR provides that every detainee must be provided with a bed, mattress and at least one blanket.

Section 34 of the IA specifically provides for the rights of irregular migrants while in detention. These include: The right to be informed in writing of the reasons for the detention and the option of an appeal; the right to request the confirmation of the detention by a court and where such confirmation is not issued within 48 hours, upon request to be released on the basis of such failure. In addition an irregular migrant may not be held in custody for longer than 30 calendar days without a court order extending the detention, which may not exceed 90 calendar days. The limitations on the time of detention and the request for confirmation are in line with international norms as no irregular migrant may be detained indefinitely. The Constitutional

Court has confirmed this limitation as a justifiable limitation on the right to liberty because of the necessity of the detention.<sup>133</sup>

### **3.5.5 Access to justice**

According to section 34 of the Constitution:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

In addition, the Constitution contains a wide list of people who may approach the court for an appropriate relief including a declaration of rights where rights are violated. Persons who may approach the court include any person who acts in his or her own interest, anyone who acts on behalf of another person who cannot, and any person who acts in the interest of the public.<sup>134</sup>

Having briefly discussed the general legal and policy framework in South for the protection of irregular migrants we now proceed to highlight the gaps in both the policy and law.

## **3.6 Gaps in law and policy**

### **3.6.1 Policy of control, exclusion and expulsion**

South African immigration policy is based solely on control, exclusion and expulsion of irregular migration. Despite the magnitude of the human rights implications for globalisation, global economic decline and political instability in the region, the government's attitude towards irregular migration is one that lacks any definitive attempt at promoting a culture of non-discrimination.<sup>135</sup> Maharaj defines the current policy as 'confusing, incoherent and contradictory'.<sup>136</sup> As in the 1990s, the government's policy on irregular migration is still one of exclusion, strict regulation, deportation and criminalization.<sup>137</sup> Section 49(4) of the IA for example renders it an offence for anyone who intentionally facilitates an illegal foreigner to

---

<sup>133</sup> *Lawyers for Human Rights case.*

<sup>134</sup> Section 38 of the Constitution.

<sup>135</sup> Maharaj (n 106 above) 15.

<sup>136</sup> As above.

<sup>137</sup> Trimikliniotis (n 105 above) 1130.



receive public services.<sup>138</sup> This approach at regulating irregular migration is limited and weak as it fails to take into consideration the human rights dimension of the migration phenomenon. Maharaj adds that,

if the illegal immigrant issue was viewed as matter of law and order, then the problem was likely to be aggravated in the long term. Such an approach will foster the development of a ‘criminal underclass’, increase xenophobia and lead to regional destabilisation. Ultimately this will violate the human rights pledge of the African National Congress, in terms of which the moral responsibility of the state is assumed to transcend territorial boundaries.<sup>139</sup>

One of the major challenges facing post-apartheid immigration policy in South Africa is attempt at breaking away from racially motivated laws and policies into a new immigration policy regime based on ‘non-racial, rational policy response to the objective needs of the country’.<sup>140</sup> Current immigration policy and laws should therefore be human rights sensitive and cognisant of the growing impact of globalisation and economic instability in the region.

### **3.6.2 Criminalization of irregular migrants employment**

As emphasised above, immigration policy of the South African government is one that seeks to eradicate irregular migration. One of the measures adopted by the government to achieve this aim is through criminalising the employment of irregular migrants in both public and private sectors. Section 38(1) of the IA forbids employers from employing irregular migrants. In addition, section 49(3) of the IA renders it an offence for an employer to employ an irregular migrant. The IA sanction provisions have however, done very little to discourage employers from employing irregular migrants who are already willing to risk their lives to work in South Africa despite the lack of protection by South African laws.<sup>141</sup> Although the exact number of irregular migrants in South Africa is unknown, experts estimate that they are between four and eight million.<sup>142</sup> The majority of irregular migrants in South Africa are low-skilled or semi-skilled workers who do not qualify for work permits.<sup>143</sup> The high number of irregular migrant workers in South Africa labour system indicates clearly that the policy of criminalising employment of irregular migrants has failed to achieve its aim.

---

<sup>138</sup> Section 49(4) of the IA.

<sup>139</sup> Maharaj (n 106 above) 17.

<sup>140</sup> As above.

<sup>141</sup> Trimikliniotis (n 105 above) 1125.

<sup>142</sup> L Waller ‘Irregular migration to South Africa during the first ten years of democracy’ (2006) *Southern African Migration Project* 1.

<sup>143</sup> Mosselson (n 6 above) 642.

Failure of sanctions as a measure to control irregular migration however, creates a negative effect of encouraging exploitation of irregular migrants by unscrupulous employers. In the case of *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* the Labour Court (LC) pointed out that the result of depriving foreign nationals without a valid work permit of recourse to the law creates a vacuum in both law and practice.<sup>144</sup> Accordingly the LC held that irregular immigration status should not deter employers from complying with terms of employment and basic conditions of employment.<sup>145</sup>

Criminalisation further encourages employment of irregular migrants to exist underground without proper oversight by the state.<sup>146</sup> Employers of irregular migrants are well aware of the fact that it is highly unlikely that irregular migrants will report low wages and long hours due to fear of deportation.<sup>147</sup> This creates an incentive for unscrupulous employers to circumvent basic conditions of employment and completely disregard fundamental labour rights of irregular migrants.<sup>148</sup> The resultant effect is a situation where irregular migrants are not only unable to bargain for fair wages, basic conditions of employment and terms of employment that are equitable with citizens but are open to extreme exploitation.<sup>149</sup> They therefore continue to earn meagre wages and work in conditions that are hazardous to their health.<sup>150</sup> This state of affairs is not in accordance with established international standards for the protection of irregular migrant workers.<sup>151</sup>

### 3.6.3 Lack of effective reporting mechanism

There is no effective reporting mechanism in place to ensure that irregular migrants can report exploitation by unscrupulous employers without fear of arrest, detention and deportation. The current law and policy on employment of irregular migrants therefore tends to promote exploitation by employers and encourages impunity at the cost of respect for the fundamental labour rights of irregular migrants recognised under the ILO, the IESCR and the MWC. This creates a glaring gap in immigration and labour laws that should protect irregular migrants from exploitation and discrimination.

---

<sup>144</sup> *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 1480.

<sup>145</sup> As above.

<sup>146</sup> Hicks (n 2 above) 402.

<sup>147</sup> See FL Liao 'Illegal immigration in garment sweatshops The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (1996) 3 *Southwestern Journal of Law & Trade in the Americas* 496.

<sup>148</sup> A Machava & T Polzer 'Bad work if you can get it: Cycles of exploitability among Mozambican immigrants in South African labour markets' (2006) 36 *Africanus: Journal of Development Studies* 171.

<sup>149</sup> See PM Nguyen 'Closing the back door on illegal immigration: Over two decades of ineffective provisions while solutions are just a few words away' (2010) 13 *Chapman Law Review* 636.

<sup>150</sup> n 2 above.

<sup>151</sup> See article 25 of the MWC.

The situation of irregular migrant farm workers is even more precarious. Research conducted into the plight of irregular migrant farm workers revealed abuse and exploitation by employers similar to slavery.<sup>152</sup> Unable to move freely to seek alternative employment due to fear of arrest and deportation, irregular migrant farm workers are held in captivity while they remain in South Africa, by their employers.<sup>153</sup>

The prohibition against unfair discrimination contained in the Constitution and various other pieces of legislation is extensive and reflects international norms and standards. The extent to which the principle of non-discrimination influences immigration legislation and policies is unfortunately not that transparent. Although the IA, as amended, proposes a new immigration regime based on a culture of human rights in government and civil society, the extent to which this contributes to eradicating marginalization, exploitation and discrimination against irregular migrants migrant workers is minimal.

#### **3.6.4 Detention conditions**

A major stumbling block to the effective implementation of the rights of irregular migrants held in detention is that of lack of proper oversight over actions of authorities. Detention of irregular migrants does not enjoy the oversight of the Judicial Inspectorate for Correctional Services and exists outside the control of the Inspecting Judge. Without such an independent body to oversee conduct of government it is questionable whether the authorities will protect the rights of irregular migrants under detention.

The 2005 report of the Working Group on Arbitrary Detention's visit to South Africa identified the conditions of detention of irregular migrants as a problem area for the state. According to the report irregular migrants deprived of their liberty were 'ill-treated, not able to contest the validity of their detention and at risk of being expelled from the country with no form of review or recourse'.<sup>154</sup> In 2006, Human Rights Watch conducted a similar investigation into the plight of irregular migrants in South Africa. The report submitted found that there is a very high incidence of detention of irregular migrants for periods beyond 30 days prescribed by law without due processes. The 2011 report of the Special Rapporteur's visit to South Africa confirms that the situation has not changed.<sup>155</sup> Irregular immigrants in detention still do not have access to legal aid and can therefore not challenge the lawfulness of their detention and can be expelled without review or recourse.

---

<sup>152</sup> As above.

<sup>153</sup> As above.

<sup>154</sup> Executive Summary of the 2005 report of the Working Group on Arbitrary Detention's visit to South Africa.

<sup>155</sup> Report submitted by J Bustamante Special Rapporteur on the human rights of migrants, 'mission to South Africa' A/HRC/17/33/Add.4/2011, para 73.

### **3.6.5 Lack of capacity and confidence to access justice**

Despite the constitutional entrenchment of the right of access to justice, there are insurmountable barriers that inhibit the capability and confidence of irregular migrants to access justice. In practice, the right of access to the courts and remedy is hindered by provisions in the IA relating to arrest, detention and deportation of irregular migrants. The obligation on the state to ensure that those whose rights are violated have access to effective remedy includes ensuring that barriers that inhibit such access are removed. There are no provisions in the IA, that provides for access to remedy in situations where the rights of irregular migrants are infringed. According to international standards, irregular status should not be a barrier to vindicating rights that have accrued to a person or a right that a person is entitled to.

Despite provisions in the Immigration Act targeting corruption, lack of oversight and ineffective reporting mechanisms promote impunity and ensure that officials who extort money from irregular migrants go unpunished. There are no reporting avenues within the system where irregular migrants can report abuse by officials without the fear of arrest, detention and deportation. This state of affairs has increased the marginalization and exploitation of irregular migrants in all sectors of society. Despite section 47 of the IA providing for an internal anti-corruption unit charged with the task of preventing, deterring, detecting and exposing any instance of corruption, abuse of power, and xenophobia, the one-sided approach implies that the focus is more on irregular migrants than the officials.

## **3.7 Conclusion**

There are certainly serious loopholes and obstacles in immigration legislation, policy and practical enforcement of fundamental rights of irregular migrants in South Africa. The current regime is outdated and inconsistent with both the domestic and external needs of the country.

## **CHAPTER FOUR**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **4.1 Summary and findings**

The study has examined the situation of irregular migrants in South Africa and the protection of their fundamental human rights. The result of the study indicates that irregular migrants are among the most vulnerable people in South Africa and their fundamental rights are generally disregarded by the state in immigration legislation laws and policies. The study focused mainly on examining the existing legal and policy protection framework for irregular migrants at the international level and in South Africa. Firstly, it was discovered that there is an extensive legal framework, standards and norms in place for the protection of irregular migrants. The entering into force of the MWC has now crystallized the rights of irregular migrants as a category of vulnerable group deserving of protection under international and national systems. Secondly, it was found that existing domestic legislation and policy on irregular migration do not adequately address the plight of irregular migrants, and there is therefore, a critical need to fill this gap in the protection of the fundamental human right of irregular migrants. This can be achieved by ensuring that South Africa ratifies or accedes to the MWC. The MWC does not promote irregular migration, but recognizes the fact that in order to effectively address the issue, an approach to immigration that is sensitive to the rights of all migrants is needed. In this vein, the MWC accentuates the fact that the promotion of the rights of migrants in a regular situation will in the long run discourage the exploitation of irregular migrants. The study also discovered that in addition to a lack of effective legislation and policy, there are no sufficient national mechanisms in place to regulate the treatment of irregular migrants, especially irregular migrants held in detention pending deportation. This can be remedied by the adoption of policies and amendment of legislation, to allow for proper protection of fundamental human rights of irregular migrants.

#### **4.2 Conclusion**

This study focused on existing legal and policy framework for the protection of the rights of irregular migrants in South Africa, and whether this framework is in accordance with international and regional standards set out in human rights instruments. As the study of the

relevant international and domestic law revealed, there is certainly a gap between the rights provided for irregular migrants in South Africa, and the rights that are internationally recognized and accepted. The study has indicated the gaps in the current system, and highlighted the lack of a comprehensive immigration policy and criminalization of irregular immigration as some of the major contributing factors. In what follows, the study proposes recommendations on how these gaps can be remedied. The recommendations include the reformulation of policy to reflect current international trends and standards for the protection of irregular migrants and the establishment of an independent body tasked with the oversight of the treatment of irregular migrants in South Africa. Whether or not these particular recommendations are implemented, it is clear that some action must be taken in order to protect the fundamental human rights of irregular migrants. The Constitution and the various international treaties impose a duty upon South Africa to respect the human rights of all people, including irregular migrants. South Africa is under a constitutional duty to ensure that the human rights of irregular migrants are not violated. The study concludes that there is a pertinent need on the African continent to adopt a comprehensive immigration policy and programme of action that ensure that the migration issue is regulated through a human rights lens.

### **4.3 Recommendations**

#### **4.3.1 Ratification of the MWC**

This paper specifically recommends that the government of South Africa ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. It is further recommended that South Africa subsequently domesticate these provisions. Current immigration laws and policies in South Africa do not adequately reflect current international norms and standards. The MWC sets out a clear human rights framework that can assist states in regulating irregular migration. The current report of the UN Special Rapporteur on the Human Rights of Migrants recommends ratification of the MWC by South Africa.<sup>156</sup> This study, as indicated above, endorses this recommendation.

---

<sup>156</sup> As above.

### **4.3.2 Domestic laws and policies**

The paper has examined the gaps in domestic policies and laws in South Africa and recommends accordingly that comprehensive policies and laws be put in place to comply with international standards for the protection of irregular migrants. The government should therefore adopt and implement a comprehensive immigration policy at the national level, guided by international human rights law and standards. It is further recommended that South African immigration policy be more sensitive to the economic and political instability in the region and the continent at large. The policy of exclusion, expulsion, restriction and criminalization of irregular migration is one of the major stumbling blocks in the protection of the fundamental rights of irregular migrants. It contributes to the vulnerable position of irregular migrants in South Africa, as irregular migrants are unable to report abuse and exploitation because of fear of arrest, detention and exploitation. State policy and legislation, focused solely on deportation, fail to take into account the plight of irregular migrants. The state should therefore formulate clear and detailed policy guidelines the implementation of which could be monitored by the national Human Rights Commission or another independent body.

### **4.3.3 Creating awareness about the rights of irregular migrants in South Africa**

The government should adopt measures aimed at integration and recognition of all migrants as part of South African Society. In his 2011 report 'mission to South Africa' the Special Rapporteur on the human rights of migrants recommends that,

the promotion of public mass-media campaigns and educational programmes which would, in particular, focus on positive values that migrants bring to the host society in economic, social and cultural terms.<sup>157</sup>

This study endorses this recommendation and adds that the need to educate society about the fundamental rights of irregular migrants may contribute to eradicate the host of marginalization and abuse at the hands of state officials and citizens.

---

<sup>157</sup> Bustamante (n 18 above) para 75.

#### **4.3.4 Establishment of visible and accessible mechanisms for reporting violation of fundamental rights**

As indicated above, one of the major stumbling blocks to the realization of the fundamental rights of irregular migrants is the inability to report violations of rights due to fear of arrest, detention and deportation. The Special Rapporteur has recommended that the government should establish a visible and accessible mechanism whereby members of the public can report cases of violence against foreign nationals. This study endorses again this recommendation. In addition to this, the mechanism should promote the rule of law and violations by public officials should not go unpunished. Furthermore, irregular migrants who have vested rights should be provided with the opportunity to claim those rights before deportation procedures are enforced.

#### **4.3.5 Judicial oversight over detention of irregular migrants awaiting deportation**

The Special Rapporteur also recommended that irregular migrants under detention for purposes of deportation should benefit from the oversight of the Judicial Inspectorate for Correctional Services under the control of the Inspecting Judge and have access to the same compliance mechanisms of detainees serving sentences or awaiting trial. The study endorses this recommendation and adds that this oversight is critical to guard against violations of recognised international norms and standards for the protection of irregular migrants held in custody.

#### **4.3.6 Adoption of regional immigration policy**

The migration phenomenon affects not only South Africa but also the region as a whole. It is therefore pertinent that South Africa becomes more active in working towards a comprehensive SADC policy on migration. Such policy should take into account the extraordinary dynamism and instability of migration forms and patterns in the region. South Africa, together with its neighbours, should move away from legislation and policy aimed at control and exclusion. According to Crush *et al*

the fundamental policy challenge is to move the states of Southern Africa to a regionally-harmonized and consistent set of policies that emphasise good governance, sound management and client-centered service delivery.<sup>158</sup>

---

<sup>158</sup> J Crush et al *Migration in Southern Africa* (2005) 'A paper prepared for the policy analysis and research programme of the Global Commission on International Migration' 1.



This study endorses this recommendation. It is therefore recommended that state policy should reflect the 'cross-cutting' nature of migration and accordingly seek to integrate it into all facets of state policy-making and planning.

Oucho and Crush have noted that South Africa continues to oppose any SADC attempt to adopt a protocol on free movement of people in the region. It is recommended accordingly that, South Africa take the front seat in drafting such a comprehensive policy given the dynamic nature of the migration phenomenon.<sup>159</sup> The positive implications of such a policy cannot be overstated.

Migration is a big feature of African livelihood and should therefore, be seen as a catalyst for development. However, migration has the potential to cause conflict between African countries, which could undermine the principles of NEPAD. It is therefore pertinent that further studies be conducted into understanding migration on the continent in fostering African cooperation, unity, interaction and development.

**Word Count: 15 604.**

---

<sup>159</sup> J Oucho & J Crush 'Contra free movement: South Africa and SADC migration protocols' (2002) 48 *Africa Today* 150.

# BIBLIOGRAPHY

## Books

Blake, N & Husain, R (2003) *Immigration asylum & human rights* New York: Oxford University Press

Currie I & Waal J (2010) *The bill of rights handbook* Cape Town: Juta

Tutu, D (1999) *No future without forgiveness* London: Rider

## Chapters in books

Alston, PG 'Labour rights as human rights: the not so happy state of the Art' in Alston (ed) (2005) *Labour Rights as Human Rights* New York: Oxford University Press

Bosniak, LS 'Human rights, state sovereignty and the protection of undocumented migrants under the international migrant workers' convention' in Bogusz, B; Cholewinski, R; Cygan, A & Szyszczak, E (eds) (2004) *Irregular migration and human rights: Theoretical, European and international perspectives* Leiden: Martinus Nijhoff

Guild, E 'Who is an irregular migrant' in Bogusz, B; Cholewinski, R; Cygan, A & Szyszczak, E (eds) (2004) *Irregular migration and human rights: Theoretical, European and international perspectives* Leiden: Martinus Nijhoff

Lansink, 'Migrant workers and non-discrimination in the workplace: an international law perspective' in O Dupper & C Garbers (eds) (2009) *Equality in the workplace: reflections from South Africa and beyond*

Oberoi, P 'Empowering migrants: human security, human rights and policy' in Edwards, A & Fertman, C (eds) (2010) *Human security and non-citizens law, policy and internal affairs* New York: Cambridge University press

Peberdy, S & Crush, J 'Rooted in racism: The origins of the Aliens Control' Act in J Crush (ed) (1998) *Beyond control: Immigration and human rights in a democratic South Africa* Cape Town: Southern African Migration Project

## Journal Articles

Brink, C 'On minorities' (2005) 24 *South African Journal of Philosophy* 153

Crush, J & McDonald, DA 'Introduction to special issue: Evaluating South African immigration policy after Apartheid (2005) 48 *Africa today* 1

Dodson, B & Crush, J 'Report on gender discrimination in South Africa's 2002 Immigration Act: Masculinising the migrant' (2004) 77 *Feminist Review* 100

Hanekom, B & Webster, AL 'The role of South Africa's government in the xenophobic violence of May 2008' (2010) 13 *University of Pennsylvania Journal of Law and Social Change* 91

Hicks, TF 'The constitution, Aliens Control Act, and xenophobia: the struggle to protect South Africa's Pariah – the undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies* 393

Klaaren, J 'A comment on the human rights watch report 'unprotected migrants: Zimbabweans in South Africa's Limpopo province' (2007) 7 *African Human Rights Law Journal* 249

Liao, FL 'Illegal immigrants in garment sweatshops: The Universal Declaration of Human Rights' (1996) 3 *Southwestern Journal of Law & Trade in the Americas* 487

Lee, JH 'Unlawful status as a constitutional irrelevancy?: The equal protection rights of illegal immigrants' (2008) 39 *Golden Gate University Law Review* 1

Lewis, B 'Forging an understanding of Black humanity through relationship: an ubuntu perspective' (2010) 1 *Black Theology: An International Journal* 69

Machava, A & Polzer, T 'Bad work if you can get it: cycles of exploitability among Mozambican immigrants in South African labour markets' (2006) 36 *Africanus: Journal of Development Studies*

Mosselson, A 'There is no difference between citizens and non-citizens anymore': violent xenophobia, citizenship and the politics of belonging in post-apartheid South Africa' (2010) 36 *Journal of Southern African Studies*

Nguyen, PM 'Closing the back door on illegal immigration: over two decades of ineffective provisions while solutions are just a few words away' (2010) 13 *Chapman Law Review* 615

Oucho, J & Crush, J 'Contra free movement: South Africa and SADC migration protocols' (2002) 48 *Africa Today*

Solomon, H 'Turning back the tide: Illegal immigration into South Africa' (2005) 1 *Mediterranean Quarterly* 90

Tessier, K 'The challenge of immigration policy in the New South Africa' (1995) 3 *Global Legal Studies Journal* 255

Trimikliniotis, N; Gordon, S & Zondo, B 'Globalisation and migrant labour in a "rainbow nation": a fortress South Africa?' (2008) 29 *Third World Quarterly* 1323

## **Reports/Papers**

Crush, J; Williams, V & Peberdy, S *Migration in Southern Africa* 'A paper prepared for the policy analysis and research programme of the Global Commission on International Migration' (2005)

Bustamante, J Special Rapporteur on the human rights of migrants, 'mission to South Africa' A/HRC/17/33/Add.4/2011

Bustamante, J Special Rapporteur on the human rights of migrants, 'Human rights of migrants' A/65/222/2010

Bustamante, J Special Rapporteur on the human rights of migrants, 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' A/HRC/7/12/2008

Global Commission on International Migration *Migration in an interconnected world: New Directions for actions* (2005)

Human Rights Watch *Keep your head down: unprotected migrants in South Africa* (2007)

Koser, K *Irregular migration state security and human security* Paper prepared for the Policy analysis and research Programme of the Global Commission on International Migration (2005)

Maharaj, *Immigration to post-apartheid South Africa* Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (June 2004)

Rodriquez Pizarro, G Special Rapporteur on the human rights of migrants, 'Specific groups and individual migrant workers' E/CN.4/2003/852002

### **National legislation**

Aliens Control Act 96 of 1991

The Constitution of the Republic of South Africa Act 108 of 1996.

Immigration Act 13 of 2002.

### **International and regional instruments**

African Charter on Human and Peoples' Rights 1981

American Convention on Human Rights 1969

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment *Adopted by General Assembly Resolution 43/173* (1988)

Convention on the Rights of the Child 1989

Convention Relating to the Status of Refugees 1954

European Convention on Human Rights 1953

International Covenant on Civil and Political Rights 1966

The International Covenant on Economic, Social and Cultural Rights 1966

International Covenant on the Rights of Migrant Workers and their Families 2002

OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa 1969

### **Case Law**

### **South African case law**

*Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 (LC)

*Lawyers for Human Rights v Minister of Home Affairs* 2004 1 SA 1 (CC)

*Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC)

*S v Makwanyane* 1995 3 SA 391 (CC)

*S v Mhlungu* 1995 3 SA 391 (CC)

*Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC)

### **African case law**

*Achuthan and Another (on behalf of Banda and Others) v Malawi* (2000) AHRLR 144 (ACHPR 1995)

*Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999)

*Doebbler v Sudan* (2003) AHRLR 153 (ACHPR 2003)

*Forum of Conscience v Sierra Leone* (2000) AHRLR 293 (ACHPR 2000)

*Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008)

*Larbi-Odam v MEC for Education (North West Province)* 1998 1 SA 745 (CC)

*Purohit and Others v The Gambia* (2003) AHRLR 96 (ACHPR 2003)

*Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001)

### **Inter-American case law**

Inter-American Court of Human Rights, Advisory Opinion OC-18/03, *Juridical Condition and Rights of Undocumented Migrants* (2003)

### **European Case law**

*Kaya v Turkey* (1999) 28 EHRR 1

*Osman v UK* (2000) 29 EHRR 245

### **UN General Comment/Recommendations**

CERD General Recommendation 30: Discrimination Against Non-Citizens

HRC General Comment 15: The position of aliens under the covenant

HRC General Comment 18: Non-discrimination

HRC General Comment 20: Prohibition of torture and cruel or punishment

HRC General Comment 14: Right to life

**Websites**

[www.gcim.org](http://www.gcim.org)

<http://www2.ohchr.org/english/law/cmw.htm>