

**IMPLICATIONS OF A POTENTIAL RATIFICATION OF THE
INTERNATIONAL CONVENTION ON THE PROTECTION OF
THE RIGHTS OF ALL MIGRANT WORKERS AND THEIR
FAMILIES BY SOUTH AFRICA**

BY

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DEDICATION

To my wife (Fatima) and children (Avery, Kit and Lemuel) who has been the force behind the scene and encouragement.

ACKNOWLEDGEMENT

I sincerely thank God Almighty for the guidance and protection throughout this endeavour. I also want to thank my family for their support and my parents for the encouragement.

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To everyone who encouraged me throughout this work and those I have not mentioned in this acknowledgement but who has been of help to me in one way or another, I say thank you.

LIST OF ABBREVIATIONS AND ACRONYMS

AIDS	Acquired Immunodeficiency Syndrome
BEAC	Basic Conditions of Employment Act
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CMW	Committee on Migrant Workers.
CCMA	Commission For Conciliation Mediation and Arbitration
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of Rights of All Migrant Workers and the Members of their Families.
ILO	International Labour Organisation
LRA	Labour Relation Act
MDGs	Millennium Development Goals
MPCS	Monetary Policy Committee
NGO	Non Governmental Organisations
SAA	Social Assistance Act
SADC	Southern African Development Community
SOWETO	South Western Township
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCRC	United Nations Convention on the Rights of the Child.
UNESCO	United Nations Educational Scientific and Cultural Organisation
UNICEF	United Nations International Children Emergency Fund.
WHO	World Health Organisation.

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CHAPTER ONE: Introduction

1.1 Background

The International Convention on the Protection of Rights of All Migrant Workers and the Members of their Families (ICRMW) is a multinational treaty in the field of human rights and migration, administering, preserving the protection of the right of migrant workers and members of their families.¹ It was assimilated on 18 December 1990, without a vote and enforced on 1 July 2003.² As of August 2019 ICRMW was signed by 54 member States of the United Nations. Today only 58 States have ratified the Convention and in Africa 24 countries have ratified while an additional 8 African countries have signed the Convention with intention to ratify in future. Above all, no country in Western Europe, North America, Australia, India and more especially South Africa are yet to ratify this convention.

The convention institutionalises a committee for monitoring and implementing the convention called the Committee on Migrant Workers (CMW). The CMW is an organ of self-standing resource persons monitoring the enforcement of the convention by its member states.

Currently, only 54 of the over 190 of independent States of the United Nations have sanctioned or acceded to the ICRMW. Although, an additional 18 UN member states have signed as an indication to ratify the convention in future, it is worth saying that many nations do not see the importance of this human rights instrument.³

South Africa, being one of the dominant economies on the African mainland and a major recipient of migrants on the African continent is yet to ratify this important

¹ Vanheule, D., 2009. The International Convention on the Protection of the Rights of all migrant workers and members of their families. In International human rights law in a global context.-Bilbao, 2009 (pp. 473-494).

²UN Treaty Collection. 2019. Chapter IV: Human rights.
https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND
(accessed on 17 May 2019).

³ <http://www.247wallst.com> (accessed 10 July 2015)

Convention.⁴ Despite being one of the most liberal and constitutional based country on the African continent with promising human rights guarantees.⁵

According to the International Labour Organisation (ILO), migrant workers are those individuals who cross national border to seek for better opportunities, driven by either employment or economic inequalities or both.⁶ More so, many people, inclusive of refugees, permanent immigrant, asylum-seekers, migrant workers among others, work and reside in a country outside their home of citizenship. The term migrant workers perspective was conceptualised by the United Nations High Commissioner for Human Rights is "a person who is to be engaged or has been engaged in a remunerated activity in a State of which he or she is not a national".⁷

The reason for the non-adoption of the ICRMW in South Africa is unclear, considering that all persons in South Africa and likewise have sets of basic rights guaranteed by the domestic law and international conventions irrespective of their legal status. Asylum seekers especially possess rights premised on international law and the South African Refugee Act, under the principle that persons fearing return to their countries for the sake of persecution, gender bias, race, nationality, religion and membership to social or political organisation must not be compelled to leave the country forcefully.⁸ South Africa observes this and in reference to the Zimbabwe rendition case where some Zimbabwean citizens were repatriated forcefully to Zimbabwe even when they insisted that it was not best for them to be home, many officials that were part of this activity have been found guilty.⁹ Refugees also have additional rights (health, work and study) in relation to work both under the Refugees Convention and South African national law.

⁴ Solomon, H., 1994. Migration to Southern Africa: a comparative perspective. *Africa insight*, 24(1): 60-71.

⁵ W Elkan Labour Migration from Botswana, Lesotho and Swaziland, Migrant and the transformation of modern Africa Society. *African Perspective* No 1. Leiden (1978)

⁶ <https://www.ilo.org> (Accessed 27 April 2018)

⁷ United Nations High Commissioner for Human Rights.
<https://www2.ohchr.org/english/bodies/cmw/faqs.htm> (Accessed 20 April 2019)

⁸ <https://www.hrw.org/legacy/reports98/sareport/App1a.htm>

⁹ <https://www.enca.com/south-africa/shadrack-sibiya-guilty-involvement-zim-rendition-case> (Accessed 23 May 2019)

In understanding the push cause of migration or the north south migration, we can look into the consideration that in Sub-Saharan Africa, over 70 million children, which amounts to 22 percent of the entire youngster in the sub-Saharan African area are engaged in forced labour (see figure 1 for global victims of forced labour).¹⁰ This goes a long way to under pin the point that most of the challenges that lead to migration are all endeared in these forced labour activities. Furthermore, the migrant workers usually travel with their family members and children included and thus endangering them. This goes a long way to the children not being able to access healthcare and education.



Figure 1: Global estimates on Proletariat

Source: International Labour Organisation¹¹

This makes one wonder whether some member States of the United Nations encourages cheap and slave labour. The commercialisation of slave or forced labour is steadily on the increase, as the number of migrants seeking better opportunities globally surge. (see figure 1 and 2).

¹⁰ United States, Department of Labour. 2017. Bureau of International Labour Affairs. <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/sub-saharan-africa>

¹¹ ILO. 2012. Statistics on forced labour, modern slavery and human trafficking. <https://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>

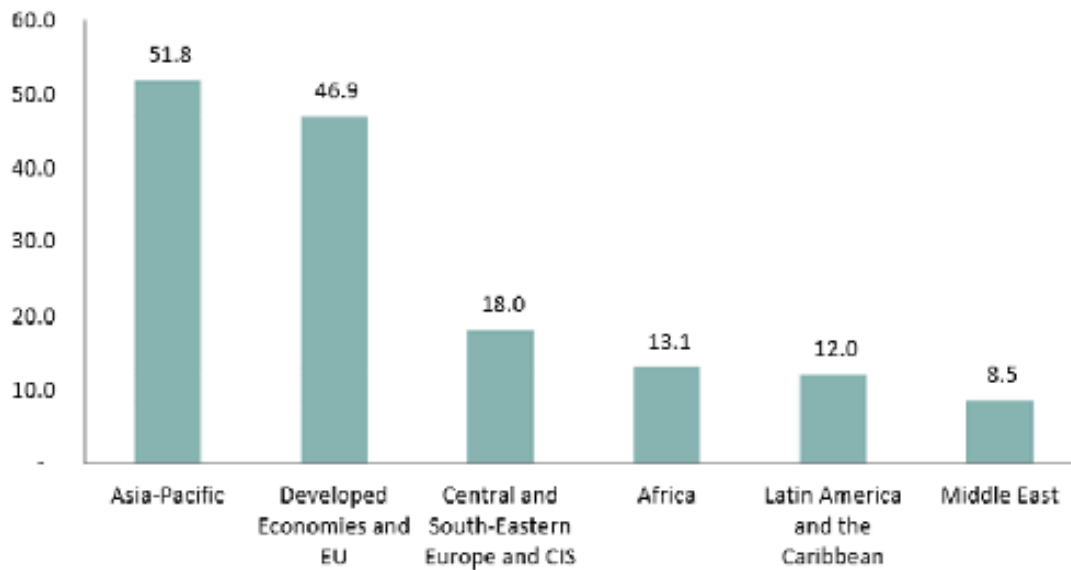


Figure 2: Annual profit of proletariat per region (US \$ billion)

Source: International Labour Organisation¹²

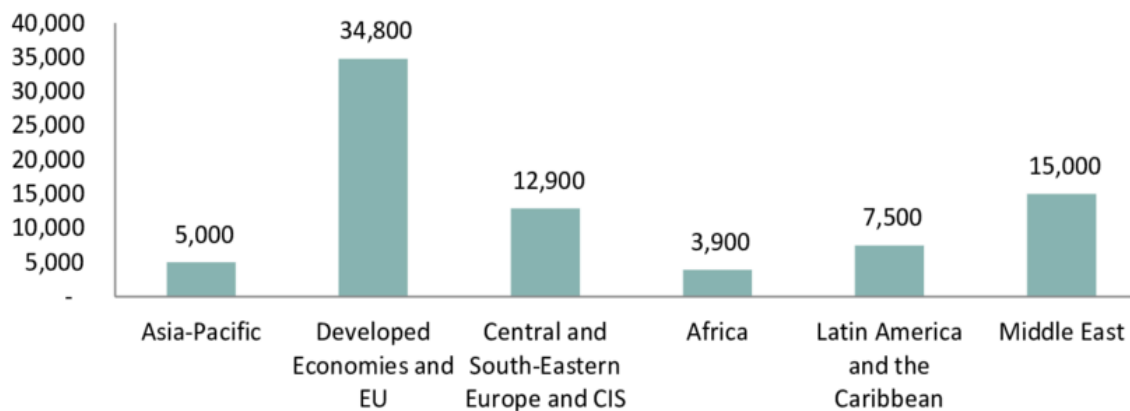


Figure 3: Annual profit per victim of proletariat per region (US \$)

Source: International Labour Organisation¹³

Hence, the questioning of the transformation of what was formerly referred to as slave labour by Stéphanie Thomson of the World Economic Forum. Where she demonstrated that there has been a transition in the modus operandi and form of force labour from barbaric system to migrant and undocumented workers status.¹⁴

¹² ILO. 2012. Statistics on forced labour, modern slavery and human trafficking. <https://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>

¹³ ILO. 2012. Statistics on forced labour, modern slavery and human trafficking. <https://www.ilo.org/global/topics/forced-labour/policy-areas/statistics/lang--en/index.htm>

¹⁴ Thomson, S. 2007. Are you benefitting from slave labour? World Economic Forum. <https://www.weforum.org/agenda/2015/12/are-you-benefitting-from-slave-labour/>

It is commonplace in a number of African countries and in South Africa especially, that migrant workers are coerced to perform at their utmost, even under inhuman conditions. It has the tendency of compromising their health and violating their fundamental human rights. These failures can be attributed to largely poor regulatory framework for them conversely, and the non-ratification of the ICRMW.¹⁵ This has resulted in gross abuse, disregard and disrespect for migrant workers and members of their families, also creating friction for employers to pay lower wages, owing to the shortfalls of the South African immigration and employment laws, lack of personal freedom, security and liberty.¹⁶ This is obviously in contravention of the laws and thus putting pressure on the reports that go out of the country, which is in conflict with basic human rights principles. In my view the ratification of the ICRMW is a solution that will go a long way to resolve many of these shortcomings.

According to Viljoen, migrant workers abuses are much prevalent in the mining industries.¹⁷ Migrant workers are met with unequal opportunities, treatment and income commensurate with the volume of work done or equal pay with locals in the country. Because, migrant workers are reluctant to seek redress, they cannot be vocal about the treatment meted on them or pursue migrant workers rights, due to the non-adoption of ICRWM. Hence, few cases that make headlines are suppressed otherwise make the complainant understand that it is more of a privilege they enjoy rather than rights.¹⁸ This opens loopholes to dehumanise migrant workers in South Africa and have resulted in severe psychological trauma in certain cases. Thus, the need for South Africa to ratify the ICRMW treaty to provide the human rights leverage required for migrant workers and even fulfil its ambition of human rights State adherer.

Migrant child labour is the least visible and eliminating child labour is so much relevant to achieving Millennium Development Goals (MDGs) 1 (do away with uttermost poverty and hunger), MDGs 2 (compulsory basic education) and MDGs 6 (wage war against HIV/AIDS pandemic, malaria and other diseases). This is worse among children,

¹⁵ Human Right Watch. 2007. "Keep Your Head Down" Unprotected Migrants in South Africa. <https://www.hrw.org/report/2007/02/27/keep-your-head-down/unprotected-migrants-south-africa>

¹⁶ Ibid

¹⁷ F Viljoen (ed) Beyond the Law: *Multi-Disciplinary Perspectives on Human Rights* (2005) 119

¹⁸ <https://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-migrants-workforce> (accessed on 20 April 2017)11

according to United Nations International Children's Emergency Fund (UNICEF)¹⁹ child labour is a harsh cause and result that dissipate a nation's human growth capital and increased poverty.²⁰ In addition, it impedes on child's education particularly in relation to the girl child. Trafficking and prostitution constitute the trounce forms of youngster drudge.²¹ In addition to MDG 7, which call on turnaround the loss of environmental resources, it would enable to drastically reduce environmental hazards – which annihilate households and positively augment conditions that incubate child labour. These are the consequences or by products that arise with the non-ratification of ICRMW that allows or give room for all these mal facets. Taking into cognisance that the principles embodying the basics or the instrument with regards to human rights is particularly articulated and well documented in various popular conventions and this could be highlighted in (Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Discrimination against women and Convention on the Rights of Child).²²

Looking At Migrant Workers versus Asylum Seekers

Migrant workers recently have disguised themselves as refugees, because in South Africa, refugees are accepted under the South African Law. In Section 3 of the Refugee Act No. 130 of 1998 in South Africa, under this law, a person can be recognized as refugee under three conditions:

- “owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality (Stateless) and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it,” either;
- “owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his

¹⁹ Unicef. 2019. Child Labour. https://www.unicef.org/protection/files/child_labour.pdf

²⁰ Ibid

²¹ Ibid

²² United Nations High Commissioner for Human Rights. 1990. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CMW.aspx> (accessed on 27 May 2019)

or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere,” either

- “is a dependent of a person contemplated in paragraph (1) or (2) above. Dependents include the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of an asylum seeker or refugee” (Refugees Act of 1998 Section 1).

Without any rule defining correct procedure for migrant workers, the asylum or refugee status permits refugee seekers to pursue any job in the country when they are in possession of a refugee status, and enjoy education to tertiary level, while paying the same school fees as locals. This is also one of the many reasons for competition over scarce resources and the conflicts that ensue between locals and migrants. Hence, Section 2 of the Refugees Act “entrenches the international law obligation of non-refoulement adds that no person may be compelled to return to or remain in a country where his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.”²³

These Acts specify that “social group” may include, but not limited to, sexual orientation, persons with specific gender, class and disability. In essence, one may argue that it is safer in South Africa to work as an asylum seeker than a legal documented migrant worker, especially in lower echelon jobs although, there is a high rate of discrimination among asylum seekers to work and study in the country.²⁴ Several human challenges plague the country, from unlawful arrest, unlawful deportation, poor healthcare, abuse and bullying in workplace, marginalisation and exploitation of this vulnerable group, resulting in high rate of job dissatisfaction, fatigue and psychological trauma among migrant workers in South Africa.²⁵

To have a full grasp of these challenges, one must first try to decipher how regulations are framed for human right issues under the legal procedure in South Africa. Including

²³ RefugeeLaw. 2019. Refugee Law Consultant. <http://www.refugee.co.za> (Accessed 27 May 2019)

²⁴ Ncube, M. 2017. South Africa Steps up Deportation of Asylum Seekers. New Deeply. <https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-steps-up-deportation-of-asylum-seekers>

²⁵ Ibid

which legislations upheld ICRMW, including how such laws and procedure redress these challenges? More so, one need to ponder how reported cases of migrant workers violations has been handled by the judiciary. The problem with this is that victims of human rights abuses find it difficult to access legal remedy since they do not have the time and sometimes authorities deliberately ignores their complaints.²⁶ Thus, it is imperative at this time for the nation to look beyond the legal discourse of South Africa's implications on ratification of the ICRMW. Nevertheless, strive to understand the global advantages toward the development of the country, as well as, join in the discourse towards global citizenship and African citizens in particular and ratify the ICRMW in order to overwhelm fewer of the challenges which appear from finagle and expound of human rights inquiry within a legal framework in South Africa and beyond.

The overarching motive of this dissertation is to survey the implications that may arise due to the potential ratification of the ICRMW by South Africa. The contribution of migrant workers - economically, socially, environmentally and psychologically among others is significantly prospect to sustainable development. However, benefits resulting from skilled migrant workers cannot be captured in economic terms alone.²⁷

1.2 Problem Statement

This study aims to assess the implications of South Africa migrant workers' rights if South Africa ratify the ICRMW. Since 1994, after South Africa became democratic one would have assumed that the country would easily ratify policies, procedures and laws relating to improved migrant workers access to human rights. However, South Africa have proven a distant isolation to such assumption, as it turns to disregard and question several United Nations arrangement or agreements, in recent times.

The Freedom Charter is an essential legal framework in South Africa for the basis of governance, however, significant neglect on the basic rights of migrant workers. It is therefore imperative to undertake a study that seeks to understand or examine the socio-

²⁶ <http://www.hrw.org>(accessed on April 2018)

²⁷ T Manuh (ed) *At home in the world? International migration and development in contemporary Ghana and in West Africa* (2005)

legal analytical methods expressing its contribution to the economic, social and environmental factors among others in South Africa.

Countries that are reluctant to ratify ICRMW base their argument on being a receiving nation, and thus create internal policies to regulate migrant workers inflow. The Departments of Home Affairs and Labour provide the protections captured in ICRMW to an extent in South Africa. Hence, this study argues that the adoption and implementation of the ICRMW will provide equitable distribution of resources, improve investment in the country, and create a level playing field for competition of resources and employment. Reduce bullying, incivility, poor pay, and all forms of discrimination of migrant workers in the country.

1.3 Research Questions

The following are the research questions emanating from this study.

- i) What is the content of the ICRMW?
- ii) What legislative and policy framework exist in South Africa regarding migrant workers in the country?
- iii) What obstacles prevent the ratification of Migrant Workers Convention in South Africa?

1.4 Literature Review

Globally and in Africa, literature governing or discussing the concept of migrant workers are derived from three main sources: academic literature, intergovernmental policy documentation and media articles.²⁸ Utilising literature review on the subject matter, this study will bring out the denotations and foundational support to migrant workers' rights under the notion and philosophy of human rights. Taking in cognisance, how migrant workers can enjoy full privilege in South Africa, in a case where the Government of South Africa ratify and implements ICRMW.

This research draws literature from communiques, online sources relevant to the ICRMW. Highlighted cases of violations recorded in relation to Migrant Workers' rights

²⁸ International Labour Office (ILO) *International labour migration: A rights based approach* (2012)

and lodge complaints concerning their employer's ill treatments, including xenophobic attacks.²⁹ Such attacks on African nationals especially in Soweto in Gauteng, Durban in KwaZulu Natal, among other provinces in the countries demonstrates the state of dissatisfaction and harassment felt by African nationals. Xenophobia which is translated to be the fear of immigrants especially from other African countries, this outcome has been seen with growing threats to the lives of migrant workers .³⁰ However, a case where only African nationals are threatened and attacked begs the assumption that South Africans might not necessary be xenophobic but Afrophobic. Afrophobia,³¹ which is the fear of Africans and melanin an opposite of Afrophilia.³²

To further streamline the discourse, the following objectives of this study will include:

1.5 Objectives

- a) To examine the content of ICRMW.
- b) To assess South African human right legislation on migrant workers.
- c) Obstacles towards the ratification of ICRMW in South Africa.

1.6 Rationale

Discourse on globalization, global citizenship, sharing economy, circular economy, collective and collaborative consumption, development, and migration studies are witnessing a rise in debate globally.³³ Although, from a legal perspective one may state that there has been significant discourse on migrant workers and their rights to work in humane condition. However, there is a disconnect in literature, theories and praxis on the socio-legal dimension on the effect or impact of inhuman behaviour expressed by employers of migrant workers in South Africa, based on the reflection of the non-adoption and implementation of the ICRMW in South Africa.³⁴

²⁹ International Labour Office (ILO) International Labour Migration: *A right-based approach* (2010)

³⁰ <http://www.citypress.co.za> (accessed on 11 March 2015)

³¹ Kivuto Ndeti; Kenneth R. Gray; Gerard Bennaars (1992). The second scramble for Africa: a response & a critical analysis of the challenges facing contemporary [sic] sub-Saharan Africa. Professors World Peace Academy. p. 127. ISBN 9966835733. Retrieved 10 December 2015.

³² Ibid

³³ Belk, R. (2007). Why not share rather than own? The Annals of the American Academy of Political Social Science, 611(1), 126-140.

³⁴ List of useful works include: On Migration generally: S Castles and A Davidson, Citizenship and Migration: *Globalization and the Politics of Belonging* Routledge, New York, (2006); M Piore Birds of

A new political and economic dispensation comes with expectations of improve quality of life and these are expectations from all migrant workers contribution economically and socially in South Africa for over 20 years and more. Harris argues that ‘the major factor which may motivate immigrants to South Africa may be associated with the country’s internationally recognized democracy and freedom.’³⁵

1.7 Research Methodology

Here I will utilize desk top method where I will review journals in this regard and completely draw relevance to it and expunge it. More so, legal method will be utilized and aimed at assessing what amendments would be needed for South Africa legislation if the convention would be ratified. The alternative way of reviewing this is by assessing ICRMW from a multi-disciplinary angle, aligning notions from legal perspective and socio-political. When using this method, I will note dissimilarities in the domestic policies and laws.

1.8 Structure of the Dissertation

This research work will be structured in five chapters. Chapter one will look at the introduction where I will give a background of the study through problem statement, research questions, literature review, objectives, rationale and research methodology. Chapter two will be on human rights from a migrant workers’ perspective and the summary of the ICRMW and a zoom of the ICRMW content. Chapter three will be on jurisprudence looking at South African immigration Act and how legislature can be amended in relation to ICRMW and look at cases that have been remarkable and has been in favour of ICRMW. Again, here I will look at the South African Immigration Act and the core of the 2002 immigration Act peculiarly vis a viz migrant. I will also look at the justiciability of migrant workers human rights. Chapter four looks at the implication if South Africa ratify the ICRMW by looking at the obstacles to the ratification of ICRMW in South Africa. In chapter five I will infer from chapters one to four and make

Passage: *Migrant Labour in Industrial Societies* Cambridge University Press (1979); B Harris ‘A foreign Experience: *Violence, Crime and Xenophobia during South Africa’s Transition* (2001) 70 *Violence and Transition Series*

³⁵ B Harris ‘A foreign Experience: *Violence, crime and Xenophobia during South Africa’s transition* (2001) 70 *Violence and Transition Series*

my conclusion and recommendations on the implications if South Africa ascends to the ICRMW.

CHAPTER TWO: Migrant Workers Perspective Under Human Rights and Summary of ICRMW

2.1 Human Rights from a Migrant Workers' Perspective

Human rights have many tributary meanings, Clapham notes, 'some invoking human rights is a heartfelt morally justified to correct all forms of injustices, for others it is no more that slogan to be treated with suspicion or even hostility.'³⁶ Although we all possess human rights, but this has to be requested, work out and benefit from these rights. The human rights used herein goes hand in gloves with the sociological ideal utilized by Piper that the rights is seen when people commence demanding and exercising them but not only when State administration recognize them.³⁷ This is recommended in South Africa because of the inadequacies by government in not guaranteeing migrant workers' rights to the same extent as the right of the citizens.³⁸

Evans notes, the presiding conception of human rights, which weighs more to civil and political rights, prefers the interests of those dear to the process of economic globalization rather than those on the outside.³⁹

Migrant workers are vulnerable and they are easily taken advantage of, Shelley illustrated how abuses faced by migrant workers and thickens the powerlessness that they experience and he also notes that the exploitation of migrant labour is over and above the norm of what is imposed on the local workers.⁴⁰ Containing and streamlining migration to equal the rights of migrant workers with this interest should be the focus and recommendation of the stakeholders.⁴¹

The rights of migrants were first mentioned in the United Nations in 1972, when the Economic and Social Council in its resolution 1709 expressed with deep shock the exportation of migrant workers to Europe in a very degrading manner that can be termed slavery. The United Nations General Assembly in its resolution 2920 called upon

³⁶ A Clapham Human Rights; a very short introduction (2007)1.

³⁷ Viljeon (n2 above)121

³⁸ T Evans *The politics of human rights: A global perspective* (2001) 118.

³⁹ As above

⁴⁰ T Shelley *Exploited: Migrant Labour in the new global; economy* (2007)6

⁴¹ ILO (n4 above)212

receiving states to discourage discrimination against migrant workers and called upon nations to encourage this by, passing legislations to protect them.

In 1976 report on clandestine and illicit trafficking on exploitation of labour by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities through the Special Rapporteur⁴² acknowledged there were two types of problems illicit and clandestine operations and discrimination of the migrant workers in their destination States. This was what triggered the recommendations for ICRMW. It was resound in Geneva in 1978, in the World Conference to Combat Racism and in 1979 the General Assembly adopted resolution 34/172 and a core committee was drawn from all member States and other international organization in 1980 with the mandate to draw up a Convention on the Protection of Migrant Workers Rights. Organizations involved included – the Commission on Human Rights, the Commission for Social Developments, the International Labour Organization, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization (WHO).

2.2 Looking at the ICRMW

The ICRMW has content of multinational attainment that provide human rights for migrant workers. Part of them are extensive and wholesome, to all human being while alternatives are more streamlined applying to only to migrant workers with regular status. Diplomats are not considered migrant workers this is because their working environment could be considered home territory. The main multinational scripts promises with certainty human rights for all human beings are the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).⁴³

ICRMW is one of the forefront conventions that seek to protect migrant workers' Rights.⁴⁴ This convention opened the many human rights abuses that are suffered by migrant workers and thus moved for its protection. The covenant seeks to safeguard and

⁴² Mrs Halima Warziza

⁴³ <http://www.un.org/en/documents>; see fact sheet 2 (Rev 1) The International Bill of Human Rights (accessed 19 May 2014)

⁴⁴ <http://www2.ohchr.org/english/law/cmw.htm> (accessed 19 May 2014)

the rights of all migrant workers and members of their families heedless of their residency in their country of residence. It list protection for migrants and members of their families, with the objective of granting migrant workers as more than simply economic factors of offering by restricting the whimsical debarment of legitimate migrant workers.⁴⁵ Some African States have ratified the convention but South Africa is yet to and thus the State refusal to ratify the convention subvert the strengths of the provisions curbed in them.

Additionally, the progressive nature of contravention of human rights also suggests that drafting and ratifying might not be enough but its required to uphold the outlined laws in the treaty.⁴⁶ For these purveying to be effectual, skilful observers were appointed to inspect how State reports on how they satisfy their human rights treaties, although lone complaints can be usher in front of those States that recognize right to complain on their concordat. Thus, migrant workers can seek redress at national, regional and international levels if their rights are infringed.

2.3 Content of the Convention

The ICRMW include a wide range of human rights from socio-political, civil, economic, and cultural. These are the guiding principle within the State where the migrant worker reside or is working or engaged in a remunerated activity of which they are seen as migrant workers-this is particularly referenced in article 2(1).⁴⁷ As I mentioned above the migrant worker is not only beneficial to the state where he or she is working but also to their home country by this they also transfer their earnings and access rightful data on the transhumance process, giving detailed interpretation of human rights as related to migrant workers.

The convention is structured into 9 parts⁴⁸. I will try to highlight only the parts relevant to this discuss. Part I contains the scope and definitions. Article1, covers the migrant workers and members of their family's rights in the entire transhumance process and

⁴⁵ <https://www.migrationpolicy.org/article/promise-and-prospects-uns-convention-migrant-workers> (accessed 19 May 2014) Yau Promise and Prospects of the UN's Convention on Migrant Workers (2005)

⁴⁶ Clapham (n6 above)52

⁴⁷ <http://www2.ohchr.org/english/law/cmw.htm> (accessed 19 May 2014)

⁴⁸ <http://www.ohchr.org/english/law/cmw.htm> (accessed 18 July 2016)

protect their inherent human rights. Article 2 attempts to define the term 'migrant workers' looking at frontier workers, seasonal workers, sea farers, work on an shoreside installation, workers that move from one job to another, project tied worker, specified-employment worker and self-employed worker. Article 3 clearly states the general principles in respect to human dignity, non-discrimination, equality between human beings. Article 4 attempts to define the term members of the migrant workers families. Article 5 states that migrant workers and members of their families should be considered regulated once allowed entry. Article 6 defines State of birth, State of employment and State of conveyance.

Part II looks at equal opportunities with respect to rights. Article 7 request States to guarantee the rights of migrant workers, their children and wives.

Part III covers the human privileges of all migrant workers and their relations. Article 8 emphasize on the entitlements of migrant workers join and depart their State of origin. In article 9 there is the guarantees privileges to life. Article 10 indicate that they will not be subjected to abuse and sadistic treatment. Article 11 serves to state that they will not be held as slaves or forced labour. Article 12 expresses freedom of reasoning, principles and creed. Article 13 guarantees their freedom of countenance. Article 14 uphold their rights to privacy, family and home. Article 15 emphasises migrant workers and members of their family will not be underprivileged in their desire for worldly go ownership. Article 16 upholds their right to sovereignty and safety. In article 17 it emphasized dignity in the behaviour tow of migrant workers and members of their family. Article 18 gives equality with citizens of concerned States. Article 19 explains, no migrant worker will be held for a criminal offence that is not in accordance with national or international law. Article 20 further emphasize they will not be incarcerated on the basis of failure to satisfy disposition bond. Looking at article 21 it protects the migrant workers of confiscation of their work permits without detailed receipt. Article 22 refrained the States from group expulsion, each case must be decided individually. Article 23 explains, they have the right to still seek assistance from their diplomatic mission. Article 24 recognizes them as a person before the law. Article 25 explains, their treatment will not be less favourable as nationals in respect of remuneration. Article 26 details the recognition of their rights by the receiving countries. Article 27 states that the migrant workers will enjoy the same treatment on employment accorded to host States

citizens. Article 28 gives migrant workers the right to healthcare. According to article 29, children of migrant workers will have a right to name and registration of their children as well as to a nationality. Article 30 gives the children of migrant workers right to basic education. Article 31 explains how State Parties should sustain cultural identity of migrant workers. Article 32 gives them the right to transfer their funds and personal belongings upon termination of their contract. Article 33 gives them the privilege to be illuminated about the state of employment from their country of birth. Article 34 mandates them to respect the cultural identity of their host State. And article 35 inferred that the protocol should be elucidated as hinted accreditation of resident migrant workers in irregular state.

The segment IV spells other privileges of migrant workers and members of their family who are archived or in a well order situation.⁴⁹ It commences with article 36 and further gives more privileges to migrant workers in addition to those stated in part 3. Article 37 emphasize on the importance of informing the State of origin and host nation the terms of employment. Article 38 mandate States of host to maintain the status of the migrant workers even when they are absent from their place of work. Article 39 gives migrant workers and members of their family the privilege to freedom of movement in the territory of the State of employment. Article 40 encourages them to promotion of their social, economic and cultural interest within the confines of the host nation's law. Article 41 remind the State of origin the civic rights of migrant workers and even encourages them to participate. Article 42 states that if the right to enjoy civic duties in the host State is granted then they may enjoy it. Article 43 encourages States of employment where migrant workers reside to grant equality with nationals to education, vocational guidance training and housing. Article 44 encourages host States to take care of the households of migrant workers, as this is the fundamental group of any society. Article 45 grant migrant workers and members of their family access to rights to schooling equally as nationals. Article 46 further exempt migrant workers from ship in and ship out duties on their individual belongings and effects. Article 47 authorizes migrant workers to transfer funds from their State of working to their State of birth. Article 48 advises State of employment to tax migrant workers equally as nationals. Article 49 explains migrant workers rights to residence shall not be terminated because

⁴⁹ <http://www.ohchr.org> (accessed 30 July 2016)

of the termination of their employment. Article 50 encourages family reunion in case of death or divorce. Article 51 gives migrant workers the right to look for alternative work within the State of employment. Articles 52, 53, 54, 55 and 56 gives migrant workers right to favourable work conditions.

Part V, gives provisions applicable to particular categories of migrant workers, and members of their families. Here we have 7 articles. Articles 57, 58, 59, 60, 61, 62 and 63 all emphasized the rights already outlined in the above part four. It looks at work conditions.

Part VI encourage sound, impartial, kind and permissible conditions in connection with intercontinental migration of workers and members of their families and they are articulated in articles 64, 65, 66, 67, 68, 69, 70 and 71.

Part VII review the application of the pact through the institution of a committee on the protection of the privileges of migrant workers and household. It explains how members shall be voted in by member States and they shall act in their distinctive capacity. The details were articulated from article 72 to 78.

Part VIII gives the general provisions sustaining the rights of each State governing admission to migrant workers and households. Also gives the United Nations the overall access with no contradiction in duties. Articles 79, 80,81,82,83 and 84 advise State parties to undertake measures to adopt legislatures to implement the treaty.

Part IX is the final provisions with the Secretary General of the United Nations as the depository of the convention. The convention was deposited in Arabic, Chinese, English, French, Russian and Spanish text.

CHAPTER THREE: South African Legislation in relation to ICRMW

3.1 South African Immigration Act

The immigration Act of 2002 took over 6 years before coming to realisation and yet in 2014 the immigration Act was amended to be under the new dispensation that is witnessed today. This is important because I am using this to examine the measures that can be put in place by the South African authority to give more privileges to migrant workers and relate how they have managed to take inspiration from ICRMW to implement it locally to boost the rights of migrant workers.

3.1.1 Core Objectives of the 2002 Immigration Act

- to enable legitimate movement of person into and out of South Africa and their residence in South Africa including members of their families
- to cut down on the administrative and bureaucratic bottle neck associated with issuing and processing of residency legally.
- halt and curtail irregular migration
- to ease and stimulate, collaboration between unit branches of government in the execution of immigration law.

3.1.2 The Law specifically in relation to Migrant Workers and the intentions of the Act are:

- to halt and cut down the numbers of unauthorized access to the South African Labour demand and supply, especially of semi-skilled and unskilled workers
- to punish agencies and employers involve in the recruitment and employment of unauthorized workers
- to encourage labour mobility of highly skilled workers to relocate to South Africa either temporarily or permanently.
- to protect the domestic employees and not placing them on the disadvantage angle especially the South African citizen in both skilled and unskilled migration scale

- to put the Department of Labour as the primary authority, implementation and enforcement of immigration law as it pertains to labour migration.

3.2 South African Immigration Tailored With ICRMW

The 1996 constitution and especially chapter 2, which holds the Bill of Rights throw light on freedom to mean all persons in South Africa should enjoy rights (such as equality, equal opportunity, access to education, health, welfare, social services and housing). It was also supported by the South African labour and related legislations, which positively gives effect to entitlements outlined in the Bill of Rights.

Dating back to 1994 after some envisage challenges a series of laws inspired from the ICRMW to protect migrant workers were amended. There was no distinction between migrant workers, permanent residence and citizens. Some of the policies are as follows in relation to the Labour Relations Act of 1995 (LRA) which ensures the rights to:

- fair labour practices
- the right for all to form and join trade unions and employer organizations
- to organize and bargain collectively if the need arises
- to strike and lock-out legitimately

The Employment Equity Act of 1998 (EEA) was written with the intention to promote and protect the right of workers to equal opportunities by completely removing unfair discrimination on the grounds of race, gender, ethnic or social origin, language, birth and sexual orientation. In 2000 the Department of Labour set out outlines for the non-discrimination of workers living with HIV and Aids thus further promoting the rights of workers.

3.2.1 Non-Discrimination to Human Rights

ICRMW Part 2 and 3 articles 7 to 35, emphasize on the guarantee of the rights of migrant workers and members of their families.⁵⁰ The South African authorities advance that its constitution protect adequately the rights of migrant workers and households especially its link to exploitation at work, gender balance and

⁵⁰ <http://www.ohchr.org> (accessed 12 January 2017)

healthcare, child rights, housing and education.⁵¹ The authorities in South Africa remain affirmative that the South African constitution guarantee migrant workers rights for them to go home or their country of birth anytime they so desire.⁵² Also they are guaranteed in the case of arrest that they will not be tortured or treated inhumanely. Migrant workers and household will be adequately protected from forced labour, practice freedom of religion, up hold their opinion without interference, freedom of expression and access to public health.⁵³ The South African constitution also guarantee migrant workers the right to fair trial and access to an interpreter should there be any need, if found guilty humanitarian consideration when sentenced, and right to contacting their diplomatic mission for assistance of any kind. Furthermore, they are also recognized as a person before the law, if employed given a contract that applies to a citizen and be treated fairly with cultural identity and their children must have the right to be given the name of their choice, registration of birth, nationality at birth and other rights that is enshrined in ICRMW.

3.2.2. Supplementary Rights of Migrant Workers and Household Who Are Documented

ICRMW articles 36 to 56 emphasize the detailing of the contract before the migrant worker travel to the reception country. The destination country must be willing to modify contracts of migrant workers if requested after arrival or before signing up on the work contract. Emphasis was also put on the side where the destination country should get hold of consideration like extra ordinary needs and obligations of the migrant workers. They should have freeness of manoeuvre in the country of their employment. Also, they should be given the opportunities to promoting and sustaining their socio-economic and cultural interest in their country of host. They would have the right to take part in their country's civic obligations. This can be ease by their country of host in accordance with the legislation. And they are allowed to participate if permitted to the life of their host community by having access to vocational guidance and social schemes and in turn the community should ensure the protection of their families. This is also found in

⁵¹<https://www.ohchr.org> (accessed 12 January 2017)

⁵²<http://www.gov.za/documents/constitution/chapter-2-bill-rights> (accessed 20 January 2017)

⁵³<http://www.gov.za/documents/constitution/chapter-2-bill-rights> (accessed 24 January 2017)

the South constitution were it gives the migrant worker some rights to privileges only meant for citizens and thus promoting the essence of ICRMW.⁵⁴ The Bill of Rights in the South African constitution clearly guard, then outline the rights of the migrant workers and household emphasizing migrant workers' role in the constitution and also detailing a what is expected of the migrant worker once they find themselves here. These rights range from healthcare service to social amenities, freedom of religion and the representation in court as detailed in the constitution.

3.3 How South African Constitution can be Tailored to ICRMW

The Bill of Rights, which is the cornerstone of South African Constitution is subject to limitations as expressed in its content - it directly promotes several rights to South African citizenry. Included are:- right to obtain a passport, stand for public office, right to vote and to benefit from government policies that allow access to land, freedom of trade and profession.⁵⁵ On many situations the migrant workers who have transited to permanent residence status should be entitled to social schemes after putting in all their work life in South Africa.⁵⁶ In 2003 and 2004 a Mozambican migrant permanent resident applied for court intervention after they were denied access on social welfare on the ground that they were not South African citizens, judgement favoured the migrant workers.⁵⁷ It commenced, when Mozambicans who worked in South Africa all their lives went to the South African Constitutional Court alleging the discrimination of the Social Assistance Act discriminated against them because of their country of birth, and the honourable court ruled in their favour even though the government objected saying this will attract more immigrants into the country and that the burden will be enormous and unsustainable for the government.⁵⁸ Louis Khosa (first applicant), Eliasse Mucambo (second applicant), and Sania Ndlovu (third applicant) versus the Minister of Social Development (first respondent), the Director General Social Development (second respondent) and the member of the Executive Committee for Health and Welfare in the Northern Province which was decided on 4 March 2004. In the Khosa matter, the

⁵⁴ <http://www.gov.za/documents/constitution/chapter-2-bill-rights> (accessed 12 February 2017)

⁵⁵ http://www.refworld.org/docid/45eecd12.html#_ftn (accessed 22 February 2017)

⁵⁶ <http://www.saflii.org/za/cases/ZACC/2004/11.html> (accessed 27 August 2019)

⁵⁷ <http://www.saflii.org/za/cases/ZACC/2004/11.html> (accessed 27 August 2019)

⁵⁸ *Khosa & Others v Minister of Social Development & Others* 2004 6 SA 505 (CC)

applicants challenged the constitutionality of section 3(c) of the Act, which reserves social grant for retired or aged South African citizens. The constitutional court awarded a court judgement in favour of the applicants on the basis that South Africa granted amnesty and modification as exemption on how the immigration Act section 28(2) of the Aliens control Act. The tripartite agreement signed in 1993 by the United Nations High Commissioner for Refugees, Mozambican government and South African government handed a refugee status to the Mozambicans that fled to South Africa as a result of the civil war in Mozambique. In 1995 South Africa granted Amnesty to Mozambican miners permitting them to apply for Permanent Residence status. There has been no appeal since the judgement was handed down in their favour.

Many migrants workers because they are claimed to be illegal they are short paid and treated as though they are not human beings.⁵⁹ Here the constitution needs to meet with the ICRMW because it says once the worker has a contract they are entitle to social benefits.⁶⁰ ICRMW provides for certain protection to documented and undocumented migrant workers. Article 22(6) requires for wages to be settled before deporting the undocumented migrant worker and to settle any liability due over time. Article 32 gives them right to repatriate all their savings and their personal effects and belonging. The South African Law supports all these, but its implementation is usually bias and thus putting the migrant workers a compromising situation. The South African constitution grants everyone rights to basic education and healthcare as a short fall to ICESCR which recognizes ‘the right of everyone to the services of physical and mental health’ and to compulsory free education.⁶¹ In relation to non citizens’ rights in the work place the Committee on the Elimination of Racial Discrimination’s General Recommendation 30 states, immediately an employment is commenced and until termination, all employees whether in possession of work permit or not, have the rights to amusement of the fruit of labour and employment premiums, including freedom of assembly and association.⁶² The South African government being a party to ICERD has responsibility to enforce prescribed minimum wages and incur responsibilities to work related injuries to undocumented migrants and even those that the government intends to deport.

⁵⁹ <http://www.saflii.org/za/cases/ZACC/2004/11.html> (accessed 27 August 2019)

⁶⁰ <http://www.saflii.org/za/cases/ZACC/2004/11.html> (accessed 27 August 2019)

⁶¹ <http://www.ohchr.org/Documents/Publications> (accessed 22 February 2017)

⁶² <http://www.ohchr.org> (accessed 22 February 2017)

3.4. Court Cases that has Shown Relevance of the ICRMW

There have been many court cases that have shown relevance to the ICRMW in South Africa. However, I will highlight some of them that I think is relevant to discourse.

3.4.1. Discovery Health Ltd versus CCMA (Commission for Conciliation, Mediation and Arbitration) (CLL Vol 17, April 2008) a Mr Lanzetta

In this case Lanzetta a migrant worker had a work permit with the condition to work for MPCS (Monetary Policy Committee). Before the expiration of Lanzetta work permit he united with the discovery health as a call centre agent and demanded for some documents from the company in order to renew his work permit before expiration.⁶³ Due to the delay from Discovery Health to issue him the documents that will support his application his work permit eventually expired in the process and as an excuse Discovery Health quoted section 38 (1) of the Immigration Act that prohibit employers from employing foreigners that status has expired. Lanzetta then refer to disputes of unfair dismissal to CCMA and Discovery Health then contested CCMA jurisdiction that the contract has been voided by his illegal status thus Lanzetta was therefore not an employee with Discovery Health. But the CCMA decided that as far as the employee relationship existed, they have jurisdiction on the case and the employer who was not happy took the matter on review to the labour court. The labour court found that although his work status was illegal, he was resident in the country legally and that the employer defaulted on the Immigration Act, as it's the employer who is prohibited from employing certain foreigners and not foreigners prohibited from accepting employment. Furthermore, the court strengthen the ruling by quoting section 23 of the constitution that empower everyone with the right to fair labour practice and that there is no where in the immigration act that faults contract of employed illegal foreigners but only prohibits the employment of illegal foreigners. The definition of an employee as per Labour Relation Act (LRA), section 23 of the South African constitution, International Law and ILO convention 87 does not require contract for a person to be an employee.

⁶³ <http://www.labourguide.co.za/general/396-illegally-employed-not-excluded-from-labour-laws> (accessed 23 February 2017)

3.4.2. Kylie Appellant and Commission For Conciliation Mediation and Arbitration (First Respondent), Commissioner Bella Goldman (Second Respondent) and Michelle Van Zyle t/a Brigitte's (Third Respondent case number CA10/08

This case though not a migrant worker case related but I however stated it to further uphold the right of employee, as stated above. In this particular labour dispute, the appellant was a sex worker who was employed in a massage parlour to perform commercial sex and was later sacked by her employer and the court heard the case but on moral ground cannot reinstate the employee because the employment is not legal and it reduces human dignity and as such will be appropriate for compensation.⁶⁴ She got support from section 7(1) of the Constitution and the Bill of Rights, which provides for rights for all who live in the South Africa. This point was also supported by Ngcobo J in *Khosa v Minister of Social Development* (2014) ZACC11; 2004 (6) SA 505 (CC) para 111. 'The word everyone is a term of general import and unrestricted meaning. It means what it conveys. Once the State puts in place a social welfare system everyone in the country has the right to have access to that system.'⁶⁵

3.5. Migrant Workers' Human Rights in South Africa

Evident from what has been discussed, we can see that some basic rights of the migrant workers and household can be accessed through the South African Constitution, however ratifying the ICRMW will give migrants a face lift. How can these rights be applied meaningfully to digest the content and application in singular situations that will be reflected directly as the rights of migrant workers and with the understanding in situations like this only the courts cannot uphold these rights, the legislature should review most of the laws in order to key in to the international instruments. For the ICRMW to be ratified in South Africa we need all hands onboard. The executive, legislative and judicial arms of government must work hand in gloves to make this a reality. In view of the confirmation of both selected cases with regard to migrants, human rights in South Africa especially that of migrant workers, they have been enforced in courts on grounds of non-discrimination and fair trial breached. It is always difficult for migrant workers to get redress in courts due to some difficulties ranging

⁶⁴ <http://www.saflii.org/za/cases/ZALAC/2010/8.html> (accessed 25 February 2017)

⁶⁵ <http://www.saflii.org/za/cases/ZALAC/2010/8.html> (accessed 25 February 2017)

from financial and social avoidance, that is why if South Africa ratifies the ICRMW it will be a win - win situation because it will reduce the occurrence of xenophobia attacks and place the citizens in a position of accommodating other nationals and having a social education in understanding the principle of human rights which we are advocating.

CHAPTER FOUR: Obstacles and Reasons for Ratification of ICRMW

4.1 Implications if South Africa Ratifies ICRMW

Common arguments against South Africa ratification of the ICRMW is based on conflicts with domestic law in other words that the rights, that it seeks to uphold are found in the domestic law. The labour laws and legislations are enlisted to give added rights to the migrant workers but in reality, countless migrants continue to be treated by the State and employers in ways that are short of the human rights upliftment as enshrined in the constitution. While this may be true in principle, conversely the implementation and enforcement systematically exclude the migrant workers.

The LRA can be seen as promoting, pacification and parleying as a means of settling labour disputes.⁶⁶ This is so because the LRA settle labour disputes and also freely educate workers and employers of their rights. The Basic Conditions of Employment Act of 1997 (BEAC) which is the primary legislation that enforces the basic conditions of employment of workers with the exclusion of those employed in defence, intelligence and security institutions. It outlines duty hours, overtime and repayment for overtime duty, leave, remuneration and termination of service. It also criminalizes child labour and offenders can be jailed for up to three years if found guilty.

Furthermore, the EEA of 1998 is there to encourage and secure the rights of workers to equal chances by elimination unequitable discrimination be it race, gender, sexual orientation, language, birth and social origin. The Department of Labour in 2000 also gave public notice on code of ethics highlighting key aspects of HIV/Aids and employment setting out recommendations for employers and employees to ensure that individuals with HIV are not unfairly discriminated against.⁶⁷ The Skills Development Act of 1998 and the Unemployment Insurance Act of 2001, the occupational health and safety Act of 1993 and the compensation for occupational injuries and diseases act of

⁶⁶ <https://www.wipo.int/edocs/lexdocs/laws/en/za/za091en.pdf> (accessed 26 May 2019).

⁶⁷ <http://www.labour.gov.za/DOL/legislation/codes-of-good-ractise/employment-equity/code-of-goodpractice-on-key-aspects-of-hiv-aids-and-employment> accessed 3rd May 2019.

1993 all fall under the jurisdiction of the Department of Labour, which is responsible for the execution, implementation and enforcement.

Many statutory bodies were accepted to advise and provide supervision in terms of the operation and application of the above legislation. They include, advisory council for occupational health and safety, commission for conciliation, mediation and arbitration, commission for employment equity, compensation board, employment conditions commission, national economic development and labour council, national productivity institute, national skills authority and unemployment insurance board. The above labour laws give effect to section 23 of the Constitution, which also explicitly prohibit slavery, forced labour and servitude (section 13).

In relation to the ICRMW it is worth noting that the above rights are mostly conferred to all but limited to citizen rights to profession and trade freely (section 22 of the Constitution). Also, migrant workers are specifically excluded from employment equity legislation in relation to disadvantaged groups for example black people, women and disabled persons, who are citizens and permanent residents. The Social Assistance Act (SAA) of 1992 as amended by the Welfare Laws Amendment Act of 1997, set down persons who wish to apply for social welfare assistance should provide proof of citizenship. In contrast, chapter two of the constitution reserves no restriction and everyone has the right to social and welfare services provided by the State. However, the amendment of the Act in 1997 does not address the question of access by migrants. By reference to the constitution migrants have right to access these services as long as they can show proof of residence. The 2002 Immigration Act emphasis provisions, for migrants (documented or undocumented) to have access to these services listed above. However, the Act requires the service providers to establish the legal status of a person prior to providing service. If established that the person is not legal in the country, then the service provider is required by law to report to the Department of Home Affairs. Failure to do so is a punishable offence.

In many instances there are evidence to show that migrants are refused social services on the basis that they are not citizens.⁶⁸ This is consistent with the outcry of many government officials especially the Mayor of Johannesburg blaming migrants for many shortfalls of services and thus going against the Constitution by depriving them of social services.⁶⁹

4.2 Possible Obstacles to Ratification of the ICRMW in South Africa

The years 2007 to 2009 global economic and financial crisis,⁷⁰ the turbulence and violence in Middle East and in North Africa have continued to play a critical role plaguing international labour domicile.⁷¹ Although, some African member States of the UN have ratified the Forced Labour Convention No. 29, 1930; the prejudice (employment and occupation) accord No. 111, 1958; and the abolition of forced labour accord number 105, 1957.⁷² Furthermore, many States have ratified the freedom of association and protection of the right to organise convention number 87, 1948; 52 of these member States have ratified the right to organise and collective bargaining convention number 98, 1949; 51 ratified the equal remuneration accord number 100, 1951; 49 ratified the minimum age accord number 138, 1973; and 50 ratified the worst forms of child labour accord number 182, 1999.⁷³

In relations to Governance on the African continent, forty-two member States have ratified the Labour Inspection Convention No. 81, of 1947; eight with regards to Agricultural Convention No. 129, 1969; 35 ratified the Tripartite Consultation Convention No. 144, 1976; and 19 ratified the Employment Policy Convention No. 122, 1964. In addition, only 19 African countries ratified the Governance Convention No. 122; while eighteen ratified Employment Service Convention No. 88, 1948; Human

⁶⁸ Constitutional Court, 2003, Khoza v. Minister of Social Development (CCT 12/03); Constitutional Court, 2004, Mahlaude v. Minister of Social Development (CCT 13/03).

⁶⁹ <https://mg.co.za/article/2016-12-07-herman-mashaba-defends-his-comments-that-illegal-immigrants-are-criminals> (accessed 20 May 2019)

⁷⁰ Chudik, A., and Fratzscher, M. 2011. Identifying the global transmission of the 2007–2009 financial crisis in a GVAR model. *European Economic Review*, 55(3), pp.325-339.

⁷¹ Zohry, A., 2005. Migration Without Borders: North Africa as a reserve of cheap labour for Europe. Available at SSRN 995683.

⁷² International Labour Conference and International Labour Office. Committee of Experts on the Application of Conventions, 1998. *Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution): General Report and Observations Concerning Particular Countries* (Vol. 86). International Labour Organization.

⁷³ Ibid

Resource Development Convention No. 142, 1975; and three countries ratified the Private Employment Services Convention No. 181, 1997.

Implicit in these protocols and convention demonstrate the nonchalant attitude of African leaders to place stringent rules on employment, punishment and appraisal of employees. In areas covering social security, migrant workers, occupational wellbeing, health and safety, wages, human resource development, fishing and indigenous peoples right, maritime and housing. Africa as a continent have failed to live up to expectation, in general terms, and with regards migrant workers the case is much severe.

With regard to migration, to date nine of the 53 African member States have ratified the Migration for Employment Convention, 1949 (No. 97), and only seven have ratified the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), these seven countries are not the main recipient migrant countries.

There are several methods towards understanding the justification for the non-adoption of the ICRMW globally and in South Africa. To underscore this discourse, we explore three critical interpretations for this justification – cost-benefit interpretation, the lopsidedness of migrant workers opportunities and the imbalance or lack of reciprocity. The cost-benefit scenario takes centre stage.

4.2.1 Cost-Benefit Interpretation

Stemming from the cost-benefit perspectives it is arguable that anyone would suggest that the low ratification of the ICRMW is a weakness on the part of member States to adopt and implement or considered a mistake in any ramification. However, this assumption will be counter understood from the complication of the fundamental imbalances in migrants' dynamics, which may not be corrected by time. In a case where the status quo remains that one is a main recipient, while the other continues to dish out its people, without adequate documentation. In some cases, like the United States of America and South Africa, where migrants are deeply unsupported by neither the government nor most of the local population.

Vulnerability is a win for capitalists globally and a loss to economic development and wellbeing, because then exploitation is considered a favour rather than a crime – economic or civil. In that, the central assumption of the cost-benefit analysis in this case assumes, that what is the cost of a migrant having full rights, and the benefits where the State does not ratify or yield to the principles of the ICRMW. In addition, when one considers that ratification entails a high cost on the one hand, while the dividends to the destination countries are minimal.⁷⁴ There are two main arguments justifying the non-adoption of the ICRMW by South Africa: the lopsidedness of the origin and destination country, and the imbalance or the lack of reciprocity of destination country to the origin country.

4.2.2 Lopsidedness of the origin and destination country

Migrant workers who are predominantly not respected are those from relatively poorer nations compared to those from relatively richer nations. Hence, the view in South Africa, that European migrants are tourists, and Africans especially those from relatively poorer nations to South Africa are referred to as migrants (those who takes local jobs and those who must depart the country).⁷⁵ Implicitly in this assumption is that the ICRMW for short has unequal impact for both sides of the migration process. Because, whether or not the origin (poorer countries) ratifies the ICRMW, it is the destination, where the onus lies to either accept and implement or decline and postpone. As long as, inequality in terms of benefits exists between the origin and destination country, humanity will continue to be second best to cost and benefit, except where disasters are involved.

4.2.3 Lack of Reciprocity of Destination Country to the Origin Country

In a case, where both the destination country and the origin country are power players in the continent, mutual guarantees are usually supported. For instance, if all countries are reciprocal – origin and destination, like the relationship between European countries or the relationship between Canada and America or New Zealand and Australia then there will be little or no need for global clamour for nations to become signatory to the ICRMW. However, this is not the case, and might never be in the future, hence

⁷⁴ Pécoud, A. 2017. The Politics of the UN Convention on Migrant Workers' Rights. *Groningen Journal of International Law*, 5(1):57-72

⁷⁵ Ibid

constituting a problem of interest among migration scholars, Non-Governmental Organisations and practitioners within this epistemic enclave, especially when considered to such other international cooperation as trade and commerce. Hatton provides clarity to this assumption, thus:

Migration is much more of a one-way street than is trade. While, in a multilateral context, trade balances have to add up roughly to zero, net migration balances do not. If rich and poor countries were gathered around the negotiating table, it is difficult to see how improved terms of access to the labour markets of the poor(er) countries could be of equal value to similar conditions of access granted by rich(er) countries in return. Indeed, even the poorer countries may have little incentive to come to the bargaining table. Those in poor countries who have the greatest incentive to support such negotiations are precisely those who wish to leave.⁷⁶

Factual confirmation exist to support the premise, South Africa for instance have not found a reason to ratify a Convention that would benefit the migrants from poorer neighbouring countries as Zimbabwe, Mozambique among others.⁷⁷ According to Piper, in relation to Asia, the divide between poorer and richer nations creates a form of competition of the origin (poorer States) to gain access into richer (destination States), particularly in the Gulf, poorer nations Piper suggest are threatened not to ratify the ICRMW, in order not to jeopardise their relation with the destination States.⁷⁸ Due to the fact that the origin member state lack bargaining power nor hold any form of comparative advantage nor chip to question the destination country.⁷⁹

⁷⁶ Hatton, T.J. 2007. Should We Have a WTO for International Migration? *Economic Policy*, 22(50): 339, 364

⁷⁷ Crush, J., Williams, V., and Nicholson, P. 2009. Migrants' Rights after Apartheid: South African Responses to the ICRMW" In Cholewinski, R, de Guchteneire, P and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights*. Cambridge; Cambridge University Press.

⁷⁸ Piper, N. 2009. Obstacles to, and opportunities for, ratification of the ICRMW in Asia. In Cholewinski, R, de Guchteneire, P, and Pécoud, A, eds, *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights*. Cambridge; Cambridge University Press.

⁷⁹ Op cit (Pécoud, A. 2017).

Another critical methodology for understanding the imbalance between the origin and destination countries is based on the supply and demand analysis.⁸⁰ Destination countries in most Asian countries have unlimited access to a pool of skilled migrants. South Africa as a destination country in Sub-Saharan Africa also have unlimited access and potential to lure talented and skilled migrant from other countries, as well as, easy access to cheap labour, market and investment, which the country does not provide for foreign African investment in the country. The country therefore has no motivation or incentive to offer rights to migrants, because, either way they are willing to come without considering migrant protection. This is a reason for the uneven or unfavourable approach taken by the nation in adopting or implementing the ICRMW. However, a shortage of skilled and unskilled migrants, due to the non-adoption and implementation of the ICRMW would force government to ratify the Convention, however, this assumption is not in sight and most impracticable.

According to Ruhs, universal legal solutions alone cannot apprehend challenges of migrant workers; rather they must be understood within the context of an economic variable in migration policy globally.⁸¹ With this resolve destination states may have the choice to choose, which migrants they grant rights to, depending on certain strategy. However, within the context of political economy as well, the ICRMW has witness minimal ratification.⁸² Destination countries will never be in short supply for skilled and unskilled workers from origin countries, because, origin or poorer countries have the insinuation that making it to destination or richer countries is a medium for prosperity and a better life. Except if this assumption is changed in the origin nations, little can be achieved. From Zimbabwe to Mozambique, Malawi to Zambia, Lesotho to Congo the future is very bleak, if not miserable. Another reason for the failure of the ICRMW is what Srdjan Vucetic referred to as “too many rights for too many people.”⁸³ By this statement Srdjan meant the rights must at any point in time be limited to the people

⁸⁰ Ibid

⁸¹ Ruhs, M. 2013. *The Price of Rights. Regulating International Labour Migration*. Princeton; Princeton University Press.

⁸² Castles, S., 2006. Guestworkers in Europe: A resurrection? *International migration review*, 40(4), pp.741-766.

⁸³ Vucetic, S, “Democracies and International Human Rights: Why is There No Place for Migrant Workers?” 11(4) *International Journal of Human Rights*, 11(4): 403-428, p.403.

of a particular territory thus maximising their level of responsibility while reaping the benefit of the rights. This in a way only gives rise to policy of isolationism, where States feel their domestic laws are superior to international laws and obligations.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

The challenges to the ratification of ICRMW in Africa and South Africa in particular, is complex and must be approached holistically. Whether South Africa is considered as a destination or origin for migrants in Africa it has to be addressed. The struggle by Non-Governmental Organisation to see towards the ratification of the migrant workers right in the country was also analysed. However, the role of NGOs is minimalistic in nature, with regards sovereignty of independent states. However, migrant workers and their family members are offered the opportunities to continue their education, but that is as far as it goes, any other position held by migrants or their family is frowned at violently. In this study, three objectives were postulated; these objectives were fulfilled with the use of secondary data.

5.1 Conclusion

In conclusion, in this dissertation I have managed to make different points that will encourage the ratification of ICRMW by South Africa. In doing this I have attempted to answer, the following questions in understanding the content of ICRMW. Looked at which legislative and policy frameworks that exist in South Africa regarding migrant workers and households. I also examined the obstacles likely to prevent the ratification of ICRMW. If the above are inscribed seemly, that will provide noteworthy propulsion in the direction of the ratification of the accord by SA authorities. The executive need to evaluate subsist legislation in order to see how it can streamline with the ICRMW. This ratification might not entail formulation of entirely new laws rather it will be re-explanation of already existing policies, laws, regulations and their applicability to migrant worker rights, and the amendment to existing policies, laws and regulations to the extent required. In view of the shortcomings, the government will appreciate the ICRMW.

5.2 Recommendations

South Africa has had a violent history, even with migrants and colonisers. So, there is little doubt why this still lingers. However, recent studies have demonstrated that it frowns more at Africans from other African nations but welcomes the Europeans from

Europe among others. However, with other African countries, South Africa is mainly the recipient or destination country than origin for migration on the continent though this is changing gradually as South Africa exports their skill labour in more and more African countries especially as they expand their indigenous companies to North, West and East of Africa. With a poor balance of payment and lopsidedness of opportunities, South Africa have frowned at ratifying the ICRMW, which would give foreign workers (particularly black workers) and their families the opportunity to work in humane condition and be remunerated based on equity and fairness.

The following are some of the recommendations deduced in this study:

- The capacity of the government to implement not only its own policies and legislation but also any additional obligations that emanate from ascending the Convention - thus the problem of accountability. The South African government must know their obligations. They will go ahead and develop capacity to meet these requirements and fulfil its obligations to ascend to the ICRMW.
- The political independence question should be addressed and to what extent that the South African government can pass its decisions and formulate its own policies and regulations regarding the entry, sojourn and entitlements of migrants.
- The elected officials and members of parliaments should be able to educate their constituents of the need to understand ICRMW and make them understand why this should be ratified and promote migrant workers right to expand and not curtailed. Again, there must be deliberate awareness of ICRMW in South Africa. This burden should be extended to the NGOs too to give room for wider and broader based enlightenment.
- The government should be encouraged to establish a good implementation, reporting and monitoring requirements imposed by ICRMW as they have done with other instruments that they have ratified for easy implementation.

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