

**SOCIO-LEGAL PERSPECTIVES ON THE REALISATION OF HUMAN  
RIGHTS OF MIGRANT WOMEN: A CASE STUDY OF ZIMBABWEAN  
MIGRANT WOMEN WHO WORK IN BOTSWANA'S INFORMAL  
ECONOMY**

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## **Dedication**

*To my children*

*(Bothale jwa phala bo tswa phalaneng)*

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‘I am grateful for your embodiment of African humanism — “*motho ke motho ka batho babang*”, that is, “*one is a person because of others*”— which disabused us of human rights legalism without humanism and freed us to live as if our grounded constituencies mattered, to be here with them, to see ourselves in them, to learn from them, and to be shaped by them. In cities, towns, villages, valleys, and mountains of southern Africa, we engaged them as the true experts in their everyday lives, approaching each conversation as an entrance into their *being* in the world. **What a fuzzy and warm feeling and a sense of fulfilment to do humanistic human rights!**’\*

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\* David Matsinhe, final email at Amnesty International titled ‘Moving on’. 14, December 2022. David is a dear friend and colleague who taught me that human rights must account for the human in it.

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*M.G. MACHACHA*

## Reflections

*Irregular mobility demonstrates migrant agency in response to conditions of precarity in their home countries. It is driven by the stringent mobility control measures restricting free movement between countries. Such conditions as demands for passports and visa policies push many to the irregular migrant status, denying them access through official migration routes. Furthermore, states create vulnerability as they enact policies that regulate against informal mobility and safeguard territorial sovereignty through stringent inclusion and exclusion criteria for the formal migration. This orchestration of vulnerability is further demonstrated when state authorities such as the police, soldiers and immigration officials become active actors in and perpetrators of corruption, violence and abuse against irregular migrants.<sup>†</sup>*

*... many female refugees and migrants face gross violations of their rights as they are exposed to gender-based discrimination, sexual and gender-based violence and other forms of abuse with limited or no access to effective legal protection. Migrant women and girls' vulnerabilities to exploitation are highlighted by the frequently abusive conditions under which they work, especially in the context of domestic service and sex industries, in which human trafficking is heavily implicated. They are also especially vulnerable to exploitation and abuse at the hands of smugglers and traffickers along irregular migration routes. It is therefore important to give particular attention to safeguarding the rights (labour, human rights, etc) of migrant women in the context of migration management, and to provide them with access to protection.<sup>\*\*</sup>*

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<sup>†</sup> Tsitsi Matose, Gracious Maviza & Wilfred Njabulo Nunu. (2022). Pervasive irregular migration and the vulnerabilities of irregular female migrants at Plumtree border post in Zimbabwe. *Journal of Migration and Health*, 5. Available at <<https://doi.org/10.1016/j.jmh.2022.100091>>.

<sup>\*\*</sup> African Union (AU). *Migration Policy Framework for Africa and Plan of Action (2018–2030)*.

## Abstract

*We wanted workers ... but human beings came.*<sup>§</sup>

This thesis examines the interplay between Botswana's legal system, gender and the human rights of Zimbabwean migrant women employed in the country's informal economy. It investigates how laws, societal gender norms and other factors affect the extent to which these women can exercise their fundamental human rights in Botswana.

The increased migration of women globally has led to a greater understanding that migration is a gendered experience, carrying with it differing risks and opportunities for women and men. This trend reinforces the need for further study of the particular gender-specific risks that women migrants face and what impact this can have on the enjoyment of their human rights. It is against this backdrop that, despite the existence of numerous human rights protections for migrant women at both the global and regional levels, these rights are seldom enforced nationally due to various reasons.

The research in this interdisciplinary thesis provides an original contribution by employing socio-legal methods to reveal how complex and interrelated legal, political, economic, historical and social factors affect Zimbabwean migrant women's ability to exercise their rights in Botswana. The study investigates the ways in which the human rights of migrant women are safeguarded and advanced by legal systems and other institutions, and the different ways in which these rights may be violated or denied, including by non-state actors. By examining various forms of gendered abuse and their root causes, the research sheds a holistic light on the challenges that migrant women face in realising their rights.

The precarious economic and political situation in Zimbabwe has forced many women to migrate to find work and support their families. Botswana has emerged as a popular destination due to its

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<sup>§</sup> OHCHR. (2022). *'We Wanted Workers, but Human Beings Came': Human Rights and Temporary Labour Migration Programme in and from Asia and the Pacific*. Available at <<https://www.ohchr.org/en/press-releases/2022/12/un-human-rights-report-urges-re-think-temporary-labour-migration-programmes>>; also see Kevin Lamb. (2016). We wanted workers: Unraveling the immigration narrative. *The Journal of Social, Political and Economic Studies* 41(4): 119ff. Available at <[link.gale.com/apps/doc/A496643772/AONE?u=anon~25b6921e&sid=googleScholar&xid=5c773428](http://link.gale.com/apps/doc/A496643772/AONE?u=anon~25b6921e&sid=googleScholar&xid=5c773428)>.

geographic proximity, the historical ties between the two countries and its reputation as a safe and stable nation. They have, however, faced numerous obstacles in the process. In this context the research study has revealed that various intersecting factors, such as gender, economic status and nationality place many Zimbabwean migrant women in Botswana in direct conflict with the law. This means that they are vulnerable to significant human rights violations and without sufficient legal protections. These include the violation of their right to security of persons, health and family life, and affronts to their internationally recognised protections against labour exploitation, trafficking, arbitrary detention and collective expulsion. This is in contravention of both the international treaties that Botswana has ratified and her own Constitution.

The study establishes that the failure to incorporate human rights norms into Botswana's domestic legislation has led to stringent immigration regulations which effectively compel many Zimbabwean migrant women to reside in the country irregularly. The result is that they are then exposed to various types of gender-based violence, restrictions on access to critical maternal health services, and cruel and inhumane conditions in employment and/or administrative detention. Further, due to lacunas in the law, children of Zimbabwean migrant women born in Botswana are also at a heightened risk of statelessness, violating their internationally recognised right to nationality.

The study's findings indicate that given their vulnerable position in society the government of Botswana has an obligation to protect, promote and fulfil the rights of Zimbabwean women migrants in her borders. It therefore recommends that the Government of Botswana implement a rights-based regulatory system to protect migrant women's human rights in line with her national, regional and international-law obligations.

**Keywords:** gender, migration, law, human rights, women migrant workers, Zimbabwe, Botswana



## Acronyms and abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACMS	African Centre for Migration & Society
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	Acquired Immunodeficiency Syndrome
APD	Asylum Procedures Directive
ArCHR	Arab Charter on Human Rights
ART	antiretroviral therapy
AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	Convention on the Elimination of Racial Discrimination
CIDT	cruel, inhuman or degrading treatment
CII	Centre for Illegal Immigrants
CRC	Convention on the Rights of the Child
CSO	civil society organisation
DRC	Democratic Republic of the Congo
DWP	decent work programme
ECHR	European Convention on Human Rights
ESAP	Economic Structural Adjustment Programme
EU	European Union
FDI	foreign direct investment
FGM	female genital mutilation
GBV	gender-based violence
GDP	Global Detention Project
GDP	gross domestic product
GNP	gross national product
HIV	Human Immunodeficiency Virus
HRC	Human Rights Committee
IACHR	Inter-American Court of Human Rights
ICBT	informal cross-border trade

ICCPR	International Covenant on Civil and Political Rights
ICCRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICJ	International Commission of Jurists
IFAD	International Fund for Agricultural Development
ILO	International Labour Organization
IMF	International Monetary Fund
IOM	International Organization for Migration
LGBTQI+	Lesbian, Gay, Bisexual, Transgender, Queer (or sometimes Questioning), Intersex
LPR	labour participation rate
MCH	maternal and child health
MDC	Movement for Democratic Change
MIDSA	Migration Dialogue for Southern Africa
MoDJS	Ministry of Defence, Justice and Security
MoU	Memorandum of Understanding
NET	new economic theory
NGO	non-governmental organisation
NGPF	National Gender Programme Framework
OAU	Organisation of African Unity
OECD	Organization for Economic Cooperation and Development
ODI	Overseas Development Institute
P	Botswana Pula (currency)
PF	Patriotic Front
PoC	people/persons of concern
RAC	Refugee Advisory Committee
RSD	refugee status determination
SADC	Southern African Development Community
SAMP	Southern African Migration Programme
SLSA	Socio-Legal Studies Association
SRH	sexual and reproductive healthcare
STD	sexually transmitted disease

TB	Tuberculosis
UAE	United Arab Emirates
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCLOS	United Nations Convention on Law of the Sea
UNDESA	United Nations Department of Economic and Social Affairs
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children’s Fund
UNIFEM	United Nations Development Fund for Women
USAID	United States Agency for International Development
WAD	Women’s Affairs Department
WHO	World Health Organisation
ZANLA	Zimbabwe African National Liberation Army
ZANU	Zimbabwe African National Union
ZANU-PF	Zimbabwe African National Union-Patriotic Front
ZAPU	Zimbabwe African Peoples Union
ZNA	Zimbabwe National Army

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## 1: Research orientation

[F]or the full benefits of international migration to be realised, the rights of women migrants must be respected.<sup>1</sup>

### 1.1 Overview

According to the Organization for Economic Cooperation and Development-United Nations Department of Economic and Social Affairs (OECD-UNDESA), women migrant workers have become an increasingly common global phenomenon.<sup>2</sup> Women now constitute 45.8% of migrant workers in Africa and 48% worldwide.<sup>3</sup> The international migration of women workers has been found to have had a number of positive effects. These include providing much-needed services in host countries, contributing to the local economy,<sup>4</sup> and improving the autonomy, human capital<sup>5</sup> and self-esteem of women.<sup>6</sup> In addition, research has found that migration can help to advance more equitable social norms and improve women's rights and access to resources within their families and communities.<sup>7</sup>

However, one of the most notable aspects of migration of women workers is that it continues to be based on the exploitation of gender inequalities by global capitalism. This means that women are frequently relegated to performing what is traditionally considered 'women's work' such as

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<sup>1</sup> K Calavita. (2006). Gender, migration, and law: Crossing borders and bridging disciplines. *International Migration Review* 40(1): 104–132.

<sup>2</sup> Richard E Bilborrow & Hania Zlotnik. (1992). Preliminary report of the United Nations Expert Group Meeting on the Feminization of Internal Migration. *International Migration Review* 26(1): 138–161; Katherine M Donato & Donna Gabaccia. (2015). *Gender and International Migration*. New York: Russell Sage Foundation; Donna R Gabaccia. (1996). Women of the mass migrations: From minority to majority, 1820–1930. In David Hoerder & L Moch (eds), *European Migrants: Global and Local Perspectives*. Boston: Northeastern University Press.

<sup>3</sup> United Nations Department of Economic and Social Affairs (UN DESA) and United Nations Children's Fund (UNICEF) (2013) *Migration Profiles – Common Set of Indicators*.

<sup>4</sup> This can be directly, either directly through taxes or indirectly, for example by providing care work which alleviates pressure from other sectors. Women migrants in the care economy increasingly fill care deficits left by the lack of affordable public care services and health sector cut-backs that are not responding to the reduction in national women undertaking reproductive labour tasks.

<sup>5</sup> SR Curran, F Garip, CY Chung & K Tangchonlatip. (2005). Gendered migrant social capital: Evidence from Thailand. *Soc Forces* 84(1): 225–255. doi: 10.1353/sof.2005.0094.

<sup>6</sup> M Boyd & E Grieco. (2003). *Women and Migration: Incorporating Gender into International Migration Theory*. Migration Policy Institute. Available at <<https://www.migrationpolicy.org/article/women-and-migration-incorporating-gender-international-migration-theory>>.

<sup>7</sup> A Bachan. (2020). An exploration of the gender-migration-development nexus: The impact of labor migration on women's empowerment. *Consilience: Journal of Sustainable Development* 20: 1–22.

being nannies, maids and sex workers. This ‘work’ often takes place in the informal economy, where women face poor working conditions, low pay and limited legal protections. This reinforces pre-existing gender patterns that oppress women and illustrates how gender continues to be a basic organising principle in the labour markets of destination countries.

In this regard, Mary Kwar concludes that:

while the overall feminisation of international migration is increasing, the vulnerability of women migrants to discrimination, exploitation and abuse is also likely to increase as well.<sup>8</sup>

Considering this situation, it is crucial to ensure that the human rights of women migrant workers are protected. This is in order to counteract the adverse effects that often accompany the increasing number of women who migrate. Several scholars<sup>9</sup> have noted that the regulations and laws in destination countries play a significant role in the way in which migrant workers enjoy their human rights. This can arise through the implementation of specific labour-market requirements that promote the migration of certain groups, and through policies and laws that limit labour mobility, make it difficult for migrants to obtain legal status, and restrict their access to basic social and labour rights.

The rights-based approach to migration law and policy as a way of safeguarding the rights of women migrants has been gaining acceptance over the past years. Sarah Paoletti<sup>10</sup> notes that:

for the full benefits of international migration to be realised, the rights of women migrants must be respected. States have the obligation to protect the fundamental rights of all persons in their territory and they must take effective action to protect migrants against all forms of human rights

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<sup>8</sup> M Kwar. (2003). *Gender and Migration: Why are Women more Vulnerable? An Information Guide on Preventing Discrimination, Exploitation and Abuse of Women Migrant Workers*. Available at <<https://books.openedition.org/iheid/6256?lang=en>>.

<sup>9</sup> Kaur Amarjit. (2010). Labour migration trends and policy challenges in Southeast Asia. *Policy and Society* 29(4): 385–397. doi: 10.1016/j.polsoc.2010.09.001; Jonathan Crush & Belinda Dodson. (2007). Another lost decade: The failures of South Africa’s post-apartheid migration policy. *TESG* 98(4): 436–454.

<sup>10</sup> S Paoletti. (2007). Pursuit of a rights-based approach to migration: Recent developments at the UN and the inter-American system’. *University of Pennsylvania Human Rights Brief*. Available at <[https://www.law.upenn.edu/cf/faculty/paoletti/workingpapers/14\(3\)HumRtsBrief14\(2007\).pdf](https://www.law.upenn.edu/cf/faculty/paoletti/workingpapers/14(3)HumRtsBrief14(2007).pdf)>.

violations and abuse. They must also combat all forms of discrimination, xenophobia, ethnocentrism and racism.<sup>11</sup>

It is acknowledged from the start that women migrant workers have unique needs and experiences which differ from those of their male counterparts. These differences are evident throughout the migration cycle, from the reasons they migrate to the sectors they work in and to the way they send and spend their remittances. As a result, it is essential for governments to develop rights-based frameworks that safeguard the specific rights of women migrants. The laws that govern female migration must be tailored to the distinct needs and priorities of women.

Internationally, women migrant workers' rights are protected by various instruments. These include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) and its General Recommendation 26 on Women Migrant Workers (GR26). In addition, four key labour conventions focus on gender equality:

- the Discrimination (Employment and Occupation) Convention (No 111);<sup>12</sup>
- the International Labour Organization (ILO) Equal Remuneration Convention, 1951 (No 100);
- the ILO Maternity Protection Convention, 2000 (No 183); and
- the ILO Workers with Family Responsibilities Convention, 1981 (No 156).<sup>13</sup>

Women are also protected, in varying degrees by the two migrant workers' conventions,<sup>14</sup> the Domestic Workers Convention<sup>15</sup> and others which guarantee the fundamental rights of *all* workers.<sup>16</sup> These conventions protect the rights of women migrant workers in areas such as non-discrimination, equal pay, maternity leave and their right to organise.

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<sup>11</sup> Paoletti (n 10).

<sup>12</sup> ILO C-111.

<sup>13</sup> ILO C-100, C-183 and C-156.

<sup>14</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) and Migration for Employment Convention (Revised), 1949 (No 97).

<sup>15</sup> Domestic Workers Convention, 2011 (No 189).

<sup>16</sup> Eight ILO fundamental Conventions: Forced Labour Convention, 1930 (No 29); Abolition of Forced Labour Convention, 1957 (No 105); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Equal Remuneration Convention, 1951 (No 100); Discrimination (Employment and Occupation) Convention, 1958 (No 111); Minimum Age Convention, 1973 (No 138) and Worst Forms of Child Labour Convention, 1999 (No 182).

Although many countries have extensive frameworks which guarantee the human rights of migrants, a significant gap still remains between these norms and the reality of migrants' experiences. This is because many countries are dualist, meaning that they do not automatically incorporate international law into their domestic legal systems. Instead, states must actively adopt these norms before they can be enforced. This applies to Botswana which is an example of a dualist state.

At the regional level, although few instrument focus directly on the migration of women workers, within the African Union Migration Framework explicit attention is given to gender.<sup>17</sup> Women migrant workers are also *generally* protected by the Maputo Protocol.<sup>18</sup> This applies not only to the protocol's non-discrimination clauses<sup>19</sup> but also to its article 13 on economic and social welfare rights, which talks specifically about the rights to work of women in Africa. The protocol, however, is silent on the specific issue of migration of women workers in Africa.

At the Southern African Development Community (SADC) level, article 5(2)(d) of the SADC Treaty (1992) states that the SADC shall

develop policies aimed at progressive elimination of obstacles to the free movement of capital and *labour*, goods and services, and of the people of the region generally, among Member States. (My emphasis)

However, despite the SADC's longstanding commitment to the principle of intra-regional freedom of movement, unrestricted mobility within the region remains far from being realised. This can be

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<sup>17</sup> First, within the section on Labour Migration; second, as an emphasis within the section on Migrant Smuggling; third, as a category of vulnerable persons in the section on Forced Migration; and, finally, in a separate subsection on Migration and Gender under 'Other Social Issues'. Also, the AU Framework refers to a number of UN and ILO conventions and protocols including the ICRMW and Domestic Workers Convention, urging their ratification and adoption by Member States. The sections on gender point to the growing feminisation of migration, including for labour in the care sector, but place greater emphasis on the vulnerability of women migrants to exploitation, trafficking and sexual slavery.

<sup>18</sup> Officially referred to as to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

<sup>19</sup> Article 2 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

attributed to the secretariat's limited success in securing enough ratifications of its two primary regional mobility policy initiatives<sup>20</sup> by Member States. Nevertheless, the SADC Protocol on Employment and Labour<sup>21</sup> established in 2014 is a valuable asset. Article 19 of this protocol addresses labour migration in the region directly, ensuring the protection of various rights, including equal treatment<sup>22</sup> and access to social services.<sup>23</sup> Moreover, it incorporates a gender perspective, mandating Member States to take action that caters to the unique needs of women, children and the youth. Article 20 further emphasises the promotion of productivity, decent labour conditions and rights protection within the informal sector, which is particularly relevant to migrant women. Nonetheless, the SADC framework continues to grapple with various shortcomings, including low rates of instrument ratification and the use of gender-neutral language in certain documents, neglecting the specific requirements of women.<sup>24</sup> Consequently, the realisation of the rights of women labour migrants within the SADC system remains somewhat elusive.

The rights of women migrants who find themselves in a state of either irregularity<sup>25</sup> or are undocumented receive even less acknowledgment.<sup>26</sup> Many jurisdictions often provide limited protection to those in irregular situations due to the association of irregular migrants with issues such as crime, trafficking, drug-related concerns, diseases and other social problems.<sup>27</sup> Furthermore, the widespread labelling of irregular immigrants as 'illegal' tends to criminalise them and places them beyond the realm of legal protection. This occurs despite the growing prevalence

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<sup>20</sup> In 1995, a draft protocol was proposed to allow SADC citizens to freely enter, establish themselves and work in another SADC state. However, it was abandoned in 1998 due to opposition from South Africa, Botswana, and Namibia. A revised draft protocol was proposed in 2005, which affirmed that migration management is a national competency. It called for the harmonisation of migration policies and legislation, but did not propose an overarching regional migration policy and legislative framework. Instead, it focused on enhancing the capacities of states to regulate migration and strengthen border management, individually and collectively. By 2016, only six states had ratified the revised draft protocol, (Lesotho, Botswana, Swaziland, Mozambique, Zambia and South Africa), short of the 10 required for it to enter into force.

<sup>21</sup> SADC 2014 Protocol on Employment and Labour.

<sup>22</sup> Article 19(f) of the Domestic Workers Convention.

<sup>23</sup> Article 19(c).

<sup>24</sup> For instance, most of the rights and protections in the SADC's 2014 Labour Migration Policy Framework are expressed in gender-neutral terms of migrant workers and their families.

<sup>25</sup> Irregular migration refers to the movement of persons that takes place outside the laws, regulations or international agreements governing the entry into or exit from the state of origin, transit or destination.

<sup>26</sup> R Perruchoud. (2008). The human rights of migrants: A shared responsibility. *Migrants Rights: A Special Issue Migration IOM*, 3.

<sup>27</sup> Perruchoud (n 26).

of irregular labour migration in Africa.<sup>28</sup> It is crucial to emphasise that the irregular nature of migration does not absolve receiving states of their obligation to safeguard these individuals' rights. In line with this perspective, a 2015 SADC document, the *Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration*, acknowledges this by stating:

Individuals taking the hazardous journey south are exposed to severe violations of their human rights, regardless of their status and are in need of assistance.<sup>29</sup>

This reflects an increasing recognition within the SADC region that individuals should have their rights safeguarded, even when they have irregular status. Some conventions articulate these rights explicitly; for instance, article 8 of the ILO Convention 143<sup>30</sup> stipulates that even migrants in an irregular situation must:

enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

In addition, certain groups of migrants may find themselves compelled to use irregular migration pathways and arrive in the receiving country as either refugees, victims of trafficking, stateless persons or unaccompanied migrant children. All these individuals require specific protection under international legal frameworks.<sup>31</sup>

A major challenge is that national laws can frequently create obstacles and hinder the internationally protected rights of women migrant workers. The SADC region exemplifies the complexities and challenges faced in protecting the rights of these individuals. The SADC consists of multiple countries, each with its own unique immigration laws, policies and regulations. This

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<sup>28</sup> Stephan van Eck & Felicia Snyman. (2015). Social protection afforded to irregular migrant workers: Thoughts on the Southern Africa Development Community (with emphasis on Botswana and South Africa). *Journal of African Law* 59: 1–23. doi: 10.1017/S002185531500011X.

<sup>29</sup> Southern Africa Strategic Plan of Action to Address Mixed and Irregular Migration (DRAFT) 2015–2018.

<sup>30</sup> Few states have ratified this convention. At present only 24 states have done so, seven of these are in Africa; however, not a single SADC state has done so.

<sup>31</sup> UN General Assembly. (1951). *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, Vol 189, 137.

lack of uniformity in migration policies can impede the effective protection of women migrant workers' rights across the region.

First, a significant variation in immigration laws is a feature of the SADC. Some countries may have well-defined and comprehensive migration policies, whereas others may lack explicit regulations altogether. This inconsistency makes it difficult for women migrant workers to navigate the legal frameworks and understand their rights and obligations in each country they pass through or reside in. This, in turn, can lead to exploitation, vulnerability to abuse and the denial of basic rights.

Furthermore, the lack of harmonisation between migration policies among SADC countries exacerbates the challenges faced by women migrant workers. Harmonisation involves coordinating policies, procedures and practices to ensure a cohesive and consistent approach to immigration within the region. In the context of women migrant workers, harmonisation would involve:

- aligning laws and regulations to protect their rights;
- providing adequate social protection;
- ensuring fair employment practices, and
- dealing with issues such as human trafficking and gender-based violence (GBV).

Consequently, the protection of women migrant workers is not only fragmented and scattered but also profoundly influenced by national laws. It has therefore become crucial to research, document and analyse the status quo in order to understand the nature of human rights violations faced by migrants due to national regulatory systems, and to identify the available remedies. Examining the impact national laws have on the internationally protected rights of women migrant workers has even greater significance from a gender perspective, because, as this thesis shows, gender shapes their migration experiences, influences their encounters with the law, and can affect the enjoyment of their human rights.

Understanding the significance of this issue from a gender perspective is even more essential, because governments have made *explicit* commitments to safeguard the rights of women, including

those of women migrant workers. An increasing emphasis on women's rights followed the Fourth World Conference on Women in 1994. This was documented and enabled through the Beijing Declaration,<sup>32</sup> the extensive acceptance of CEDAW ratification,<sup>33</sup> and the adoption of both the Maputo Protocol and the SADC Protocol on Gender and Development.<sup>34</sup> Both national and international legal frameworks mandate governments to actively safeguard, advocate and meet the human rights of all women. Consequently, African governments are duty-bound to guarantee the protection of the rights of women migrants who relocate to their countries. In this way the primary aim of this thesis is to assess the impact the regulatory framework has on Zimbabwean women migrant workers in Botswana regarding the realisation of their human rights. In instances where there are gaps or deficiencies in this framework, the thesis provides recommendations and solutions that would ensure that the regulation of these workers is centred on the protection and advancement of their human rights.

## 1.2 Background to study

While labour movement from Zimbabwe to Botswana has roots in the colonial period, it surged markedly in the post-2000 period, coinciding with Zimbabwe's significant economic and political challenges. Data indicate that approximately 477 000 Zimbabweans moved to Botswana in 2000, and this figure had increased to a million by 2008.<sup>35</sup>

According to 2017 government statistics, it was reported that a total of 807 332 Zimbabweans entered Botswana during that year. Among these were 466 607 men and 340 729 women.<sup>36</sup> Whereas 807 332 Zimbabweans entering Botswana in 2017 may seem high, it is important to note that this figure does not necessarily indicate that each person made only one visit. Owing to the prevalence of circular migration, people may enter and exit Botswana multiple times throughout the year – a fact that is not reflected in statistics. Nonetheless, these figures suggest that a significant number of Zimbabweans are still entering Botswana even at the present time. When

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<sup>32</sup> United Nations. (1995). *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women*, 27 October 1995. Available at <<https://www.refworld.org/docid/3dde04324.html>>.

<sup>33</sup> Of 195 countries, 189 have ratified the CEDAW.

<sup>34</sup> Entered into force in 2018.

<sup>35</sup> Government of Botswana. (2009). *Statistics 2009*. Available at <[www.statsbots.org.bw](http://www.statsbots.org.bw)>.

<sup>36</sup> Government of Botswana. (2017). *Statistical Yearbook 2017*. Available at <[https://www.statsbots.org.bw/sites/default/files/publications/Statistical%20Year%20Book%202017\\_0.pdf](https://www.statsbots.org.bw/sites/default/files/publications/Statistical%20Year%20Book%202017_0.pdf)>.



considering the population of Botswana, which is approximately 2.3 million (as of the 2022 national census),<sup>37</sup> this number takes on even greater importance. Furthermore, this figure does not include the factor of irregular migration.

Campbell and Crush observe that the migration of Zimbabwean people to Botswana takes place via various channels. These include different types of residence or work permits; recognised refugees and asylum-seekers; and through undocumented or irregular means.

These different flows of migrants also vary in terms of their duration. The length of stay may range from short term to permanent residence and as previously mentioned, may involve circular migration.<sup>38</sup> The Table below indicates migrant arrivals in Botswana by nationality and gender in 2017.

**TABLE 16: TOTAL ARRIVALS BY NATIONALITY AND GENDER, 2017**

Nationality	Sex		Total	% Distribution
	Male	Female		
<b>SADC</b>				
Zimbabwe	466,603	340,729	<b>807,332</b>	5766657.1
South Africa	484,003	221,991	<b>705,994</b>	5042814.3
Namibia	125,729	62,860	<b>188,589</b>	1347064.3
Zambia	132,234	55,277	<b>187,511</b>	1339364.3
Lesotho	7,669	13,366	<b>21,035</b>	150250.0
Malawi	15,583	4,173	<b>19,756</b>	141114.3
Swaziland	6,634	2,400	<b>9,034</b>	64528.6
Mozambique	6,207	2,011	<b>8,218</b>	58700
United Republic of Tanzania	5,385	1,293	<b>6,678</b>	47700
Angola	1,300	443	<b>1,743</b>	12450
Democratic Republic of the Congo	1,074	586	<b>1,660</b>	11857.1
Mauritius	1,075	455	<b>1,530</b>	10928.6
Seychelles	127	186	<b>313</b>	2235.7
Madagascar	120	85	<b>205</b>	1464.3
<b>Total</b>	<b>1,253,743</b>	<b>705,855</b>	<b>1,959,598</b>	<b>13997128.6</b>

Source: Government of Botswana, *Statistical Yearbook 2017*

<sup>37</sup> Exact number is 2 346 179, see Government of Botswana. (2022). *Population Census*. Available at <<https://www.statsbots.org.bw/census-2022>>.

<sup>38</sup> E Campbell & J Crush. (2012). *Unfriendly Neighbours: Contemporary Migration from Zimbabwe to Botswana, the Southern African Migration Programme*. Kingston, Ontario: Queen's University, Southern African Research Centre.

Consistent with global patterns, the workforce moving from Zimbabwe to Botswana is becoming more women dominated. Current data show that 45% of Zimbabwean labour migrants in Botswana are women.<sup>39</sup> One unique gender aspect is that women migrants tend to be younger than their male counterparts<sup>40</sup> This swing towards more women migrants in the region highlights the fact that men and women often migrate for diverse reasons. Whereas men generally migrate to secure long-term formal work, women usually migrate for short-term informal roles in fields such as informal trade and domestic work. This phenomenon can be attributed to various social factors, which are explored in detail in this research. These factors include limited access to formal migration channels, a scarcity of formal employment opportunities and the enduring responsibilities women often bear within their families. This makes it challenging for them to abandon their domestic obligations completely for extended periods of time.<sup>41</sup> Campbell's research on migration in southern Africa corroborated this when he discovered that:

gender differences in male and female migration show up in the timing of actual and anticipated migration periods, with males consistently staying away longer than women. Gender differences are also apparent in the frequency and duration of visits to other countries. Women make more frequent visits but of shorter duration than men.<sup>42</sup>

Given the situation, numerous Zimbabwean women who move to Botswana, frequently bypass complex immigration processes linked to formal jobs. Instead, they choose to work as undocumented migrants in the unregulated informal economy. Typically, many of these migrants either seek low-skilled roles such as hair-braiding, domestic labour and sex work, or they engage in informal trading.<sup>43</sup>

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<sup>39</sup> Campbell & Crush (n 38).

<sup>40</sup> Campbell & Crush (n 38).

<sup>41</sup> V.N Muzvidziwa. (2007). *Women Without Borders: Informal Cross-Border Trade Among Women in the SADC*. Addis Ababa: OSSREA Publications.

<sup>42</sup> Campbell & Crush (n 38).

<sup>43</sup> Kwar (n 8).

Irregular migrant workers are not covered under Botswana's national labour laws,<sup>44</sup> because work permits are required before they can claim protection under these laws.<sup>45</sup> However, due to the previously mentioned reasons, many women migrants from Zimbabwe either choose not to or cannot follow this path. Consequently, from a policy perspective, the legal standing of irregular migrant workers in Botswana remains ambiguous. They are governed principally by the Immigration Act, 2011, which is restrictive and punitive.<sup>46</sup> This Act poses numerous challenges for undocumented foreign nationals, and defines 'illegality' to include actions such as:

- not using official entry or exit points;<sup>47</sup>
- not possessing proper documentation;<sup>48</sup>
- engaging in prohibited activities;<sup>49</sup> and
- exceeding permitted stays.<sup>50</sup>

If a non-citizen breaches any of the stipulations outlined in the Act, they are deemed to have committed an offence. This can lead to penalties including imprisonment, fines and potential deportation. Consequently, irregular labour migrants lead uncertain and unstable lives, frequently finding themselves at odds with the law.

Women migrants, in particular, face more complex challenges when compared with their male counterparts. For example, in their paper titled, 'Non-citizens and maternal mortality in Botswana: A rights perspective,'<sup>51</sup> Mogobe et al noted that:

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<sup>44</sup> Employment Act 29 of 1982 [Cap 47:01]; Employment (Amendment) Act 10 of 2010; Public Service Act 30 of 2008 [Cap 26:01]; Trade Disputes Act 15 of 2004 [Cap 48:02]; Workers Compensation 23 of 1998 [Cap 47:03]; Trade Unions and Employers' Organizations Act 23 of 1983 [Cap 48:01].

<sup>45</sup> Section 22 of the Immigration Act 3 of 2011 states that 'a non-citizen shall not engage in any occupation for reward or profit, unless they are in possession of a work permit or exemption'.

<sup>46</sup> Act 3 of 2011.

<sup>47</sup> Section 4: Unauthorised entry or exit from Botswana, unless done through designated entry points, is deemed an offence.

<sup>48</sup> Section 8: Individuals are penalised if they enter Botswana without a travel document in their own name.

<sup>49</sup> Section 22: Non-citizens are prohibited from working for gain without a proper work permit or exemption, and violations are penalised.

<sup>50</sup> Section 18: Overstaying in Botswana beyond the allowed 90-day limit for visitors is a punishable offence.

<sup>51</sup> K Dintle Mogobe, S Ray, F Madzimbamuto, M Motana, D Ramogola-Masire, G Rankgoane, R Phillips, H Dereje & M Mokotedi. (2014). Non-citizens and maternal mortality in Botswana: A rights perspective. *International Journal of Migration, Health and Social Care* 10(4): 220–230. Available at <<https://doi.org/10.1108/IJMHS-08-2013-0029>>.

discrimination against non-citizen women in Botswana, by denying them free access to maternal health services, extends into loss of life because of delays in seeking healthcare especially for obstetric emergencies.<sup>52</sup>

In this empirical study the authors found that low-wage migrant women (many of whom were irregular) who did not have access to the free maternal healthcare were at greater risk of maternal mortality.

Because of the reasons outlined above, the subject of this study is a *Zimbabwean woman migrant worker* in Botswana, which can be justified by several key factors. As a *Zimbabwean*, her inclusion in the study is justified by the substantial number of Zimbabwean migrants present in Botswana, who form the largest number of migrants in the country.<sup>53</sup> This highlights the relevance and importance of studying this particular group given the implications it has on policy and socio-economic dynamics within Botswana. Furthermore, focusing on *women* migrants is essential as they face unique vulnerabilities in their migratory journeys. By focusing on the status of Zimbabwean women, we can gain valuable insights into the specific challenges they encounter as they navigate a new country and seek economic opportunities. Their circumstances highlight the gendered dynamics of migration, the intersection of gender and vulnerability, and the potential empowerment of women within this context. In addition, considering her as a *migrant worker* aligns with the predominant motivations driving migration, particularly economic pursuits.<sup>54</sup> Therefore, the subject, as a low-wage worker in the informal sector, represents the conditions of many Zimbabwean women who undertake similar employment. Understanding the complexities and obstacles faced by Zimbabwean women in the labour market allows for a comprehensive analysis of their integration into the workforce, access to social services and the protection of their labour rights. Therefore, while Botswana hosts a variety of migrants, the focus of this study is specific: she hails from Zimbabwe, she is a woman, and she has likely entered or stayed in Botswana without official authorisation. As a result, she probably works in a low-paying job within

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<sup>52</sup> Mogobe et al (n 51).

<sup>53</sup> Zimbabweans make up 58.8% of migrants in Botswana; see <[https://migrants-refugees.va/country-profile/botswana/#:~:text=II.&text=In%202020%2C%20the%20migrant%20population,%2C%20and%20Zambian%20\(4%25\)>](https://migrants-refugees.va/country-profile/botswana/#:~:text=II.&text=In%202020%2C%20the%20migrant%20population,%2C%20and%20Zambian%20(4%25)>)>.

<sup>54</sup> According to the ILO, 69% of migrants are economically active. ILO. (nd). *Global Estimates on International Migrant Workers Results and Methodology*. Available at <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_808935.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_808935.pdf)>.

the informal sector, faces restricted access to Botswana's social services and labour protections, and is at risk of having her rights violated.

Nonetheless, this thesis posits that Botswana has a duty to safeguard the rights of these migrants. Above all, the Constitution of Botswana enshrines an equality and non-discrimination provision which articulates:

Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely, (a) life, liberty, security of the person and the protection of the law.<sup>55</sup>

Section 15(2) states further:

no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.<sup>56</sup>

The aforementioned constitutional provisions seemingly suggest that everyone, regardless of their immigration standing, should be granted their basic human rights within the borders of the Republic of Botswana. However, it is noteworthy that this assertion is somewhat tempered by section 15(4)(b) which specifies:

this section shall not apply to any law so far as that law makes provision ... with respect to persons who are not citizens of Botswana.

Yet, as is explored in this thesis, the Botswana judiciary has progressively chosen a more purposive approach to the Constitution that emphasises the realisation of human rights.<sup>57</sup> Additional legal frameworks can also be employed to address this issue. For instance, the previously mentioned article by Mogobe et al pointed out accurately that the lack of provision of maternal health services

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<sup>55</sup> Section 3 of the Constitution of the Republic of Botswana 1966.

<sup>56</sup> Section 3(2).

<sup>57</sup> See *Attorney-General v Dow* 1992 BLR 119 (Ca) and *Patson v The Attorney-General* 2008 (2) BLR 66 (HC).

based on nationality constitutes a violation of women's human rights. This is true both in the context of the non-discrimination clause in Botswana's Constitution and as outlined in General Recommendation 24 by the CEDAW (relating to article 12 of the Convention). Article 12 explicitly mandates that states must guarantee access to maternal health services for pregnant women as a human right, regardless of their nationality or economic background.<sup>58</sup>

Moreover, there is evidence from Botswana's judiciary, as seen in the *Molefi v Blue Blends Investments* case,<sup>59</sup> that a worker in Botswana may have a right to compensation even where they were working so-called 'illegally'. This understanding is derived from the common-law doctrine of unjust enrichment<sup>60</sup> or by applying the *in pari delicto potior conditio defendentis* rule, especially if the employer knew the individual was working unlawfully. While this particular case centred on a migrant woman with formal employment who continued to work after her visa lapsed, it underscores that, to some extent, Botswana's courts do recognise the labour rights of individuals working within the country's borders, even if their employment status is deemed irregular.

These limited findings and the various regional<sup>61</sup> and global human rights<sup>62</sup> conventions which Botswana has ratified indicate that the state has an obligation to implement a rights-based framework when regulating female Zimbabwean labour migrants. Through this assertion, the focus of this thesis is on a critical examination of the impact Botswana's laws have on the realisation of human rights of Zimbabwean migrant women employed in the country's informal economy.

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<sup>58</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No 24: article 12 of the Convention (Women and Health)*, 1999, A/54/38/Rev1, chap I.

<sup>59</sup> *Molefi v Blue Blends Investments (Pty) Ltd t/a Nescafe* [2004] 1 BLR 259 IC.

<sup>60</sup> 'Unjust enrichment' is a legal principle rooted in English law that occurs when one individual gains a benefit unjustly, often due to luck, error, or another's misfortune. This gained benefit has neither been earned nor paid for by the person who receives it. Ethically and morally, the individual should not retain this unearned benefit. Legally, the person enriched must return the gains that were unfairly acquired. This doctrine is employed in cases where there is no existing contract and serves to prevent one party from unfairly benefiting at the expense of another.

<sup>61</sup> Examples include: the African Charter on Human and Peoples' Rights; the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; and the African Charter on the Rights and Welfare of the Child.

<sup>62</sup> The International Covenant on Civil and Political Rights; the Convention on the Elimination of All Forms of Discrimination Against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child; and Mogobe et al (n 51). The cross-referencing for Mogobe et al is incorrect.

Adopting a socio-legal lens, the study assesses how laws and gender intersect to shape the extent to which these women enjoy human rights protections in accordance with international standards.

The primary purpose of this assessment is to identify the dynamic relationship between laws and gender in Botswana, specifically how they influence the realisation of human rights protections. By exploring this interaction, the thesis highlights the existing challenges and gaps that Zimbabwean migrant women face in accessing their rights within Botswana's legal framework. In doing so, it proposes reforms guided by a gender-sensitive and rights-based approach that aligns with both Botswana's domestic legal obligations and its international commitments.

### 1.3 Statement of problem

Research in 2009 by Kiwanuka and Monson from the Forced Migration Studies Programme at the University of the Witwatersrand sheds light on the myriad challenges faced by Zimbabwean migrants when attempting to secure legal employment in Botswana. The obstacles cited include:

- the inability to access passports in Zimbabwe;
- Botswana's stringent asylum policies, discouraging many from seeking refugee status, even when their circumstances align with that designation;<sup>63</sup>
- the challenges associated with procuring work permits in Botswana (these permits often require the migrant to possess advanced skills).<sup>64</sup>

Moreover, as previously highlighted, survival is the primary motivation for many Zimbabwean migrants, particularly women, to venture to Botswana. Their intention is often to engage in short-term, ad hoc jobs, colloquially referred to as 'piece' work.<sup>65</sup> The earnings from these jobs are crucial, as they are sent back as remittances to support their families in Zimbabwe.<sup>66</sup>

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<sup>63</sup> A Betts. (2013). Botswana: The division of Zimbabweans into refugees and migrants. In A Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*. New York: Cornell University Press, 81.

<sup>64</sup> M Kiwanuka & T Monson. (2009). *Zimbabwean Migration into Southern Africa: New Trends and Responses*. Forced Migration Studies Programme, University of the Witwatersrand.

<sup>65</sup> 'Piece work' pertains to acquiring work in fragmented, part-time 'pieces' that cumulatively form a full working week. For example, a domestic helper might serve one employer for a day in a week and then work for various other employers on different days of the week.

<sup>66</sup> Betts (n 63) 80.

In this way, the circumstances they find themselves in, coupled with the nature of the jobs available to them, compel many Zimbabweans to either enter or stay in Botswana irregularly,<sup>67</sup> mostly working within the unregulated informal sector. While several aspects of national legislation regulate the legal employment of Zimbabwean labour migrants in Botswana,<sup>68</sup> there is a notable absence of clear policy addressing those who arrive in Botswana through covert channels<sup>69</sup> and subsequently engage in the informal sector. The murky legal landscape surrounding their status and the absence of clear regulations often subjects them to discrimination. This discrimination manifests in two primary ways:

- *Socially*: Local Botswana populations often display strong xenophobic sentiments towards Zimbabweans.<sup>70</sup>
- *Legally*: Botswana's legislation, which can be characterised as anti-foreigner in nature (e.g., laws that curtail migrants' access to healthcare), perpetuates discrimination against these migrants.<sup>71</sup>

This reality was corroborated by Kiwanuka and Monson in their study, wherein they noted that among the five southern African nations that host the majority of Zimbabwean migrants – Botswana, Malawi, Mozambique, South Africa and Zambia:

Botswana has the most exclusionary policy towards Zimbabweans, regularly deporting large numbers and limiting their access to basic social services.<sup>72</sup>

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<sup>67</sup> Section 8 of Botswana's Immigration Act 2011 stipulates that it is an offence for a non-citizen or non-resident to enter Botswana without holding an appropriate travel document issued specifically to them. In a related provision, section 18 of the same Act declares it illegal for a visitor to overstay in the country beyond the allotted maximum duration of 90 days.

<sup>68</sup> Refugees (Recognition and Control) Act 1968 [Cap 25:03], 5 April 1968. Available at <<https://www.refworld.org/docid/3ae6b4d60.html>> (accessed 28 November 2019); see also Campbell & Crush (n 38).

<sup>69</sup> Kiwanuka & Monson (n 64).

<sup>70</sup> A study by SAMP revealed prevalent perceptions among the Botswana regarding Zimbabweans: on a zero to ten scale, close to 70% rated illegal immigrants as zero. A staggering 95% opposed granting them freedom of speech in Botswana. Moreover, there was significant support for militarizing borders, prosecuting entrepreneurs employing illegal immigrants, and advocating for the deportation of all unauthorized immigrants.

<sup>71</sup> T Moroka & M Tshimanga. (2009). Barriers to and use of healthcare services among cross-border migrants in Botswana: Implications for public health. *International Journal of Migration, Health and Social Care* 5(4): 33–42.

<sup>72</sup> Kiwanuka & Monson (n 64).



Therefore, the prevailing issue revolves around the treatment of Zimbabwean migrants working in Botswana's informal sector. Regrettably, these individuals often face arrest, detention and mass deportations under highly undignified conditions. Such practices not only contravene Botswana's human rights obligations at national and international level but also exemplify a fundamental problem: Botswana lacks an adequate regulatory system to address the situation of informal migrant workers from Zimbabwe. As the number of these migrants is expected to grow given the current state of that country,<sup>73</sup> it becomes imperative to address this issue promptly and effectively. Failing to do so results in the violation of their human rights.

The challenges are even more acute for women migrant workers than for males. This is due to Botswana's steadfast preoccupation with 'gender-neutral' laws.<sup>74</sup> These laws are rooted in policies that overlook the distinct effects such laws may have on men versus women. In his research paper titled, 'Women's inclusion and exclusion from property ownership in Botswana,' Kalabamu<sup>75</sup> points out that such a gender-neutral stance frequently results in structural discrimination against women. He attributes this to the 'historically constructed power differences between men and women',<sup>76</sup> a feature embedded in Botswana's patriarchal societal fabric.

Therefore, women migrants in Botswana find themselves especially susceptible to the discriminatory effects of the law, due to their dual status as both migrants and women. For instance, the national health policy<sup>77</sup> states that non-nationals are not eligible for free healthcare. While the policy seems gender-neutral on the surface, it disproportionately affects women non-nationals who need specialised obstetric care during pregnancy, childbirth and the postpartum period –

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<sup>73</sup> Samaita. K, (2019). Zimbabwe's economy in steep contraction as inflation hits 300%. *BusinessLIVE* (online). Available at <<https://www.businesslive.co.za/bd/world/africa/2019-09-26-zimbabwes-economy-in-steep-contraction-as-inflation-hits-300/>> (Accessed 3 February 2020).

<sup>74</sup> Kalabamu. F, (2001). Housing delivery systems in Botswana: The inadequacy of gender-neutral policies. In AT Rwomire (ed), *African Women and Children: Crisis and Response*. Westport: Praeger, 205–224.

<sup>75</sup> Kalabamu. F (2005). *Women's Inclusion and Exclusion from Property Ownership in Botswana*. Paper presented at Conference on Promoting Social Inclusion in Urban Areas: Policies and Practice. Centre for Global Gender Studies Gothenburg University, Lund, Sweden, 16–17 September 2005, 1–24.

<sup>76</sup> Kalabamu (n 74).

<sup>77</sup> African Health Organization (AHO). (2015). *Botswana: The Health System*. Available at <[http://www.who.int/profiles\\_information/index.php/Botswana:The\\_Health\\_System](http://www.who.int/profiles_information/index.php/Botswana:The_Health_System)>.

requirements not affecting men. This concept of ‘dual vulnerability’ for women migrants has been well-documented in academic literature.<sup>78</sup>

The prevailing circumstances underscore the importance of adopting a gendered lens in migration governance, recognising the unique migration experiences of men as opposed to women. This stance is backed by the International Organisation for Migration (IOM), which has a gender policy articulating:

It is recognized that a person’s sex and gender shape every stage of the migration experience, whether forced, voluntary or somewhere in between ... Risks, vulnerabilities and needs are also shaped in large part by one’s gender, and often vary drastically for different groups. The roles, expectations, relationships and power dynamics associated with being a man, woman, boy or girl significantly affect all aspects of the migration process and can also be affected in new ways by migration.<sup>79</sup>

In this thesis it is therefore crucial to examine how legal frameworks interact with gender in the context of migration. This is not merely an academic exercise; understanding the gendered nuances of migration has real-world implications for policy-making. The goal is to formulate policies that are responsive to the unique needs of women migrants, rather than adopting a one-size-fits-all approach. Despite existing research on migration in Botswana, studies that focus specifically on the complex intersection of gender and migrant status – particularly as it pertains to those working in the informal sector – and the implications of the legal system on this group are notably lacking. This study aims to fill that gap by scrutinising Botswana’s existing regulatory framework for its efficacy in governing women migrants from Zimbabwe employed in the informal sector. It proposes a gender-sensitive, rights-based approach to better regulate and protect this vulnerable group.

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<sup>78</sup> Morris. D (1998). Minority women in a changing labour market: The case of Wales. *Minorities and Women* 28.  
<sup>79</sup> IOM. (2015–2019). *Gender Equality Policy, C/106/INF/8/Rev.1*. Available at <<https://governingbodies.iom.int/system/files/en/council/106/C-106-INF-8-Rev1-IOM-Gender-Equality-Policy-2015-2019.pdf>>.

## 1.4 Research questions

Based on the gaps in the existing research, the fundamental research questions that this study seeks to answer are:

- In what way does Botswana's legal system interact with gender to have an impact on the realisation of human rights of Zimbabwean migrant women who work in the country's informal economy?
- How can the Botswana legal system be reformed or adjusted to promote gender equality and enhance the realisation of human rights for Zimbabwean migrant women working in the country's informal economy?

In order to facilitate this discovery, the sub-questions consider:

- How does gender, encompassing a range of interconnected social characteristics such as poverty, cultural norms and practices, limited access to education and healthcare, economic disadvantages, and vulnerability to violence, shape the migration experience of Zimbabwean women in Botswana?
- What is the normative human rights framework protecting the rights of Zimbabwean women migrant workers in Botswana's informal economy?
- What legal and policy mechanisms are in place in Botswana to regulate Zimbabwean women migrant workers in the informal economy, and to what extent do these legal and policy mechanisms align with human rights standards for protecting the rights of women migrant workers?
- When do gender implications intersect with these legal and policy mechanisms and what is the resulting impact on the human rights situation of Zimbabwean migrant women engaged in Botswana's informal economy?
- What gender-sensitive and rights-based reforms can Botswana implement to comply with national, regional and global standards for regulating Zimbabwean women migrant workers in the informal economy?

These research questions have been chosen because they address important aspects related to the migration experiences and human rights situation of Zimbabwean women migrant workers in Botswana's informal economy. The questions cover various dimensions, including:

- the influence of gender and other social characteristics;
- the normative human rights framework;
- legal and policy mechanisms;
- impact assessment; and
- potential reforms.

By exploring these aspects, the research can provide valuable insights into the *challenges*, *gaps* and *opportunities* in the protection and realisation of the human rights of Zimbabwean women migrant workers in Botswana's informal economy. Through a comprehensive examination of these research questions, the aim is to shed light on the complexities of the migrant woman's situation, identify areas for improvement in legal and policy frameworks, and propose gender-sensitive and rights-based reforms to enhance the human rights situation of this vulnerable group.

## 1.5 Research method and data

### 1.5.1 Method: A socio-legal study

This study uses qualitative socio-legal methods to examine the law as a dynamic and evolving social phenomenon. Rather than seeing law as a set of fixed rules,<sup>80</sup> socio-legal studies view law as a product of history and culture, which takes different forms in different social contexts.<sup>81</sup> Socio-legal studies also focus on how the law is experienced and interpreted by different actors,<sup>82</sup> and how it affects their lives.<sup>83</sup>

O'Donovan<sup>84</sup> observes that viewing the law in this way departs from the traditional doctrinal perspective. However, socio-legal research has become increasingly popular because the law, as traditionally viewed, often falls short in its approach to social problems. This is why socio-legal research tools and methods have become appealing, as they emphasise not only the legal problem

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<sup>80</sup> Reza Banakar & Max Travers. (2005). *Theory and Method in Socio-Legal Research* (Onati International Series in Law and Society). London: Bloomsbury.

<sup>81</sup> Banakar & Travers (n 80).

<sup>82</sup> Darren O'Donovan. (2016). Socio-legal methodology: Conceptual underpinnings, justifications and practical pitfalls. In D O'Donovan, *Legal Research Methods: Principles and Practicalities*. Melbourne: La Trobe University Press, 7.

<sup>83</sup> O'Donovan (n 82).

<sup>84</sup> O'Donovan (n 82).

but also the social realities surrounding it. Thomas recognises the need for socio-legal research by stating that:

empirically, law is a component of the wider social and political structure and is inextricably related to it in an infinite variety of ways. And therefore, only understood if studied in that context.<sup>85</sup>

The interaction between gender and migration and the law as sociological phenomena in this study, means that a socio-legal study appears to be the best method to be applied to the research for this particular instance. In line with this, O'Donovan states that:

Socio-legal methodology also draws upon legal realism in its focus upon how law actually functions in society. Doctrinal legal research directs itself solely towards the normative function of rules: identifying their prescriptive content rather than their actual effect. Socio-legal methodology tackles certain key silences in doctrinal legal scholarship and adopts a more realistic approach to law as merely one form of regulation.<sup>86</sup>

Therefore, rather than viewing the law as a system of rules and doctrines, it is understood to be a reflexive social institution which requires research methods other than traditional doctrinal methods.<sup>87</sup> This way of understanding socio-legal practice is supported by the Socio-Legal Studies Association (SLSA), which defines socio-legal studies as those that:

embrace disciplines and subjects concerned with law as a social institution, with the social effects of law, legal processes, institutions, services and with the influence of social, political and economic factors on law and legal institutions.<sup>88</sup>

In the context of this study a socio-legal perspective on human rights involves the study of how human rights law is implemented within migration governance systems. It recognises that there is often a gap between the theory of human rights and its practise and seeks to understand how human

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<sup>85</sup> P Thomas. (1986). Curriculum development in legal studies. *Law Teacher* 20, 112.

<sup>86</sup> O'Donovan (n 82).

<sup>87</sup> Roseline Barbour & John Schostak. (2005). Interviewing and focus groups. In Bridget Somekh & Cathy Lewin (eds), *Research Methods in the Social Sciences*. London: Sage Publications.

<sup>88</sup> Socio-Legal Studies Association (SLSA). (2009). *Statement of Principles of Ethical Research Practice 1.2.1*. Birmingham: SLSA.

rights can be considered as a social construction, practice and institution or a way of governing social relations. Because human rights can be seen as norms or standards created through legal or other structures that regulate the interaction between those with and without power, the study also examines how the state and its laws can sometimes threaten human rights, thereby creating the need for their protection.

In this way, a socio-legal study of human rights examines the interplay between law, society and human rights, and considers the legal, social and historical context in which the human rights discourse and practise take place. It draws from multiple disciplines to understand the complex social, legal and political factors that shape how people enjoy human rights. The study focuses on the ways in which the legal system and other social institutions protect and promote human rights, and the role of non-state actors in this process. In addition, it analyses the ways in which human rights are violated or denied, examining the various forms of human rights abuse and their underlying causes, and examining the factors that make certain groups (e.g., women) more vulnerable to abuse than others.

In order to undertake this study, the following socio-legal methods are employed:

#### 1.5.2.1 Gender theory methodology

Gender theory, as a framework for analysis, examines how societal norms, roles and expectations shape gender identities and relations.<sup>89</sup> When applied to migration studies, gender theory provides a lens to understand how gender intersects with the processes, experiences and outcomes of migration. It explores the ways in which migration is influenced by and, in turn, influences gender dynamics, power relations and social inequalities. This methodology delves into the social construction of gender, challenges binary conceptions of gender, and analyses how gender interacts with other social categories such as race, class and nationality.

By employing gender theory in migration studies, researchers gain insights into the diverse and complex ways in which gender shapes the migration journey, including access to resources, social

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<sup>89</sup> A Jule. (2014). Gender theory. In AC Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research*. Dordrecht: Springer. Available at <[https://doi.org/10.1007/978-94-007-0753-5\\_1137](https://doi.org/10.1007/978-94-007-0753-5_1137)>.

networks, labour-market participation, and experiences of inclusion and exclusion.<sup>90</sup> It illuminates the interplay between gender, migration and broader social structures, contributing to a more nuanced understanding of the gendered dimensions of migration and informing approaches to promote gender equality and social justice in migratory contexts.

This thesis employs gender theory methodology in Chapters 2 and 3 which aims to conceptualise the gender and migration discourse in the international and sub-regional context.

#### 1.5.2.2 Feminist legal methods

In his essay, ‘Socio-legal methodology: Understandings, justifications and practical pitfalls’, O’Donovan highlights the significant contributions of feminist legal theorists to the field of socio-legal research. Katherine Bartlett, one of the pioneering scholars, recognised the exclusionary potential of the law when not analysed from a gendered perspective.<sup>91</sup> In order to address this, Bartlett proposed feminist legal methods that can be employed to examine how laws have an impact on women specifically.

Bartlett outlined three types of feminist legal methodology. The first method is known as ‘asking the women question’, which involves examining how the law fails to consider the experiences and values of women. This process also identifies legal norms and ideas that may place women in an unfavourable position. Bartlett explains that this involves:

examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women.<sup>92</sup>

For instance, she cited sex-based, maximum work-hour legislation in labour law as discriminatory when viewed through the lens of the women question.

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<sup>90</sup> Katherine M Donato et al. (2006). A glass half full? Gender in migration studies. *The International Migration Review* 40(1): 3–26. Available at <<http://www.jstor.org/stable/27645577>> (Accessed 14 July 2023).

<sup>91</sup> Katharine Bartlett. (1989). Feminist legal methods. *Harvard Law Review* 103: 829–888. Available at <[https://scholarship.law.duke.edu/faculty\\_scholarship/148](https://scholarship.law.duke.edu/faculty_scholarship/148)>.

<sup>92</sup> Bartlett (n 91)

The second method is ‘feminist practical reasoning’,<sup>93</sup> acknowledging the differences in how men and women interpret the law. Bartlett argued that women are more attuned to situational contexts and resist universal principles that do not align with their own experiences. This approach supports socio-legal methodology in that it aims to uncover the actual effects of the law rather than focusing solely on its normative content.

The third method is ‘consciousness-raising’,<sup>94</sup> which involves an interactive and collaborative process of articulating personal experiences with the law and making meaning from them collectively. By sharing their encounters openly, women create a body of knowledge that exposes the deficiencies of the law. This process allows for the exploration of shared experiences and patterns, transforming individually perceived personal hurts into a collective recognition of oppression.

These feminist legal methodologies proposed by Bartlett have made significant contributions to socio-legal research. They have shed light on the gendered implications of the law and fostered a deeper understanding of its effects on women’s lives. Whereas all three methods are mentioned here for the sake of completeness of Bartlett’s work, this thesis uses only the first method in chapter 4: ‘Asking the woman question.’ In this chapter, a feminist critique of legal systems and human rights is conducted in order to examine critically how the law fails to consider women’s experiences, values and rights, and highlights areas requiring reform.

#### 1.5.2.3 Historical studies method

‘Historical methods of research are the process of systematically examining an account of what has happened in the past.’<sup>95</sup> This is a technique that involves delving into history to uncover the roots and evolution of a particular practice or phenomenon. Berg and Lune put it succinctly when they state that historical research ‘attempts to systematically recapture the complex nuances, the people, meanings, events, and even ideas of the past that have influenced and shaped the present’.<sup>96</sup> In Chapter 5 of my thesis, I employ this methodology to establish a comprehensive understanding

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<sup>93</sup> Bartlett (n 91).

<sup>94</sup> Bartlett (n 91).

<sup>95</sup> Available at <[https://www.academia.edu/22583546/Historical\\_Method\\_of\\_Research](https://www.academia.edu/22583546/Historical_Method_of_Research)>.

<sup>96</sup> BL Berg & H Lune. (2012). *Qualitative Research Methods for the Social Science* (8th ed). Pearson.



of the linkages between Botswana's restrictive migration policy towards Zimbabwean nationals and the surge in Zimbabwean migration, given the context of the country's political and economic challenges over a prolonged period of time.

In order to achieve this objective, I rely on the historical studies method, which enables me to present a detailed account of the historical and factual background of Zimbabwean migration in Botswana. I study the relevant literature, interpret the chronological development of this subject-matter and analyse the various factors that have contributed to the current state of affairs. Through this approach, I attempt to provide a nuanced perspective on the interplay of political and economic factors that have shaped Botswana's migration policy towards Zimbabweans over the years which have led to the situation in which Zimbabwean migrant women who work in Botswana's informal economy find themselves today.

#### 1.5.2.4 Critical content analysis

Critical content methodology is an approach to research that involves analysing written or visual content to identify underlying social and political messages or power structures.<sup>97</sup> It is commonly used in fields such as law,<sup>98</sup> media studies<sup>99</sup> and cultural studies<sup>100</sup> to explore how social norms and power dynamics are conveyed and reinforced through texts and images.<sup>101</sup> In socio-legal studies, critical content methodology enables the examination of a wide range of texts and discursive materials to uncover underlying biases, power dynamics and social constructions. This approach expands beyond traditional legal texts, considering broader societal implications and the influence of discourse on the shaping of legal norms. By scrutinising language, identifying power imbalances and exploring social reflections within discourse, researchers gain insights into how legal discourse interacts with society, shapes perceptions and influences practices. This

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<sup>97</sup> J Utt & K Short. (2018). Critical content analysis: A flexible method for thinking with theory. *Understanding and Dismantling Privilege* 8(2): 1–7. Available at <<https://www.wpcjournal.com/article/view/18826>>.

<sup>98</sup> M Salehijam. (2018). The value of systematic content analysis in legal research. *Tilburg Law Review* 23(1–2): 34–42. Available at <<https://doi.org/10.5334/tilr.5>>; also see <<https://www.ie.edu/law-school/news-events/news/politics-coding-systematic-content-analysis-legal-text/>>.

<sup>99</sup> K Hunting. (2021). Critical content analysis: A methodological proposal for the incorporation of numerical data into critical/cultural media studies. *Annals of the International Communication Association* 45(1), 39–58. doi: 10.1080/23808985.2021.1910061.

<sup>100</sup> Hunting (n 99).

<sup>101</sup> N Fairclough. (2003). *Analysing Discourse: Textual Analysis for Social Research*. New York & London: Routledge.

methodology challenges biases, amplifies marginalised voices and contributes to a nuanced understanding of the socio-legal landscape.<sup>102</sup>

The study employs critical content analysis to conduct a thorough examination of Botswana's legal and regulatory system on labour migration, focusing on laws that govern Zimbabwean migrants in Botswana to analyse their gender-specific impact. Chapter 6 assesses national laws and policies, including:

- the Constitution
- the Immigration Act;<sup>103</sup>
- the Public Health Act<sup>104</sup> and other health-related provisions;
- the Employment (Domestic Employees) Regulations;<sup>105</sup>
- the Employment of Non-Citizens Act;<sup>106</sup>
- the Citizenship Act;<sup>107</sup>
- the Trafficking Act;<sup>108</sup>
- The Refugee Act.<sup>109</sup>

Upon employing the critical content analysis, this research delves into the nuances of Botswana's legal and regulatory framework governing labour migration. The objective here is to unveil any underlying gender biases and power dynamics that are integrated into these legal texts, either explicitly or implicitly. This is significant as such biases can affect the experiences, rights and opportunities of Zimbabwean migrants.

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<sup>102</sup> M Davies. (2019). Doing critical-socio-legal theory. In M Davies (ed), *Routledge Handbook of Socio-Legal Theory and Methods*. London: Routledge. doi: 10.4324/9780429952814.

<sup>103</sup> Immigration Act 19 of 1966 [Cap 25:02]. Available at <[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=91527](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91527)> (accessed 28 November 2019).

<sup>104</sup> Public Health Act 44 of 1971 [Cap 63:01]. Available at <[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=91547&p\\_country=BWA&p\\_count=182](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=91547&p_country=BWA&p_count=182)> (accessed 23 October 2019).

<sup>105</sup> Employment (Domestic Employees) Regulations 1984. No 156. Available at <[https://www.ilo.org/dyn/natlex/natlex4.detail?p\\_lang=en&p\\_isn=1249](https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=1249)> (accessed 11 November 2019).

<sup>106</sup> Employment of Non-Citizens Act (No 11) [Cap 47:02].

<sup>107</sup> Botswana: Citizenship Act 8 of 1998 [Cap 01-01].

<sup>108</sup> Anti-Human Trafficking Act 32 of 2014.

<sup>109</sup> Refugees (Recognition and Control) Act of 1968 [Cap 25:03].

#### 1.5.2.5 Comparative analysis

Comparative analysis in law refers to the process of comparing and contrasting legal systems or laws from different jurisdictions in order to identify similarities and differences. This method is used to understand the legal principles, concepts and practices in different legal systems and to understand how these systems operate. Comparative analysis is often used to explore the strengths and weaknesses of these different legal systems and to inform legal reform efforts.<sup>110</sup>

The comparative analysis method is used in Chapter 8 where international best practices in the areas of gender, migration, human rights and the law are discussed. This highlights the areas in which Botswana's law and policies are deficient in order to lay the foundation for any legal reform by way of a gender-sensitive, rights-based approach that is nationally, regionally and internationally compliant with Botswana's obligations. The aim is to draw lessons from countries which have legal systems that are more sophisticated in relation to migration, gender and the law.

Therefore, alternative research techniques are used in this study in addition to conventional doctrinal procedures. In order to analyse the data and respond to the study questions, socio-legal methodologies, such as feminist legal approaches, historical studies and critical content analysis,<sup>111</sup> are used. In order to identify global best practices in the areas of gender, migration and the law, the comparative legal technique is also employed in the final chapters to evaluate the legislation from various jurisdictions.

#### **1.5.2 Data**

Data collection for this study is conducted through a comprehensive desk-based approach, using a variety of reliable sources for analysis. Both primary and secondary sources are used, and they include:

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2011). The methodology of comparative law. *Roger Williams University Law Review* 16(1): article 2. Available at <[http://docs.rwu.edu/rwu\\_LR/vol16/iss1/2](http://docs.rwu.edu/rwu_LR/vol16/iss1/2)>.

<sup>110</sup> Eberle (n 110).

<sup>111</sup> Eberle (n 110).

- *Legal documents and texts:* These include legislation, constitutions, court judgments,<sup>112</sup> legal opinions, regulations and other official legal documents. These sources provide insights into the formal legal framework and its practical application.
- *Government reports and publications:* Analysis of government reports, policy documents and publications related to migration, labour, human rights and gender issues in Botswana and Zimbabwe provides insights into the legal framework, policy initiatives and official perspectives on the topic.
- *Academic research and scholarly literature:* Existing studies, research papers and academic literature focused on migration, human rights, gender and the informal economy offer valuable theoretical frameworks, empirical findings and conceptual insights that contribute to the study.
- *International and regional reports:* Reports and publications from international organisations such as the United Nations, International Organization for Migration (IOM), International Labour Organization (ILO), and regional bodies such as the African Union (AU) and the Southern African Development Community (SADC) provide a broader perspective on migration, human rights and gender dynamics, including their relevance to Zimbabwean migrant women in Botswana's informal economy.
- *Non-governmental organisation (NGO) reports:* Reports and publications by NGOs focusing on human rights, women's rights, migration and labour rights, such as the African Centre for Migration & Society (ACMS), the Centre for Human Rights, and the Southern African Migration Project (SAMP) offer invaluable data, comprehensive case studies, and qualitative insights into the unique experiences and challenges encountered by Zimbabwean migrant women in Botswana's informal economy.
- *Media sources:* An analysis of newspaper articles, online news platforms and other media sources provide anecdotal evidence, narratives and public discourse related to the human rights situation of Zimbabwean migrant women in Botswana's informal economy. Critical analysis is applied to ensure the reliability and accuracy of the information.

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<sup>112</sup> In the context of this social legal study focused on revealing the lived experiences of law, the choice to limit reliance on judicial decisions was not an oversight but a realisation that emerged throughout the research process. The thesis emphasises capturing the nuanced, real-world impact of legal frameworks on individuals and communities, acknowledging that these impacts may not always be sufficiently reflected in case law predominantly.

- *Statistical databases:* Official statistical databases maintained by government agencies or international organisations provide quantitative data related to migration, employment, gender and human rights indicators, offering a broader understanding of trends and patterns.

Therefore, whereas primary data are used, secondary data analysis is also a key component of this study, enabling a balanced and critical analysis of the research problem. The abundance of secondary literature on gender, law and migration globally, accessible through libraries and the internet, provides diverse perspectives on the subject-matter. The availability of data and the desktop-based research approach reduces costs, facilitates efficient progress and ensures timely completion of the project within the designated timeline.

## **1.6 Research objectives**

This thesis has five objectives:

- The initial objective of this research is to establish a comprehensive and appropriate theoretical and methodological framework for examining the gender and migration discourse. This is accomplished through a synthesis of various sociological migration theories and gender theories. The significance of this undertaking lies in its ability to facilitate a thorough analysis of the research problem under consideration. By integrating these two distinct but interrelated perspectives, the study aims to provide a more nuanced and holistic understanding of the complex dynamics that underpin gender and migration.
- Following the establishment of the theoretical and methodological framework, the aim is to delineate the human rights framework that safeguards the rights of migrant women on a global scale. This step is critical as it provides a comprehensive overview of the legal and normative mechanisms that exist to protect the fundamental rights of women who have migrated from their country of origin. By outlining these frameworks, the study highlights the importance of protecting the human rights of migrant women in the face of the numerous challenges and vulnerabilities presented by their new country of residence.
- The next objective is to establish the context surrounding the migration of women from Zimbabwe to Botswana. This involves examining the various economic, political and social factors that have contributed to this phenomenon. By delving into the underlying causes of this migration trend, the study aims to provide a more nuanced and comprehensive

understanding of the experiences of Zimbabwean women who have migrated to Botswana. Through this analysis, the study seeks to shed light on the challenges and opportunities that these women face in their new country of residence.

- The fourth objective is to undertake a critical analysis of the existing legal and regulatory framework in Botswana concerning Zimbabwean women who have migrated for labour purposes. The primary aim is to provide a comprehensive and detailed overview of the legal status of the subjects under study, with a view to assessing the effectiveness of the regulatory mechanisms in place. Through this investigation, the study seeks to ascertain whether the current regulatory framework in Botswana adequately protects the rights of Zimbabwean women who have migrated for work purposes. By examining the effectiveness of this regulatory framework, the study aims to identify potential gaps and shortcomings that need to be addressed to ensure the protection and realisation of women migrant workers' rights.
- The final objective is to draw from the findings of the study and make recommendations for potential reforms regarding the laws governing Zimbabwean women migrant workers employed in Botswana's informal sector. These recommendations will be framed within a gender-sensitive and human rights-based approach. The objective is to propose measures that ensure the protection and promotion of the rights of these women with a particular focus on those working in the informal sector. The study promotes more equitable and just regulatory mechanisms that consider the unique challenges and vulnerabilities faced by Zimbabwean women migrant workers in Botswana by adopting gender-sensitive and human rights-based approaches.

### **1.7 Research significance**

Globally, the importance of the study of migration is expanding, mostly as a result of the divergent demographic trends and patterns seen between industrialised and developing nations. More than a billion people rely on migration to escape poverty and raise their families' socio-economic standing, this figure includes 215 million external migrants and 750 million internal migrants.<sup>113</sup> This makes migration a crucial and influential socio-economic phenomenon that demands close attention and rigorous analysis.

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<sup>113</sup> PD Sutherland. (2013). Migration and development: How migration matters to the post-2015 debate. *Migration and Development* 2(2): 151–156.

In the SADC region, the discourse on migration is gaining momentum. The regional grouping, the Migration Dialogue for Southern Africa (MIDSA), to which all SADC Member States belong, has resolved to draft a Regional Migration Framework. The first draft of this framework is currently undergoing vetting. At the time of writing in 2023 a finalised version was not publicly available. In addition, the African Union (AU) declared 2019 as the ‘African Year of Refugees, Returnees, and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa’.<sup>114</sup> This highlights the current topicality of migration and displacement issues in the African policy space.

Studying women migrants is particularly necessary in order to ensure that considerations of gender are integrated into the migration discourse from the outset. A failure to do so could result in policies being drafted that could have a disparate impact on women and men, which could be detrimental not only to migrants but also to the African continent itself. By examining the experiences of women migrants, the study aims to develop a more nuanced understanding of the gendered nature of migration and to contribute to the development of more equitable and just migration policies.

## **1.8 Brief review of literature**

Since its 1966 independence from Britain, Botswana has rapidly evolved from a poor migrant-exporting nation to one attracting migrants. Consequently, the nation attracts a wide range of individuals, from expert professionals to those seeking lower-wage employment from all over Africa. In addition, many of its expats have repatriated and Botswana is now a hub for refugees and asylum-seekers from the southern African area.

Prior to independence, Botswana was chiefly a source of migrants due to its lack of appeal as a ‘destination’ in the southern African region. This was attributed to its stark under-development, placing it among the world’s 20 most impoverished nations with a per-capita income of

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<sup>114</sup> African Union (AU). (2019). ‘Declaration on the African Union Theme of the Year 2019: “The Year of Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa”’: Citizenship Rights in Africa Initiative’. Available at <<https://citizenshiprightsafrica.org/declaration-on-the-african-union-theme-of-the-year-2019-the-year-of-refugees-returnees-and-internally-displaced-persons-towards-durable-solutions-to-forced-displacement-in-africa/>> (accessed 7 September 2019).

approximately US\$70 in 1966.<sup>115</sup> However, with a combination of effective governance and revenue from diamond extraction, Botswana has transformed into one of the globe's most rapidly expanding economies, now holding the title of an upper-middle-income nation. Its economy leans heavily on mining, cattle production and tourism.<sup>116</sup> By 2022, Botswana had reported a gross domestic product (GDP) per capita of almost US\$7 737.7<sup>117</sup> annually, ranking it among Africa's top performers.<sup>118</sup>

While Botswana attracts migrants from various countries, the majority come from Zimbabwe.<sup>119</sup> Determining the exact number of Zimbabweans in Botswana is challenging due to the relatively free cross-border movements between the two nations.<sup>120</sup> Both countries' citizens can cross legally without a visa, often for shopping, socialising or regular work. In 2002, records indicated that 533 154 individuals entered Botswana from Zimbabwe and 510 623 left, with about 40% stating their reason as 'visiting' or 'holiday'.<sup>121</sup> Nonetheless, with worsening economic conditions in Zimbabwe, and factors such as the rising cost of passports,<sup>122</sup> many Zimbabweans are bypassing official border checkpoints and crossing furtively into Botswana, often without proper documentation.<sup>123</sup>

This 'unofficial' influx of migrants from Zimbabwe has faced considerable resistance from Botswana's officials,<sup>124</sup> leading them to implement strict measures to counteract it. In addition, many Botswana perceive these Zimbabwean migrants negatively, broadly believing that they are:

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<sup>115</sup> E Croeser. (2019). Diamonds add sparkle to the Botswana economy. *Bizcommunity.com*. Available at <<https://www.bizcommunity.com/Article/29/608/192420.html>> (accessed 11 December 2019).

<sup>116</sup> L de la Horra. (2018). How Botswana became one of Africa's wealthiest nations. *Fee.org*. Available at <<https://fee.org/articles/how-botswana-became-one-of-africas-wealthiest-nations/>> (accessed 21 February 2020).

<sup>117</sup> World Bank GDP per capita (current US\$) – Botswana. Available at <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=BW>>.

<sup>118</sup> Botswana has the fifth highest GDP per capita in Africa in 2022; see AB Emmanuel. (2022). 10 African countries with the highest GDP per capita, according to latest data. *Business Insider Africa*. Available at <<https://africa.businessinsider.com/local/markets/10-african-countries-with-the-highest-gdp-per-capita/3qtpzde>>.

<sup>119</sup> Kiwanuka & Monson (n 64).

<sup>120</sup> Kiwanuka & Monson (n 64).

<sup>121</sup> Kiwanuka & Monson (n 64).

<sup>122</sup> M Frykberg. (2019). Zimbabwe increases passport fees in bid to raise forex. *IOL News*. [online] *Iol.co.za*. Available at <<https://www.iol.co.za/news/africa/zimbabwe-increases-passport-fees-in-bid-to-raise-forex-37409725>> (accessed 15 January 2020).

<sup>123</sup> K Lefko-Everett. (2004). Botswana's changing migration patterns. [online] *migrationpolicy.org*. Available at <<https://www.migrationpolicy.org/article/botswanas-changing-migration-patterns>> (accessed 16 January 2020).

<sup>124</sup> Kiwanuka & Monson (n 64).



- usurping jobs meant for locals;
- contributing to a rise in violent crimes such as robberies; and
- showing little respect for traditional authorities.

Consequently, it is not unusual to find undocumented Zimbabweans accepting jobs for less than minimal pay. The sight of law enforcement often prompts them to scatter due to their lack of documentation. Many Batswana exploit this vulnerability, offering these migrants unfairly low wages, aware that they are unable to seek protection under national labour laws due to their ‘illegal’ employment status.

In this way, undocumented and or irregular Zimbabwean migrants in Botswana face significant vulnerabilities. Van Eck and Snyman highlight this concern in their article titled ‘Social protection afforded to irregular migrant workers: Thoughts on the Southern Africa Development Community (with emphasis on Botswana and South Africa)’, where they observe:

irregular migrants undoubtedly form the most vulnerable group. Members of this group are often subjected to substandard living and working conditions, are always fearful of being deported and are in most instances excluded from the varying degrees of social protection coverage that governments provide.<sup>125</sup>

The Botswana government has even implemented an aggressive ‘arrest-and-deport’ strategy, often referred to as ‘clean-up campaigns’, which predominantly targets those Zimbabweans lacking appropriate or outdated papers. However, other foreign nationals in similar circumstances are not targeted by this approach. Starting from the early 2000s, this ‘campaign’ has been progressively institutionalised. Campbell points out that the government is now integrating:

countrywide roadblocks and regular police and military raids on workplaces and residences. A Centre for Illegal Immigrants (known locally as ‘*Teronko ya MaZimbabwe*’ or a ‘Prison for

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<sup>125</sup> Stephan van Eck & Felicia Snyman. (2015). Social protection afforded to irregular migrant workers: Thoughts on the Southern Africa Development Community (with emphasis on Botswana and South Africa). *Journal of African Law* 59: 1–23. doi: 10.1017/S002185531500011X.

Zimbabweans’) was established in Francistown where deportees are held in deplorable conditions, prior to being bussed to the border at Ramakgwebana.<sup>126</sup>

Deportations are especially distressing for women migrants. In her 2015 article, ‘We deport them but they keep coming back: The normalcy of deportation in the daily life of “Undocumented” Zimbabwean migrant workers in Botswana’, Galvin shares unsettling tales of detained Zimbabwean women, who are due to be deported, enduring unsanitary conditions alongside their breastfeeding babies or young children.<sup>127</sup> Galvin continues by describing the challenging everyday lives of these Zimbabwean female migrant workers in Botswana, noting:

Women who work as house cleaners and live at their employers’ gated homes avoid detection: ‘When they [the police] ring the bell I tell them there are no Zimbabweans here. ... You see I speak very good English ... so ... they think I am the madam.

Several times, when law enforcement arrived while she was with her employer, he would bribe them to prevent her deportation. During special events such as Christmas or when these women need to travel home for funerals and other family matters, they use unofficial border crossings; pay a fee (approximately P150) to bus drivers who ‘arrange’ their departure with immigration officers; or settle penalties for exceeding the limit of their 90-day permits.<sup>128</sup>

The challenges continue, as Galvin highlights the hurdles these women encounter in seeking healthcare: they often resort to self-treatment, depend on compassionate healthcare workers, fabricate documents, or borrow funds for private treatment and their children’s vaccinations. Galvin continues:

Pregnant women choose to forgo pre-and post-natal care and seek admission to hospital in an advanced stage of labour in order to curtail their contact with a state institution.<sup>129</sup>

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<sup>126</sup> Campbell & Crush (n 38).

<sup>127</sup> Treasa M Galvin. (2015). We deport them but they keep coming back: The normalcy of deportation in the daily life of “undocumented” Zimbabwean migrant workers in Botswana. *Journal of Ethnic and Migration Studies* 41(4): 617–634. doi: 10.1080/1369183X.2014.957172.

<sup>128</sup> Galvin (n 127).

<sup>129</sup> Galvin (n 127).

Even so, Botswana's government insists that these undocumented migrants are in violation of the law for both unauthorised entry and employment in the country, often due to the absence of proper travel documents or permits. While this may be true, it could be attributed to the unique position that Zimbabwean migrants hold, which has not been formally addressed by Botswana's institutions. Kiwanuka and Monson describe these Zimbabwean labour migrants in Botswana as 'humanitarian migrants' for specific reasons, which they elaborate on:

they are usually neither recognised refugees nor voluntary economic migrants. Their migration is largely motivated by humanitarian need, but they do not generally seek humanitarian assistance through the asylum system, choosing proactive livelihood-seeking instead.<sup>130</sup>

Zimbabwean migrant workers grapple with profound humanitarian issues that have not only pushed them to leave their homeland but also hindered their ability to procure travel documents or the means to apply for work permits in Botswana. They are hesitant to seek refugee status, as doing so would limit their employment opportunities; Botswana's laws largely bar refugees from engaging in remunerative work.<sup>131</sup> In addition, refugees in Botswana face restrictions against returning to their home countries,<sup>132</sup> though, as previously mentioned, women labour migrants often do return home. Therefore, Botswana's existing regulatory framework, designed mainly for either voluntary economic migrants or officially recognised refugees, falls short in addressing the unique needs of these migrants. The contention is that this absence of a tailored institutional response has inadvertently placed them at odds with the law.

Another concern voiced by the Botswana government is the perceived security risk posed by Zimbabwean migrants to the country's population of 2.3 million. Given Zimbabwe's population

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<sup>130</sup> Kiwanuka & Monson (n 64).

<sup>131</sup> According to section 14 of the Botswana: Refugees (Recognition and Control) Act of 1968, refugees are subjected to the same employment procedures as other foreign nationals in Botswana. This procedure is defined in the Immigration Act of 2011, mandating all foreigners to secure work permits. However, in reality, even when refugees apply for these permits, they rarely obtain them. This is because Botswana implements a rigorous camp-based system, restricting refugees' mobility. As a result, refugees in Botswana are essentially restricted to camps and practically denied the right to work. This lack of work rights is a significant reason why many Zimbabweans, who could potentially qualify as refugees, don't pursue this status.

<sup>132</sup> Section 10(2) of the Botswana: Refugees (Recognition and Control) Act states that: 'A recognized refugee shall on his departure from Botswana cease to be a recognized refugee.'

of 16.5 million, Botswana's administration often warns its citizens about the potential of being outnumbered if too many foreigners are allowed into the country. This perspective has led to what Hammerstad describes as the 'securitization of migration' in Botswana.<sup>133</sup> He suggests that:

a securitising move is to present something to an audience as an existential threat to a particular referent object and argue that this threat must be counteracted urgently and by all means necessary.

Therefore, the government's reaction to undocumented migration from Zimbabwe has been to categorise Zimbabwean migrants as a security concern, leading to the issue being treated with immediate and high-level seriousness. This perspective likely contributes to the Botswana's indifference towards the treatment of undocumented Zimbabweans, as they are perceived as a real danger.

Despite the validity (or lack thereof) of these governmental stances, a frequently neglected point is that these strategies, designed to limit irregular Zimbabwean migration, were crafted at a time when men migrants were the majority, not women. Generally, women are not deemed a security threat,<sup>134</sup> yet they have been seriously affected<sup>135</sup> by these stringent policies. Given the increase in migration of women, these strategies need to be re-evaluated with a gender-specific focus. This is critically important because, even though these women live under dire circumstances that entail economic, social and, notably, psychological impacts,<sup>135</sup> many of them still return after being deported. Despite the risks of traversing unofficial borders and the looming threat of an undignified deportation, leading to a life marked by constant fear and secondary citizenship status, *they still choose to come back*. This decision indicates that, for them, this challenging path is still the most favourable one available. Literature supports this, showing a significant cyclic pattern in Zimbabwe–Botswana migration: after deportation, many migrants promptly return.<sup>136</sup> Current policies seem ineffective in deterring these migrants, a sentiment echoed by Crush et al, who state that:

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<sup>133</sup> AC Hammerstad. (2012). Securitization from below: The relationship between immigration and foreign policy in South Africa's approach to the Zimbabwe crises. *Conflict, Security and Development* 12(1): 1–30.

<sup>134</sup> AA Ullah, NH Hasan, SM Mohamad & D Chatterraj. (2020). Migration and security: Implications for minority migrant groups. *India Quarterly* 76(1), 136–153. Available at <<https://doi.org/10.1177/0974928419901199>>.

<sup>135</sup> Ullah et al (n 134).

<sup>136</sup> Galvin (n 127).

Punitive approach involving arrest and deportation, which has been the dominant policy response in Botswana ... at considerable cost to the state, with disruption and abuse of migrants, *has had little discernible effect on migration flows.*<sup>137</sup> (Emphasis original)

Hence, there is no real benefit in treating women migrants in such a manner, particularly by a nation that prides itself on good governance and human rights; it is clearly not a sustainable approach. In addition, the ill-treatment of women migrants carries broad implications. This sentiment is echoed by Crush et al in their 2017 article:

Poor treatment of female migrants on the way to and at the workplace exercises an extremely negative impact on the migrants themselves and their households and is also antithetical to development and inclusive growth in their home countries. Low wages and other forms of financial extortion, for example, significantly reduce the remitting ability of migrants. Precarious employment in the agricultural and domestic service sectors is highly gendered with female migrants being most vulnerable to exploitation by formal and informal labour brokers and recruiters, employers and the authorities (especially the police).<sup>138</sup>

This thesis proposes that, for many reasons, Botswana should adopt a rights-based approach to its migration policies concerning these women. First, under the present exclusionary conditions for migrants, women migrants face a higher likelihood of encountering violence. This was confirmed by Alfaro-Velcamp, McLaughlin and Schumacher in their work titled ‘Rape without remedy.’<sup>139</sup> Their research revealed that female migrants, especially those without documentation, frequently suffer from significant levels of sexual violence and lack avenues for redress due to their ‘illegal’ status. Similar circumstances are evident in Botswana, as highlighted in a 2010 US report on human trafficking within the country, which mentions:

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<sup>137</sup> J Crush, B Dodson, V Williams & D Tevara. (2017). *Harnessing Migration for Inclusive Growth and Development in Southern Africa*. Vienna & Waterloo, ON: ICMPD & SAMP, 14.

<sup>138</sup> Crush et al (n 137).

<sup>139</sup> T Alfaro-Velcamp, R McLaughlin & Udo Schumacher (review ed). (2019). Rape without remedy: Congolese refugees in South Africa. *Cogent Medicine* 6: 1. doi: 10.1080/2331205X.2019.1697502.

Botswana families which employ Zimbabwean women as domestic workers at times do so without proper work permits, do not pay adequate wages, and restrict or control the movement of their employees by holding their passports or threatening to have them deported back to Zimbabwe.<sup>140</sup>

Adopting a rights-based perspective on the migration of women would guarantee safer transit to and better living conditions in their destination countries for them. This is a pressing human rights concern, especially in the case of Botswana. Beyond the clear human rights advantages, Botswana can reap additional benefits. Dodson suggests that enabling women's migration within the region could pave the way for 'enhancing women's empowerment and positioning them as development catalysts'. She further emphasises that, while it should not be limitless, 'controlled female migration, particularly that of a short-term nature, can be harnessed as a powerful force for regional development.'<sup>141</sup> Hence, by ensuring improved living conditions, female migrants have the potential to play a pivotal role in development.

Crush and his colleagues have highlighted the vital role women migrants play in development. They observed that, contrary to the common belief that male migrants send more remittances, female migrants play a significant role in this aspect,

globally, female migrants send approximately the same per capita amount of remittances as male migrants, but women tend to send a higher proportion of their income. Women also usually send money more regularly and for longer periods of time than men.<sup>142</sup>

Therefore, women migrants contribute more to their home countries' economies than their male counterparts. Narrowing the focus, safeguarding women's rights aligns with Botswana's National Policy on Gender and Development. This policy, in its own terms, seeks to address such issues as:

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<sup>140</sup> Alfaro-Velcamp, McLaughlin & Schumacher (n 139).

<sup>141</sup> B Dodson. (2000). Women on the move: Gender and cross border migration to South Africa from Lesotho, Mozambique and Zimbabwe. In D McDonald (ed). *On Borders Perspectives on International Migration in Southern Africa*. New York & Cape Town: St Martins Press & SAMP, 44.

<sup>142</sup> Crush et al (n 137).

access to justice, protection of human rights and freedom from violence ... through special measures targeting vulnerable groups ... such as women and girls.<sup>143</sup>

This preliminary investigation sets the stage for more in-depth research. While not exhaustive, it provides a compelling foundation for further study. The initial findings indicate that adopting a rights-based approach could significantly benefit this group of women who seem to be facing numerous challenges within Botswana. This aligns not only with international best practices but also with Botswana's own development objectives regarding gender equality and women's economic empowerment.

Nevertheless, experts<sup>144</sup> have pointed out the challenges in formulating policies due to a lack of research on the gender-specific effects of migration. This study therefore aims to focus on this dearth of knowledge. In order to truly grasp the depth of rights violations faced by Zimbabwean women migrants working in the informal sector, a comprehensive examination of their interactions with Botswana's laws and policies is essential. Only then can we discern the appropriate reforms needed to safeguard these women.

Concerning this, several general studies of migrants in Botswana have been conducted by organisations such as SAMP,<sup>145</sup> the ACMS<sup>146</sup> and other authors.<sup>147</sup> However, existing research on Zimbabwean women working in the informal economy – particularly regarding the impact Botswana's laws have on their human rights – is either limited or inadequately explored. Consequently, there is a dearth of information available concerning these women and how the regulatory framework in Botswana affects their human rights, particularly in terms of gender-related aspects. This gap in knowledge underscores a significant omission in the literature, leaving the vulnerabilities faced by these women largely unrecognised. The scarcity of studies in this area

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<sup>143</sup> K Datta. (2004). A coming of age? Re-conceptualising gender and development in urban Botswana'. *Journal of Southern African Studies* 30(2): 251–268. Available at <[www.jstor.org/stable/4133835](http://www.jstor.org/stable/4133835)> (accessed 8 March 2020).

<sup>144</sup> J Oucho, E Campbell & E Mukamaambo. (2000). Botswana: Migration perspectives and prospects. *Southern African Migration Project*. Available at <<http://samponline.org/wp-content/uploads/2016/10/Acrobat19.pdf>> (accessed 2 September 2019).

<sup>145</sup> Oucho, Campbell & Mukamaambo (n 143).

<sup>146</sup> Kiwanuka & Monson (n 64).

<sup>147</sup> Lefko-Everett (n 122); Van Eck & Snyman (n 128); Galvin (n 126).

is supported by a migration study conducted by the Southern African Migration Programme (SAMP), which acknowledges the lack of comprehensive understanding of this subject:

The lack of research of organizations engaged in ... migration hampers our ability to make more precise and impactful assessments of migration patterns and trends, as well as of migrants' vulnerabilities.<sup>148</sup>

This study attempts to close this gap.

### **1.9 Organisation of research**

The first chapter is an introduction to the research study, aiming to provide a comprehensive understanding of its key objectives, goals and its significance in the broader field of study. It outlines the aims, objectives and primary questions of the research, establishing a foundational context to ensure clarity on the scope and purpose.

In the second chapter, the focus shifts to constructing the theoretical and conceptual framework, specifically addressing gender and migration. This section incorporates an extensive literature review, delving into relevant areas at macro- and micro-levels. It particularly emphasises the role of gender in shaping migration, setting the stage for subsequent chapters.

Chapter 3 aims to contextualise women's migration in the SADC by examining two distinct groups within the region. Through this analysis, the chapter seeks to offer a localised understanding of the diverse experiences of women migrants in the SADC context.

In Chapter 4, the research provides a detailed overview of the international and regional human rights normative framework governing the study subjects. The emphasis is on understanding the protections available to women migrant workers within this framework. The chapter uses a gendered analysis to explore factors contributing to the failure of realising the rights of migrant women, with a focus on gender-based discrimination and inequality.

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<sup>148</sup> Oucho, Campbell & Mukamaambo (n 143).



Chapter 5 takes a historical perspective, analysing the Zimbabwe–Botswana migration of women. The examination of social, economic and political factors contributing to this migration aims to provide a nuanced understanding of the challenges faced by Zimbabwean women migrants to Botswana.

Chapter 6 involves the collection and presentation of data, offering insights into the effectiveness of laws and policies in Botswana governing Zimbabwean women migrant workers. Human rights challenges within the legal and regulatory framework are highlighted.

In Chapter 7, the author provides an analysis of the findings, employing a critical perspective to enrich the overall understanding of the research topic. The chapter evaluates regional and international best practices, using a comparative approach to highlight policies and mechanisms for protecting the rights of women migrant workers in Botswana. Recommendations, informed by this evaluation, aim to contribute to the development of more effective and equitable policies in the region.

### **1.10 Limitations of study**

The main limitation of this research is that it does not encompass all women migrants in Botswana. A broader scope would provide a deeper insight into the dynamics between formal and informal work, as well as how nationality might influence the standing of female migrants in Botswana. However, due to resource constraints, the focus of this study is set narrowly on Zimbabwean women migrants in the informal sector, given that they represent the most substantial group of women migrants in the country. This targeted approach is chosen in the hope of yielding findings that have greater impact.

### **1.11 Ethical concerns**

Ethical concerns are minimised in this thesis as the research is desk-based and therefore does not involve human participants. The data are collected from sources such as published articles, government reports and websites. This means that there is no risk of harm to participants either physically, psychologically, socially, legally or through a breach of privacy.

## 2: Conceptualising the migration of women: global perspectives

*Gender is one of the oldest, if not the oldest, forces shaping human life and, accordingly, it influences migration and migrants' lives. Nonetheless, gender has regularly been sidelined in scholarly research on international migration over the past 100 years.*<sup>1</sup>

### 2.1 Introduction

In this chapter, the overarching goal is to present a comprehensive understanding of migration as a sociological concept. This involves framing women as social beings within the migration process and conducting a gendered analysis of migration studies. This is to be done in a way that may be useful in providing an understanding of the contemporary migratory movements of women from Zimbabwe to Botswana. First, the chapter departs from the well-established notion that gender is a social construct of what is considered 'male' and 'female', and that gender norms are the standards which shape roles, expectations and behaviours associated with masculinity and femininity.<sup>2</sup> It is acknowledged that gender norms can both empower and constrain rights and opportunities. A gendered analysis of migration therefore offers a perspective on: gender relations,<sup>3</sup> how gender affects access to resources,<sup>4</sup> and differences in power and equality in economic, social and legal structures.<sup>5</sup>

In this way it is contended that a complexity of various factors may cause individuals to migrate, and these factors often play out differently for women and men.<sup>6</sup>

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<sup>1</sup> R Pessar & SJ Mahler. (2003). Transnational migration: Bringing gender in. *International Migration Review* 37(3): 812–846.

<sup>2</sup> Ben Cislighi & Lori Heise. (2019). Gender norms and social norms: Differences, similarities and why they matter in prevention science. *Sociology of Health & Illness*, 42. doi: 10.1111/1467-9566.13008.

<sup>3</sup> Examining the dynamics and power structures between genders in the context of migration, including roles, responsibilities and social interactions.

<sup>4</sup> Investigating how gender influences the ability of individuals to access and control resources such as education, employment, healthcare and social support networks within the migratory context.

<sup>5</sup> Analysing the disparities in power, agency, and equality within economic, social, and legal structures that shape the experiences of migrant women, highlighting both the challenges they face and their strategies for resilience.

<sup>6</sup> It is for this reason this thesis will purposefully use the term 'women migrants' and not 'female migrants' (unless the context demands it) as "female" often refers to biological differences, while "woman" is a gender term that indicates social and cultural differences. Gender is a complex interrelation of an individual's biological sex, identity, and socially defined roles. By using "woman migrants", the focus is shifted from mere biological differences to the broader socio-cultural, psychological, and political contexts of their experiences. Also see C Wright. (1995). Gender awareness in migration theory: Synthesizing actor and structure in southern Africa. *Development and Change*, 26: 771–779.

In order to investigate this, the chapter first outlines and defines key terms which are used in the thesis. Second, it then provides a general overview of mainstream migration literature which discusses the impact of migration on sending and receiving states, with a particular focus on the effect of remittances. Mainstream migration studies are then critiqued from a gender perspective. This acknowledges that scholarship has been historically biased towards males and has seldom identified women as migrants in their own right. In order to show this, the study outlines classic migration theories and proceeds to establish that they are largely devoid of any sophisticated gendered analysis.

Following this, the chapter then attempts to integrate gender in migration studies using feminist methods such as gender relations theory and the feminist integrative approach. This section positions women *within* the migratory process and attempts to depict how migrant women reconcile their gendered lives. Conclusions are then be provided based on the learnings of the chapter.

## **2.2 A global analysis**

### **2.2.1 Understanding migration**

#### 2.2.1.1 Definitions and terms

Migration is arguably one of the most significant phenomena of the present time. Klagge et al have described migration as a key process of development and social change.<sup>7</sup> When studying migration, it is important, from the outset, that distinctions be made between its different types. Global contemporary migration has been found to be motivated by diverse factors and made up of various types of movement. In this way we are now speaking of ‘mixed migration’,<sup>8</sup> mixed in terms of both the type of migrant (students, smuggled persons, economic or labour migrants) and the reasons why they migrate (pursuing studies, family reunification, better work opportunities).

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<sup>7</sup> B Klagge, K Klein-Hitpaß, A Fihel, M Kindler, E Matejko & M Okólski. (2007). *High-skilled Return Migration and Knowledge-based Economic Development in Regional Perspective. Conceptual Considerations and the Example of Poland*. Centre of Migration Research Working Papers No 19/77.

<sup>8</sup> ‘Mixed migration’ refers to cross-border movements of people including refugees fleeing persecution and conflict, victims of trafficking and people seeking better lives and opportunities. Motivated to move by a multiplicity of factors, people in mixed flows have different legal statuses and a variety of vulnerabilities. See: <<https://mixedmigration.org/about/>>.

Acknowledging this, this thesis proposes a broad definition of the term ‘migrant’, one which is commonly used by the International Organisation for Migration (IOM), and which is as follows:

The term migrant was usually understood to cover all cases where the decision to migrate was taken freely by the individual concerned for reasons of ‘personal convenience’ and without intervention of an external compelling factor; it therefore applied to persons, and family members, moving to another country or region to better their material or social conditions and improve the prospect for themselves or their family.<sup>9</sup>

The so-called ‘feminisation of migration’<sup>10</sup> has also been observed by some scholars as an aspect of the mixed nature of recent migration, as it implies that an increasing number of women are becoming migrants compared to previous years. However, as is discussed in this chapter, the migration of women may not be such a new phenomenon, but rather the result of the historical exclusion of women in migration studies.<sup>11</sup>

It is important to note that migration is being understood increasingly as a continuing process rather than a one-off event.<sup>12</sup> In more recent literature, authors such as Castles, Van Hear and Bakewell identify people’s ‘mobility’ as a more relevant topic of study rather than actual ‘migration’. This is because the term ‘mobility’ better encapsulates the fluidity of movement patterns as well as the blurring between various types of movement and the increasing unpredictability of mobility patterns in recent years.<sup>13</sup> This is particularly relevant to this research

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<sup>9</sup> International Organisation for Migration (IOM). (2014). *Key Migration Terms*. Available at: <<http://www.iom.int/cms/en/sites/iom/home/about-migration/keymigration-terms-1.html#Migrant>> (accessed 23 December 2014).

<sup>10</sup> A Adepoju. (2004). *Changing Configurations of Migration in Africa*. Washington, DC: Migration Policy Institute. Available at <<http://www.migrationpolicy.org/article/changing-configurations-migration-africa>>.

<sup>11</sup> H Zlotnik. (2003). *The Global Dimensions of Female Migration*, *Migration Information Source*. Available at: <<http://www.migrationinformation.org/feature/display.cfm?ID=109>> (accessed 9 November 2011).

<sup>12</sup> L Ackers. (1998). *Shifting Spaces. Women, Citizenship and Migration within the European Union*. Bristol: The Policy Press; H Lutz. (2010). Gender in the migratory process. *Journal of Ethnic and Migration Studies*, 36(10): 1647–1663. doi: 10.1080/1369183X.2010.489373; S Pemberton & L Scullion. (2013). The policies and politics of managed migration: Exploring mature labour migration from central and eastern Europe into the UK. *Journal of Ethnic and Migration Studies*, 1–19. doi: 10.1080/1369183X.2013.733863

<sup>13</sup> S Castles & N van Hear. (2005). *Developing DFID’s Policy Approach to Refugees and Internally Displaced Persons*. Oxford: COMPAS. Available at: <<http://www.compas.ox.ac.uk/publications/reports-and-other-publications/dfid-approach-to-refugees/>>.

as Zimbabwean–Botswana migration patterns after 2008 have been strongly characterised by their irregularity and circularity.<sup>14</sup>

In this way, recent scholars prefer the use of the word ‘mobility’ rather than ‘migration’ as more appropriate when describing contemporary movements of people.<sup>15</sup> This is due to the fact that, whereas in previous years migration was considered to be the movement of persons from place A to place B, in recent times these movements have become increasingly more unpredictable.<sup>16</sup> Scholars such as Wallace and Faist have also spoken of ‘the mobility turn’, which they describe as the divide between the predominantly unwanted migration of so-called ‘low-skilled’ labour migrants and the more positively alleged mobility of higher-skilled professionals.<sup>17</sup> It is purported that the majority of Zimbabwean migrants would be categorised as belonging to the former grouping.<sup>18</sup>

The interpretations of these scholars are duly noted; however, this study uses the terms ‘migrant’ and ‘migration’ as they are seen to be more appropriate in the context of this research. This acknowledges their historical usage<sup>19</sup> and that they are more applicable to labour migrants – the principal case study of this research. External migration,<sup>20</sup> also referred to as ‘international migration’, is the form of migration that is considered in this research, which explores the cross-border migration of Zimbabwean nationals to Botswana.

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- <sup>14</sup> E Campbell & J Crush. (2012). *Unfriendly Neighbours: Contemporary Migration from Zimbabwe to Botswana*. Available at <<http://samponline.org/wp-content/uploads/2016/10/Acrobat61.pdf>> (accessed 2 September 2020).
- <sup>15</sup> L Ackers & B Gill. (2008e). Brain drain? The experience of sending countries. In L Ackers & B Gill *Moving People and Knowledge: Scientific Mobility in an Enlarging European Union*. Cheltenham: Edward Elgar Publishing Limited, 187–229; M Morokvasic. (2004). ‘Settled in mobility’: Engendering post-wall migration in Europe. [Electronic version]. *Feminist Review*, 77: 7–25; T Faist. (2013). The mobility turn: A new paradigm for the social sciences? *Ethnic and Racial Studies*, 36(11): 1637–1646. doi:10.1080/01419870.2013.812229
- <sup>16</sup> C Wallace. (2002). Opening and closing borders: Migration and mobility in East-Central Europe. *Journal of Ethnic and Migration Studies*, 28(4): 603–625. doi:10.1080/1369183021000032227
- <sup>17</sup> Wallace (n 16). Also see: Faist (n 15).
- <sup>18</sup> Campbell & Crush (n 14).
- <sup>19</sup> Wallace (n 16); K Willis. (2010). Introduction: Mobility, migration and development. *International Development Planning Review*, 32(3–4). doi:10.3828/idpr.2010.15
- <sup>20</sup> International Organisation for Migration (IOM) (n 9).

The key focus of this thesis is economically motivated migratory movements as it refers to those who decide to migrate in order to improve their financial situation.<sup>21</sup> It can be argued that the majority of Zimbabwean migrants in Botswana are economic migrants.<sup>22</sup> However, some scholars hypothesise that the margins between forced and economic migration have become increasingly blurred. Castles and Van Hear<sup>23</sup> talk of the ‘asylum–migration nexus’, a term coined by the United Nations High Commissioner for Refugees (UNHCR) in its 2002 Agenda for Protection,<sup>24</sup> which notes how the distinctions between categories of migrant and asylum-seeker have become increasingly indistinct. As an example, in the many places in the world where migrant-sending countries are in economic crisis, more and more people feel *forced* to move due to the need to improve their financial status. In this way such persons tread a fine line between being both asylum-seekers (as they have been forcibly displaced by the deteriorating conditions in their country) and economic migrants (as they are essentially making a personal choice to move which may not be as a result of persecution per se). In a similar vein, Kiwanuka and Monson<sup>25</sup> use the term ‘humanitarian migrants’ when they speak of Zimbabwean labour migrants in Botswana because:

they are usually neither recognized refugees nor voluntary economic migrants. Their migration is largely motivated by humanitarian need, but they do not generally seek humanitarian assistance through the asylum system, choosing proactive livelihood-seeking instead.<sup>26</sup>

Family migration<sup>27</sup> is also relevant to this thesis as evidence has shown that Zimbabwean women migrants have recently travelled to Botswana as part of family migration. ‘Return migration’<sup>28</sup> is also explored in this study and it refers to migratory movements that occur after the initial

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<sup>21</sup> L Scullion & S Pemberton. (2010). *Exploring Migrant Workers Motivations for Migration and Their Perceived Contributions to the UK: A Case Study of Liverpool*. Salford: The University of Salford.

<sup>22</sup> Campbell & Crush (n 14).

<sup>23</sup> Castles & Van Hear (n 13).

<sup>24</sup> United Nations High Commissioner for Refugees (UNHCR). (2002). *Agenda for Protection [Global Consultations on International Protection/General]*, 26 June 2002, A/AC.96/965/Add.1. Available at: <<https://www.refworld.org/docid/3d4fd0266.html>> (accessed 20 June 2021).

<sup>25</sup> M Kiwanuka & T Monson. (2009). Zimbabwean migration into southern Africa: New trends and responses. Working Paper 38, Forced Migration Studies Programme, University of the Witwatersrand.

<sup>26</sup> Kiwanuka & Monson (n 25).

<sup>27</sup> International Organisation for Migration (IOM) (n 6).

<sup>28</sup> IOM (n 9).

emigration from the home country and involves the migrants moving back to their country of origin.

### **2.3 Impact of international migration: help or hindrance?**

When people move, they do so with a reason: for most people, it is to improve their current situation. But does migration achieve this? Does migration benefit people and, if so, in what way? This is an important question as there is currently an overwhelming, growing sentiment that migration, especially that of so-called ‘low skilled’ labour migrants, is cumbersome and unwanted in receiving states. Increasingly, the world is witnessing a backlash against migration and many countries are now engaging in anti-migrant behaviour which has manifested in the form of tightened border controls<sup>29</sup> and, in some cases, xenophobic behaviour against migrants in receiving states.<sup>30</sup> Crush and Pendleton have gone as far as saying that ‘anti-immigrant intolerance is a global phenomenon’.<sup>31</sup> There are common, widespread assumptions that migrants ‘steal the jobs of locals’, place undue pressure on national social services or commit crimes. However, many of these assumptions are made regardless of what the actual evidence is on the impact migration has on these countries.<sup>32</sup>

The following section examines these questions, essentially asking whether the international movement of people is advantageous or not. This is done by presenting literature on the impact migration has on receiving and sending states.

#### ***2.3.1 Impact of international migration on host countries***

In general, research has shown that host countries experience both advantages and disadvantages as a result of migration.<sup>33</sup> During times when larger migrations have happened, this has caused population surges and higher population numbers that can at times strain infrastructure and

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<sup>29</sup> I Stock, A Üstübici & SU Schultz. (2019). Externalization at work: Responses to migration policies from the Global South. *CMS*, 7: 48. Available at: <<https://doi.org/10.1186/s40878-019-0157-z>>.

<sup>30</sup> J Crush & W Pendleton. (2004). *Regionalizing Xenophobia? Citizen Attitudes to Immigration and Refugee Policy in Southern Africa* (rep, i–49). SAMP Migration Policy Series No 30. Waterloo, ON: Southern African Migration Programme.

<sup>31</sup> Crush & Pendleton (n 30).

<sup>32</sup> Crush & Pendleton (n 30).

<sup>33</sup> For the pros and cons of migration, see: <https://www.embraceni.org/migration/the-pros-and-cons-of-migration/>.

services in the host country.<sup>34</sup> Furthermore, when migrants move to a new country, they are often faced with many unknowns, such as finding housing and employment, in addition to adjusting to new laws, cultural norms and possibly a foreign language. Issues such as these can be challenging for a host country trying to assimilate migrants into society and provide them with the necessary support.<sup>35</sup> As a result, migration continues to be a heavily debated topic in many countries. On the one hand, some are of the opinion that immigration brings many advantages to a host country, both for the economy and society. On the other hand, others believe that high levels of immigration threaten national identity, increase dependence on social services, cheapen labour and threaten national security<sup>36</sup> – through irregular immigration or terrorism.

### 2.3.1.1 Effect of migration on employment opportunities and wages

In the United States, one of the most controversial aspects of migration is its effect on the employment and wages of the host population, and much of this discussion has been centred on its effect on the wages of native workers with less than a high school education. There is generally an expectation that an influx of immigrants with less formal education than the host country average would reduce the wages of those migrants' native counterparts. Varying techniques have been adopted by economists to study the effect that migration has on wages and employment, and different methods often produce different estimates; however, there appears to be an emerging consensus about the likely range of the size of the impact. In their book, *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*, Smith and Edmonston<sup>37</sup> analysed the available literature on the subject and found an average effect of an approximately 4% decline in wages for native-born workers with less than a high school education. They argue that 'immigration has only a relatively small adverse impact on the wage and employment opportunities of competing native groups.'<sup>38</sup>

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<sup>34</sup> World Economic Forum. (2017). *Migration and Its Impact on Cities*. Available at <[http://www3.weforum.org/docs/Migration\\_Impact\\_Cities\\_report\\_2017\\_low.pdf](http://www3.weforum.org/docs/Migration_Impact_Cities_report_2017_low.pdf)>.

<sup>35</sup> J-M André & F Azzedine. (2016). *Access to Healthcare for Undocumented Migrants in France: A Critical Examination of State Medical Assistance*. Available at <<https://publichealthreviews.biomedcentral.com/articles/10.1186/s40985-016-0017-4>>.

<sup>36</sup> World Economic Forum (n 34).

<sup>37</sup> James P Smith & Barry Edmonston (eds). (1997). *The New Americans: Economic, Demographic, and Fiscal Effects of Immigration*. Washington, DC: National Academy Press.

<sup>38</sup> Smith & Edmonston (n 37) 7.



Friedberg and Hunt<sup>39</sup> conducted a similar review in their article entitled ‘The impact of immigrants on host country wages, employment and growth’ and found comparable results, stating that ‘a 10% increase in the fraction of immigrants in the population reduces native wages by at most 1%’.<sup>40</sup> Card<sup>41</sup> goes as far as to acknowledge the controversies surrounding what is the appropriate framework within which to measure the effect of migration on native wages but still concludes that immigration has a negligible impact on wage inequality among citizens in the host country.

Low-skilled immigrant workers can also *benefit* the citizens of the host country by lowering the prices of labour-intensive goods and services. In this vein, Cortés<sup>42</sup> found that a 10% increase in low-skilled migrants’ share in the labour force decreased the cost of migrant-intensive services by approximately 2%; this was as a result of the reduction in wages. And in his paper, ‘Welfare effects of illegal immigration’, Palivos<sup>43</sup> argues:

illegal immigration has actually had positive effects on the receiving country because ‘illegal’ immigrants are paid less than the value of what they produce, leading domestic households to increase their holdings of capital.

#### 2.3.1.2 Effect of migration on government infrastructure and social services

Another issue debated about migrants’ effects on their receiving countries is whether the migrants cost the country money – that is, what is the balance between the taxes they pay and the cost of government services they receive? One study that investigated this was conducted by Smith and Edmonston.<sup>44</sup> They discovered what the estimated fiscal impact was of all immigrants (both legal and irregular) on federal and state budgets in the United States. Unsurprisingly, the study found positive fiscal benefits across all levels of government for the average immigrant, concluding:

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<sup>39</sup> Rachel M Friedberg & Jennifer Hunt. (1995). The impact of immigrants on host country wages, employment and growth. *Journal of Economic Perspectives*, 9(2): 23–44.

<sup>40</sup> Friedberg & Hunt (n 39) 42.

<sup>41</sup> David Card. (2009). Immigration and inequality. *American Economic Review*, 99(2): 1–21.

<sup>42</sup> P Cortés. (2008). The effect of low-skilled immigration on US prices: Evidence from CPI data. *Journal of Political Economy*, 116(3): 381–422.

<sup>43</sup> Theodore Palivos. (2009). Welfare effects of illegal immigration. *Journal of Population Economics*, 22(1): 131–144.

<sup>44</sup> Smith & Edmonston (n 37).

Although subject to the uncertainties inherent to long-run projections, careful forward-looking estimates of immigration's fiscal effects, accounting for all levels of government spending and tax revenue, suggest a modestly positive influence on average.

In his essay, 'The economic logic of illegal immigration', Gordon Hanson came to a different conclusion when he calculated that the burden of immigration is in reality borne by state governments, despite this being quite modest.<sup>45</sup>

### 2.3.1.3 Impact of migration on host country's economic growth and GDP

The question of how migration affects the economy of a host country is a common one. One way to measure the impact of migration on economic growth is by measuring the changes in output per capita in host countries (GDP growth per capita) which occurs as a result of migration. In this vein, evidence suggests that migration can indeed have a positive impact on GDP growth in host countries. The analysis can, however, be nullified by some of the pull factors which drive migration – for example, where migrants choose to settle in countries already experiencing high GDP growth, one could conclude either that it is the increased migration which is 'causing' that growth,<sup>46</sup> or that the country was experiencing that growth anyway.

However, there are authors who have found a solution to this: Alesina et al,<sup>47</sup> and Ortega and Peri<sup>48</sup> use a gravity model to disentangle the effects of migration driven by push factors. In a cross-sectional setting, they found quite large positive impacts of migrants on output per capita in recipient countries. However, in this study, they related this to a positive impact on employment, capital accumulation and labour productivity from *mainly high-skilled international migrants*, which not only increases productivity on its own, but also fosters diversity in the labour force and is ultimately beneficial to the economy.<sup>49</sup>

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<sup>45</sup> Gordon H Hanson. (2007). *The Economic Logic of Illegal Immigration*. Available at: <[https://www.researchgate.net/publication/255571954\\_The\\_Economic\\_logic\\_of\\_Illegal\\_Immigration/citation/download](https://www.researchgate.net/publication/255571954_The_Economic_logic_of_Illegal_Immigration/citation/download)>.

<sup>46</sup> International Monetary Fund (IMF) (2016a). Spillovers from China's transition and from migration. In *World Economic Outlook. Subdued Demand – Symptoms and Remedies*. Washington, DC: IMF.

<sup>47</sup> A Alesina, J Harnoss & H Rapoport. (2015). *Birthplace Diversity and Economic Prosperity*. National Bureau of Economic Research Working Paper 18699. Cambridge, MA: NBER.

<sup>48</sup> F Ortega & G Peri. (2014). Openness and income: The role of trade and migration. *Journal of International Economics* 92: 231–251.

<sup>49</sup> Ortega & Peri (n 48).

### **2.3.2. *Impact of international migration on sending countries: remittances***

As discussed previously, economically motivated migrants are the key subject of this research and, since many migrants are motivated to move with the intention of finding work, earning money and remitting funds to their home countries, remittances make up a key feature of the way migration affects sending states.

The Overseas Development Institute (ODI) describes remittances as ‘the monetary transfers sent from migrants to family and friends back home’.<sup>50</sup> To go further than this, remittances are usually the private savings of migrant workers and families that are spent in the migrant’s country of origin. They can be spent on food, clothing and other expenditure, and can often drive the home economy. For many developing nations (including many African nations), remittances from citizens working abroad provide an important source of much-needed funds and, in some countries, research has found that funds from remittances exceed development aid sent from the developed world and other forms of external funding.<sup>51</sup>

That said, it must be noted from the outset that understanding the true impact of remittances is difficult, because, in general, it has been challenging to track how remittance funds are spent, as these remittances are commonly done via private transfers. Furthermore, the literature on remittances is also vast, as migration is a continually dynamic and fluid area of research. For this reason, the following section will present only a brief overview of research on remittances, which is necessary for framing the concepts discussed in this thesis.

### **2.3.3 *Importance of remittances to developing nations***

For various reasons, developing countries often face many difficulties when trying to obtain external funding or borrowing. Just as a first-time home buyer – with a zero-credit score and no security – may have difficulty obtaining financing for a mortgage, such a person would not be an

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<sup>50</sup> J Hagen-Zanker. (2015). *Effects of Remittances and Migration on Migrant Sending Countries, Communities and Households*. London: EPS-PEAKS, 29.

<sup>51</sup> A 2019 World Bank study has shown that money sent home by workers now largest source of external financing in many low- and middle-income countries. Such is the case in Comoros, El Salvador, Haiti, Honduras, Kyrgyz Republic, Nepal, Samoa, Tajikistan, Tonga, West Bank and Gaza.

attractive candidate for a large loan as they would be considered particularly high risk and unlikely to service the loan. Similarly, many developing nations tend to have governments which are not particularly stable and therefore are less likely to repay the debt or avoid going into default. Furthermore, whereas Bretton Woods Institutions such as the World Bank can often provide funding, these funds often come with strings attached, such as the implementation of mandatory structural adjustment programmes.<sup>52</sup> In this way, many governments in the developing world may view this as too large an encroachment on their sovereignty. This is especially so in the context of newly acquired independence from colonial rulers.<sup>53</sup> Remittances therefore provide many developing nations with the opportunity to fund development in their own way.

Notably, some believe that since recipients of remittances are likely to use the funds to purchase necessities such as food, clothing and housing, these contributions ultimately will not spur any tangible development because these small-scale purchases cannot be considered as investments in the strict sense. However, there are others, such as Mundaca,<sup>54</sup> who believe that remittance funds from abroad assist in developing the domestic financial system in the receiving countries. This is especially so in recent years, as remittances are now being increasingly sent both through wire transfer for businesses and through banks and other financial institutions. Conditional on restrictions on the movement of capital around the country, these funds can help individuals not only to pay for the consumption of goods and services but can also be used to make loans to businesses if they are saved rather than spent. Some banks may even seek to establish branches abroad to make the transfer of remittances easier. In this way, remittances can be catalysts for development.

#### 2.3.3.1 Effect of remittances on poverty

When migrants migrate and remit money home, an assumption can be made that when they do so, this should lead to an increase in the household's income, and in that way contribute to a reduction

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<sup>52</sup> SE Alvarado & DS Massey. (2010). In search of peace: Structural adjustment, violence, and international migration. *The Annals of the American Academy of Political and Social Science*, 630(1): 137–161. Available at: <<https://doi.org/10.1177/0002716210368107>>.

<sup>53</sup> Alvarado & Massey (n 52) 7.

<sup>54</sup> Gabriela Mundaca. (2009). Remittances, financial market development, and economic growth: The case of Latin America and the Caribbean. *Review of Development Economics*, 13: 288–303. doi:10.1111/j.1467-9361.2008.00487.x.

in poverty in the receiving country. But does research support this? In short, yes, this assertion has generally been found to be true. Numerous studies that show that remittances have been found to have a positive effect on poverty levels of sending countries.

In Nepal, for instance, Lokshin et al<sup>55</sup> found that at least 20% of the reduction in poverty that took place between 1995 and 2004 was due to labour migration and remittances. Although domestic migration played a part, the reduction in poverty was predominantly due to international migration. Other studies also corroborate these findings. For instance, researchers Adams and Page<sup>56</sup> found that, globally, remittances do indeed reduce poverty. In this study, they reviewed 74 low- and middle-income countries and found that a 10% increase in remittances per capita would lead to a 3.5% decline in people living in poverty in that country. A 2005 study by the World Economic Outlook,<sup>57</sup> ‘Globalization and external imbalances’, also had similar findings. These findings have also been replicated in other regions, for instance, in sub-Saharan Africa, a study by Gupta, Patillo and Wagh shows that remittances have a direct poverty-mitigating effect.<sup>58</sup>

However, in Latin America a study by Acosta et al<sup>59</sup> found that, although migration does indeed reduce poverty, the impacts were small if the receiving households were more affluent. Therefore, essentially in countries where migrants are heavily concentrated in the lower-income deciles, the impact on poverty was found to be greater. However, there may be another reason, it being that migration appears to me more ‘cost effective’ when emanating from poorer countries. To explain: countries which had higher numbers of poorer migrants and greater poverty were also found to have more established migration networks; and established migration networks had the effect of reducing the cost of migration, which essentially made migration more profitable for them. These results are confirmed by the previously mentioned Gupta study.<sup>60</sup> In this way:

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<sup>55</sup> M Lokshin, M Bontch-Osmolovski & E Glinskaya. (2010). Work-related migration and poverty reduction in Nepal. *Review of Development Economics*, 14: 323–332.

<sup>56</sup> R Adams & J Page. (2005). Do international migration and remittances reduce poverty in developing countries? *World Development*, 33(10): 1645–1669.

<sup>57</sup> World Economic Outlook. (2005). *Globalization and External Imbalances*. Washington, DC: IMF.

<sup>58</sup> S Gupta, C Patillo & S Wagh. (2009). Effect of remittances on poverty and financial development in sub-Saharan Africa. *World Development*, 37(1): 104–115.

<sup>59</sup> Pablo Acosta, Cesar Calderón, Pablo Fajnzylber & Humberto Lopez. (2007). ‘What is the impact of international remittances on poverty and inequality in Latin America? World Bank Working Paper WPS4249.

<sup>60</sup> Acosta et al (n 59).

The poverty-reducing impact of international remittances depends on the country and type of migration flows and remittances are more likely to have a poverty-reducing effect when they are received by poorer households.<sup>61</sup>

### 2.3.3.2 Effect of migration on the allocation of household labour

Since migration will always imply the absence of one or more members of the household (often the main breadwinner) by definition, it will affect the allocation of household labour. This often affects the availability of able-bodied adults and may also have repercussions on gender relations within the household. In cases where there are children, this can also affect their access to school and other education services.

Research has found that there are both positive and negative consequences for the allocation of labour when family members migrate internationally. Hagen-Zanker notes that when migrants leave the household, this often results in a ‘lost labour effect’, meaning that there are fewer people available to work locally, tend the land or take care of children, especially if it was women who were migrating. However, in some cases, these negative effects can outweigh the positive effects of remittances. A study of six sub-Saharan African countries in 1987 by Lucas<sup>62</sup> found that the migration of miners had a negative impact on domestic crop production. However, the same study found that migration and the use of remittances also enhanced crop-productivity efforts in the long-term. A study by Taylor<sup>63</sup> also found negative short-term effects, as did Cox-Edwards and Ureta, and Davis, who found that migrants leaving home resulted in a significant increase in the workload for the household members staying behind.<sup>64</sup>

But migrant remittances have also been found to have a possible impact on the labour–leisure balance of the members of the household who remain. This has been found in situations where the remittances are sent which cover living expenses: in such cases, remaining family members may

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<sup>61</sup> Hagen-Zanker (n 50) 29.

<sup>62</sup> Robert EB Lucas. (1987). Emigration to South Africa’s mines. *The American Economic Review*, 313–330.

<sup>63</sup> Edward J Taylor. (1999). The new economics of labour migration and the role of remittances in the migration process. *International Migration*, 37(1): 63–88.

<sup>64</sup> A Cox Edwards & M Ureta. (2003). International migration, remittances, and schooling: Evidence from El Salvador. *Journal of Development Economics*, 72(2): 429–461.

decrease their labour force participation and opt for more leisure. Gubert<sup>65</sup> found this to be the situation in Mali, and this was confirmed both by Hanson<sup>66</sup> in studying Mexico and by Germeñi et al<sup>67</sup> in Albania.

The sending of remittances has also been found to have an impact on the type of work done by remaining household members. In some instances, the rates of self-employment increased when remittances were used to invest in business ventures, which speaks to the role of remittances in development, as pointed out earlier. This has been confirmed in research by Funkhouser<sup>68</sup> which found that remittances resulted in a reduction of labour-force participation in Nicaragua, but this corresponded with higher levels of self-employment. Similarly, a ten-country study presented by Davis<sup>69</sup> at an International Fund for Agricultural Development (IFAD) Round Table found that households receiving migrant remittances ‘diversified their livelihood activities and shifted from labour intensive agriculture to livestock’.<sup>70</sup>

On a more positive note, migration remittances have been found to decrease child labour. Various studies have found this, including a Filipino study by Yang,<sup>71</sup> and one by Joseph and Plaza,<sup>72</sup> who showed that children in households receiving international remittances are 6% less likely to participate in the labour force in Ghana. This has, however, not been found to be the case in Nepal and Vietnam, as shown in studies by Panday<sup>73</sup> and Nguyen and Nguyen,<sup>74</sup> respectively.

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<sup>65</sup> F Gubert. (2000). Migration, remittances and moral hazard. Evidence from the Kayes Area (Western Mali). CERDI Working Papers 2000/17.

<sup>66</sup> GH Hanson. (2007). Emigration, remittances, and labor force participation in Mexico. *Integration and Trade Journal*, 27: 73–103.

<sup>67</sup> E Germeñi, IE Beka & A Sarris. (2001). Estimating remittance functions for rural-based Albanian emigrants. Working Paper, ACE Research Project, P97-8158-R.

<sup>68</sup> E Funkhouser. (1992). Migration from Nicaragua: Some recent evidence. *World Development*, 20(8): 1209–1218.

<sup>69</sup> Benjamin Davis. (2007). Presentation by Mr Benjamin Davis. In IFAD Round Table Proceedings on Migration and rural employment in Conjunction with the 30th Session of IFAD’s Governing Council, February 2007.

<sup>70</sup> Hagen-Zanker (n 50) 29.

<sup>71</sup> D Yang. (2005). *International Migration, Human Capital, and Entrepreneurship: Evidence from Philippine Migrants’ Exchange Rate Shocks*. (World Bank Policy Research Paper 3578). Washington, DC: World Bank.

<sup>72</sup> George Joseph & Sonia Plaza. (2010). Impact of remittances on child labor in Ghana. Policy Research Working Paper Series.

<sup>73</sup> Satyam R Panday. (2011). *Impact of Remittances on Child Labor Exposure Evidence from Nepal*. Available at: <[https://people.brandeis.edu/~spanday/nepalchlabor\\_remittance.pdf](https://people.brandeis.edu/~spanday/nepalchlabor_remittance.pdf)>.

<sup>74</sup> Cuong Nguyen & Hao Nguyen. (2013). Do internal and international remittances matter to health, education and labor of children? The case of Vietnam. MPRA Paper 48672.

### 2.3.3.3 Effect of remittances on access to education

Remittances gained through international migration have also been found to have an impact on access to social services, for instance, on children's access to education.<sup>75</sup> In general, a positive relationship has been found to exist between remittances sent and the level of enrolment in school in El Salvador, the Philippines and Sri Lanka.<sup>76</sup> This statement, however, must be qualified as much of this research focuses on the direct effect remittances have on financing education.<sup>77</sup> Emerging literature now highlights the possible negative effects that the absence of certain household members can have on children's education. For instance, studies have shown that parental absence, particularly of fathers, has a negative impact on their children's school attendance – most especially for sons. This has been shown by scholars such as McKenzie and Rapoport, and Herrera and Carrillo.<sup>78</sup> Therefore, it must not be taken for granted that remittances will always result in positive school attendance as this advantage may also be offset by other socially negative consequences.

### 2.3.3.4 Effect on economic growth

Given the role of remittances in international migration, one would expect that migration would have a positive impact on economic growth in the sending state. Hangen-Zanker notes that one way this this could happen is through *increased aggregate demand*,<sup>79</sup> which occurs as a result of the increased spending funded by remittances. Second, remittances can increase human capital by financing investments in social sectors such as education and health; and, third, as the World Bank

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<sup>75</sup> JR Bucheli, AK Bohara & M Fontenla. (2108). Mixed effects of remittances on child education. *IZA J Develop Migration*, 8: 10. Available at: <<https://doi.org/10.1186/s40176-017-0118-y>>.

<sup>76</sup> See A Cox Edwards & M Ureta. (2003). International migration, remittances, and schooling: Evidence from El Salvador. *Journal of Development Economics*, 2(2): 429–461; Yang (n 68); Prabal K De & Dilip Ratha (2012) Impact of remittances on household income, asset and human capital: Evidence from Sri Lanka. *Migration and Development*, 1(1): 163–179.

<sup>77</sup> Edwards & Ureta (n 76); Yang (n 71); De & Ratha (n 76); also see: RH Adams. (2006a). Remittances, poverty, and investment in Guatemala. In Ç Özden & M Schiff (eds) *International Migration, Remittances and the Brain Drain*. Washington, DC: World Bank/Palgrave Macmillan, 53–80; and Richard H Adams Jnr, Alfredo Cuecuecha & John Page. (2008). *The Impact of Remittances on Poverty and Inequality in Ghana*. Washington, DC: World Bank.

<sup>78</sup> See D McKenzie & H Rapoport. (2011). Can migration reduce educational attainment? Evidence from Mexico. *Journal of Population Economics*, 24(4): 1331–1358; Melissa Siegel. (2012). Migration and development policy. Background Paper, Maastricht Graduate School of Governance.

<sup>79</sup> Aggregate demand is an economic measurement of the total amount of demand for all finished goods and services produced in an economy. Aggregate demand is expressed as the total amount of money exchanged for those goods and services at a specific price level and point in time.



notes, in comparison to other income sources, remittances tend to be quite stable and not as vulnerable to external shocks as other industries on a particular country.<sup>80</sup>

However, it may not always be positive, because outflows of labour can also have a negative impact on the sending economy, most especially when there is *brain drain*.<sup>81</sup> Therefore, authors such as Gupta et al,<sup>82</sup> whose studies consider different aspects of economic growth will yield conflicting results. For instance, those that analyse the effect of migration on the labour supply of sending households will find that migration reduces growth. This has been confirmed by Chami, Fullenkamp and Jahjah.<sup>83</sup> However, studies that focus on economic growth as the alleviation of credit constraints and improvement of financial access (as a result of remittances) will probably conclude that migration increases growth. This has been confirmed by studies by Giuliano and Ruiz-Arranz,<sup>84</sup> and Toxopeus and Lensink.<sup>85</sup>

It is important to note that most empirical studies focus primarily on the impact of *remittances* on economic growth and not on other aspects of migration. Therefore, evidence of the effect of remittances on economic growth has tended to be inconclusive. Ratha<sup>86</sup> suggests that one reason for this may be that investments which are made in relation human and physical capital by remittances can really be realised only in the long-term, which makes it hard to gauge the current impact. Second – and this is the case in many developing countries – when remittances are received in challenging, under-developed contexts, they face especially hard challenges in relation to overcoming barriers which limit growth.<sup>87</sup>

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<sup>80</sup> World Bank (2006). *Global Economics Prospects: Economic Implications of Remittances and Migration 2006*. Washington, DC: World Bank.

<sup>81</sup> The term ‘brain drain’ refers to the international transfer of human capital resources, and it applies mainly to the migration of highly educated individuals from developing to developed countries. In lay usage, the term is generally used in a narrower sense and relates more specifically to the migration of engineers, physicians, scientists and other very high-skilled professionals with university training, often between developed countries.

<sup>82</sup> Gupta, Patillo & Wagh (n 58).

<sup>83</sup> Ralph Chami, Connel Fullenkamp & Samir Jahjah. (2003). Are immigrant remittance flows a source of capital? IMF Working Paper WP/03/189.

<sup>84</sup> Paola Giuliano & Marta Ruiz-Arranz. (2005). Remittances, financial development, and growth. IMF Working Paper WP/05/234.

<sup>85</sup> HS Toxopeus & R Lensink. (2006). Remittances and financial inclusion in development. In T Addison & G Mavrotas (eds), *Development Finance in the Global Economy: The Road Ahead, UNU-WIDER Studies in Development Economics and Policy*. New York: Palgrave Macmillan.

<sup>86</sup> Dilip Ratha. (2007). ‘Leveraging remittances for development. MPI Policy Brief June 2007.

<sup>87</sup> Ratha (n 86).

## 2.4 Migration as a gendered experience

The preceding section has provided a comprehensive overview of migration and its broader impacts on both source and receiving countries. While this literature offers valuable insights into how migration shapes societies and the larger social order, the aim of this chapter is to delve deeper into the individual experiences within this process, with a particular focus on women. It is crucial to understand how women, as key actors in migration, personally navigate and are affected by the dynamics discussed in the previous section. While the previous section examined the societal consequences of migration, the subsequent section aims to unravel the ways in which these societal changes, brought about by migration, directly impact the lives of individuals. This exploration begins by addressing the historical exclusion of women from mainstream migration studies, highlighting the importance of studying women's migration experiences.

It must be noted that in 2019 the International Organisation for Migration (IOM) estimated the number of international migrants to be almost 272 million globally, with nearly two-thirds of this number being labour migrants. If these numbers seem large, it is because they are: over the past four decades, the total number of international migrants has more than doubled. However, migration has remained at a fairly constant level. This comprises approximately 3.3% of the global population – about half of whom are women – despite the common misconception that most migrants are men. The misapprehension that it is predominantly men who migrate has resulted in the studying of migration through a 'gender-neutral' lens which has led to the situation where the interaction between gender and migration has scarcely been considered or understood. Omelaniuk<sup>88</sup> argues, however, that a gendered analysis of the processes of migration, whether within or between countries, may be fairly recent, but this does not mean that migration by women is a new phenomenon, and therefore an in-depth study of women and migration is long overdue.

This is especially more urgent in the context of the current international migration crisis which has brought migration to the fore as a prioritised policy area in many countries. At present many countries are attempting to manage migration in various ways. In doing this, they may rely erroneously on migration information which is devoid of a gendered analysis and therefore

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<sup>88</sup> Omelaniuk. (2003). *Gender, Poverty Reduction and Migration*. Available at <<http://siteresources.worldbank.org/EXTABOUTUS/Resources/Gender.pdf>>.

prejudicial to women, who, as stated previously, make up half of international migrants. For this reason there is an urgent need to understand the migration of women in order to ensure that the experiences of women are reflected in migration policy. Omelaniuk says that for us to understand these structures and their intersections ‘a detailed study of female migration and the law in a theoretical specific context, anchored in the discussion of migration and gender studies’ is required.<sup>89</sup>

By way of example, based on the previous section, a gendered understanding of the impact of migration in host countries would not only analyse how the regulatory system of a host state potentially limits migrants’ access to certain types of employment but also how this can play out differently for men and women migrants in the same country. In this vein, a United Nations report noted:

In host countries, gender relations and hierarchies as well as policies or practices leading to gender inequities have a large effect on how migration can impact migrant women. The legal status of migrant women, the gender norms implicit in admission regulations and general attitudes to migrants are also important factors influencing the subsequent experiences of migrant women and the impact of their migration on countries of destination.

Studies have further noted that laws and practices governing the rights of women and migrants in receiving countries have a direct effect on migrant women.<sup>90</sup> For instance, often women who are recruited as domestic workers or those who are irregular workers in host countries are particularly vulnerable and, depending on the regulatory framework of the host country, there may be little to no protection or recourse in cases of abuse. (Regulatory frameworks are discussed extensively in Chapter 6) However, in addition to prejudicial laws and policies experienced by all migrants, migrant women are further affected by the level of gender inequality in the host society. An example is labour market segmentation based on gender and the relegation of women to traditionally female occupations (secretarial work, nursing, garment industry work, etc) can mean

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<sup>89</sup> Omelaniuk (n 88).

<sup>90</sup> N Yeates. (2011a). Going global: The transnationalization of care. *Development and Change* 42(4): 1119.

that migrant women are paid less than migrant men; in this way, wage inequality between migrant women and migrant men can often continue in host countries.<sup>91</sup>

Similarly, when the impact that poverty migration has on receiving states is revealed, it must also be ascertained who experiences this reduction in poverty because in many cases even as countries experience economic development and poverty reduction due to remittances, these benefits are not always spread out evenly to everyone. This may be a reason why the feminisation of poverty<sup>92</sup> persists, even in settings where countries are experiencing growth.<sup>93</sup> This could be due to continued unequal access to resources, a lack of decision-making power and an increased care burden, for example. Migration studies have often missed these aspects of the enquiry when discussing the impacts of migration, which indicates that women have been largely left out of the conversation.

## 2.5 Absence of gender in mainstream migration theories

The most glaring indicator of the exclusion of women in mainstream migration studies is the absence of any sophisticated gender analysis in classic migration theories. De Haas attributes this to the fixation that previous migration theorists had with producing ‘grand theories’ which came up with generalised understandings of migration phenomena.<sup>94</sup> In doing this, they often failed to explain the great diversity in migration experiences across ‘different ethnic, gender, skill and class groups’.<sup>95</sup> As the primary focus of this thesis is the migration of women, this section explores classic migration theories and explains how they fail predominantly to incorporate gender in their analysis. The section discusses the neoclassical theory, the new economics theory, the dual-labour market and the networks theory.

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<sup>91</sup> Caroline Alcorso. (1991). Non-English speaking background immigrant women in the workforce, Centre for Multicultural Studies, University of Wollongong, Working Paper 4, 132. Available at: <<https://ro.uow.edu.au/cmsworkpapers/5>>.

<sup>92</sup> The ‘feminisation of poverty’ means that women have a higher incidence of poverty than men, that their poverty is more severe than that of men and that poverty among women is on the increase. Preventing and reducing women’s poverty, if not eradicating it, is an important part of the fundamental principle of social solidarity to which the world is committed.

<sup>93</sup> Cristina Muñoz. (1998). The feminization of poverty in developing countries. *The Brown Journal of World Affairs* 5(2): 283–288.

<sup>94</sup> Hein de Haas. (2021). A theory of migration: The aspirations-capabilities framework. *Comparative Migration Studies*, 9(8). doi: 10.1186/s40878-020-00210-4.

<sup>95</sup> De Haas (n 94).

### 2.5.1. Neoclassical theory (macro-level)

The neoclassical theory of migration assumes that labour markets and economies eventually move towards equilibrium through trade and migration. This theory was developed in the context of economic development theories originally championed by economists: Hicks,<sup>96</sup> Lewis,<sup>97</sup> Harris and Todaro.<sup>98</sup> According to this theory, migration is caused by geographic differences in labour supply and demand and the resulting differentials in wages between labour-rich versus capital-rich countries. Those who migrate are seen to be purely rational actors motivated by the potential of receiving higher wages in the countries they migrate to. Where this is an assumption of full employment, the theory predicts a *linear* relationship between wage discrepancies and migration flows.<sup>99</sup> Mansoor and Quillin<sup>100</sup> have found that wage differential of 30% or higher is required in order for the advantages of migration to offset its costs.<sup>101</sup> To put it simply, under this theory migrants move from places where there are copious amounts of labour and where wages are low to places where labour is scarce and wages are higher. The decision to migrate is taken at the individual level and the potential of higher earnings in the long run compensates for the cost and risk of relocating.

On application, this theory has been found to have some deficiencies. First, some extended neoclassical models explain that migration is determined by *expected* rather than *actual* earnings and ‘the key variable is earnings weighted by the probability of employment’.<sup>102</sup> In this way wages in destination countries may not actually be higher; there simply needs to be an expectation that they will be.<sup>103</sup> Second, the linear relationship between wages and migration does not appear to be

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<sup>96</sup> JR Hicks. (1932). *The Theory of Wages*. London: Macmillan.

<sup>97</sup> W Arthur Lewis. (1954). Economic development with unlimited supplies of labour. *The Manchester School of Economic and Social Studies*, 22: 139–191.

<sup>98</sup> J Harris & MP Todaro. (1970). Migration, unemployment and development: A two-sector analysis. *American Economic Review* 60: 126–142.

<sup>99</sup> See Thomas Bauer & Klaus F Zimmermann. (1999). Assessment of possible migration pressure and its labour market impact following EU enlargement to Central and Eastern Europe. A study for the Department of Education and Employment, United Kingdom. IZA Research Report No 3, July; George Borjas. (1987). Self-selection and the earnings of immigrants. *American Economic Review*, 77(4): 531–553; DS Massey, J Arango, G Hugo, A Kouaci, A Pellegrino & JE Taylor. (1993). Theories of international migration: A review and appraisal. *Population and Development Review* 19(3): 431–466.

<sup>100</sup> Ali Mansoor & Bryce Quillin. (2006). *Migration and Remittances. Eastern Europe and the Former Soviet Union*. Washington, DC: The World Bank.

<sup>101</sup> Also see Hubert Krieger & Bertrand Maitre. (2006). Migration trends in an enlarging European Union. *Turkish Studies* 7(1): 45–66.

<sup>102</sup> Massey et al (n 99).

<sup>103</sup> Bauer & Zimmermann (n 99).

valid both in relation to the degree of wage differential and the level of the country income as claimed. This is due primarily to the fact that the ability to migrate is related to *some* cost. Therefore, it is not the poorest individuals who migrate, nor is it necessarily true that it is the poorest countries which send the most labour,<sup>104</sup> as would be the case if the theory were true in absolute terms. Adjustments to the theory have therefore found that migration patterns will not necessarily be linear but rather display a hump shape: migration will tend to accelerate with the growth of a country's wealth as more individuals or households are able to fund migration.<sup>105</sup> Then, as the country continues to develop, the emigration rates will diminish as the incentives to migrate change.

Macro-level neoclassical models have been criticised for their narrow focus on wage differentials between sending country and the destination country, and on the economic motivations of potential migrants. It has been found on numerous occasions that economic advantage is not the only motivation for migration.<sup>106</sup>

For instance, women (especially) are often drawn into migration for non-economic reasons, such as to flee violence from a partner<sup>107</sup> or from widespread systematic violence, such as that which creates major refugee flows.<sup>108</sup> While it may be true that men also migrate to escape violence and persecution, women tend to be more vulnerable to such experiences in part because 'they either hold subordinated positions within households (as well as the larger society) or because as the

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<sup>104</sup> See Thomas Faist. (2000). *The Volumes and Dynamics of International Migration and Transnational Social Spaces*. Oxford: Oxford University Press; Christian Dustmann, Maria Casanova, Michael Fertig, Ian Preston & Christoph M Schmidt. (2003). *The Impact of EU Enlargement on Migration Flows. the Immigration and Nationality Directorate of the UK Home Office* (Home Office Online Report 25/03). Available at <[https://www.scirp.org/\(S\(lz5mqp453edsnp55rrgict55...\)\)](https://www.scirp.org/(S(lz5mqp453edsnp55rrgict55...)))>; Hein de Haas. (2008). Migration and development. A theoretical perspective. International Migration Institute Working Paper no 9. University of Oxford.

<sup>105</sup> DS Massey, J Arango, G Hugo, A Kouaouci, A Pellegrino & JE Taylor. (1998). *Worlds in Motion. Understanding International Migration at the End of the Millennium*. Oxford: Clarendon Press.

<sup>106</sup> Massey et al (n 105).

<sup>107</sup> M Gamburd. (2000). *The Kitchen Spoon's Handle: Transnationalism and Sri Lanka's Migrant Housemaids*. Ithaca, NY: Cornell University Press; Laura S Adams. (2002). Beyond gender: State failure to protect domestic violence victims as a basis for granting refugee status. *Thomas Jefferson Law Review*, 24: 239–48; Dianne Walter Hart. (1997). Leticia: A Nicaraguan woman's struggle.' In WH Breezley & J Ewell (eds), *The Human Tradition in Modern Latin America*. Oxford: Rowman & Littlefield, 255–272.

<sup>108</sup> Monica Boyd. (1999). Gender, refugee status and permanent settlement. *Gender Issues* 17: 5–25; Phyllis Coven. (1995). Immigration and naturalization service gender guidelines: Considerations for asylum offices adjudicating asylum claims from women. *International Journal of Refugee Law* 7: 700–719; Jennifer Hyndman. (1998). Managing difference: Gender and culture in humanitarian emergencies. *Gender, Place and Culture* 5: 241–260.

transmitters of ethnic culture in their families women are targeted as representatives of a subordinated nation'.<sup>109</sup> The international marriage markets have also caused an increase women's migration, which is not accounted for by neoclassical migration theories.<sup>110</sup>

In this way, neoclassical economic conceptions of migration have been a prime target of feminist criticism and revision, as they have been found to conceptualise migrants as purely rational actors embedded in social contexts which lack gendered power relations. In line with this, research by Massey et al<sup>111</sup> found that although a positive relationship between wage differentials and migration flow was generally sustained, it was by no means the strongest predictor of migration levels, especially in relation to female migration.<sup>112</sup>

### **2.5.2. Human capital theory (micro-level)**

The human capital theory, first introduced by Sjaadstad in 1962<sup>113</sup> and expanded upon by Todaro<sup>114</sup> in the 1969 article, 'A model of labour migration and urban unemployment in less developed countries',<sup>115</sup> is a transplantation of the prior neoclassical macro theories to the micro-level model of individual choice. These theories develop traditional macro-economic theories by incorporating socio-demographic characteristics of the individual as important determinants of migration at the micro level.<sup>116</sup> Therefore, although they are similar to macro theories in that at the centre of their analyses is a rational individual who migrates with the goal of maximising their benefits and gains, they consider that factors other than wage differentials will inevitably dictate who migrates and who does not. Human capital endowments which these theories consider as

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<sup>109</sup> Patricia Albanese. (2001). Nationalism, war, and archaization of gender relations in the Balkans. *Violence Against Women*, 7: 999–1023; Cynthia Enloe. (2000). *Manoeuvres: The International Politics of Militarizing Women's Lives*. Berkeley, CA: University of California Press.

<sup>110</sup> S Staab. (2004). *In Search of Work. International Migration of Women in Latin America and the Caribbean. Selected Bibliography, United Nations*. Santiago: Women and Development Unit.

<sup>111</sup> Massey et al (n 105).

<sup>112</sup> David R Hodge. (2007). The international sexual trafficking of women and children. *Affilia* 22: 163–74; Anne McClintock. (1996). 'No longer in a future heaven': Nationalism, gender, and race. In G Eley & RG Suny (eds), *Becoming National: A Reader*. New York: Oxford University Press, 260–285.

<sup>113</sup> Larry Sjaadstad. (1962). The costs and returns of human migration. *Journal of Political Economy* 70: 80–93.

<sup>114</sup> Michael P Todaro. (1969). A model of labour migration and urban unemployment in less developed countries. *American Economic Review* 59: 138–148.

<sup>115</sup> Todaro (n 114).

<sup>116</sup> Todaro (n 114).

having an impact on migration are skills, marital status, age, occupation, gender and labour market status, expectations and preferences.

Human capital theory has faced a great deal of criticism for presenting an overly optimistic view of migration, most especially in the context of the forced migration crisis which the world now faces, where migration is not always a voluntary process that is undertaken to maximise gains. Women, who make up a majority of those forcibly displaced, therefore do not fall neatly into this theory.<sup>117</sup>

General dissatisfaction with neoclassical theories led to the development of alternative theoretical perspectives which have sought to analyse ‘an interplay of individuals, motivations and contexts’ better than the neoclassical framework.<sup>118</sup> They are discussed below.

### ***2.5.3. New economics theory***

New economics theory (NEM) is a variation of neoclassical theory; the difference being that this theory takes into account the societal aspect of migration. It claims that the decision to migrate is commonly taken at a family or a household level.<sup>119</sup> The NEM holds that the decisions of migrants are influenced further by a comprehensive set of factors which are shaped by conditions in the home country of the migrant, and for this reason

migrant decisions are not based purely on individual utility-maximizing calculations but are rather a household response to both income risk and to the failures of a variety of markets – labour market, credit market, or insurance market.<sup>120</sup>

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<sup>117</sup> R Manchanda. (2004). Gender conflict and displacement: Contesting ‘infantilisation’ of forced migrant women. *Economic and Political Weekly* 39(37): 4179–4186. Available at: <<http://www.jstor.org/stable/4415535>> (accessed 2 July 2021).

<sup>118</sup> Daniel Courgeau & Eva Lelièvre. (2006). Individual and social motivations for migration. In G Caselli, J Vallin & G Wunsch (eds), *Demographic Analysis and Synthesis*. Waltham, MA: Academic Press, 345–367.

<sup>119</sup> Oded Stark. (1991). *The Migration of Labor*. Cambridge, MASS: Basil Blackwell.

<sup>120</sup> Lucia Mytna Kurekova. (2009). *Theories of Migration: Critical Review in the Context of the EU East–West Flows* (Best Participant Essays Series 2010/44). CARIM-V Summer School on Euro-Mediterranean Migration and Development, 7. Available at: <[https://www.researchgate.net/publication/228279066\\_theories\\_of\\_Migration\\_Critical\\_Review\\_in-the\\_Context\\_of\\_the\\_EU\\_East-West\\_Flows](https://www.researchgate.net/publication/228279066_theories_of_Migration_Critical_Review_in-the_Context_of_the_EU_East-West_Flows)>.



The migration of selected family members may also be used to as a way of mitigating risks at the household level and diversifying income resources for the entire family. Therefore, if things go well for the ones who migrate, they will provide support for their families in the country of origin, and vice versa. Here, remittances play a central role in the NEM theory, as sending money home directly supports the idea of household interconnectedness and the diversification of risk as a way of understanding the causes and consequences of migration.<sup>121</sup>

NEM and other household models of migration which emphasise the importance of the family or the household as the primary site of decision-making have been found to take a more gendered approach to migration. This is the case because they recognise that the relative control over resources exercised by men and women has a significant and often gender-differentiated impact on family consumption. Nevertheless, these theories have been criticised for effectively substituting the *rational, calculating individual* in neoclassical economic theories of migration with a *rational, calculating household*. NEM has been criticised for overlooking the dynamics within households (i.e. gender roles) by assuming that decision-making is equal at the household level.<sup>122</sup>

In this way, feminists have contended that decisions and actions taken within families or households do not necessarily result in unified and equally beneficial outcomes for all members. This is because families and households, as units where production and redistribution take place, also represent centres of struggle where people with diverse activities and interests can often come into conflict with one another. When subject to ongoing power dynamics at the familial and household levels, such varied interests and activities strongly suggest that the interests of men and women within families and households do not always align, and that this may affect decisions about various matters – such as how remittances should be used, for example.

#### **2.5.4. Dual labour market theory**

The dual labour market theory postulates that migration is caused by the demand for labour in developed economies. It is different from neoclassical theories because, according to this theory,

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<sup>121</sup> Taylor (n 63) 63–88.

<sup>122</sup> Faist (n 104).

labour demand pulls migrants *independently* from the labour or wage conditions in the originating societies. It is therefore the need for cheap workers in more developed societies that is the main factor explaining migration. The theory was developed in 1979 by Piore,<sup>123</sup> who explains the reason calling it the ‘dual labour market theory’:

duality unfolds along the lines of two types of organization in the economy, namely capital-intensive where both skilled and unskilled labour is utilized, and labour intensive where unskilled labour prevails. The theory argues that migration is driven by conditions of labour demand rather than supply: the character of the economy in advanced countries creates a demand for low-skilled jobs which domestic workers refuse to take up due to, for example, status. As immigration becomes desirable and necessary to fill the jobs, policy choices in the form of active recruitment efforts follow the needs of the market.<sup>124</sup>

In short, there are always jobs in more developed countries that are difficult to fill because they are dirty, dangerous and demanding. The wages for these jobs are low and so is the prestige, therefore migrants will come to fill these positions.

An example of the application of this theory as that in many parts of sub-Saharan Africa, for instance, the inadequate education facilities in rural areas and the demand for female labour (housemaids) in urban areas have meant that more women are migrating in search of employment in urban areas. As households need more income and employment opportunities are becoming available in urban centres, more women have been venturing into these opportunities.

Although having some merit, this theory has been criticised for excluding the conditions of migrant sending countries, which may also have effects on migration. It has also been seen to over-emphasise formal recruitment practices, which are largely inapplicable in Africa, where most migrant labour has come to be largely informal. The theory has also been unable to account for the differences in immigration rates between countries that have similar economic profiles. However, it does provide an intelligent explanation for the coexistence of a continuing labour demand for

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<sup>123</sup> Michael J Piore. (1979). *Birds of Passage. Migrant Labor and Industrial Societies*. Cambridge: Cambridge University Press.

<sup>124</sup> Piore (123).

foreign nationals alongside structural unemployment in receiving countries.<sup>125</sup> This is so in the case study of Botswana, which has relatively high rates of unemployment yet still has a chronic need for migrant labour.

### 2.5.5. *Networks theory*

Later migration theories have attempted to explain why migration *persists* rather than offering explanations for its origin in the first place.<sup>126</sup> One such theory is the network theory. The basis of this theory is the connection between people at the country of origin and the destination country. Networks theory proposes that migratory movements are often related to long-standing prior links between sending and receiving countries, for instance, cultural or commercial relationships. These relationships then go on to form particular institutional frameworks. This then explains why certain types of migration continue even in circumstances where negligible wage differentials or no recruitment policies encourage migration. In such a situation the existence of a diaspora or *networks* is likely to influence the decisions of migrants when they choose their destinations.<sup>127</sup> This theory also helps to rationalise why migration patterns are not evenly distributed across countries, instead rather forming what Faist<sup>128</sup> refers to as so-called *migration regimes*.

The explanation of migration through networks has also enhanced the migration studies discourse in that the theory has been able to predict future migration flows.<sup>129</sup> This is because migration networks are seen to facilitate *chain migration*. Using this theory, Bauer et al<sup>130</sup> predict an exponential increase in Mexican immigration in the United States as a result of networks, which are seen to have a significant impact on migrants' decision about where to migrate.

In addition to the United States, the network theory has been found to be particularly applicable in the African context. It is common that family members or friends, upon migrating, reach out to

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<sup>125</sup> Joachim Arango. (2000). Explaining migration: A critical view. *International Social Science Journal* 52(165): 283–296.

<sup>126</sup> Massey et al (n 105) 431–466.

<sup>127</sup> Steven Vertovec. (2002). Transnational networks and skilled labor migration. Paper presented at the conference: Ladenburger Diskurs 'Migration' Gottlieb Daimler-und-Karl Benz-Stiftung, Ladenburg, 14–15 February.

<sup>128</sup> Faist (n 104).

<sup>129</sup> Robert E Lucas. (2006). Migration and economic development: A review of existing evidence. *Journal of African Economies* 15(suppl 2): 337–395.

<sup>130</sup> T Bauer, G Epstein & I Gang. (2002). *Herd Effects or Migration Networks? The Location Choice of Mexican Immigrants in the US*. Available at <<https://ssrn.com/abstract=333740>>.

those they know in the country of origin to also migrate. They then assist new migrants by providing temporary accommodation and linking them with prospective job opportunities. In fact, Arango says: ‘Migration networks can be seen as a form of social capital so far as they are social relations that permit access to other goods of economic significance such as employment or higher wages.’<sup>131</sup> In their study on the relevance of migration theories in the identification of influencing factors for Nigerian and Zimbabwean migrants in South Africa<sup>132</sup> Enigbokan et al found this to be the case when they stated:

The presence of existing migrant social networks influenced the migration decision of many of the immigrants. The networks established by these migrants in the host countries continue to serve as a coping mechanism, even in view of the hardships and discrimination they face. It is also a strong pull factor that draws new migrants into the country, although, the underlying reasons for migration may either be a political or economic push from home countries.<sup>133</sup>

In this study, they found this to be the case even in South Africa, which has in recent years seen an upsurge of xenophobic violence<sup>134</sup> directed at migrants who are predominantly of African origin.

Network theories about migration have tended to adopt an even more gendered approach to migration as they have emphasised the need to see gender as a core organising principle that underlies migration processes, and that links country of origin to destination and return. However, as mentioned, social networks cannot explain why and how such networks were developed between one country and another to start with; they simply explain the perpetuation or continuance of migration.

Furthermore, the web of networks does not seem to be evenly spread across countries and region, as theorists argue that the development of such networks is very contextual, that is, dependent on

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<sup>131</sup> Arango (n 125).

<sup>132</sup> Oluwatobi Enigbokan, Beverly Edkins & Olukunle Ogundele. (2015). Relevance of migration theories in the identification of influencing factors for Nigerian and Zimbabwean migrants in South Africa. Paper presented at the Economic Society of South Africa (ESSA) Conference, Cape Town, September 2015.

<sup>133</sup> Oluwatobi, Edkins & Ogundele (n 132).

<sup>134</sup> Crush & Pendleton (n 30).

historical, geographical and political ties which existed before large-scale migration started.<sup>135</sup> For example, in many instances of large-scale women migration, such as was the case with South-East Asia–United Arab Emirates (UAE), there is no convincing evidence indicating the pre-existence of such close ties between major migrant-sending and -receiving countries. Therefore, the network theory alone cannot explain the patterns of international migration of women either.

## **2.6. Integrating feminist theory into migration studies**

While the historical narratives of international migration theory have largely sidelined the gender perspective, the importance of integrating this element cannot be overstated. Gender plays an instrumental role in influencing migration dynamics, with differential impacts on who migrates, when, where, and why. Regrettably, traditional migration theories, with their primary focus on the causes of international migration, often overlook these nuances. This results in an inadequate understanding of the gendered experiences within the complex matrix of migration, thereby limiting our comprehension of the distinct circumstances that prompt women to migrate, and their specific experiences in different labour markets. For instance, we lack theoretical grounding to accurately explain the conditions under which women become international migrants, their predominance in certain labour flows, and the subsequent impact of migration on their lives. Addressing these questions requires us to reconsider migration from a more gender-sensitive lens and to recognise that the process of movement is not gender-neutral. Indeed, it has differential consequences for men and women, which can lead to varying socio-economic outcomes.

In light of this, the following section seeks to redress this gender bias in migration theories. We endeavour to thread the needle of gender through the fabric of migration theory, starting with a historical perspective of feminist studies in migration. This reframing will allow us to reveal the richly gendered dimensions of migration, thereby forging a more comprehensive, inclusive, and precise understanding of migration phenomena.

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<sup>135</sup> M Kritz, LL Lim & H Zlotnik (eds). (1992). *International Migration Systems: A Global Approach*. Oxford: Clarendon Press.

### 2.6.1 *Historical development of feminist studies of migration*

Ravenstein's 'Laws of migration',<sup>136</sup> the earliest theory put forward to explain migration, highlighted its gendered nature. The theory noted that women were more likely than men to migrate; however, they did so within shorter distances. Therefore, women worldwide have always been on the move, but research shows they have been migrating more in recent decades. This has resulted in their constituting an increasing share of migrant populations almost everywhere. Another notable feature is that the international migration of women is growing at a faster rate than men.<sup>137</sup>

Despite this, it was not until about the past few decades that some focus began to be put on the role of gender in the migration process. Boyd and Grieco<sup>138</sup> trace the recent development of gender in migration to the 1960s and early 1970s, in line with the focus on 'women in development'.<sup>139</sup> The movement, which placed an emphasis on the importance of the situation of women, led to questions being raised about the presumed invisibility of women as migrants and their supposed passivity in the migration process. At the time, the prominent understanding was that women migrants were largely appendages of male migrants.

The focus on women as primary agents in the migration process is a relatively recent development, only beginning to gain momentum in the 1980s. However, despite the growing recognition of women's crucial roles in migration, there remains a concerning gap in data that is gender-specific. As Fleury<sup>140</sup> points out, the United Nations Department of Economic and Social Affairs (UNDESA) data reveal a paradoxical decline in countries reporting sex-disaggregated migrant data from 1990 to 2010. While sex-disaggregated data is undeniably vital, understanding women's roles in migration goes beyond merely dividing data by sex. It necessitates a comprehensive understanding of how gender dynamics permeate each stage of the migration cycle. Gender, after all, does not exist in a vacuum but interacts with social, cultural, economic, and political elements

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<sup>136</sup> E Ravenstein (1885). The laws of migration. *Journal of the Statistical Society of London* 48(2): 167–235.

<sup>137</sup> M Boyd & E Grieco (2003). *Women and Migration: Incorporating Gender into International Migration Theory*. Migration Information Source, 1 March 2003, MPI Feature.

<sup>138</sup> Boyd & Grieco (n 137).

<sup>139</sup> Boyd & Grieco (n 137).

<sup>140</sup> A Fleury. (2016). Understanding women and migration: A literature review. *KNOMAD Working Paper 8*. Available at <<https://www.knomad.org/publication/understanding-women-and-migration-literature-review-annex-annotated-bibliography>>.

in shaping migration experiences. Therefore, when we examine the intersection of migration and gender, we must adopt an analytical lens that extends beyond numerical data. This analysis must be grounded in a socio-cultural context, taking into account gender norms, cultural perspectives and the broader socio-economic environment. This nuanced approach acknowledges that women's migration experiences are influenced not only by their sex but also by the gendered expectations and norms prevalent in their societies of origin and destination.

The first thing that can be said of this is that studies *generally* indicate that migration can provide new opportunities to improve women's lives and the lives of those they leave behind.<sup>141</sup> For many women, migration offers an opportunity to realise their human rights to the full. It can offer career and education opportunities that result in a more empowered life. Migration can also allow women and girls to free themselves from cultural barriers that would otherwise hinder their human potential. Kenny and O'Donnell<sup>142</sup> also observe that migration can have positive impacts on both the sending and the receiving areas and can change oppressive gender relations, leading to changes in gendered roles and responsibilities to the benefit of women.

However, other authors have noted that migration also brings risks, and may expose women to new vulnerabilities, further entrenching gender inequalities. The fact that migration can increase women's vulnerabilities has largely gone unnoticed since, until recently, migrating women were rarely studied. However, it is important that women migrants in particular are studied, because, according to Boyd and Grieco,<sup>143</sup> 'gender is deeply embedded in determining who moves, how those moves take place, and the resultant futures of migrant women and families.'

A feminist integration of migration therefore needs to look beyond simple differences in migration behaviour between men and women: it needs to examine the inequalities underlying those differences. It also needs to look at how these are shaped by the social and cultural contexts of the individual, and the influence that membership of social groups and economic and political

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<sup>141</sup> A Adepoju. (1984). Migration and female employment in South-Western Nigeria. *African Urban Studies* 18(Spring): 1–13.

<sup>142</sup> C Kenny & M O'Donnell. (2016). *Why Increasing Female Migration from Gender Unequal Countries is a Win for Everyone*. (Centre for Global Development). Available at <<http://www.cgdev.org/publication/why-increasing-female-immigrationflows-gender-unequal-countries-could-have-significant>>.

<sup>143</sup> Boyd & Grieco (n 137)

conditions can have on decisions about migration. It must also consider the whole process of migration, which can then have an impact on the potential benefits (or disadvantages) of migration. The following section attempts to analyse migration through this gender lens, putting women at the centre of the migratory process, using gender relations theory and the feminist integrative approach.

### **2.6.2. Gender relations theory**

Recent evolution of gender and migration literature draws heavily on gender relations theory,<sup>144</sup> particularly work focusing on how gender relations shift as a consequence of migration and settlement.<sup>145</sup>

Undoubtedly, the migration of any family member will result in the restructuring of households and, consequentially, the relationships within the household. Therefore, international migration can re-shape gender norms and relations in a variety of ways. In the most obvious sense, migrants themselves will probably encounter different ideas and expectations about gender roles and engage in different gender-specific behaviours in host countries compared to their originating countries. But there is also scholarship which has shown that international migrant flows can have an influence on gender relationships in migrant-sending states.<sup>146</sup>

Changes in household relationships as a result of migration are well documented in the literature, as has been written about by Locke et al, Deshingkar and Grimm, and Hagen-Zanker et al.<sup>147</sup> These changes in the structure of a household have been found to have palpable effects on households (this was discussed briefly in the section on remittance effects on household labour allocation). However, in attempting to frame the migration conversation through a gender lens, this section outlines the effect that migration has on gender relations. The section is divided into two parts:

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<sup>144</sup> RW Connell. (1987). *Gender & Power*. Stanford, CA: Stanford University Press; RW Connell. (2002). *Gender*. Cambridge: Polity Press.

<sup>145</sup> Connell (n 144).

<sup>146</sup> Kenny & O'Donnell (n 142).

<sup>147</sup> Catherine Locke, Janet Seeley & Nitya Rao. (2013). Migration and social reproduction at critical junctures in family life course. *Third World Quarterly* 34(10): 1881–1895; P Deshingkar & S Grimm. (2005). *Internal Migration and Development: A Global Perspective* (Migration Research Series No 19). Geneva: IOM; J Hagen-Zanker, R Mallett, A Ghimire, Q Shah & U Bishnu. (forthcoming). Migration from the margins: Mobility, vulnerability and inevitability in western Nepal and north-western Pakistan. London: Secure Livelihoods Research Consortium.



first, examining the effect migration has on gender relations which result from migrant absence; second, the impact on gender relations of the experiences of those who migrate. It must be mentioned at this point that, although this section attempts to provide an overview of the impact of gender relations, it has been found that this is a very context-specific phenomenon, so where an impact is discussed in one context, it may manifest differently in another.

#### 2.6.2.1 Effect of migrant absence on gender relations

As mentioned above, we can distinguish two main types of impact that international migration can have on gender differences within countries: absence and experience. Migrant absence effects refer to changes in the division of household labour that occur in response to the absence of a member of the family. These rearrangements may depart from prevailing gender norms of necessity. For instance, Menjivar and Agadjanian<sup>148</sup> found that when men migrate, the women who remain behind will usually take up the responsibilities normally undertaken by men.

In the case of agriculture, Biao found (in China) that these new responsibilities could translate into empowerment in the sense that agricultural resources now became more evenly redistributed between the genders as a result of male migration.<sup>149</sup> Furthermore, in their book, *Internal Migration and Development: A Global Perspective*, Deshingkar and Grimm found that wives who remained often gained greater power in the domestic sphere and that this also encouraged the participation of women in community decision-making.<sup>150</sup> Mumtaz and Gulati<sup>151</sup> confirmed these findings when they found that male migration can empower women who remain behind, because of the resultant gain of control over certain types of decision-making within the household which were held traditionally by men.

It must be noted, however, that research has often shown that the ‘new’ roles and responsibilities tend to be temporary, only responding superficially to the need for a ‘household head’, without

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<sup>148</sup> C Menjivar & V Agadjanian. (2007). Men’s migration and women’s lives: Views from rural Armenia and Guatemala. *Social Science Quarterly* 88: 1243–1262.

<sup>149</sup> X Biao. (2007). How far are the left-behind left behind? A preliminary study in rural China. *Population, Space and Place* 13(3): 179–191.

<sup>150</sup> Deshingkar & Grimm (n 147).

<sup>151</sup> Soofia Mumtaz & Leela Gulati. (1995). In the absence of their men: The impact of male migration on women. *Pakistan Development Review* 34(2): 168+. *Gale Academic OneFile* (accessed 17 November 2020).

that necessarily having a sustainable impact on underlying gender roles. Biao<sup>152</sup> showed this in the aforementioned study of rural Chinese women. He found that, even though they had become more active in agriculture due to mass male migration, their changed role resulted from the sector becoming more marginal and not necessarily because they had gained significant power.

Olimoya and Bosc<sup>153</sup> noticed another impact on gender relations as a result of women taking up roles which are traditionally 'male'. In a study conducted in Tajikistan, they noted that women who were forced to take up new roles due to male migration were often stigmatised and faced various social and physical challenges when carrying out the required tasks. In this instance, they found that women faced difficulties in purchasing plots of land for agriculture and in obtaining credit for farming implements. Women were also not allowed to sell crops or livestock and often needed male relatives to act as brokers in such cases, which would result in arguments between the two parties about the sharing of the proceeds. These situations would then lead to a loss of social or other support networks that the women had previously had.<sup>154</sup>

Similarly, a study by Hagen-Zanker et al<sup>155</sup> in Nepal also showed that wives who remain behind have an increased workload which has both a physical and social affect. This is because, although the respondents in the study complained about having to perform harder labour, they also considered it 'harder' in that they were performing socially unacceptable 'male' tasks. In relation to this, they complained particularly of ploughing fields, which was not only physically difficult for those women staying behind, but also stigmatising in some communities.

The absence of a woman migrant, on the other hand, may require the remaining men to conduct typically 'female' activities, and there are some studies, such as those of Gramburd, and Hoang

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<sup>152</sup> Biao (n 149).

<sup>153</sup> S Olimova & I Bosc. (2003). *Labour Migration from Tajikistan*. Dushanbe: IOM in Cooperation with the Sharq Scientific Research Centre.

<sup>154</sup> Uma Kothari. (2002). Migration and chronic poverty. Working paper 16, Institute for Development Policy and Management, The University of Manchester.

<sup>155</sup> Hagen-Zanker et al (n 147).

and Yeoh,<sup>156</sup> which have shown how men's share of housework increased in the absence of women migrants. This has been found to be the case even if they do not particularly like doing the work.<sup>157</sup>

However, due to the highly gendered nature of their responsibilities – such as housework, childcare and eldercare – it has often been found to be difficult to transfer these duties to men when women migrate. This has been found to be the case in Thailand, in a study by Jong and Popul.<sup>158</sup> Furthermore, often the presence of other women relatives in the household who are available to take on the tasks of absent migrant women can further reduce men's involvement in typically 'women's' housework.<sup>159</sup>

This evaluation has shown that migrant absence can have varied impacts on gender relations in sending states. These changes have been found to be context-specific and to vary depending on the state concerned. In general, male migration will result in a temporary – albeit superficial – increase in women partaking in male roles, but this does not always translate into empowerment as it can result in their being overburdened and sometimes stigmatised. Also, female absence may at times lead to an increase in men's share of 'women's work', but this may not necessarily always be case due to the very specific work that women perform or where there are other women present to take on these tasks.

#### 2.6.2.2 Migrant experience impact on gender relations

In contrast to the above migrant *experience* effects, there are those changes that occur when the migrant returns to the origin country with different bargaining power and/or gender norms as a result of their migration experience. In general, for these effects to occur, migrants' experiences abroad have either to change gender norms and expectations or to afford them more bargaining power at home (usually as a result of making more money). Some empirical studies show that

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<sup>156</sup> Gamburd (n 107); LA Hoang & BSA Yeoh. (2011). Breadwinning wives and 'left behind' husbands: Men and masculinities in the Vietnamese transnational family. *Gender and Society* 25(6): 717–739.

<sup>157</sup> M Asis, S Huang & B Yeoh. (2004). When the light of the home is abroad: Unskilled female migration and the Filipino family. *Singapore Journal of Tropical Geography* 25: 198–215.

<sup>158</sup> GF de Jong. (2000). Expectations, gender, and norms in migration decision-making. *Popul Stud (Camb)* 54(3): 307–319; SR Curran, F Garip & CY Chung. (2005). Gendered migrant social capital: Evidence from Thailand. *Social Forces*, 84: 225–255.

<sup>159</sup> RS Parreñas. (2005). *Children of Global Migration: Transnational Families and Gendered Woes*. Stanford, CA: Stanford University Press; J Derby. (2010). *Divided by Borders: Mexican Migrants and Their Children*. Berkeley, CA: University of California Press.

gender norms and relative bargaining power can move in the direction of more gender egalitarian arrangements as a result of migrants' relocating abroad.<sup>160</sup> However, there is also strong evidence that the extent of change largely depends on the 'types of employment migrant women partake in as well as the status of migrant men where they work.'<sup>161</sup>

Therefore, the conversations concerning the impact on gender relationships from the migrant experience of women who migrate have come to varied conclusions. Guendelum, Perez-Itriago, Grasmuck and Pessar have argued that migration has the effect of emancipating women from the patriarchal attitudes and practices that they are subjected to in migrant-sending countries. They assert that migrant-receiving states provide more access to job opportunities and income for migrant women than they would have in their countries of origin. This access to resources reduces their dependency on men and the family, enhancing their bargaining leverage.

Other authors, such as Kibria, Parrado and Flippen, Pessar and Mahler,<sup>162</sup> have concluded that the relationship between international migration and gender relations is uneven and ever-changing.<sup>163</sup> These writers choose to highlight the fact that women's employment does not necessarily translate into increased independence, nor does it automatically result in the weakening of patriarchal gender relations at their place of origin.<sup>164</sup> Various authors have found that gender relations in households are greatly dependent on the context of reception, the type of labour market

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<sup>160</sup> S Guendelman & A Perez-Itriago. (1987). Double lives: The changing role of women in seasonal migration. *Women's Studies International Forum* 13: 249–271; P Hondagneu-Sotelo. (1992). Overcoming patriarchal constraints: The reconstruction of gender relations among Mexican immigrant women and men. *Gender and Society*, 6(3): 393–415; EA Parrado, CA Flippen & C McQuiston. (2005). Migration and relationship power among Mexican women. *Demography* 42(2): 347–372.

<sup>161</sup> EN Glenn & Nisei Issei. (1986). *Warbride: Three Generations of Japanese American Women in Domestic Service*. Philadelphia, PA: Temple University Press; C Menjívar. (1999). The intersection of work and gender: Central American immigrant women and employment in California. *American Behavioral Scientist* 42: 601–627.

<sup>162</sup> N Kibria. (1990). Power, patriarchy, and gender. Conflict in the Vietnamese immigrant community. *Gender and Society* 4(1): 9–24, EA Parrado & CA Flippen. (2005). Migration and gender among Mexican women. *American Sociological Review* 70: 606–632; Pessar & Mahler (n 1).

<sup>163</sup> Kibria (n 162); Pessar & Mahler (n 1); Parrado & Flippen (n 162); Parrado, Flippen & McQuiston (n 160).

<sup>164</sup> Kibria (n 162) 9–24; M Castro. (1986). Work versus life: Colombian women in New York. In J Nash & H Safa (eds), *Women and Change in Latin America*. South Hadley, MA: Bergin and Garvey, 231–255; SM George. (2005). *When Women Come First: Gender and Class in Transnational Migration*. Berkeley/Los Angeles, CA: University of California Press; MM Ferree. (1979). Employment without liberation: Cuban women in the United States. *Social Sciences Quarterly* 60: 35–50; Menjívar (n 158).

incorporation and the assimilation patterns that migrants experience.<sup>165</sup> In this way, the transformation of gender relations due to international migrants' experience is complex and multi-dimensional: migration might promote gender egalitarianism in some cases, but not in others.

In sum, gender relations theory and its application to migration sheds light on the complex dynamics and power relations at play in the migration process. It provides a rich framework to investigate how migration impacts gender roles and relations in both sending and receiving countries, and how these changes in turn affect the experience of migration and the decision to migrate. The theory recognises that migration is not a gender-neutral process, but one that is deeply embedded in the gender norms and power relations of both sending and receiving societies. It helps to explain the variations in migration patterns and experiences across gender, such as the increasing feminisation of migration, the differential impacts of 'male' and 'female' absence on the remaining household members, and the shifting gender dynamics upon the return of migrants.

This framework allows for a more complete understanding of how migration intersects with gender, beyond the simple dichotomy of men versus women migrants. It highlights the fluid and contingent nature of gender roles and relations, which can shift in response to the changes brought about by migration, whether due to absence or the lived experience of migration. However, it also cautions that these shifts are not always progressive or emancipatory, as they are contingent on a multitude of factors, including the type of employment undertaken by migrants and the gender norms prevalent in their countries of origin and destination.

In the context of this study, this theory will be instrumental in guiding the examination of gendered migration patterns and their implications. It will assist in the analysis of how migration shapes gender roles and relations, and how these in turn affect migration decisions and experiences.

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<sup>165</sup> Glenn & Issei (n 161); Parrado & Flippen (n 162); YL Espiritu. (1997). *Asian American Women and Men: Labor, Laws and Love*. Thousand Oaks, CA: Sage; J Derby & L Schmalzbauer. (2013) The relational contexts of migration: Mexican women in new destination sites. *Sociological Forum* 28(1): 1–26.

### 2.6.3 *Feminist ‘integrative’ approach*<sup>166</sup>

To overcome the shortcomings presented by the dominant migration theories, Oishi<sup>167</sup> proposes an ‘integrative approach’ to the international migration of women. The integrative approach adopts three levels of analysis:

- macro-level (the state);
- micro-level (individuals); and
- meso-level (society).

This approach therefore uses a loose combination of neoclassical and/or dual labour, household and network theories to explain the reasons why women migrate. She argues that at a macro-level states play a major role in determining the patterns of international migration of women due to the fact that their emigration policies have differential impacts on men and women.<sup>168</sup> This is especially true in Africa, where migration laws and policy have tended to respond to a male migrant as a result of the historical context of migration in southern Africa, where migrants were predominantly male and migrating to work on mines. Therefore, the assertion here is that countries with more open emigration policies to women will attract women migrants.

The second part of the analysis considers the factors at the agent level – the autonomy of migrant women themselves – as adding to the reasons why women choose to migrate. Oishi suggests that in order for large-scale migration of women to take place, women in the sending country have to have more autonomy and decision-making power within the household. In the context of sub-Saharan Africa this becomes particularly prevalent in the context of female-headed households. With women heading households and having greater decision-making power within them, the decision to migrate is more often that solely of the woman.

At the meso-level, it is assumed that there must be a conducive social environment which accommodates the migration of women. If society ostracises women who go abroad and return

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<sup>166</sup> Nana Oishi. (2002). Gender and migration: An integrative approach. *Working Paper 49*. Centre for Comparative Immigration Studies, San Diego, CA: University of California.

<sup>167</sup> Oishi (n 166).

<sup>168</sup> Lin Lim & Nana Oishi. (1996). International labor migration of Asian women: Distinctive characteristics and policy concerns. *Asian and Pacific Migration Journal (APMJ)* 5: 85–116. doi: 10.1177/011719689600500105.

home, large-scale migration of women is not likely to take place. Women must therefore feel comfortable about leaving their community, and it must also welcome and not penalise women who return from abroad. In addition, if prior networks exist, women and their communities are more likely to encourage migration. In the context of sub-Saharan Africa, where families are largely communal and women's family and care responsibilities are largely taken up by other community members, this meso-level analysis becomes clearer.

The integrative approach by Oishi fills a vital gap by providing a nuanced understanding of the gendered nature of migration. This approach acknowledges that migration is not a homogenous process, nor is it a process that can be understood merely in terms of the economic factors presented in neoclassical, household and dual-labour theories. Rather, it is a process shaped by the interplay of individual decisions, societal factors, and state policies. By using this approach, this thesis aims to shed light on the multiple layers of influences and motivations that shape women's migration experiences. This approach emphasises the need to recognise and accommodate the gendered factors that motivate and shape women's migration experiences. It highlights the fact that women may migrate not only due to economic factors but also because of a desire for greater autonomy and self-determination, societal acceptance and networks, and differential impacts of emigration policies.

Oishi's framework draws attention to the fact that women's migration cannot be understood without a thorough understanding of the power dynamics at play within their personal lives, the societal norms that shape their experiences, and the institutional frameworks that can either facilitate or hinder their migration. This makes it a powerful tool for understanding not just the patterns of women's migration, but also the reasons behind these patterns, and the impact of migration on women's lives.

Further, incorporating Oishi's integrative approach into a socio-legal analysis of migration can also significantly enrich our understanding of the intersection between law, society, and migration. By acknowledging the role of state policies, individual agency, and societal attitudes in shaping women's migration experiences, this framework enables a more balanced exploration of the socio-legal dimensions of migration. In the context of socio-legal analysis, the integrative approach

illuminates the ways in which laws and policies can shape the gender dynamics of migration. It facilitates an understanding of how state emigration policies and the legal environment can create, reinforce or challenge gender inequalities and norms within migration patterns. For instance, understanding how legal frameworks may inadvertently be biased towards a male migration model, as seen in many African contexts, can help identify legal reforms needed to ensure gender equity.

At the micro-level, a socio-legal analysis using Oishi's approach can help unravel how legal norms and practices interact with individual autonomy and decision-making. For instance, exploring the legal status of women, their rights to movement, and their access to legal mechanisms can shed light on how law influences women's choices and experiences in migration. On the meso-level, the integrative approach can help in examining how societal norms and attitudes, as reflected and reinforced by law, have an impact on women's migration. By examining societal responses to women migrants, the community's support or stigmatisation, and existing networks, we can understand how societal practices and legal structures intersect.

In summary, the application of Oishi's integrative approach in a socio-legal analysis can provide a holistic view of women's migration, offering important insights into the ways in which laws, policies, and societal attitudes shape, and are shaped by, the gendered nature of migration. This multi-layered understanding can contribute to more informed, equitable, and effective legal responses to migration. By using this approach, this thesis explores the intersections of gender, migration and law, thereby adding a valuable dimension to socio-legal scholarship.

## **2.7 Conclusion**

An important conclusion we can draw from the literature presented in this chapter is this:

Gender is deeply embedded in determining who moves, how those moves take place, and the resultant futures of migrant women and families.<sup>169</sup>

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<sup>169</sup> Boyd & Grieco (n 137).



It is now also clear that there are different aspects to migration and that in some cases migration can have both a positive and a negative effect – it is not one-dimensional. Despite various fallacies which persist about migration, such as the common misconception that migration costs host countries more than they bring in, there is no evidence that substantiates that this is always the case – in fact, in various contexts it can be beneficial to a variety of stakeholders. For example, receiving states can benefit from the reduced cost of some services and possible economic growth due to the presence of migrants. Furthermore, remittances have been found to be a very powerful economic tool in various ways: having an impact on poverty, improving access to education and allowing women to have greater bargaining power when they return.

Concomitantly, the idea that migration is wholly beneficial to the sending state can also be challenged in many ways. As a complex phenomenon, migration can have both positive and negative connotations for the sending states, for the household and at a macro-economic level. The literature reviewed has also shown that those living abroad, upon their return, often re-shape their gender norms and relationships when they return home, but that, in migrant-sending countries, the impact of international migration depends not only on how migrants' experiences carry over upon their return, but also on how household members adapt to a migrant's absence. Therefore, a clear understanding of the interplay between gender and migration demands a multi-layered, context-specific approach that appreciates these complexities. This will equip us to better navigate the intricacies of migration policies, integration efforts and societal responses, providing a robust foundation for future studies and practical interventions in this field.

### 3: Regional perspectives: migration of women in the SADC

*Southern African cities are on the move. As elsewhere in the global south, populations are continuing to grow, shrink and transform in response to demographic and economic pressures.\*<sup>1</sup>*

#### 3.1 Introduction: regionalising and (en)gendering migration in the Southern African Development Community (SADC)

The purpose of this chapter is to regionalise migration in the Southern African Development Community (SADC) context by exploring certain migration types and patterns in the southern African region as these are particularly relevant to this research. The chapter does this by outlining common types of migration undertaken by women in the region. The section also discusses the impact of Covid-19 on regional migration. Conclusions are also provided.

#### 3.2 SADC migration

Migration in southern Africa,<sup>1</sup> whether to or from the region, has been found to be driven largely by the quest for better economic opportunities. For instance, Enigbokan et al<sup>2</sup> found that the hopes of employment, economic stability and better pay which migrants expected after studying in the destination country was a major driving force behind migration to South Africa. However, political

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\*<sup>1</sup> C Blaser & LB Landau. (2014). *Managing Migration in Southern Africa: Tools for Evaluating Local Government Responsiveness* (Working Paper 19). Migrating out of Poverty. Arts B, University of Sussex. Available at <[https://assets.publishing.service.gov.uk/media/57a089d540f0b652dd000424/WP19\\_Blaser-Landau.pdf](https://assets.publishing.service.gov.uk/media/57a089d540f0b652dd000424/WP19_Blaser-Landau.pdf)>.

<sup>1</sup> Southern Africa refers to member states of the Southern African Development Community (SADC): Angola, Botswana, the Comoros, the Democratic Republic of the Congo (DRC), eSwatini, Lesotho, Malawi, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe. Within the International Organisation for Migration (IOM), all these member states are covered by the Regional Office for Southern Africa, except for the United Republic of Tanzania, which falls under the Regional Office for East and Horn of Africa. This region is not to be confused with the UN Statistical Division's classification of southern Africa with the following five countries: Botswana, eSwatini, Lesotho, Namibia and South Africa.

<sup>2</sup> Enigbokan, Oluwatobi & Edkins, Beverly & Ogundele, Olukunle. (2015). Relevance of migration theories in the identification of influencing factors for Nigerian and Zimbabwean migrants in South Africa. Paper presented at the Economic Society of South Africa (ESSA) Conference, Cape Town, September 2015.

instability<sup>3</sup> and, increasingly in recent years, environmental threats<sup>4</sup> have also been identified as drivers of migration in the region.

In 2020 the region was estimated to have a population of close to 363.2 million people, of whom 6.4 million are international migrants.<sup>5</sup> Some countries in the region are the economic hubs and have therefore traditionally been migrant-receiving countries. For example, the mining sectors and industrial development in Botswana, South Africa and Zambia, and the oil wealth of Angola, have attracted both skilled and low wage labour migrants from within the southern African region and beyond. As of 2020, there were approximately 2.9 million migrants in South Africa, which is the most developed economy in the region and for this reason has become a very attractive destination for those in search of education and better opportunities.

### **3.3 Impact of Covid-19 on human mobility in the region**

When the Covid-19 pandemic hit the SADC region in March 2020, states in the region implemented an array of emergency response measures. These measures included: partial and complete lockdowns; restrictions on international and domestic travel; bans on public gatherings; border closures; and the prohibition of the movement of people – in some cases requiring people to acquire special permits to leave their homes.<sup>6</sup>

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<sup>3</sup> Kanayo Ogujiuba, Patience Anjofui & Nancy Stiegler. (2019). Push and pull factors of international migration: Evidence from migrants in South Africa. *Journal of African Union Studies*, 8: 219–250. doi: 10.31920/2050-4306/2019/8n2a12.

<sup>4</sup> In the eastern part of the region, Comoros, Madagascar, Malawi, Mozambique and other countries are frequently affected by natural hazards such as cyclones and flooding (Internal Displacement Monitoring Centre (IDMC), 2019). Slow-onset disasters such as drought impact the lives and the migration patterns of millions in Botswana, eSwatini, Lesotho, Namibia and Zambia. Available at <<https://www.migrationdataportal.org/regional-data-overview/southern-africa>>.

<sup>5</sup> International Migrant Stock, United Nations. (2020). See: *International Migrant Stock | Population Division* (un.org). Available at <[https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undes\\_a\\_pd\\_2020\\_international\\_migrant\\_stock\\_documentation.pdf](https://www.un.org/development/desa/pd/sites/www.un.org.development.desa.pd/files/undes_a_pd_2020_international_migrant_stock_documentation.pdf)>.

<sup>6</sup> United States Government Health Alert: Botswana, Covid-19 Travel Permit Applications. Available at <<https://www.osac.gov/Country/Botswana/Content/Detail/Report/7cd7ceb4-b642-48db-9721-188400978318>>.

Moreover, many SADC states instituted national states of disaster<sup>7</sup> and emergency,<sup>8</sup> declarations of public health emergency,<sup>9</sup> and some even introduced new laws in an effort to contain the virus.

In states such as South Africa and Zimbabwe, lockdown periods, border closures and even movement restrictions continued to be implemented to varying degrees during the pandemic. These preventive measures against Covid-19 have seriously curtailed migration and mobility in the region. The impact on migrants in the region has been particularly severe: besides an inability to cross borders, some countries, such as South Africa, withdrew visa exemptions for nationalities that were previously visa-exempted and also invalidated active visas held by persons from countries considered to be Covid-19 hotspots.<sup>10</sup> In this way the Covid-19 crisis had a significant impact on mobility in the region and will form an important backdrop when discussing the case study of the thesis in Chapter 4.

### **3.4 Feminised migration in the region**

Traditionally, the pattern of labour migration in Africa has largely been male dominated. Women usually remained at home while men moved from home to find paid work. However, this appears to be changing. Recently, a striking increase in the migration of women has been observed, a phenomenon Adepoju terms the ‘feminisation of migration’.<sup>11</sup>

In line with international trends, the links between labour migration and gender have been largely ignored in sub-Saharan Africa. This has happened because, consistent with neoclassical approaches, migration policies in the region have been classified as class, race and gender neutral. They have therefore been implemented without taking into consideration the differential impacts they have on gender relations or the strong redistributive effects they may have on economic sectors – that is, they may favour some economic activities while disfavouring others.

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<sup>7</sup> Malawi, South Africa and Zimbabwe.

<sup>8</sup> Angola, Botswana, the Democratic Republic of the Congo (DRC), eSwatini, Lesotho, Mozambique and Namibia.

<sup>9</sup> Botswana, Madagascar; also see International Centre for Not for Profit Law (ICNL). Available at <<https://www.icnl.org/post/analysis/african-government-response-tocovid-19>>.

<sup>10</sup> Available at <<https://blog.avocats.deloitte.fr/south-africa-covid-19-immigration-update>>.

<sup>11</sup> Aderanti Adepoju. (1984). Migration and female employment in South-Western Nigeria. *African Urban Studies* 18(Spring): 1–13.

However, the supposed feminisation of migration has resulted in closer scrutiny of migration and gender intersections. In this respect, studies have been conducted that show that in some cases the migration of women has resulted in better employment and entrepreneurial opportunities for them. However, other studies have established that some forms of labour migration have resulted in the exacerbation of existing gender inequalities and has worsened the social and economic status of women.

The next section provides a gender analysis of two common forms of migration of women in the region, and which are the focus of this thesis: informal cross-border trade and migrant domestic workers in the SADC.

### ***3.4.1 Gendered dynamics of informal cross-border trade***

In the past two decades, the region has seen the flourishing of its informal sector due to various political and economic factors. Many women have ventured into informal cross-border trade (ICBT), which has proved to be a very profitable endeavour. This resulted in the burgeoning ICBT as a prominent and viable economic activity for many southern African women, allowing low-income women the opportunity to ‘climb out of poverty’. ICBT can be defined as ‘merchandise that crosses borders without being recorded officially, it also involves under-invoicing and under-declarations’. ICBT is an extremely feminised feature, the majority of informal traders are women between the ages of 24 and 40 and, by current estimates, this form of trade now accounts for as much as 30–40% of trade in the SADC region.<sup>12</sup>

According to the International Labour Organisation (ILO), despite the fact that ICBT transactions go unrecorded, informal trade is the most important source of employment among self-employed women in sub-Saharan Africa, providing 60% of women’s non-agricultural employment.<sup>13</sup> As a result, ICBT has been noted as an important feature in the fight against poverty in the region. ICBT has been credited with creating employment for people who would otherwise have fallen through

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<sup>12</sup> United Nations Conference on Trade and Development Economic Development in Africa Report. (2018). Available at <<https://www.osac.gov/Country/Botswana/Content/Detail/Report/7cd7ceb4-b642-48db-9721-188400978318>>.

<sup>13</sup> A Shaw. (2010). *Gender and Trade in East Africa A Review of the Literature*. UK Department for International Development (DFID).

the cracks of structural adjustment policies, such as those in Zimbabwe.<sup>14</sup> It has also enhanced household incomes by acting as a form of supplementary income while real income has steadily declined in the region. Finally, given the predominance of women involved in ICBT, it has been viewed as a tool for the empowerment of women, allowing them to earn more money than in other traditional sectors such as agriculture.

As mentioned above, ICBT in the SADC is extremely feminised, and studies report that it is made up of almost 70% women,<sup>15</sup> with some claiming the number to be as high as 85%.<sup>16</sup> The reasons for this are mainly because women in the region have traditionally been excluded from the formal sector<sup>17</sup> and have been forced into the informal sector as a mode of survival. ICBT has been extremely valuable to the women of the SADC; however, it has not been without its pitfalls. Ndlela has commented that although this sector plays an important role in alleviating urban poverty by generating employment and mobilising its own resources, its activities remain marginalised.<sup>18</sup> As a result, women have suffered in ways discussed below.

#### 3.4.1.1 Harassment

According to a United Nations Development Fund for Women (UNIFEM) study, ‘harassment and sexual exploitation by border officials seeking bribes constitute the biggest obstacles for women informal cross-border traders in Africa.’<sup>19</sup> This study, which surveyed women in Zimbabwe, reported that traders were harassed by South African police, soldiers and customs officials if they refused to pay bribes. In some cases, many women were forced to engage in transactional sex in

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<sup>14</sup> Under pressure from Bretton Woods Institutions, Zimbabwe attempted a full liberalisation model in the 1980s. However, it was soon discovered that liberalisation had an unfortunate gender bias. Deregulation and privatisation made Zimbabwean women ‘the casualties of liberalisation’ as they became the main victims of structural related retrenchments and an ever-worsening economic situation in the country.

<sup>15</sup> United Nations Conference on Trade and Development Economic Development in Africa Report (n 12).

<sup>16</sup> DB Ndlela. (2006). *Informal Cross-Border Trade: The Case of Zimbabwe*. Johannesburg: Institute for Global Dialogue.

<sup>17</sup> Ndlela (n 16): ‘Cross-border trading is dominated by women, a condition mainly attributed to their lower levels of literacy. Since hawking requires only the most basic skills, it has opened opportunities for historically disadvantaged women. As formal employment was dominated by men, the incidence of poverty and deprivation was much higher among women than among men. This prompted women to seek survivalist strategies in informal sector activities and cross-border trading well ahead of men.’

<sup>18</sup> Ndlela (n 16).

<sup>19</sup> United Nations Development Fund for Women (UNIFEM). (nd). *Strengthening Accountability, Sustaining Trade: Who Responds to Women Informal Cross Border Traders?* New York: UNIFEM.

order to secure accommodation, transport or obtain border clearance.<sup>20</sup> This in turn may exacerbate the current HIV/AIDS pandemic in sub-Saharan Africa<sup>21</sup> and may increase the stigma associated with women engaging in cross-border trade.<sup>22</sup>

#### 3.4.1.2 Illicit activities

Owing to the difficulty in obtaining the travel documents required, ICBT has been found to give rise to various difficulties such as instilling a culture of corruption in trade at border posts.<sup>23</sup> Despite this, a UNIFEM study noted that, although ICBT is ‘informal’, the people engaging in it were subject to the same procedures as for visa applications and immigration, customs declaration, duty payment and applications for phytosanitary certificates the same way that formally registered business owners do; and that an overwhelming number of traders submit to these formalities.<sup>24</sup>

#### 3.4.1.3 Lack of policy framework

Ndlela has written that, at independence, some southern African countries inherited a dualistic economy that comprised a modern formal sector and a sprawling and underdeveloped rural, communal and urban informal sector.<sup>25</sup> Owing to historical inequalities between the sexes as well as issues which were the result of structural adjustment policies, as mentioned above, women have been pushed into the informal sector, the activities of which (such as ICBT) operate in an inappropriate regulatory and policy environment. The benefits of development and economic policies such as employment and wage policies are received only by those in the male-dominated

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<sup>20</sup> Nastasya Tay. (2010). Women traders confronting sexual harassment at borders (South–South learning on social protection). *IPS Inter Press Service*, 22 September 2010.

<sup>21</sup> Southern Africa, in particular, has the highest HIV prevalence rates in the world fuelled by high levels of poverty, gender inequality and weak healthcare delivery systems. Out of the 28 500 000 people living with HIV and AIDS in sub-Saharan Africa, 42% are in southern Africa and the sub-region accounts for one-third of all AIDS deaths globally. Unfortunately, because of the harsh conditions under which ICBT is conducted, women end up engaging in risky behaviour which exposes them to contracting the HIV. See V Bayano. (2008). *Optimising Regional Integration in Southern Africa: Assessing Informal Cross Border Trade in SADC*. Harare: Southern African Research and Documentation Centre (SARDC).

<sup>22</sup> R Mupedziswa. (1998). *Structural Adjustment and Women Informal Sector Traders in Harare*. Zimbabwe: Perpetua Gumbo.

<sup>23</sup> When interviewing cross border-traders in Ndlela. Many CBTs, especially women, were not perturbed about paying bribes, as this is part of the business. More than five respondents claimed that they stood to gain by paying bribes, which in many cases was much cheaper than paying the calculated custom duties (interviews with female CBTs).

<sup>24</sup> Mupedziswa (n 22).

<sup>25</sup> D Njiwa. (2013). *Tackling Informal Cross-border Trade in Southern Africa*. Geneva: International Centre for Trade and Sustainable Development.

formal sector.<sup>26</sup> In addition, infrastructure constraints, such as poor road networks, telecommunications and the lack of storage and trading places leads to further challenges.<sup>27</sup>

#### 3.4.1.4 Time poverty and vulnerability

Although ICBT is relatively profitable for those who undertake it, it involves a very heavy workload. It is characterised by long hours of work and often women will use overnight travel in order to cut down on accommodation costs. Women involved in ICBT are typically away from their families for extended periods of time. Traders who operate from serviced market stalls, such as in flea-markets, can work for ten hours at a time and often make their way home extremely late at night.<sup>28</sup> Besides the obvious safety issues (for women especially) and the difficulty of juggling these demanding time schedules along with other economic or social responsibilities.<sup>29</sup>

#### 3.4.1.5 Formal financing difficulties

Another gendered hurdle women may face when engaging in ICBT is that of obtaining formal financing when they begin or want to sustain their business. When women begin in the ICBT business, they will usually require some kind of start-up capital, and in countries such as Zimbabwe it is notoriously difficult for low-income women to obtain legitimate funding. In her book, *The Struggle for Economic Support of the Indigenous Business Women in Zimbabwe*, Chopamba argues that women are less likely to borrow from formal sources because of the ‘collateral, social and cultural barriers’.<sup>30</sup> Therefore, they have to rely on informal funding, which is characterised by ‘a lack of regulation, high interest rates and improper modes of recovery.’<sup>31</sup>

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<sup>26</sup> Mupedziswa (n 22).

<sup>27</sup> Njiwa (n 25).

<sup>28</sup> Njiwa (n 25).

<sup>29</sup> Moses Chibaya. (nd). *Women Demonstrate Against Arrest*. Available at <<http://www.thezimbabwean.co/news/zimbabwe/59492/women-demonstrate-against-arrest.html>>.

<sup>30</sup> L Chopamba. (2010). *The Struggle for Economic Support of the Indigenous Business Women in Zimbabwe*. Xlibris Corporation (e-Book).

<sup>31</sup> Sheila Kiratu & Roy Suryapratim. (2010). *Beyond Borders: The Gender Implications of Trade Liberalization in Southern Africa*. Winnipeg, Manitoba: International Institute for Sustainable Development (IISD).



### 3.4.2 *Intersectional gendered vulnerability: migrant domestic workers in southern Africa*

Domestic work is one of the biggest drivers of migration in the southern Africa region. It is also one of the most prominent sectors of migrant labour in the SADC. Although accurate data is hard to obtain as many domestic workers work in the informal sector, increasing research has shown that domestic work is also more common in southern Africa than in the rest of the African continent. For sub-Saharan Africa, official data from 2013 suggests that migrant domestic workers make up around 7% of all migrant workers in the region.<sup>32</sup> Migrant domestic work is therefore a phenomenon which is specific to the SADC region.

Migrant domestic work is also extremely feminised. Of all the migrant workers in sub-Saharan Africa, an estimated 9.4% of women and 5.8% of men are migrant domestic workers.<sup>33</sup> The sector has long been an important sector of employment for black women from many African countries.<sup>34</sup> However, as in other cases where work is regularly informal, the sector has also exposed women to various vulnerabilities. Migrant domestic workers appear to experience intersecting discrimination due to their gender, and their migration and labour status. The next section is devoted to unearthing where these grounds of discrimination intersect and the impact this has on the migrant domestic worker. For example: What is the lived experience of a young, undocumented migrant domestic worker who is employed in the informal economy? How is the risk of violence and harassment in the world of work exacerbated due to her status?

#### 3.4.2.1 Undervalued and unprotected

Although domestic workers comprise a significant part of the regional workforce in informal employment, they are also among the most vulnerable groups of workers. Domestic workers' work is often undervalued and unprotected.<sup>35</sup> In many parts of the world, migrant domestic workers receive low wages, work inordinately long hours, have no guaranteed weekly day(s) of rest and

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<sup>32</sup> International Labour Organisation (ILO). (2016). *Migrant Domestic Workers Across the World: Global and Regional Estimates*. Available at <[https://www.ilo.org/global/topics/labour-migration/projects/gap/publications/WCMS\\_490162/lang--en/index.htm](https://www.ilo.org/global/topics/labour-migration/projects/gap/publications/WCMS_490162/lang--en/index.htm)>.

<sup>33</sup> ILO (n 33).

<sup>34</sup> Z Jinnah & M Kiwanuka. (2015). *Doing the 'Dirty Work'?* MiWORC Research Report, No 10. Johannesburg: African Centre for Migration & Society/University of the Witwatersrand; L Griffin. (2011). Unravelling rights: 'Illegal' migrant domestic workers in South Africa. *South African Review of Sociology* 42(2): 83–101. (Note that the ILO uses the term 'undocumented' migrant worker as opposed to 'illegal'. The term 'undocumented' avoids the stigmatisation and recognises humanity of the migrant worker.)

<sup>35</sup> Jinnah & Kiwanuka (n 34); Griffin (n 34) 83–101.

are often disproportionately vulnerable to physical, mental and sexual abuse from employers, or experience restrictions on their freedom of movement.<sup>36</sup> The exploitation of domestic workers can be attributed partly to gaps in national labour and employment legislation, and often reflects discrimination along the lines of gender and migrant status.

It must be noted that the behaviours of those who employ migrant domestic workers are themselves nestled within broader social and gender structures, as well as the ‘legacy of social, racial and class hierarchies that characterise the localities and generations from which they emerge.’ The conventional gendered outlook towards domestic work affects the justifications for its undervaluation. Domestic work is perceived as a task meant for ‘women and girls’, and it is considered unprofessional and traditionally remunerated inadequately or not at all. Moreover, studies reveal that the socialisation procedures responsible for shaping perceptions about these forms of work tend to endure even after legal reforms are introduced. This is evident in South Africa, where extensive legal reforms were implemented to safeguard domestic workers; however, unfavourable perceptions and violence against domestic workers remain prevalent.<sup>37</sup>

Despite this, migrants employed in the domestic work sector are essential workers in the Covid-19 response, playing vital roles in the care of children, of sick and dependent people, and in the maintenance of homes, which helps to prevent the spread of the virus. Despite their huge contribution to the functioning of households and the economy at large, they have been one of the groups most affected by the crisis, many ending up on the street when their employers lost their jobs.

#### 3.4.2.2 Unclear working conditions

The context in which domestic workers work makes them extremely vulnerable to abuse. Traditionally, they are employed in private households where the employed person receives remuneration but the terms on which the employee is employed is often very unclear; in addition, many work without visas and within the framework of informality. Consequently, migrant

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<sup>36</sup> Jinnah & Kiwanuka (n 34); Griffin (n 34) 83–101.

<sup>37</sup> Migrant domestic workers study for the southern African region. Southern African Migration Management (SAMM) Project May 2021.

domestic workers are often excluded from the scope of the labour legislation in their country of destination, and the evidence indicates that the migrant population is more vulnerable than national domestic workers,

often working longer hours, receiving lower wages and having more reported cases of sexual abuse and gender-based violence than their national counterparts. This has been underlined by the effects of the COVID-19 pandemic, which left many migrant domestic workers on the street when their employers lost their jobs.<sup>38</sup>

Migrant domestic workers are also at risk of ending up in an irregular situation if the employer does not renew their work permits or if they leave their employer to work for someone else, which heightens their vulnerability.

#### 3.4.2.3 Domestic servitude

As stated above, some domestic workers are not working legally as they do not have the appropriate documentation. This has given rise to employers taking advantage of these workers. In Botswana, for example, Botswana employers use the irregular status of their domestic workers to restrict their movement and often threaten to have them deported in order to keep their labour. This has resulted in increasing cases of modern-day slavery or domestic servitude. A study on human trafficking by the United States Agency for International Development (USAID) observed that ‘some women from Zimbabwe who voluntarily, but illegally, migrate to Botswana to seek employment are subsequently subjected by their employers to involuntary domestic servitude’.<sup>39</sup>

### 3.5 Conclusions

This chapter focused on regional migration and the impact Covid-19 had on regional mobility, with a particular focus two types of woman migrant: the informal cross-border trader and the migrant domestic worker. The chapter found that although this type of migration can offer women

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<sup>38</sup> Available at <[https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/vacancynotice/wcms\\_789648.pdf](https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/vacancynotice/wcms_789648.pdf)>.

<sup>39</sup> M Kontos & G Bonifacio. (2015). *Migrant Domestic Workers and Family Life: International Perspectives*. London: Palgrave Macmillan.

many economic opportunities, they may not have had in their home countries, women often experience very specific gendered discrimination and vulnerably when engaging in this work.

The overall goal of this chapter has been to introduce the migrant woman as a social being:

- as the member of a household;
- as a contributor to the economy; and
- as an actor in her society.

Our exploration so far has probed the intricate relationship between women migrants and their socio-cultural environment. We have critically examined the social aspect of this socio-legal study, focusing on the dynamic interplay between the woman migrant's decision to migrate and how it influences, and is influenced by, the world around her. The following chapter turns its attention to the normative human rights framework, illuminating the woman migrant as a subject of rights and duties. As we shift our perspective to this rights-based dimension, we investigate how these rights are either realised or undermined throughout her migration journey.

## 4: Human rights protections of migrant women: a normative framework

*I believe in a human right to migration, as fundamental as the right to freedom of expression, or freedom from discrimination on the grounds of gender, race, religion or sexuality. I have come to this belief by migrating myself.<sup>1</sup>*

### 4.1 Introduction

The preceding chapters have revealed an increasing body of scholarly work that explores the influence of gender on migration dynamics. However, there has been a notable lack of attention given to the role of law in this context, despite the inherent intersection between the two fields, as highlighted by Calavita.<sup>2</sup> In light of the present thesis's goal to uncover socio-legal insights regarding the status of women, it is essential to incorporate the legal aspect into the discussion.

The legal status of migrant women, alongside the gender norms embedded within the regulatory frameworks of both sending and receiving states, significantly shapes their subsequent experiences and has a direct impact on the destination countries. Therefore, by exploring the legal dimensions, this thesis now begins to understand the interplay between the legal status of migrant women, gender norms, and their overall migration experiences, and the impact it has on their human rights.

From the onset we can acknowledge that the legal and policy system governing women migrants has an impact on them at different levels. For instance, although numerous international instruments outline the human rights of migrant women, many may not exactly enjoy these rights owing to specific national laws (often different in each country) that regulate the admission and stay of migrants, and which can contain provisions that have a negative impact on the human rights of migrant women. By way of example, many countries include provisions in their national laws that can bar women migrants from being accompanied by their partners and/or children, which makes it difficult for migrant women to realise their right to a family life. Moreover, the gendered market segmentation of work can often result in migrant women being concentrated in occupations that are not adequately protected under domestic labour laws. For example, if they work as

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<sup>1</sup> A Pakistani migrant living in the United States.

<sup>2</sup> K Calavita. (2006). Gender, migration, and law: Crossing borders and bridging disciplines. *The International Migration Review* 40(1): 104–132. Available at <<http://www.jstor.org/stable/27645581>>.

domestic workers or in the sex industry, these two highly feminised migrant professions are notoriously under-regulated to the detriment of the realisation of the human rights of those who engage in these lines of work. Therefore, as observed by UNDESA: ‘Conventions, laws and practices governing the rights of women and migrants in receiving countries affect migrant women.’<sup>3</sup>

To begin the discussion this chapter discusses the legal protections that migrant women enjoy under the human rights system. The human rights system contains a plethora of legal protections for migrants at global, regional, sub-regional and national levels. The aim of this chapter is to explore this normative framework insofar as it applies to migrant women more generally and then specifically to migrant women in the southern Africa region, all the while engaging in a critical discussion on ‘What are the rights that migrant women have?’ and ‘How do they enjoy those rights?’ in order to facilitate the answering of the research question.

The chapter begins by framing the discussion through conceptualising the human rights discourse in the historical context and then in relation to migration and human rights. It involves a detailed conversation outlining the human rights which accrue to the migrants at the international (both global and within the African Union (AU)) and sub-regional Southern African Development Community (SADC) levels, in addition to those which accrue to women migrants specifically. Given the impact that Covid-19 has had on mobility and the human rights of all migrants, and the gendered impact it has had on the enjoyment of rights by women migrants, the chapter also discusses the impact that Covid-19 has had on the status of migrants’ rights. The conversation then turns to analysing data that discusses what the lived experience of migrant women is in relation to these various human rights standards, that is, the level at which migrant women enjoy the human rights protections which accrue to them, as viewed through a feminist and/or gender and law lens. This comprehensive examination is crucial for developing a nuanced understanding of the realisation of human rights within the context of migration. A conclusion is then provided.

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<sup>3</sup> UN DESA. (nd). *Women and International Migration Division for the Advancement of Women Department of Economic and Social Affairs*. Available at <[https://www.un.org/en/development/desa/population/migration/events/coordination/3/docs/P01\\_DAW.pdf](https://www.un.org/en/development/desa/population/migration/events/coordination/3/docs/P01_DAW.pdf)>.

## 4.2 Human rights and migration

### 4.2.1 What are human rights? A brief introduction

The concept of human rights has evolved over the centuries, rooted in philosophical and intellectual contributions from prominent scholars who advocated the inherent dignity and entitlements of every individual.

The Enlightenment, an era spanning the 17th and 18th centuries, witnessed significant advancements in human rights theory. John Locke, in his work, *Two Treatises of Government*,<sup>4</sup> proposed the idea of natural rights. According to Locke, individuals possess certain fundamental rights such as life, liberty and property, which are not granted by governments but are inherent to human beings. These rights are inalienable and cannot be legitimately taken away by any authority. He stated:

The state of nature has a law of nature to govern it, which obliges everyone: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.

He stated further: ‘Being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.’ Locke’s ideas formed the basis of the concept of individual rights and heavily influenced the drafting of later human rights declarations.

Thomas Hobbes, in his famous work, *Leviathan*,<sup>5</sup> presented a different perspective on natural law. Hobbes argued that human beings are driven by self-interest and a desire for self-preservation. He believed that in the state of nature, without a social contract or government, life would be ‘solitary, poor, nasty, brutish, and short’. According to Hobbes, individuals willingly surrender some of their natural rights to a sovereign authority in exchange for protection and stability. While his views were more focused on the necessity for a strong central government, Hobbes’s ideas contributed to the understanding of the social contract and the role of government in protecting individual rights.

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<sup>4</sup> J Locke. (1690). *Second Treatise of Government*.

<sup>5</sup> T Hobbes. (1651). *Leviathan*.

Jean-Jacques Rousseau in his work, *The Social Contract*,<sup>6</sup> explored the relationship between individuals and society. He argued that society should be based on a social contract in which individuals voluntarily participate and agree to abide by the general will. Rousseau emphasised the importance of collective decision-making and the preservation of individual freedom within a community. His ideas regarding ‘popular sovereignty’<sup>7</sup> and the ‘general will’<sup>8</sup> influenced democratic theory and the idea of equal participation in the governance of society.

Immanuel Kant’s philosophy expressed in *Groundwork of the Metaphysics of Morals* emphasised the importance of moral autonomy and universal principles. His concept of the *categorical imperative*, which advocates treating individuals as ends in themselves rather than means to an end, laid the groundwork for the idea of human dignity and the universality and indivisibility of human rights:<sup>9</sup>

Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.<sup>10</sup>

During the 19th century, the movement to abolish slavery was arguably one of the earliest and most influential human rights movements in history.<sup>11</sup> Activists and abolitionists argued that every individual possesses inherent rights and dignity, irrespective of their race or status.<sup>12</sup> The movement challenged the notion that some individuals could be treated as property, emphasising the fundamental equality of all human beings. The efforts to abolish slavery led to significant legal and political developments.<sup>13</sup> The abolitionist movement pushed for legislative changes such as

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<sup>6</sup> J-J Rousseau. (1762). *The Social Contract*.

<sup>7</sup> ‘Popular sovereignty’ is the principle that political power should reside in the hands of the people collectively, who have the ultimate authority to make decisions for the common good.

<sup>8</sup> ‘General will’ represents the collective and common interest of the entire community, reflecting the general consensus and serving as the foundation for legitimate political decisions and governance.

<sup>9</sup> I Kant. (1785). *Groundwork for the Metaphysics of Morals*.

<sup>10</sup> Kant (n 9).

<sup>11</sup> DB Davis. (2006). *Inhuman Bondage: The rise and Fall of Slavery in the New World*. Oxford: Oxford University Press.

<sup>12</sup> E Foner. (2015). *Gateway to Freedom: The Hidden History of the Underground Railroad*. New York: WW Norton & Company; see also A Hochschild. (2005). *Bury the Chains: Prophets and Rebels in the Fight to Free an Empire’s Slaves*. Boston, MASS: Houghton Mifflin Harcourt.

<sup>13</sup> Hochschild (n 12).



the banning of the transatlantic slave trade<sup>14</sup> and the abolition of slavery itself.<sup>15</sup> These legal measures recognised the inherent rights of individuals and laid the foundation for broader human rights frameworks.

Despite being less prominent in the literature, women have also played crucial roles in shaping the human rights discourse. Mary Wollstonecraft, an 18th-century philosopher and writer, advocated women's rights and equality in her influential work, *A Vindication of the Rights of Woman*.<sup>16</sup> She emphasised the significance of education and rationality in achieving social justice.<sup>17</sup> In the 19th century, women such as Sojourner Truth, Susan B Anthony and Ida B Wells-Barnett made significant contributions to the advancement of human rights. Sojourner Truth, an African American abolitionist and women's rights activist, spoke out against race and gender discrimination, challenging societal norms.<sup>18</sup> Susan B Anthony played a pivotal role in the women's suffrage movement in the United States, advocating *white* women's right to vote.<sup>19</sup> Ida B Wells-Barnett campaigned against racial segregation and unequal treatment of African Americans through her writing and investigative journalism.<sup>20</sup> Emmeline Pankhurst, a British political activist, led the suffragette movement in the early 20th century. Alongside other suffragettes, she fought for *white* women's right to vote in the United Kingdom, employing direct action, civil disobedience and protests.<sup>21</sup>

The 20th century marked a crucial milestone in the codification of human rights principles into international law. The aftermath of World War II and the horrors of the Holocaust drove the global community to establish a comprehensive framework for protecting human rights. One of the most influential documents in this regard is the Universal Declaration of Human Rights (UDHR)

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<sup>14</sup> H Thomas. (1997). *The Slave Trade: The Story of the Atlantic Slave Trade, 1440–1870*. London: Simon & Schuster.

<sup>15</sup> S Drescher. (2009). *Abolition: A History of Slavery and Antislavery*. Cambridge: Cambridge University Press; see also R Blackburn. (2011). *The Overthrow of Colonial Slavery, 1776–1848*. New York: Verso.

<sup>16</sup> M Wollstonecraft. (1792). *A Vindication of the Rights of Woman*.

<sup>17</sup> Wollstonecraft (n 16).

<sup>18</sup> Sojourner Truth. (1851). *Ain't I a Woman?*

<sup>19</sup> SB Anthony. (19th century). Suffrage speeches and writings.

<sup>20</sup> IB Wells-Barnett. (Late 19th and early 20th centuries). Investigative journalism and activism.

<sup>21</sup> E Pankhurst. (Early 20th century). Suffragette movement leadership.

adopted by the United Nations General Assembly in 1948.<sup>22</sup> Drawing upon the ideas of various scholars and thinkers, including those mentioned above, the declaration enshrines fundamental rights such as:

- the right to life, liberty and security;<sup>23</sup>
- freedom of expression;<sup>24</sup>
- equality before the law;<sup>25</sup> and
- freedom from torture<sup>26</sup> and discrimination.<sup>27</sup>

In addition to the UDHR, the codification of human rights continued through the development of various legal instruments and international treaties. Examples include:

- the International Covenant on Civil and Political Rights (ICCPR);<sup>28</sup>
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>29</sup>
- the African Charter on Human and Peoples' Rights;<sup>30</sup>
- the European Convention on Human Rights;<sup>31</sup> and
- the American Convention on Human Rights.<sup>32</sup>

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<sup>22</sup> UN General Assembly. (1948). *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Available at <<https://www.refworld.org/docid/3ae6b3712c.html>>.

<sup>23</sup> Article 3.

<sup>24</sup> Article 19.

<sup>25</sup> Article 7.

<sup>26</sup> Article 5.

<sup>27</sup> Article 2.

<sup>28</sup> UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations Treaty Series vol 999, 171. Available at <https://www.refworld.org/docid/3ae6b3aa0.html>, *International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200. Available at <<https://www.refworld.org/docid/3b00f47924.html>>.

<sup>29</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200. Available at <<https://www.refworld.org/docid/3b00f47924.html>>.

<sup>30</sup> Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982). Available at <<https://www.refworld.org/docid/3ae6b3630.html>>.

<sup>31</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14*, 4 November 1950, ETS 5. Available at <<https://www.refworld.org/docid/3ae6b3b04.html>>.

<sup>32</sup> Organization of American States (OAS), *American Convention on Human Rights ('Pact of San José')*, Costa Rica, 22 November 1969. Available at <<https://www.refworld.org/docid/3ae6b36510.html>>.

These legal instruments establish obligations for states to respect, protect and fulfill the rights enshrined within them. They create frameworks for accountability and serve as a basis for promoting human rights domestically and internationally.

In Africa, the decolonisation movement, which emerged in the wake of the decline of colonialism, has been strongly influenced by the principles and ideals of human rights.<sup>33</sup> The struggles against colonial rule and the quest for self-determination were closely intertwined with the fight for human rights and the recognition of the inherent dignity and equality of all individuals.<sup>34</sup> The decolonisation movement drew on the language and framework of human rights to challenge the oppressive systems and structures of colonialism. The movement emphasised the right to sovereignty, cultural autonomy and political independence of colonised peoples.<sup>35</sup> Human rights provided a powerful tool for activists and movements to articulate their demands, seek justice and challenge the legacies of colonialism such as systemic discrimination and economic exploitation. By linking the decolonisation struggle to human rights, advocates sought to ensure that the process went beyond mere political independence, but also addressed the social, economic and cultural dimensions of liberation. Nelson Mandela famously asserted: ‘There is no freedom without bread.’<sup>36</sup>

The influence of human rights in the decolonisation movement helped shape the discourse, strategies and aspirations of decolonisation efforts,<sup>37</sup> highlighting the inseparable link between freedom, justice and human rights in the post-colonial world.<sup>38</sup> In this way, the African conception of human rights has a rich and diverse history, encompassing the contributions of scholars from

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<sup>33</sup> A Moses, M Duranti & R Burke (eds). (2020). Anti-colonial struggles and the right to self-determination. In *Decolonization, Self-Determination, and the Rise of Global Human Rights Politics (Human Rights in History)*, 33–150. Cambridge: Cambridge University Press.

<sup>34</sup> Moses, Duranti & Burke (n 33).

<sup>35</sup> A Anghie. (2004). *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press. Available at <<https://doi.org/10.1017/CBO9780511614262>>.

<sup>36</sup> N Mandela. (10 July 1993). Acceptance address by Nelson Mandela at the Clark University Investiture, Atlanta, Georgia, United States. Available at <[http://www.mandela.gov.za/mandela\\_speeches/1993/930710\\_clark.htm](http://www.mandela.gov.za/mandela_speeches/1993/930710_clark.htm)>.

<sup>37</sup> F Fanon. (1961). *The Wretched of the Earth*. New York: Grove Press. Available at <<https://grattoncourses.files.wordpress.com/2019/12/frantz-fanon-richard-philcox-jean-paul-sartre-homi-k.-bhabha-the-wretched-of-the-earth-grove-press-2011.pdf>>.

<sup>38</sup> WD Mignolo & A Escobar. (eds). (2010). *Globalization and the Decolonial Option*. London: Routledge. Available at <<https://doi.org/10.4324/9781315868448>>; see also SJ Ndlovu-Gatsheni. (2013b). *Empire, Global Coloniality and African Subjectivity*. New York & Oxford: Berghahn Books. Available at <<https://www.berghahnbooks.com/title/Ndlovu-GatsheniEmpire>>.

various regions. African perspectives on human rights are deeply rooted in indigenous philosophies and cultural values.

Leaders of anti-colonialist movements such as Kwame Nkrumah,<sup>39</sup> Julius Nyerere<sup>40</sup> and Nelson Mandela<sup>41</sup> played pivotal roles in articulating human rights principles within an African context. They drew upon the philosophy of ubuntu,<sup>42</sup> which stresses the interconnectedness and communal nature of human existence. Ubuntu emphasises respect for human dignity, community harmony and the belief that one's humanity is interdependent of others – clear human rights principles.

A significant milestone in the codification of human rights principles specific to Africa is the African Charter on Human and Peoples' Rights. Adopted by the Organization of African Unity (now the African Union) in 1981, this regional human rights instrument reflects African perspectives and experiences, recognising both individual and collective rights. The Charter emphasises the importance of cultural diversity, collective rights, and social and economic development as integral aspects of human rights in Africa.

African scholars have made substantial contributions to the development and understanding of human rights principles. Desmond Tutu, for instance, championed human rights and justice during South Africa's anti-apartheid struggle. His advocacy for truth and reconciliation highlighted the significance of restorative justice in addressing human rights violations.<sup>43</sup> African legal scholars, including Makau wa Mutua,<sup>44</sup> Abdullahi Ahmed An-Na'im,<sup>45</sup> Mahmood Mamdani<sup>46</sup> and Kwame

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<sup>39</sup> J Kiano. (1963). *Africa Must Unite by Kwame Nkrumah*. London, Heinemann. *The Journal of Modern African Studies* 1(3): 405–406. doi: 10.1017/S0022278X00001877.

<sup>40</sup> JK Nyerere. (1968). *Ujamaa: Essays on Socialism*. London: Oxford University Press.

<sup>41</sup> N Mandela. (1995). *Long Walk to Freedom*. London: Abacus.

<sup>42</sup> Dorine E van Norren. (2022). African Ubuntu and sustainable development goals: Seeking human mutual relations and service in development. *Third World Quarterly* 43(12): 2791–2810. doi: 10.1080/01436597.2022.2109458; see also T Metz. (2019). *The African Ethic of Ubuntu. 1 000 –Word Philosophy: An Introductory Anthology*. Available at <<https://1000wordphilosophy.com/2019/09/08/the-african-ethic-of-ubuntu/>>.

<sup>43</sup> D Tutu. (1999). *No Future Without Forgiveness*. New York: Doubleday.

<sup>44</sup> M wa Mutua. (2002). *Human Rights: A Political and Cultural Critique*. Philadelphia: University of Pennsylvania Press.

<sup>45</sup> AA An-Na'im. (1990). *Toward an Islamic Reformation: Civil Liberties, Human Rights, and International Law*. New York: Syracuse University Press.

<sup>46</sup> M Mamdani. (1996). *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton University Press.

Anthony Appiah<sup>47</sup> have critically examined the intersections between human rights, African cultural values and the post-colonial context, enriching the African human rights discourse.

African women scholars have also played important roles in advancing human rights in Africa. These include women such as:

- Funmi Olonisakin,<sup>48</sup> a Nigerian scholar, who focuses on the intersections of security, peacebuilding and human rights, particularly addressing gender and conflict.
- Fareda Banda,<sup>49</sup> a Malawian legal scholar, who specialises in international human rights law and women's rights, advocating gender equality and access to justice.
- Eunice N Sahle, an Ethiopian scholar, who conducts research on women's rights and gender equality, emphasising the empowerment of women within African societies.
- Navi Pillay, a South African jurist and former UN High Commissioner for Human Rights, who has been a prominent advocate of human rights, addressing violations and promoting justice and equality in Africa.<sup>50</sup>
- Sylvia Tamale, a Ugandan legal scholar, has made significant contributions to feminist jurisprudence and human rights, challenging patriarchal norms and advocating social justice and equality.<sup>51</sup>

The list of individuals and their endeavours that have shaped the global human rights movement is endless, and those mentioned here are merely a fraction of the prominent and acknowledged figures and events. Moreover, an abundance of unsung heroes exist who have contributed significantly to the advancement of human rights.

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<sup>47</sup> KA Appiah. (1992). *In My Father's House: Africa in the Philosophy of Culture*. Oxford: Oxford University Press.

<sup>48</sup> F Olonisakin. (nd). Publications and expertise profile. Available at <<https://funmiolonisakin.com/publications/>>.

<sup>49</sup> F Banda. (nd). Publications and expertise profile. Available at <<https://www.researchgate.net/scientific-contributions/Fackson-Banda-2031386497>>.

<sup>50</sup> N Pillay. (nd). Publications and expertise profile. Available at <<https://www.researchgate.net/profile/N-Pillay/2>>.

<sup>51</sup> S Tamale. (nd). Publications and expertise profile. Available at <<https://www.researchgate.net/scientific-contributions/Sylvia-Tamale-2051415068>>.

Alongside the African Charter on Human and Peoples' Rights, African regional organisations, such as the African Commission on Human and Peoples' Rights<sup>52</sup> and the African Court on Human and Peoples' Rights,<sup>53</sup> provide mechanisms for individuals and communities to seek redress for human rights violations and contribute to the progressive development of African human rights law.

It also important to note that the evolution of human rights, while significant and influential, has not been immune to imperfections.<sup>54</sup> Throughout history, the development of human rights has often occurred within gendered and racialised contexts, leading to biases and exclusions, even within the human rights framework itself. In many instances, the early conceptions of human rights were shaped by dominant societal norms that favoured certain groups over others.<sup>55</sup> This led to the exclusion or marginalisation of women, racial and ethnic minorities, indigenous peoples and other vulnerable populations.

Owing to these factors, the struggle for gender equality and the recognition of women's rights has been an ongoing battle, as discriminatory practices and patriarchal norms have persisted. Similarly, racialised contexts have often resulted in the marginalisation and subjugation of individuals based on their race or ethnicity, perpetuating inequality and limiting the full realisation of human rights for all. In this way, the quest for gender equality and racial justice has been interlinked with the broader human rights movement, highlighting the need to address these historical biases and rectify the inequalities that persist in the interpretation and application of human rights principles.<sup>56</sup> Recognising and addressing these shortcomings is crucial for achieving a more comprehensive

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<sup>52</sup> Established by the African Charter on Human and Peoples' Rights which came into force on 21 October 1986 after its adoption in Nairobi (Kenya) in 1981 by the Assembly of Heads of State and Government of the Organization of African Unity (OAU). The African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of human and peoples' rights throughout the African continent. The Commission has its headquarters in Banjul, the Gambia.

<sup>53</sup> Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998).

<sup>54</sup> M Ignatieff. (2001). *Human Rights as Politics and Idolatry*. Princeton, NJ: Princeton University Press.

<sup>55</sup> A Anghie. (2004). *Imperialism, Sovereignty, and the Making of International Law*. Cambridge University Press. Available at <<https://doi.org/10.1017/CBO9780511614262>>.

<sup>56</sup> KW Crenshaw. (1991). Mapping the margins: Intersectionality, identity politics, and violence against women of color. *Stanford Law Review* 43(6): 1241–1299.

understanding of human rights that respects the dignity and rights of all individuals, regardless of gender, race or other social identities.<sup>57</sup>

#### **4.2.2 Human rights and law**

When understanding human rights, it is important to understand that they are essentially extra-legal, meaning that they exist beyond the legal system. They are based on the fundamental values and principles of human dignity, equality and freedom, which are universally recognised and protected by international human rights law. Human rights are a set of universal moral and legal principles that uphold the inherent dignity and worth of every human being.

However, while human rights may be seen as extra-legal, they are, in fact, enforced through legal instruments such as international and regional treaties, national constitutions and domestic legislation. These legal instruments establish the obligations and responsibilities of states to respect, protect and fulfill human rights for all individuals within their jurisdiction. Human rights law provides a framework for holding states accountable for human rights violations, and it empowers individuals to seek remedies and redress for such violations. Therefore, whereas human rights may transcend legal systems and be viewed as moral and ethical principles, their enforcement and realisation rely heavily on the legal instruments and systems that support them.

In this way the law is an important tool as the realisation of human rights often depends on legal channels such as domestic and international courts, tribunals and monitoring bodies. Legal mechanisms provide a framework for individuals and groups to claim their rights and hold duty-bearers accountable for violations of human rights. Without legal enforcement, human rights could remain mere aspirations, leaving vulnerable groups at the mercy of oppressive regimes, discriminatory practices and abusive actors. Therefore, while human rights are extra-legal in nature, the legal system plays a crucial role in their implementation and protection. Having a clear understanding of human rights as extra-legal principles can highlight the situation of many migrant women whose rights exist in theory but are not enforced effectively through legal frameworks.

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<sup>57</sup> P Alston. (2005). Ships passing in the night: The current state of the human rights and development debate seen through the lens of the Millennium Development Goals. *Human Rights Quarterly* 27(3): 755–829.

### 4.2.3 *Migration as a human rights issue*

Migration is a human rights issue. This is because, whereas Chapter 2 showed that although migration has the potential to be an empowering and positive experience for individuals and communities and can be advantageous to both the country of origin and of destination, it is also clear it can often place some people in precarious situations and, as a result, may be a serious human rights concern. Many migrants who are in particularly vulnerable situations may require specific protection due to:

- the situations they left behind;
- their circumstances of transit;
- the conditions they find on arrival;
- personal characteristics such as their gender, gender identity, age, disability, health status; or
- an intersection of these factors.

In such cases it may be especially pertinent to ensure that the human rights of such people are respected, protected and fulfilled. In this way, migration and human rights are inextricably linked. First, this thesis contends that this is so because migration is itself a human right. Under international law, everyone is entitled to leave any country – even their home country – and to return to their own country.<sup>58</sup> However, this right does not neglect the sovereign prerogative that states have to decide criteria for the admission and removal of non-nationals, including migrants. Secondly, the precarious situations in which many migrants find themselves can arise from a variety of distinct factors. These factors may intersect or coexist simultaneously, affecting and exacerbating one another, and they may also transform over time as their circumstances evolve. This places migrants at a greater susceptibility to vulnerability and given that the concept of vulnerability is fundamental in the context of the human rights framework, this underscores the importance of safeguarding migrants as a crucial human rights concern.

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<sup>58</sup> Article 13.2 of the Universal Declaration of Human Rights, UN General Assembly, 10 December 1948, 217 A(III). Available at <<https://www.refworld.org/docid/3ae6b3712c.html>> (accessed 14 November 2021). Also see article 12.2 of the International Covenant on Civil and Political Rights which says: ‘Everyone shall be free to leave any country, including his own.’



The migration and human rights discourse has been gaining traction over the previous century. The formation of the International Labour Organisation (ILO) under the auspices of the Treaty of Versailles is seen by many writers as one of the most significant occurrences in the trajectory of migration as a global policy issue.<sup>59</sup> In its Preamble, the Constitution of the ILO outlined that the ‘*protection of the interest of workers when employed in countries other than their own*’ was one of the ‘*conditions of labour*’ that needed to be improved to deal with the injustice that can ‘*imperil*’ peace.<sup>60</sup> This means that as far back as 1919 the international community recognised the human rights of migrants as central to maintaining peace and security. Since then, migration governance has grown globally and at present an extensive range of international conventions, regional treaties, bilateral agreements and national provisions exist which provide a normative framework for regulating migration. Distinct international law rules also regulate the treatment of migrants specifically. The international legal framework incorporates detailed provisions to protect the rights of migrants, including migrant workers. This is because, according to the ILO, 69% of the international migrant population are economically active.<sup>61</sup> Migrant worker rights are therefore central to the human rights framework which focuses on migration because a predominant number of migrants are labour migrants.

From a regional perspective, Africa was one of the first continents to establish a legal regime relating to the protection of those who move between states when the then Organisation of African Unity (OAU) – now the AU – promulgated a convention on refugees called the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>62</sup> It was prompted by

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<sup>59</sup> Alexander Betts & Lena Kainz. (2017). *The History of Global Migration Governance*. Refugee Studies Centre Working Paper Series 122: 22; R Karatani. (2005). How history separated refugee and migrant regimes: In search of their institutional origins. *International Journal of Refugee Law* 17(3): 517–541. Available at <<https://doi.org/10.1093/ijrl/eei019>>; K Long. (2013). When refugees stopped being migrants: Movement, labour and humanitarian protection. *Migration Studies* 1(1): 4–26. Available at <<https://doi.org/10.1093/migration/mns001>>; Philip Martin, Susan Martin & Sarah Cross. (2007). High-level dialogue on migration and development. *International Migration* 45(1): 7–25. Available at <<https://doi.org/10.1111/j.1468-2435.2007.00394.x>>.

<sup>60</sup> International Labour Organization (ILO). *ILO Constitution, 1919*. Available at <[https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO)>.

<sup>61</sup> ILO. (nd). *Global Estimates on International Migrant Workers Results and Methodology*. Available at <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_808935.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_808935.pdf)>.

<sup>62</sup> Organization of African Unity(OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa (‘OAU Refugee Convention’), 10 September 1969, 1001 UNTS 45. Available at <<https://www.refworld.org/docid/3ae6b36018.html>> (accessed 14 November 2021).

the large number of displaced Africans who were fleeing conflicts as a result of liberation struggles against former colonial rulers. At the time it was the first regional refugee convention in the world and the only applicable binding instrument in the entire developing world.<sup>63</sup>

In recent years, the human rights of migrants have been at the forefront of African policymaking. In 2006 the AU adopted its two main migration frameworks: the Migration Policy Framework and the African Common Position on Migration and Development. The Migration Policy Framework, which was revised in 2018, identifies migration as one of the most important issues of our time.<sup>64</sup> The framework articulates the AU's position on migration, emphasising to member states that 'migration management policies and practices should uphold the human rights of all migrants'.<sup>65</sup> In addition to these principal frameworks, the African Commission on Human and Peoples' Rights (ACHPR) adopted Resolution 114 on Migration and Human Rights in 2007.<sup>66</sup> In it the Commission urges states:

To recognize the importance of the human rights of all migrants, including refugees and IDPs, and to ensure that national legislation relating to migration issues is consistent with and does not conflict with international human rights standards and conventions.<sup>67</sup>

Therefore, the international regime explicitly recognises that those who leave their countries are in a specific situation of vulnerability and require special protections. This places the migration issue firmly at the top of the human rights agenda in Africa and, indeed, in the world.

#### **4.2.4 Dignity and migration**

The notion of dignity is a central pillar in the human rights discourse. General consensus maintains that dignity is not only a fundamental right, but is also a basis of other rights, often referred to as

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<sup>63</sup> JO Moses Okello. (nd). The OAU Convention and the Continuing Challenge for the African Union. *Forced Migration Review*. Available at <<https://www.fmreview.org/faith/okello#:~:text=Home%20%C2%BB%20FMR%20Online-,The%201969%20OAU%20Convention%20and%20the%20continuing%20challenge%20for%20the%20African%20Union,-J%20O%20Moses>>.

<sup>64</sup> Stating in its introduction that 'migration is a major issue in the 21st century, and poses social, economic and political challenges for policy makers engaged in the management of migration for the betterment of the continent'.

<sup>65</sup> Migration Policy Framework for Africa and Plan of Action (2018–2030).

<sup>66</sup> Resolution 114 on Migration and Human Rights – ACHPR/Res114(XXXXII)07.

<sup>67</sup> Resolution 114 (n 66).

the ‘fountain from which other rights flow.’<sup>68</sup> Dignity is so fundamental that it enjoys premium recognition in the Universal Declaration of Human Rights, which states in article 1: ‘All human beings are born free and equal in dignity and rights.’ The foremost human rights document in Africa, the African Charter, also states prominently at article 5: ‘Every individual shall have the right to the respect of the dignity inherent in a human and to the recognition of his legal status.’ This article has the effect of linking dignity to the legal status of every person.

The fundamental nature of the notion of dignity is also mentioned in the Preamble to the United Nations Charter and in the preambles of many other major human rights instruments, such as the African Charter<sup>69</sup> and two treaties: the International Convention Against Racial Discrimination (ICERD) and the Convention Against All Forms of Discrimination Against Women (CEDAW). If a preamble is seen a scene-setting provision in a convention, then dignity can be seen as a point of entry for other rights, given its constant mention in many preambles.

Domestic legal systems have also interpreted dignity in this way. In Botswana the landmark case of *Attorney-General of Botswana v Thuto Rammoge*<sup>70</sup> ruled that the right to freedom of assembly and association protected the right of LGBTQI+ advocacy groups to organise and promote their rights. As Esterhuizen notes:

in *Rammoge* the Court of Appeal stated that the protection of dignity was the *foundation* and core of all other rights in the Constitution: ‘To deny any person his or her humanity is to deny such person human dignity and the protection and upholding of personal dignity.’<sup>71</sup>

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<sup>68</sup> United Nations Law Commission. (1980). *Yearbook of the International Law Commission, Vol II, Part I*. UN ILC, 217; B Venter. (2017). A selection of constitutional perspectives on human kidney sales. *Potchefstroom Electronic Law Journal* 16(1): 351–403. Available at <<https://doi.org/10.17159/1727-3781/2013/v16i1a2315>>.

<sup>69</sup> ‘Considering the Charter of the Organisation of African Unity, which stipulates that “freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples”.’

<sup>70</sup> *Attorney-General v Rammoge* Court of Appeal of the Republic of Botswana, Civil Appeal CACGB-128-14 (2016).

<sup>71</sup> Tashwill Esterhuizen. (2019). Decriminalisation of consensual same-sex sexual acts and the Botswana Constitution: *Letsweletse Motshidiemang v The Attorney-General (LEGABIBO as amicus curiae)*. *African Human Rights Law Journal* 19(2): 843–861. Available at <<https://dx.doi.org/10.17159/1996-2096/2019/v19n2a14>>.

Scholars have understood dignity in two ways: first, in relation to the intrinsic value of every human being<sup>72</sup> (as described in the UHDR). Second, dignity is understood in the context of what it means to live a dignified life under decent conditions. These conditions relate to other rights such as that of education, freedom of movement, access to food, right to equality, etc. Article 5 of the African Charter interestingly links the right to dignity to the prohibition of

all forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment.

From these readings, we can deduce that dignity represents essentially what it is to be *human*, which is why it underpins the *human* rights discourse. South African scholar Rinie Steinmann states succinctly that ‘dignity legalises the notion that the essence of humanity must be recognised and respected’.<sup>73</sup> When thought of in this way, dignity is related closely to the African notion of ubuntu/*botho*<sup>74</sup> which is often used to describe ‘humanness or personhood’ among speakers of Bantu languages (a concept expanded upon in Chapter 6).

In contextualising dignity within the migration discourse, the UN Special Rapporteur on the human rights of migrants, François Crépeau, once famously stated that ‘dignity has no nationality’.<sup>75</sup> The UN expert was pointing out that the notion of dignity is not tied to any particular citizenship and that the act of migrating does not result in one losing one’s right to dignity. Expanding on this, Crépeau (and Samaddar) in fact contended that the act of migrating is, in many instances, a ‘dignity-seeking exercise’.<sup>76</sup> In their article, ‘Recognizing the dignity of migrants’, the authors noted poignantly that due to the undignified conditions many migrants find themselves in in their

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<sup>72</sup> Daniel Sulmasy. (2007). *Human Dignity and Human Worth*. doi:10.1007/978-1-4020-6281-0\_2; Rinie Steinmann. (2016). The core meaning of human dignity. *Potchefstroom Electronic Law Journal (PELJ)* 19(1): 1–32. Available at <<https://dx.doi.org/10.17159/1727-3781/2016/v19i0a1244>>; Vasil Gluchman. (2017). Nature of dignity and human dignity. *Human Affairs* 27(2): 131–144. Available at <<https://doi.org/10.1515/humaff-2017-0012>>.

<sup>73</sup> Steinmann (n 72).

<sup>74</sup> A Nguni/Bantu term meaning ‘humanity’. It is also sometimes loosely translated as ‘I am because we are’ or ‘I am because you are’; *Motho ke motho ka batho* (Setswana), *Umuntu ngumuntu ngabantu* (isiZulu).

<sup>75</sup> United Nations. (2011). *Migrants Must be Treated with Dignity and Respect, Human Rights UN Expert Says*. [Press release]. Available at <<https://news.un.org/en/story/2011/10/392482-migrants-must-be-treated-dignity-and-respect-human-rights-un-expert-says>>.

<sup>76</sup> François Crépeau & Ranabir Samaddar. (2011). Recognizing the dignity of migrants. *Refugee Watch: A South Asian Journal on Forced Migration* 37: 55–67.

home countries – extreme poverty, violence, limited opportunities for themselves and their children and discrimination – migration is itself ‘fundamentally an exercise of dignity-seeking’. This is because many migrants ‘can’t imagine a future (or a good future) for themselves and their children in the home country and wish to have better options’.<sup>77</sup> When thought of in this way, the first step in understanding the rights of migrants is to accept that they – as all people – are entitled to dignity, whatever the circumstances that befall them.

### **4.3 The migrant as a subject of human rights under international and regional normative frameworks**

#### ***4.3.1 An international perspective***

In accordance with international human rights standards which are anchored in the inherent dignity of *all* persons, migrants are entitled to the fundamental rights enjoyed by *every person* ‘regardless of their legal status in a State’.<sup>78</sup> With the exception of article 25 of the International Covenant on Civil and Political Rights (ICCPR), which relates to political participation, the Human Rights Committee (HRC) has stated explicitly that all the rights guaranteed in the ICCPR apply to migrants. This position is clarified in General Comment No 15: The Position of Aliens under the Covenant.<sup>79</sup>

In the African regional context, the African Charter also entrenches almost all rights in ‘every individual’. This includes economic, social and cultural rights, such as property, work, health, education and family. In interpreting the African Charter, as early as 1997, the ACHPR specified the following:

Article 2 of the Charter emphatically stipulates that ‘Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without

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<sup>77</sup> Crépeau & Samaddar (n 76).

<sup>78</sup> UDHR (adopted 10 December 1948), UNGA Res 217 A(III), art 1. See also Human Rights Committee, General Comment No 15: The position of aliens under the Covenant, UN Doc. HRI/GEN/1/REV9(VOLI), 11 April 1986; Amnesty International. (2012). *In Hostile Terrain: Human Rights Violations in Immigration Enforcement in the US Southwest*. Amnesty International, 13.

<sup>79</sup> UN Human Rights Committee (HRC), CCPR General Comment No 15: The Position of Aliens Under the Covenant, 11 April 1986. Available at <<https://www.refworld.org/docid/45139acfc.html>> (accessed 31 October 2021).

distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status’.

This text obligates states to ensure that persons living on their borders, regardless of their immigration status, are afforded the full spectrum of human rights. The following section outlines the specific rights which migrants enjoy under international human rights law. It must, however, be noted that this does not comprise an exhaustive list – simply those rights that are relevant to answering the questions in this thesis.

### ***4.3.2 International law protections enjoyed by migrants<sup>80</sup>***

#### ***4.3.2.1 Right to life***

Every migrant enjoys the right to life and as a result all states have an obligation to guarantee that no migrant is arbitrarily deprived of this right.<sup>81</sup> In line with this, the UN General Assembly, in its Resolution 23/20, affirms explicitly that states are obliged to prosecute right-to-life violations, including extrajudicial killings that take place during a migrant’s journey from their country of origin to the country of destination and vice versa.<sup>82</sup> States also have a duty to mitigate loss of life during land and sea border crossings.<sup>83</sup>

In general, international human rights norms and the international law of the sea bestow a duty on states to protect and ensure the right to life of individuals within the state’s territory at sea or on a ship under a particular state’s jurisdiction. The law of the sea contains particular provisions for the rescue and protection of individuals who are lost at sea – this protection extends to migrants. Article 98 of the United Nations Convention on the Law of the Sea (UNCLOS) obliges shipmasters to assist people found at sea who are in danger of being lost. There is also an obligation to rescue distressed individuals who have informed the shipmaster of their need for assistance, as long as

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<sup>80</sup> UN General Assembly, Convention on the Law of the Sea (UNCLOS), 10 December 1982. Available at <<https://www.refworld.org/docid/3dd8fd1b4.html>> (accessed 31 October 2021) art 98.

<sup>81</sup> UN General Assembly, International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, United Nations, Treaty Series, Vol 999, 171. Available at <<https://www.refworld.org/docid/3ae6b3aa0.html>> (accessed 31 October 2021] art 6; UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW), 18 December 1990, A/RES/45/158. Available at <<https://www.refworld.org/docid/3ae6b3980.html>> (accessed 31 October 2021) art 9.

<sup>82</sup> UN General Assembly, Resolution 23/20, Human rights of migrants, UN Doc A/HRC/RES/23/20, 26 June 2013, para 4(c).

<sup>83</sup> Paragraph 4(d).

such assistance does not endanger the ship, crew or passengers. Article 98(2) of the UNCLOS also stipulates that states that have a coastal shore have a positive obligation to collaborate with neighbouring states in order to undertake effective search-and-rescue activities. Also, specifically relevant to migrants, Chapter 2 of the 1979 International Convention on Maritime Search and Rescue (SAR) delineates that individuals at sea who are in distress must be assisted regardless of their *nationality, status or the circumstances in which they are found*.<sup>84</sup>

Migrants, however, often face very dangerous, life-threatening conditions when migrating. It is commonly documented that many migrants lose their lives while on the move. In 2020, the International Organisation for Migration (IOM) Missing Migrants Project recorded 3 174 deaths on migratory routes worldwide<sup>85</sup> during the period 1 January 2020 to 17 December 2021. These data indicate that despite the human rights protection they have, migrants often experience widescale violations of their right to life.

#### 4.3.2.2 Right to equality and non-discrimination<sup>86</sup>

The right to be free from discrimination is entrenched in international law and is outlined under several international human rights law instruments; this right necessarily extends to migrants. By way of example, article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Similarly, article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) declares:

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<sup>84</sup> International Commission of Jurists. (2014). *Migration and International Human Rights Law: A Practitioner's Guide*. ICJ, 101.

<sup>85</sup> ReliefWeb. (2020). *Over 3 000 People Die During Migration Journeys in 2020 Despite Covid-19 Pandemic*. December 2020. Available at <<https://reliefweb.int/report/world/over-3000-people-die-during-migration-journeys-2020-despite-covid-19-pandemic>>.

<sup>86</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations Treaty Series, Vol 993, 3. Available at <<https://www.refworld.org/docid/3ae6b36c0.html>> (accessed 31 October 2021) art 2(2); International Labour Organization (ILO), ILO Declaration on Fundamental Principles and Rights at Work, June 1988. Available at <<https://www.refworld.org/docid/425bbdf72.html>> (accessed 31 October 2021) art 2.

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>87</sup>

Migrants are also protected from discrimination when they belong to one of the groups protected by the CEDAW,<sup>88</sup> the Convention on the Rights of the Child (CRC)<sup>89</sup> or the ICERD. Migrants are also to be treated equally and in a non-discriminatory manner racially, as outlined by General Recommendation No 30: Discrimination against non-citizens<sup>90</sup> which states:

Article 5 of the Convention incorporates the obligation of States parties to prohibit and eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law.<sup>91</sup>

The right to equality and non-discrimination is also guaranteed under numerous regional human rights instruments in African, inter-American, European and other regional human rights systems. For example, article 2 of the African Charter states:

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, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

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<sup>87</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entry into force 3 January 1976), 993 UNTS 3.

<sup>88</sup> Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entry into force 3 September 1981), 1249 UNTS 13, art 1.

<sup>89</sup> Convention on the Rights of the Child (adopted 20 November 1989, entry into force 2 September 1990), 1577 UNTS 3, art 2(1).

<sup>90</sup> General Recommendation No 30: Discrimination against Non-citizens, UN Doc CERD/C/64/Misc11/rev3, 19 August 2004.

<sup>91</sup> General Recommendation 30 (n 90) art 1(3).



The right to equality and non-discrimination is therefore a right enjoyed internationally. The migrant worker's rights to equality and non-discrimination are likewise protected<sup>92</sup> and the ILO has also produced instruments which protect the migrant's right to non-discrimination in the workplace. For instance, the ILO Declaration on Fundamental Principles and Rights at Work advocates non-discrimination in the workplace, in addition to other rights. Article 2 of the Declaration states:

All Members, even if they have not ratified the [ILO] Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labor; (c) the effective abolition of child labor; and (d) the elimination of discrimination in respect of employment and occupation.

The right to equality and non-discrimination enjoys such universal acceptance that in 2003, in its 'Advisory opinion on the juridical conditions and rights of undocumented Migrants', the Inter-American Court of Human Rights (IACHR) stated that the principle of equality and non-discrimination has reached the status of *jus cogens* or a peremptory norm of general international law. Therefore, all states are bound by these rules, regardless of whether they have ratified the specific international treaties pertaining to them or not.<sup>93</sup>

Despite this universal recognition of the right to equality, migrants face high levels of discrimination at every stage of the migration journey. This was confirmed by the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance Declaration and Programme of Action (The Durban Declaration),<sup>94</sup> which found that xenophobia

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<sup>92</sup> See Vincent Chetail. (2021). Sources of international migration law. In Brian Opeskin, Richard Perruchoud & Jillanne Redpath-Cross (eds), *Foundations of International Migration Law* Cambridge: Cambridge University Press, 79.

<sup>93</sup> Inter-American Court HR, On the Juridical Conditions and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, 17 September 2003, para 173(4).

<sup>94</sup> United Nations, Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001. Available at <<https://www.refworld.org/docid/3db573314.html>> (accessed 14 November 2021).

levelled against non-citizens (migrants, in particular), constitutes ‘one of the main sources of contemporary racism’. Despite all the legal protections they have to equality and non-discrimination, detailed in various instruments, migrants continue to face endemic levels of discrimination in areas related to health, education, social security, work and housing. It continues by saying that ‘this is a global issue affecting the countries of origin, the countries of transit and the countries of arrival’.

#### 4.3.2.3 Protection against arbitrary arrest and detention<sup>95</sup>

International human rights law states that everyone, including migrants, should not be subjected to arbitrary arrest or detention. This is outlined at article 6 of the African Charter:

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.

Various other international law instruments encompass this right.<sup>96</sup> For instance, under article 9 of the ICCPR, a state may not arbitrarily arrest and detain any individual. In addition, a state has an obligation to show that they have considered other less-restrictive measures than detention and found them to be insufficient in order to prove that detention is not arbitrary. To this end, the Human Rights Committee, in the communication, *A v Australia*, clarified that the need to wait for an entry permit or until the end of removal proceedings did not justify the prolonged detention of a migrant when other measures which were less restrictive had not been considered.<sup>97</sup> Similarly, the European Court of Human Rights (ECtHR) has established that detaining a migrant for an unreasonably long period without informing them of the reason for their detention is a violation under the ECHR.<sup>98</sup>

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<sup>95</sup> Article 9 of the ICCPR; art 16(4) of the International Convention on the Protection of the Right of All Migrant Workers and Members of Their Family.

<sup>96</sup> American Convention (Pact of San José), art 7; ArCHR, art 14; ECHR, art 5; ICCPR, art 9.

<sup>97</sup> See Human Rights Committee, *A v Australia*, Communication No 560/1993, Views of 30 April 1997, para 8.2.

<sup>98</sup> ECtHR, *Saadi v United Kingdom*, [GC], No 13229/03, ECHR 2008, Judgment of 29 January 2008, paras 67–74.

Article 16(4) of the ICRMW also protects migrant workers and their families from individual or collective arbitrary arrest or detention. The Committee on Migrant Workers notes that for arrest or detention not to be arbitrary, it must:

- be ‘prescribed by law’;
- ‘pursue a legitimate aim under the ICRMW’;
- be ‘necessary in the specific circumstances’; and
- be ‘proportionate to the legitimate aim’.<sup>99</sup>

The ICRMW states that the criminalisation of irregular migration does not establish a legitimate reason for regulating irregular migration.<sup>100</sup> It further emphasises that lawful administrative detention may become arbitrary if it exceeds the period of time for which a state can properly justify it.<sup>101</sup>

Despite these protections, detaining migrants during immigration is commonplace the world over. As detention often occurs without a trial or while migrants are awaiting proceedings of some kind, it can result in arbitrary detention. Such detention is increasingly being used by states as a ‘push-back’ strategy to dissuade migrants from entering their jurisdictions. The Global Detention Project (GDP) estimates that every day ‘tens of thousands’ of women, men and children worldwide are detained for reasons related to their immigration status.<sup>102</sup>

#### 4.3.2.4 Protection against torture and inhuman treatment<sup>103</sup>

The prohibition of torture and inhumane treatment is such a universally accepted principle that it has the status of *jus cogens* or is considered a peremptory norm of international law. This means that states are obliged to enforce the prohibition of torture even if the state in question has not ratified any treaty pertaining to it particularly. It is also a *non-derogable* right – one of those core rights that may never be suspended, even during times of war, when national security is threatened,

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<sup>99</sup> General Comment No 2 on the rights of migrant workers in an irregular situation and members of their families, 28 August 2013, para 23.

<sup>100</sup> General Comment No 2 (n 99) para 24.

<sup>101</sup> General Comment No 2 (n 99) para 27.

<sup>102</sup> Global Detention Project. Using data and analysis to promote the human rights of migrant detainees. Available at <<https://www.globaldetentionproject.org/>>.

<sup>103</sup> Article 2(2) of the ICCPR.

or during other public emergencies, as clarified by article 2(2) of the Convention against Torture (CAT).<sup>104</sup>

Various regional human rights treaties and the ICCPR also prohibit torture and cruel, inhuman or degrading treatment (CIDT).<sup>105</sup> Article 10 of the ICRMW also guarantees migrant workers the right to be free from torture and CIDT<sup>106</sup> and delineates specifically that detained migrant workers have a right to humane treatment during detention – as specified in article 17(1). In addition, accused migrants should not be placed together with convicted persons.<sup>107</sup> In order to ensure this, state parties are therefore obliged to guarantee that:

they provide adequate conditions in accordance with international human rights standards, including by providing adequate food and drinking water; allowing communication with family and friends; providing access to qualified medical personnel; and protecting them from inhumane treatment, including sexual abuse.<sup>108</sup>

#### 4.3.2.5 Procedural safeguards in collective expulsion proceedings

Procedural safeguards in collective expulsion proceedings are designed to protect the rights of individuals in cases where a group of people is being deported from a country. A number of procedural safeguards are in place in international law to protect the rights of individuals subject to collective expulsion proceedings. These safeguards are designed to ensure that the rights of the individuals being expelled are respected, and that the decision to expel is taken in accordance with the principles of legality, necessity, and proportionality.

One of the key procedural safeguards in collective expulsion proceedings is the requirement that the state provide a fair and impartial hearing to the individuals being expelled. This may take the form of a judicial review, or a review by an administrative body with the authority to issue binding

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<sup>104</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, 85. Available at <<https://www.refworld.org/docid/3ae6b3a94.html>> (accessed 31 October 2021).

<sup>105</sup> See ICCPR, art 7; ECHR, art 3; American Convention (Pact of San José), art 5(2); ArCHR, art 8; African Charter, art 5.

<sup>106</sup> ICRMW, art 10.

<sup>107</sup> See General Comment No 2 (n 99), paras 36–48.

<sup>108</sup> ICRMW, art 17(1).

decisions. In either case, the individuals being expelled must be given the opportunity to present their case and to challenge the decision to expel them.

Another important procedural safeguard is the requirement that the state provide adequate reasons for the decision to expel a group of individuals. This helps to ensure that the decision is not taken arbitrarily, and that it is based on legitimate and objective criteria. In addition to these safeguards, several international instruments also provide additional protection to individuals subject to collective expulsion proceedings. The European Convention on Human Rights, for example, prohibits collective expulsions and requires states to provide individualised assessment in all cases where an individual's right to respect for private and family life is at stake.

#### 4.3.2.6 Procedural safeguards in individual expulsion proceedings

The expulsion or deportation of migrants is a common feature in many countries' immigration systems. However, under international human rights law, all states have duty to provide appropriate, effective and adequate remedies to people whose rights have been violated. This duty is outlined at articles 2 and 3 of UN General Assembly, Resolution 60/147. In *Ahani v Canada* the Human Rights Committee clarified that when the possibility of a substantive human rights violation is present during the expulsion of an individual, then additional procedures are necessary to ensure the right to an effective remedy.<sup>109</sup> In addition, article 22 of the ICRMW prescribes that a state must ensure that procedural safeguards are in place in order to protect migrant workers during individual expulsion proceedings. Article 22(2), (3) and (4) states:

2. Migrant workers and members of their families may be expelled from the territory of a State Party only in pursuance of a decision taken by the competent authority in accordance with law.
3. The decision shall be communicated to them in a language they understand. Upon their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

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<sup>109</sup> Human Rights Committee, *Ahani v Canada*, Communication No 1051/2002, Views of 15 June 2004, paras 10.6–10.8.

4. Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he or she should not be expelled and to have his or her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek a stay of the decision of expulsion.

Article 22(6) of the Convention requires further that states must allow an individual to take care of any outstanding claims for payments within a reasonable time before or after their departure from the state in question.<sup>110</sup> A matter regarding individual expulsion with inadequate procedural safeguards was heard at the African Commission on Human and Peoples' Rights in the *Kenneth Good v Republic of Botswana* Communication. The case involved a political science professor who was an Australian national who had criticised Botswana's model of presidential succession.<sup>111</sup> His employment at the University of Botswana was then terminated and he was subsequently deported by way of an executive order by being declared an 'an undesirable inhabitant of or visitor to Botswana' under the Immigration Act.<sup>112</sup> Botswana's national legislation barred domestic courts from hearing an appeal of an executive order of removal. In this case the African Commission found there to have been violations of articles 7(1) and 12(4) of the African Charter, which guarantee the right to have one's cause heard by a competent tribunal and the right of non-nationals. Ultimately, it has held that a migrant has a right to have their cause heard before being expelled.<sup>113</sup>

#### 4.3.2.7 The right to family

The family has been described as a central unit of human society. Many international and regional instruments acknowledge the family as the 'fundamental group of society'.<sup>114</sup> One of the earliest known articulations of the right to family can be found at article 16 of the UDHR, which states:

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<sup>110</sup> Also see ILO Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143), art 9(1).

<sup>111</sup> See: Kenneth Good & Ian Taylor. (2005). Botswana: No model for Africa. *Mail and Guardian*, 11 March 2005.

<sup>112</sup> Immigration Act 19 of 1966 [Cap 25:02].

<sup>113</sup> ACommHPR, *Good v Republic of Botswana*, Communication No 313/05, 47th Ordinary Session, May 2010.

<sup>114</sup> Including arts 12 and 16(1) of the UDHR; Preamble and art 23 of the ICCPR; arts 1, 2 and 17 of the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, 1986; arts 9, 10, 20, 21 and 22 of the Convention on the Rights of the Child; the ICPRMW, all through the document; art 10 of the ICESCR; art 18 of the African Charter; art 6 of the European Social Charter; and Preamble of the African Charter on the Rights and Welfare of the Child.

‘Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family’.

Family is also major driver of migration and the term ‘family migration’ is now commonly used to categorise the migration of people who migrate as a result of new family ties or those who migrate to maintain pre-existing family relationships. The right to family is important especially in the lives of women because they tend to be the primary caregivers.

Given its importance under international human rights law, states are required to pay consideration to a migrants’ family life and their family members when making decisions pertaining to their admission, detention or expulsion. The ICRMW bestows a duty on state parties to ‘pay attention to the problems that may be posed for members of his or her family, in particular for spouses and minor children’ when a migrant worker is detained and to ‘take appropriate measures to ensure the protection of the unity of the families of migrant workers’.<sup>115</sup>

Despite these clear articulations of the right to family, many migrants experience frequent violations of this right. The right of migrants to bring their family members to a destination state is not commonly sanctioned and continues to be resisted in many states. As the UNICEF notes in a working paper on *Family Unity in the Context of Migration*, ‘migration status remains a key barrier keeping families from being together.’<sup>116</sup> This is especially detrimental to children, who are often the hardest hit when they are separated from their caretakers.

#### 4.3.2.8 Protection against labour exploitation<sup>117</sup>

Given that a large proportion of migrants are labour migrants (almost 70% of all migrants)<sup>118</sup> including those central to this thesis, the right against labour exploitation is an important one to delve into in the context of this research. Migrants enjoy extensive protection against labour

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<sup>115</sup> ICRMW, arts 17(6), 44.

<sup>116</sup> UNICEF Working Paper: Family Unity in the Context of Migration. Available at <<https://www.unicef.org/media/58341/file/Family%20unity%20issue%20brief.pdf>>.

<sup>117</sup> ICRMW, art 11; ICCPR, art 8.

<sup>118</sup> In 2019, there were 169 million international migrant workers in the world and they constituted 4.9% of the global labour force in the destination countries. These international migrant workers made up approximately 69% of the world’s international migrant population of working age (aged 15 and over) in 2019 (ILO, Migration Data Portal 2021). Available at <<https://www.migrationdataportal.org/themes/labour-migration>>.

exploitation through numerous ILO conventions<sup>119</sup> and the ICRMW. By way of example, article 8 of the ICCPR states that ‘no one shall be held in slavery or servitude’, and a similar provision exists in article 11 of the ICRMW. This provision explicitly prohibits slavery, servitude and forced labour. Accordingly, states are obliged to take such measures as will prevent all forms of forced or compulsory labour by migrant workers. These measures include eliminating practices such as the use of illegal confinement and withholding travel documents as a way of compelling migrants into compulsory or forced labour.<sup>120</sup>

This has been expanded on by the treaty body which oversees the implementation of the ICERD – the Committee on the Elimination of Racial Discrimination (CERD) – which has stated previously that, whereas states are permitted to enact legislation that requires migrants to possess work permits,

all individuals are entitled to the enjoyment of labour and employment rights, including the freedom of assembly and association, once an employment relationship has been initiated until it is terminated.<sup>121</sup>

#### 4.3.2.9 Right to social security

The right to social security is enshrined in the UDHR, which delineates ‘everyone as a member of society has the right to social security’.<sup>122</sup> And article 27 of the International Convention on the Protection of the Rights of All Migrant Workers and their Families states that:

With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.

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<sup>119</sup> Forced Labour Convention, 1930 (No 29); Abolition of Forced Labour Convention, 1957 (No 105); Protocol of 2014 to the Forced Labour Convention, 1930; Forced Labour (Supplementary Measures) Recommendation, 2014 (No 203).

<sup>120</sup> See ILO Forced Labour Convention (No 29), art 11; General Comment No 2, 28 August 2013, para 60.

<sup>121</sup> See General Recommendation No 30 on discrimination against non-citizens, 19 August 2004, para 35. See also General Comment No 2 para 62.

<sup>122</sup> UDHR (1948), art 22.



The content of the right has been expanded on by various universal and regional human rights bodies who have explicitly determined that migrant workers do indeed have a right to social security. For instance, in its General Comment 19 the Committee on Economic, Social and Cultural Rights (CESCR) specified that:

where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.<sup>123</sup>

Despite this the right to social security it is seldom realised by migrants, as they appear to live in a legal 'limbo'. This is because even when migrant workers contribute fully to the economies of both destination (through labour and taxes) and origin countries (through remittances), they are often left out of national social security programmes in numerous countries. Migrants often cannot claim social security in their countries of origin due to their absence, while in destination countries they are met with restrictive conditions or outright non-access to social security.

#### 4.3.2.10 Right to health

Article 12 of the ICESCR articulates clearly the right to attain the highest standard of health for all persons. The content of the right was expanded upon by the CESCR in General Comment 19, when they established that 'persons, irrespective of their nationality, residency or immigration status, are entitled to [both] primary and emergency medical care'.<sup>124</sup> This clarified that the right also extends to migrants. Similarly, the African Charter and the Maputo Protocol provide for the right to health as a right of everyone, irrespective of their immigration status or citizenship.<sup>125</sup>

Additional confirmation was provided by the CERD committee, which indicated that states have a duty to

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<sup>123</sup> See CESCR, General Comment No 19 on the right to social security, UN Doc E/C12/GC/19, 4 February 2008, para 36.

<sup>124</sup> CESCR (n 123) para 37.

<sup>125</sup> African Charter, art 16, Maputo Protocol, art 14.

ensure ... the right of (undocumented) non-citizens to an adequate standard of physical and mental health by, inter alia, refraining from denying or limiting their access to preventive, curative and palliative health services.<sup>126</sup>

In their publication, *Migration and International Human Rights Law: A Practitioner's Guide*, the International Commission of Jurists (ICJ) concludes that:

when a healthcare system normally provides treatment beyond primary and emergency medical care, the exclusion of asylum-seekers, or documented or undocumented migrant workers and members of their families from the system would violate Article 12 [of the] ICESCR read together with Article 2, Article 5 [of the] ICERD, or (in cases involving children) Article 24 [of the] CRC.<sup>127</sup>

Despite this, the right to health remains precarious for many migrants. The World Health Organisation (WHO) reports that migrants often face various barriers to health services in destination countries. In addition, these barriers are rooted in the discrimination and stigmatisation experienced and can include administrative hurdles, language barriers and a restrictive policy environment which generates fears of being deported or losing employment.<sup>128</sup>

#### 4.3.2.11 Right to freedom of movement<sup>129</sup>

Several human rights instruments, including the ICCPR (article 12), the ICRMW (article 39), the Convention on the Rights of the Child (article 10(2)) and the ICERD (article 5), establish that migrants have a right to freedom of movement within the territory of the state in which they are located. Migrants' freedom of movement also extends to the right to leave a state and the right to return home to their state of origin.<sup>130</sup>

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<sup>126</sup> See General Recommendation No 30, preamble and para 36.

<sup>127</sup> See International Commission of Jurists. (2014). *Migration and International Human Rights Law: A Practitioner's Guide*. ICJ, 249.

<sup>128</sup> World Health Organisation (WHO). (2018). *Health of Refugees and Migrants Regional Situation Analysis, Practices, Experiences, Lessons Learned and Ways Forward*. Geneva: WHO. Available at <<https://www.who.int/migrants/publications/EURO-report.pdf>>.

<sup>129</sup> Article 12(3) of the ICCPR.

<sup>130</sup> See General Comment No 15: The Position of Aliens under the Covenant, 11 April 1986, para 5.; CERD, General Recommendation No 22: Article 5 and refugees and displaced persons, UN Doc A/54/18, 24 August 1996. This right does not guarantee the right of entry into any state.

International law further provides that any restrictions to the right of freedom of movement in the state of residence must be provided for by law and must be necessary to achieve a legitimate aim. Furthermore, if any migrant wishes to return to their own state, another state cannot arbitrarily prevent them from doing so.<sup>131</sup>

It must be noted, however, that the guarantee against arbitrary removal under article 13 of the ICCPR does not extend to undocumented migrants. However, the Human Rights Committee (HRC) has explained that when the status of a migrant is questioned during investigation, states are obliged to account for rights which arise under article 13.<sup>132</sup>

#### ***4.3.3 Permissible international-law restrictions on migrants' human rights***

As stated previously, although migrants are endowed with a range of fundamental rights and freedoms, there are certain restrictions on these rights which are recognised under international law. For instance, international human rights norms allow states to treat nationals and non-nationals dissimilarly; but in such cases the state must show that the different treatment is in place to serve a legitimate state objective and is proportional in its application.<sup>133</sup>

The most prominent of these permissible restrictions is the right to vote and hold political office: states are allowed to reserve these rights for their citizens. In this way, the ICRMW recognises only the right of migrants to participate in the electoral process in their home countries.<sup>134</sup> Also, subject to the procedural and substantive limitations (including the principle of non-refoulement),<sup>135</sup> states can also prevent non-citizens from entering and remaining in a destination country.

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<sup>131</sup> See ICCPR, art 12(3); General Comment No 15 (n 130) para 8.

<sup>132</sup> General Comment No 15 (n 130) para 9.

<sup>133</sup> General Comment No 15 (n 130); International Convention on the Elimination of All Forms of Racial Discrimination, arts 1(2) and (3). See, eg, CERD, General Recommendation No 30.

<sup>134</sup> ICRMW, art 41.

<sup>135</sup> Under international human rights law, the principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.(n 130)

States have been less likely to recognise the economic, social and cultural rights of migrants because of the assumption that these types of rights often have an implication on the public purse and will stretch state resources.<sup>136</sup>

#### 4.4 Specific rights protections enjoyed by migrant women

In addition to the discrimination that all migrants experience, women migrants can suffer further sex-specific discriminatory restrictions which have the potential to limit their mobility and expose them to exploitation in receiving countries. This can be discrimination based on age, marital status, migration status, pregnancy and/or maternity status.

The AU also confirms that gender has an impact on migration when they state: ‘Who migrates, why, and their migration experience, is affected by gender roles, relations and inequalities.’<sup>137</sup> In its 2019 Migration Policy Framework for Africa and Plan of Action the AU notes poignantly:

... many female refugees and migrants face gross violations of their rights as they are exposed to gender-based discrimination, sexual and gender-based violence and other forms of abuse with limited or no access to effective legal protection. Migrant women and girls’ vulnerabilities to exploitation are highlighted by the frequently abusive conditions under which they work, especially in the context of domestic service and sex industries, in which human trafficking is heavily implicated. They are also especially vulnerable to exploitation and abuse at the hands of smugglers and traffickers along irregular migration routes. It is therefore important to give particular attention to safeguarding the rights (labour, human rights, etc) of migrant women in the context of migration management, and to provide them with access to protection.<sup>138</sup>

Therefore, although women enjoy the protections described previously, given their vulnerable status during migration and taking into account that migration is a gendered experience which has a different impact on men and women – as discussed in the previous chapter – various global

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<sup>136</sup> UN Office of the High Commissioner for Human Rights (OHCHR), *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation*, October 2014, HR/PUB/14/1. Available at <<https://www.refworld.org/docid/54479e174.html>> (accessed 14 November 2021).

<sup>137</sup> African Union (AU). (2018). *Migration Policy Framework for Africa and Plan of Action 2018–2027*. Available at <<https://au.int/en/documents/20181207/migrati.on-policy-framework-africa-mpfa>> (accessed 19 December 2020).

<sup>138</sup> African Union (AU). (2019). *Migration Policy Framework for Africa and Plan of Action (2018–2030)*.

instruments apply to migrant women specifically. In this way, the international community has developed various instruments which protect women migrants, and specifically women migrant workers. These instruments are discussed in the next section.

#### ***4.4.1 Protection from gender- and sex-based discrimination***

The CEDAW is the most prominent international law instrument on the protection of the rights of women. The aim of CEDAW is to provide long-term solutions to gender-based discrimination and exclusion which, when combined with other factors such as ethnicity, economic situation, nationality, age and occupation can contribute to limiting the ability of migrant women to exercise their rights.

The CEDAW Committee's General Recommendation No 26 on women migrant workers<sup>139</sup> details the circumstances that create the specific vulnerability of migrant women and also their experiences of gender- and sex-based discrimination. It continues by identifying this vulnerability as 'both a cause and a consequence of the violation of their human rights'. General Recommendation 26 is very clear that migration is not a gender-blind phenomenon, because the migration process has a different impact on women and men. It also acknowledges that there are various categories of migrant women but says that it is concerning itself with those who are vulnerable or prone to abuse, stating in paragraph 4:

Thus, the scope of this general recommendation is limited to addressing the situations of the following categories of migrant women who, as workers, are in low-paid jobs, may be at high risk of abuse and discrimination and who may never acquire eligibility for permanent stay or citizenship, unlike professional migrant workers in the country of employment. As such, in many cases, they may not enjoy the protection of the law of the countries concerned, at either de jure or de facto levels.

General Recommendation 26 also maintains that it is crucial to incorporate a gender perspective in any analysis of the migration of women. A gender perspective must also be integrated when states are elaborating public policies that have the aim of eradicating discrimination and violence

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<sup>139</sup> CEDAW Committee General Recommendation No 26 (2008).

against them, promoting both their rights and their social and economic inclusion. In addition, women in Africa are protected from gender-based discrimination by article 18 of the African Charter, which states:

the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions.

Article 2 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol) also provides extensively for the principles of gender equality and the elimination of discrimination in stating boldly:

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
  - a) include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
  - b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general wellbeing of women;
  - c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
  - d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;
  - e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.
2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

There is no indication in the Protocol that these protections must be afforded to citizens of Member States only and therefore they are also inferred to apply to migrant women.

#### 4.4.2 *Protection of domestic workers' rights*

In 2012, the ILO estimated that 52.6 million people were engaging in domestic work of some kind and, of these, 83% were women domestic workers.<sup>140</sup> Domestic work is therefore a very feminised area of work which is also commonly performed by migrants.<sup>141</sup> Husni and Suryani say that special attention must be afforded to women migrant domestic workers because of:

- (1) the increasing number of women working outside the country of origin;
- (2) the micro and macroeconomic improvements brought in by the remittances they produce; and
- (3) their working characteristics that tend to cause problems, especially for those who work in the informal sector.<sup>142</sup>

The authors go on to state that women migrant domestic workers experience intersecting discrimination on the basis of 'class, race, gender and nationality'. Although women domestic workers enjoy the protection of the eight core ILO conventions,<sup>143</sup> given their heightened vulnerability and being prone to exploitation, in 2011 the ILO devised a special convention to protect women who undertake domestic work and, by extension, women migrant domestic workers. The Domestic Workers Convention (No 189)<sup>144</sup> is a ground-breaking tool which has the potential to contribute to guaranteeing the rights of women nationals and migrant women who are employed as domestic workers.

In its preamble, the Convention appreciates the precariousness of domestic work, boldly stating:

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<sup>140</sup> International Labour Organisation (ILO). (2013). *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*. Available at <[https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_173363.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf)>.

<sup>141</sup> ILO. (nd). *Migrant Domestic Workers*. Available at <<https://www.ilo.org/global/topics/labour-migration/policy-areas/migrant-domestic-workers/lang--en/index.htm>>.

<sup>142</sup> Lalu Husni and Ani Suryani. *Legal Protection for Woman Domestic Workers Based on the International Convention*. University of Mataram.

<sup>143</sup> The Freedom of Association and Protection of the Right to Organize Convention, 1948; The Right to Organize and Collective Bargaining Convention, 1949; The Forced Labour Convention, 1930; The Abolition of Forced Labour Convention, 1957; The Equal Remuneration Convention, 1951; The Discrimination (Employment and Occupation) Convention, 1958; The Minimum Age Convention, 1973; and The Worst Forms of Child Labour Convention, 1999.

<sup>144</sup> International Labour Organization (ILO), Convention Concerning Decent Work for Domestic Workers, 16 June 2011, PRNo15A. Available at <<https://www.refworld.org/docid/4e0d784e2.html>> (accessed 7 November 2021).

... that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights ...

Despite its being an important tool that states can use to protect some of the most vulnerable in our society, the convention, which came into force in 2013, has unfortunately suffered very low ratification rates – to date it has been ratified by only 32 states.<sup>145</sup>

#### ***4.4.3 Protection from trafficking and sexual exploitation***

As the AU Migration Framework observes:

Over the last decade, a salient trend in African migration has been the rise in irregular migration. Migrants use increasingly precarious routes, which render them vulnerable to abuse by smugglers and traffickers. Women and girls are particularly vulnerable to human trafficking, sexual and gender-based violence.

Although not all women migrants are victims of trafficking, they are at a heightened risk of many types of exploitation, such as trafficking and forced sex work. To this end, article 6 of the CEDAW obligates states parties to take all appropriate measures to ‘suppress all forms of trafficking in women and exploitation of prostitution<sup>146</sup> of women’.<sup>147</sup> In addition, article 4 of the Maputo Protocol, which protects the rights to life, integrity and security of the person, obliges state parties to

take appropriate and effective measures to ... prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.<sup>148</sup>

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<sup>145</sup> Antigua and Barbuda, Argentina, Belgium, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Finland, Germany, Grenada, Guinea, Guyana, Ireland, Italy, Jamaica, Madagascar, Malta, Mauritius, Mexico, Namibia, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Portugal, Sierra Leone, South Africa, Sweden, Switzerland, Uruguay.

<sup>146</sup> The writer is using this term as it is stated in the convention and does not personally believe in the use of the term, rather preferring the use of the word ‘sex work’.

<sup>147</sup> CEDAW, art 6.

<sup>148</sup> Article 4.2(g) of African Union, Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003. Available at <<https://www.refworld.org/docid/3f4b1>>.



In addition, a number of international, regional and national policy and legal frameworks for combatting trafficking in persons are in place. However, women and girls continue to make up the majority of (detected) victims of trafficking across the globe. Because trafficking is also intimately linked to migration as it involves the movement of people. In 2020, in response to this, the CEDAW Committee dealt with the specific situation of women and girls who are trafficked in the context of migration with the CEDAW General Recommendation No 38 (2020) on trafficking in women and girls in the context of global migration.<sup>149</sup> In it, the Committee reiterates:

Migration is a constitutive element of modern society and can be empowering for women if they are able to migrate and work in conditions in which their dignity is respected. Although it presents new social and economic opportunities for many women, migration may also place their human rights and security at risk, in particular if they are compelled to travel through irregular channels and/or it results in an irregular migration situation. Women and girls face an increased risk of being trafficked at all stages of the migration cycle – in transit, in reception and accommodation facilities, at borders and in destination countries. Upon return, they may experience reprisals and revictimization.

General Recommendation 38 is a significant milestone in drawing attention to the specific challenges faced by women and girls in the context of migration, particularly the increased vulnerability to trafficking and sexual exploitation. However, it is essential to approach the Committee's terminology with caution and sensitivity. Regrettably, the recommendation occasionally uses the terms 'prostitution' and 'sexual exploitation' interchangeably, implying that all individuals engaged in sex work are victims, which is not always the case. It is crucial to recognise that prevailing feminist rhetoric has now begun to understand that sex work exists on a continuum,<sup>150</sup> and not all individuals involved in the industry are coerced or exploited. There are

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<sup>149</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020. Available at <<https://www.refworld.org/docid/6006fa354.html>> (accessed 10 November 2021).

<sup>150</sup> Cecilia Benoit, Michaela Smith, Mikael Jansson, Priscilla Healey & Douglas Magnuson. (2019). The prostitution problem: Claims, evidence, and policy outcomes. *Archives of Sexual Behavior* 48: 1905–23; also see C Benoit (2021). Editorial: Understanding exploitation in consensual sex work to inform Occupational Health & Safety Regulation: Current issues and policy implications. *Social Sciences* 10(7): 238. Available at <<https://doi.org/10.3390/socsci10070238>>.

diverse perspectives and experiences within the realm of sex work, including instances where individuals engage in consensual and voluntary transactions.

While acknowledging the heightened risk of exploitation faced by some individuals in the sex industry, it is important to approach the issue with nuance, respect for individual agency, and an understanding of the complex factors that influence individuals' involvement in sex work.

## **4.5 Covid-19 and its impact on migrants' human rights**

### ***4.5.1 Women migrants' rights during pandemics***

Covid-19 has had a disastrous impact on migrants' enjoyment of human rights. The pandemic has meant that migrant workers were usually the first to be retrenched when a decrease in revenue – caused by restrictions on economic activity and movement due to measures put in place to curb Covid-19 – began to have an impact on businesses. In the case of domestic workers, home-based workers, agricultural workers and others who work in the informal economy, exclusion is a natural extension of the fact that they are not seen as legitimate 'workers' by national labour laws.

Migrants have also been found to be the least prioritised for testing and treatment; and where access exists, many will be afraid to take advantage of it for fear of deportation or detention when they have irregular status. They will therefore experience violations of their right to health. Unemployment benefits and other social security benefits which become necessary in the context of loss of income are also rarely enjoyed by non-nationals.

The impact of Covid-19 on women migrants has been disproportionate and their human rights situation has deteriorated significantly. A United Nations policy brief, *The Impact of Covid-19 on Women*, stated that 'Covid-19 has unevenly impacted women and girls in the domains of health, economy, social protection, and gender-based violence'.<sup>151</sup>

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<sup>151</sup> United Nations Policy Brief: *The Impact of COVID-19 on Women*, 9 April 2020.

In its 2020 report, *End Stigma and Discrimination Against Migrant Workers and Their Children during Covid-19 Pandemic*,<sup>152</sup> UNICEF notes that the increased isolation and reduced mobility caused by the pandemic has increased the ‘risk of abuse, exploitation and trafficking in persons, particularly of women migrant workers’ (by both employers and intimate partners) and children. This is because when households are subjected to financial, security and health pressures, and are living under restricted conditions, then women and girls face higher risks of violence and abuse.

#### **4.5.2 Status of migrants’ human rights during pandemics**

The Covid-19 pandemic has had a negative impact on the human rights of migrants, especially women, as states have implemented restrictive measures to curb its spread. But many states are arguing that a global pandemic is such a situation that necessitates states to take measures which may not always be in line with human rights standards in order to protect people. These measures can include restrictions on movement, curfews and lockdowns. However, what does international law prescribe in such circumstances? This section discusses the impact of public emergencies such as the global pandemic on the status of the rights of migrants.

Generally, migrants’ human rights during times of public emergency are determined by three layers of legal norms:

- a core content of fundamental rights that applies in all circumstances;
- the use of the derogation mechanism under some human rights conventions and standards, and
- the lawful restrictions on human rights.

##### 4.5.2.1 Fundamental rights of migrants that apply in all circumstances

Non-derogation was discussed briefly in section 3 of this chapter. To reiterate, some rules in international law are considered such core standards of humanity that they cannot be derogated from under any circumstances, even during times of emergency, including in relation to migrants. They include:

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<sup>152</sup> UNICEF. (2020). *End Stigma and Discrimination Against Migrant Workers and Their Children during COVID-19 Pandemic*. 5 June 2020. Available at <<https://www.unicef.org/eap/press-releases/end-stigma-and-discrimination-against-migrant-workers-and-their-children-during>>.

- the right to life;
- the right to be freedom from torture, inhuman and degrading treatment; and
- the prohibition of forced labour and slavery.

Other rules are more specific to the situation of migrants. These are:

- the prohibition of collective expulsion;
- the correlated right to an individual assessment;
- the principle of non-discrimination and equality, including the prohibition of racism and incitement of hatred based on nationality or religion.<sup>153</sup>

Importantly, these rules are considered legally binding on all states under customary international law and they apply to all migrants regardless of their documentation status and irregular situation.

#### 4.5.2.2 Use of the derogation mechanism under some human rights conventions

Some conventions include a provision which enables states to derogate from their provisions in times of emergency – for example, the current global Covid-19 pandemic. They include:

- the ICCPR, article 4(1);
- the European Convention on Human Rights, article 15(1);
- the American Convention on Human Rights, article 27(1);
- the Arab Charter on Human Rights, article 4(1), and
- the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, article 35(1).<sup>154</sup>

Interesting to note is that the African Charter does not contain a derogation clause. This means that the limitations on the rights and freedoms enshrined in the African Charter cannot be justified by public emergencies or special circumstances. Despite allowing derogation in these circumstances, various safeguards must be met:

- the situation must meet the definition of a public emergency;<sup>155</sup>

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<sup>153</sup> Chetail (n 92) 119–164.

<sup>154</sup> See also UNHRC, 2020.

<sup>155</sup> The use of derogation requires a ‘public emergency which threatens the life of the nation’.

- the emergency must be officially proclaimed and the secretariat of the convention must be notified of the intention to derogate and provide justifications for the derogation;
- the derogation must be a necessity;<sup>156</sup>
- the derogation must be proportional;<sup>157</sup>
- non-derogable rights cannot be derogated from; and
- the state must comply with other international obligations.<sup>158</sup>

It is notable that, unlike the ICCPR, the ICESCR does not include a provision on derogations during emergencies. The ICESCR has a somewhat different standard for limitations, providing that States

may subject such rights only to such limitations as are determined by law and only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.<sup>159</sup>

Other treaties relevant to the rights of migrants which do not contain derogation clauses are:

- the CERD;
- the CRC
- the ICRMW;
- the ILO Migration for Employment Convention;
- the ILO Migrant Workers (Supplementary Provisions) Convention;
- the Protocol against the Smuggling of Migrants by Land, Sea and Air; and
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons.

These indicate that even during times of emergencies the rights of migrants remain largely intact.

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<sup>156</sup> The derogation must be ‘strictly required by the exigencies of the situation’ in order to protect public health and be limited in duration, coverage and scope.

<sup>157</sup> The derogatory measures must be proportionate to the objective they mean to achieve and must be the least restrictive measure to achieve this goal.

<sup>158</sup> Derogations must be consistent with other legal duties under customary international and treaty law.

<sup>159</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, Vol 993, 3. Available at <<https://www.refworld.org/docid/3ae6b36c0.html>> (accessed 14 November 2021) at art 4.

#### 4.5.2.3 Lawful restrictions to human rights

Many rights under international law are not in themselves absolute and are subject to restrictions. An example explored above is the right to migrate, which can be restricted by state sovereignty. Therefore, in addition to the lawful derogation of rights taking into consideration various safeguards there are also laws under international law which may be restricted for the purposes of addressing a public health emergency. This represents the final layer that can affect the status of rights enjoyed by migrants during a pandemic. In the specific context of migration these rights are:

- the right to family life;<sup>160</sup>
- the right to liberty and the prohibition of arbitrary detention; and
- the right to freedom of movement within the territory of a state.

However, even in extraordinary circumstances, certain prerequisites must be met before a restriction is imposed. First, the restriction of a human right must remain an exception. Therefore any restrictions made must not ‘impair the essence of the rights by reversing the relation between principle and exception’.<sup>161</sup> Second, in order for it to be lawful, any restriction on a recognised right must satisfy four conditions: legality,<sup>162</sup> necessity,<sup>163</sup> proportionality<sup>164</sup> and compatibility.<sup>165</sup>

#### 4.6 Migrant women’s rights from a sub-regional policy perspective: the SADC

The Southern African Development Community (SADC) is a regional economic community comprising 16 countries in southern Africa, of which Botswana and Zimbabwe are Member States. The objectives of the SADC are to achieve:

- peace and security;
- economic growth to alleviate poverty, and
- the enhancement of the standard and quality of life of the peoples of southern Africa.<sup>166</sup>

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<sup>160</sup> As an obstacle to removal or a ground for family reunification.

<sup>161</sup> P Thielbörger. (2019). The ‘essence’ of international human rights. *German Law Journal* 20(6): 924–939. doi: 10.1017/glj.2019.69.

<sup>162</sup> The restriction is provided by law with clear and accessible legal grounds.

<sup>163</sup> The restriction is necessary for the protection of one of four permissible grounds, which include public health, and is designed to meet this specific objective.

<sup>164</sup> The restriction is proportionate to the protection of public health and constitutes the least intrusive means to achieve its legitimate purpose.

<sup>165</sup> The restriction is consistent with other human rights, including the principle of non-discrimination.

<sup>166</sup> Available at <[www.sadc.int/about-sadc/overveiw](http://www.sadc.int/about-sadc/overveiw)>.

The SADC purports that it will achieve these objectives through a series of strategic plans and binding protocols.<sup>167</sup> No overall sub-regional policy framework governs migration in the SADC region. This is despite a foundational tenet being the free movement of people.<sup>168</sup> Although the 2005 SADC Protocol on Facilitation of Movement of Persons provides a regional legal framework on migration in the SADC which is legally binding, it has not yet come into force as too few member states have ratified it. As a result, currently, regional migration is regulated through a series of existing migration or labour migration policies, which are discussed in the next section. In the spirit of this thesis, a gender analysis of the SADC migration normative framework is also included.

#### ***4.6.1 Migration human rights frameworks and policies at SADC level***

The founding document of the SADC, the SADC Treaty, articulates the regional body's objectives, among which is:

To develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and people of the region generally, among Member States.<sup>169</sup>

Similarly, article 3(a) of the SADC Protocol on Education and Training indicates that member states must:

work towards the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the Region for the specific purposes of study, teaching, research and any other pursuits relating to education and training.

It is evident, therefore that the movement of people in the region is central to the purpose of the SADC. The 2003 SADC Charter of Fundamental Social Rights also highlights migration by identifying that an objective of the SADC is to 'promote labour policies, practices and measures,

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<sup>167</sup> Available at <[www.sadc.int/about-sadc/overveiw](http://www.sadc.int/about-sadc/overveiw)>.

<sup>168</sup> One of the objectives in the SADC Treaty is: 'To develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and people of the Region generally, among Member States.'

<sup>169</sup> Article 5(2)(d) of the SADC Treaty 1992.

which facilitate labour mobility ...'. Importantly, the Charter lays the foundation for ensuring the basic human rights of migrant workers: their rights to decent work, collective bargaining, freedom of association and access to social security are guaranteed.<sup>170</sup>

Several other frameworks recognise the human rights of migrants in the SADC. For instance, the draft SADC Protocol on Employment and Labour – agreed to by ministers and social partners in May 2013 – provides and recognises the importance of collective bargaining, social dialogue, and consultations among employers, trade unions and the government. The Protocol also emphasises non-discrimination, equal treatment and social protection for all workers and their families. It also specifically protects the rights of migrant workers, children and young persons, and people living with disabilities.<sup>171</sup> Although this mechanism was meant to apply initially to national labour, member states took the decision to deal with labour migration within this protocol. As a result, at a meeting in 2013, the Labour Migration Action Plan<sup>172</sup> was endorsed by the SADC ministers and social partners responsible for employment and the labour sector in the region.<sup>173</sup>

The SADC Decent Work Programme (DWP) also has its basis in the protection of human rights. The objectives of the DWP aim to protect the right to social security of all workers and their families, safeguard occupational health and safety, and protect vulnerable persons such as those affected by HIV and AIDS in the workplace. The DWP also aims to eliminate trafficking in persons and child labour in the region and to promote programmes and policies which work towards relieving youth unemployment.

The DWP contains a lengthy section on the protection of migrant workers' rights entitled 'Protection of Migrant Workers'. It acknowledges that

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<sup>170</sup> 2003 SADC Charter of Fundamental Social Rights.

<sup>171</sup> SADC Protocol on Employment and Labour. Available at <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---migrant/documents/genericdocument/wcms\\_379411.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_379411.pdf)>.

<sup>172</sup> SADC Labour Migration Action Plan. Available at <<https://www.sadc.int/news-events/news/sadc-adopts-new-labour-migration-action-plan-promote-skills-transfer-and-match-labour-supply-and-demand-regional-integration/>>.

<sup>173</sup> The SADC Secretariat also convened a labour migration workshop for the tripartite structure in the region in Johannesburg from 21–23 August 2013. One of the conclusions to emerge from that workshop was the need to develop a regional policy on labour migration to which this initiative directly responds.



the migration for the purpose of employment has always been a part of people's livelihood strategies in southern Africa. Labour migration has historically been a central part of cross-border mobility.<sup>174</sup>

The DWP also acknowledges the increasing levels of irregular migration in the region and highlights the increased human rights vulnerabilities that those with irregular status face. It states:

Many of the migrant workers in irregular situation are subjected to various forms of exploitation in recruitment and employment, to inhuman labour conditions, substandard housing, exclusion from social protection and denial of many basic labour and human rights. This is exacerbated by the practices of a certain number of labour brokers, whose sole concern is to maximize financial profits to the detriment of migrant workers' rights.

Despite this extensive protection that migrant workers have under various human rights mechanisms at the SADC level, one of the greatest deficiencies in the SADC system is the fragmentation of policies and also the absence of enforcement because of the lack of ratification of the mechanisms by member states, which has the effect of rendering these standards unenforceable. However, the SADC, in collaboration with the IOM, is currently drafting a regional migration policy which will be considered in 2023. Perhaps it will redress the deficiencies in the current migration normative framework.<sup>175</sup>

#### **4.6.2 Gender and migration in the SADC**

The 1997 SADC Declaration on Gender and Development<sup>176</sup> proclaims that the SADC believes that '[g]ender equality is a fundamental human right'. The declaration also acknowledges that, whereas efforts have been made to 'raise the status of women to that of men', huge disparities in status still occur in the southern Africa region.

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<sup>174</sup> SADC Decent Work Programme. Available at <[https://www.ilo.org/africa/areas-of-work/labour-migration/WCMS\\_379400/lang--en/index.htm](https://www.ilo.org/africa/areas-of-work/labour-migration/WCMS_379400/lang--en/index.htm)>.

<sup>175</sup> SADC. (2020). *SADC develops Regional Migration Policy Framework*, 20 October 2020. Available at <<https://www.sadc.int/news-events/news/sadc-develops-regional-migration-policy-framework/>>.

<sup>176</sup> SADC. (nd). *Declaration on Gender & Development*. Available at <[https://www.sadc.int/files/7613/5292/8380/Declaration\\_on\\_Gender\\_Development\\_1997.pdf](https://www.sadc.int/files/7613/5292/8380/Declaration_on_Gender_Development_1997.pdf)>.

In order to redress gender inequity, the SADC promulgated the SADC Protocol on Gender and Development (the SADC-PGD). The SADC-PGD does not offer direct protection to women migrants; the only instance of it speaking of mobility is in relation to human trafficking, which it recognises as a serious issue affecting mostly women and children. However, there are some sections where woman migrants may find protection indirectly – for instance, article 17 states:

States Parties shall, by 2015, adopt policies and enact laws which ensure equal access, benefit and opportunities for women and men in trade and entrepreneurship, taking into account the contribution of women in the formal and informal sectors. States Parties shall, by 2015, review their national trade and entrepreneurship policies, to make them gender responsive.

This part of the SADC-PGD can protect migrant domestic workers and informal cross-border traders (discussed in Chapter 3) given that both categories of migrant work in the informal sector. Article 19 of the Protocol also binds states to ensure that the economic value of domestic work is recognised and that domestic workers are remunerated adequately.

The Policy Framework for Population Mobility and Communicable Diseases in the SADC Region (2009) is one of the most progressive documents on gender, migration and health, despite its being non-operational and only existing in draft form since 2009. The document appreciates that migration in the SADC is now increasingly feminised and notes that women migrants have peculiar challenges when it states:

The feminisation of cross-border movement, with women and girls now crossing borders on par with men, has grave implications for the health of migrants, as mobility process makes women more vulnerable to communicable diseases. They are more likely to suffer gender-based harassment and violence (including sexual). Also, women are also more likely to move with their young children who will also be susceptible to communicable diseases.

Beyond this, women migrants receive very little protection under the SADC legal framework – for example, the SADC Labour of Migration Draft Policy Draft mentions gender only once. There is also a great deal of fragmentation in SADC instruments which undermines the fulfilment of any obligations created under the SADC-PGD.

And although the SADC Protocol on Trade attempts to deal with some of the issues faced by some migrants – for example, informal traders – such as transport issues, transportation and storage requirements pertaining to certain goods and exemptions from customs, it makes no specific mention of informal traders. This raises many questions about whether informal trade will fall within its ambit of application. The SADC Protocol on Trade is also ‘gender blind’, which places further challenges on applying it to women migrants.

#### **4.7 An added layer: national laws, state sovereignty and migrants’ human rights**

As previously discussed, international law upholds a right to leave a country – even one’s own – and return to that country. However, states still retain their prerogative to decide on admission and expulsion criteria, meaning that such a right is not absolute. This is because at the heart of the discussion on international migration state sovereignty continues to be an overarching principle. Therefore, despite the protections afforded at the global and regional levels, it is the domestication of these standards in national systems that will ultimately decide how migrants can enjoy their human rights.

At a national level, most countries usually have migration and labour policies that govern the entry, stay and employment of foreign workers, although in most cases labour and migration policies are usually distinct from each other. Many countries issue residence or work permits through ministries of Home Affairs<sup>177</sup> (as is the case in South Africa) or through both ministries of Labour and Home Affairs.<sup>178</sup> Often countries enter into bilateral agreements with migrant-sending states. In the SADC region, for example, these are common because South Africa has a long history of migrant labour in fundamental sectors of its economy such as the mining industry and has a continuing need for critical skills which are lacking in the country.<sup>179</sup>

Under national systems, the rights of migrants are unfortunately less enjoyed – the level of protection varies widely as countries have different migration laws and policies. Botswana’s

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<sup>177</sup> As is the case in South Africa.

<sup>178</sup> Botswana, DRC and Tanzania use such a system.

<sup>179</sup> South Africa has bilateral agreements with Mozambique, eSwatini, Lesotho and Malawi (now expired). It has also signed a Memorandum of Understanding (MoU) with Zimbabwe, Cuba and Tunisia to meet labour demands in critical sectors or for certain skills.

national migration policies and laws and the impact these have on Zimbabwean migrant workers will be analysed further in the case study (see Chapter 5). At this stage, it is important merely to understand that international law protections are often limited by the way states implement them domestically.

#### **4.8 Migrant women's lives and human rights**

As has been described previously, migrant women are protected by various international and regional standards that address their specific vulnerabilities. While all migrants are covered by human rights treaties, migrant women receive additional protection due to the presence of sex-based discrimination. However, the effectiveness of human rights laws lies in their ability to safeguard the vulnerable. Therefore, it raises the question: Why do migrant women still face discrimination, abuse, and exploitation despite the existence of a robust normative human rights framework?

The reality reveals that civic stratification, which examines the way rights claims are made by migrant women, can be a valuable framework. However, on its own, it is insufficient. This is because the primary function of human rights law is to grant rights, but their actual implementation depends on specific societal contexts. Therefore, to gain a comprehensive understanding, it is necessary to extend this exploration and consider how human rights are experienced in practice. Without considering the practical manifestations of rights by migrant women and how their rights are realised or constrained within specific contexts, a discussion on human rights of migrant women would remain incomplete. Because of this, the questions addressed in this section involve an examination of how migrant women navigate and engage with the legal frameworks that govern them, aiming to shed light on the ways in which women experience laws and rights. These inquiries aim to answer a fundamental question posed in this thesis: how women encounter and engage with laws and rights (the interplay between law and gender). In line with a gender analysis, this section adopts a feminist legal approach, employing methodologies that centre on 'asking the women question'<sup>180</sup> and critically examining human rights from a feminist perspective. This approach is

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<sup>180</sup> Katharine Bartlett. (1989). Feminist legal methods. *Harvard Law Review* 103: 829–888. Available at <[https://scholarship.law.duke.edu/faculty\\_scholarship/148](https://scholarship.law.duke.edu/faculty_scholarship/148)>.

used to make discoveries and contribute to a nuanced understanding of the experiences of migrant women within legal systems.

#### 4.9 Feminist critique of legal systems and human rights

Feminists critique the notion of law and human rights and have long contended that legal systems and human rights law represent male ideals.<sup>181</sup> In this way, the main aim of feminist legal scholars is to challenge the androcentric construction of the human rights discourse and change the subordinate status of women in society through a reworking of the law and its approach to gender. Therefore, the preliminary point of entry for any legal feminist literature is often the lived experiences of women with the law. In a break from positivist annotations of legal studies which view the law as value-free, feminist legal scholars not only often write from their own personal experiences but also report on those of others. These scholars argue ‘that gender is socially constructed, and that law is critically important in shoring up gender roles.’<sup>182</sup>

Feminist legal scholars purport that the law is not in fact value-free but that it reflects power dimensions or relations derived from a patriarchal society. In this way, the law will in many ways uphold male norms, even in the face of a claim being made of universality and neutrality in the law. In the words of MacKinnon: ‘When [law] is most ruthlessly neutral, it is most male.’<sup>183</sup>

Furthermore, if women are invisible in relation to the law, migrant women are even more so. This is because learnings from intersectional feminists from the standpoint traditions have taught us that certain groups of women who experience oppression and discrimination as a result of intersecting identities can be even more vulnerable due to their specific situations not being accounted for in legal systems. Under intersectional analysis, the law not only upholds male norms but also white, privileged, formally educated, Western ones – groupings that many migrant women are not a part of.

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<sup>181</sup> L Parisi. (2022). Feminist perspectives on human rights. *Oxford Research Encyclopedia of International Studies*. Oxford: Oxford University Press. Available at <<https://oxfordre.com/internationalstudies/view/10.1093/acrefore/9780190846626.001.0001/acrefore-9780190846626-e-48>> (accessed 3 April 2022).

<sup>182</sup> It must be noted that feminist jurisprudence will tend to refer to ‘gender’ as being synonymous with femaleness.

<sup>183</sup> CA MacKinnon.(1983). Feminism, Marxism, method, and the state: Toward feminist jurisprudence. *Signs* 8(4): 635–658. Available at <<http://www.jstor.org/stable/3173687>>.

Intersectional analysis in legal studies was developed by lawyer and activist Kimberly Crenshaw. Crenshaw argued that certain groups of people endure very particular forms of discrimination and oppression as a result of the intersections of their identity. In her preliminary writings,<sup>184</sup> Crenshaw asserted that the discrimination that a black woman worker experiences differs from that of a black male worker or a white woman worker because a black woman endures a specific type of discrimination as a function of her being both *black* and a *woman* (the intersection of these identities). In her later writings and many others' writings (beyond legal studies),<sup>185</sup> identities in which discrimination can intersect are expanded upon to include religious beliefs, disability, migrant status, class, etc.

The next section consolidates these critiques and discusses four ways in which migrant women remain unseen by the law and, as a result, are denied the enjoyment of their human rights.

#### **4.9.1 De facto *discrimination***

One way in which feminist scholars have critiqued the law is that although on the surface laws may in their application appear to protect everybody equally, there is in fact *de facto* discrimination in their application because only the male experience is considered. In such cases, feminist scholars have noted that it is not enough merely to assert non-discrimination through the law but also to ensure that laws are *de facto* non-discriminatory in their application. In this vein, in her essay, 'Does migration law discriminate against women?', Briddick observes that migrant women can be disadvantaged by 'facially gender-neutral laws'. For instance, provisions in some laws categorise certain workers as either low- or high-skilled and distribute opportunities in accordance with this stratification. Given that male workers are more likely to be higher skilled than their women counterparts, such provisions discriminate indirectly against women migrants.<sup>186</sup>

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<sup>184</sup> Kimberley Crenshaw. (1989). Demarginalizing the intersection of race and sex: A black feminist critique of Antidiscrimination doctrine, feminist theory and antiracist politics. *University of Chicago Legal Forum* 1: article 8. Available at <<http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8>>.

<sup>185</sup> Intersectionality has been used in various disciplines, including: political science, sociology, psychology, epidemiology, education, political science and public administration.

<sup>186</sup> C Briddick. (2021). When does migration law discriminate against women? *AJIL Unbound* 115: 356–361. doi: 10.1017/aju.2021.50.

Another poignant example of women's exclusion under the law in the context of the gender and migration discourse is highlighted by Crawly in her article, *Refugees and Gender: Law and Process*.<sup>187</sup> She notes that, although, statistically speaking, women have traditionally made up a larger number of those who have been forcibly displaced and as a result more deserving of refugee status under international law, they are in fact less likely to be granted refugee status. Moreover, globally, they make up a smaller proportion of officially recognised refugees.<sup>188</sup> Crawly traces this back to the historical roots of refugee law and policy which began in the post-World War II, Cold War and liberation of Africa period. At that time, the archetypal asylum-seeker was a man who was commonly being persecuted for his activities or beliefs; therefore, many refugee laws will reflect this.

The Botswana refugee law, for example, in section 2(1), recognises only 'political refugees' (at the time of writing of this thesis in 2023 this was still the case). However, women have not typically been thought of as refugees in this sense as their activities and the type of persecution they often suffer has not always been thought of as political. In this way, refugee law for a long time neglected the private-sphere persecution such as domestic violence and female genital mutilation (FGM) which most often affect women.

#### **4.9.2 The hidden 'costs' of claiming rights**

In her 2016 book, *Decentering Citizenship: Gender, Labor, and Migrant Rights in South Korea*,<sup>189</sup> feminist scholar Choo points out another reason why especially women migrants may not benefit from the protection of human rights law. She suggests that often when migrant women's rights are not realised it is commonly thought of as an issue of access, but she claims that this is not always the case. In her sophisticated analysis Choo submits that an important factor which affects the way women claim their rights is what she terms 'the hidden cost of claiming rights'. She asserts: 'This human rights discourse carries unacknowledged costs that women must navigate as they claim their rights.' She traces this to the almost tacit assumption in the human rights discourse that such

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<sup>187</sup> Heaven Crawley. (2001). Refugees and gender: Law and process. *Current Issues in Criminal Justice* 14(1): 121–124. doi: 10.1080/10345329.2002.12036253.

<sup>188</sup> Crawley (n 187).

<sup>189</sup> Hae Yeon Choo. (2016). *Decentering Citizenship: Gender, Labor, and Migrant Rights in South Korea*. Stanford University Press, 216. Available at <<http://www.sup.org/books/title/?id=24510>> (accessed 29 March 2022).

rights are ‘cost-free’ and that this means they can always be claimed when they are there. However, using research on migrant women in South Korea, she found that this is not always necessarily the case. She points out situations where a certain cost can be attached to claiming those rights – at times moral – which can infringe on women’s respectability. An example is when migrant women are sexually violated and claiming their rights would entail their appearing in front of authorities as ‘victims’, an identity many women do not want to have. She argues that *not* claiming rights is therefore not an issue of access per se, but it can also be ‘a conscious choice made by the claimants’, given the social order which they occupy.

In her work she points out that claiming rights is not simply an issue of their being there or not there but that they are in fact very complex, contextualised negotiations. In South Korea, for example, migrant women many chose to ‘forgo’ claiming their rights in favour of assimilation into South Korean society.<sup>190</sup>

#### ***4.9.3 Rights: rhetoric vs reality***

In addition to de facto discrimination due to male-centred laws and the costs of claiming rights, another criticism of the international human rights system is that it is ‘characterised by a significant gap between aspirational rhetoric and the reality of limited implementation and enforcement’, most especially in relation to women.

In the previous section the extensive human rights protections of migrants were discussed. It was also shown that in addition to the general rights that all migrants enjoy, women have additional protections under the CEDAW, many general recommendations and ILO conventions. These protections are relevant to their experience of gender-based discrimination such as trafficking, exploitation and prostitution and domestic-work protection. However, it appears that in practice the greater the rights these treaties afford migrant women, the less they are protected in reality. This can be seen by the fact that, in practice, despite having more human rights standards which apply to them, migrant women generally benefit from less coverage than men because countries rarely take gender into account when devising migration laws and policies.

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<sup>190</sup> Choo (n 189).



Put differently, although international law contains many protections of migrant women, countries do not domesticate these standards, which essentially renders them meaningless. For example, according to the UN, women currently make up more than 80% of international migrant domestic workers, yet, as at 2022, only 35 countries have ratified the ILO Convention on Domestic Workers.<sup>191</sup> This international instrument is imperative for ensuring the rights and dignity of domestic workers – 83% of whom are women – are realised. This demonstrates a significant gap between the rights that women migrants ‘have’, and the way in which countries ensure that they actually enjoy them.

#### **4.9.4 Gendered routes to irregularity**

The consequence of countries not domesticating international law rules that protect migrants’ rights has been highly securitised domestic migration-control practices which are concerned predominantly with deterrence, detention and deportation. Such practices often limit legal access to migration and can result in people becoming irregular. As a result, it is commonplace, especially in Africa, that women who are unable to migrate by regular legal means may seek to do so irregularly.

Measures that countries put in place to prevent irregular migration may compel migrants to undertake more dangerous and clandestine journeys than if they were able to do so legally. Studies have shown that such practices often produce a gendered disadvantage which is more hazardous for women than for men: for instance, tightened border controls aimed at preventing irregular migration have been implicated in high levels of gender-based violence experienced by women in transit.<sup>192</sup>

Repressive migration laws can also violate many other women’s rights, including increasing migrant women’s risk of dying. For instance, in many countries women are forced to make irregular maritime journeys and, even though more men than women flee in this way, women –

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<sup>191</sup> No 189.

<sup>192</sup> WHO European Region. (2017). *Sexual Violence Against Refugee Women on the Move to and Within Europe*. Available at <<https://www.hhri.org/publication/sexual-violence-against-refugee-women-on-the-move-to-and-within-europe/>>; Jane Freedman. (2016). Sexual and gender-based violence against refugee women: A hidden aspect of the refugee ‘crisis’. *Reproductive Health Matters* 24(47): 18–26. doi: 10.1016/j.rhm.2016.05.003.

due to their physiology and specific situations – are more likely than men to face a higher risk of drowning<sup>193</sup> or dying at sea.<sup>194</sup>

In addition to those gender-based risks encountered during transit, the vulnerability of migrant women is also a factor in destination countries in the context of decent work and inclusion in the labour market. Accordingly, it has been found that many independent woman migrants seeking work can be faced with numerous obstacles when attempting to migrate legally. For instance, many Asian countries have imposed restrictions on women migrants that include a general ban on women migrating for the purposes of work.<sup>195</sup> This prohibition applies characteristically to those sectors of feminised work such as domestic work. The trend also appears in African countries: Botswana, for instance, has professions which are earmarked for citizens only and domestic work is one of them: this results in every foreign domestic worker essentially working ‘illegally’. This situation is discussed in greater detail in the case study in Chapter 6.

#### 4.10 Conclusions

This chapter has involved an analysis of the legal protections which migrant women have under international law; it has essentially been a discovery of the migrant woman as a subject of human rights. The chapter began by locating migration within the human rights discourse ultimately finding that migration is a pertinent human rights issue due to the heightened vulnerability that migrants often face. In this vein the chapter notes the importance of understanding dignity as central to understanding how migrants must be afforded rights.

The chapter then outlined the various protections that migrants and most especially migrant women enjoy under the various global, regional and sub-regional normative frameworks. The extensive list of protections in this regard, most especially in relation to migrant women, was discussed. However, despite the existence of these legal safeguards, various deficiencies such as gendered laws (*de facto* discrimination) or gendered consequences of the law (gendered routes to

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<sup>193</sup> Qualitative findings indicate that weaker swimming skills, heavier clothing and travelling with children may also lead to higher risks of drowning. Available at <<https://www.migrationdataportal.org/blog/how-lack-data-perpetuating-invisibility-migrant-womens-deaths>>.

<sup>194</sup> S Pickering & B Cochrane. (2013). Irregular border-crossing deaths and gender: Where, how and why women die crossing borders. *Theoretical Criminology* 17(1): 27–48. doi: 10.1177/1362480612464510.

<sup>195</sup> With the exception of professionals.

irregularity) mean that these measures are largely meaningless. For purposes of applying these legal protections in a concrete situation, the following chapter explores the lived reality of migrant women migrating from Zimbabwe to Botswana.

## 5: Contextualising the movement of women from Zimbabwe to Botswana

*Although migration between Zimbabwe and Botswana has a long history dating back to the colonial period and even before, contemporary movements between the two countries are unprecedented in their scale and scope.<sup>1</sup>*

### 5.1 Introduction

In this chapter, our focus shifts to the historical context of migration between Zimbabwe and Botswana, exploring the intricate interplay of social, political and economic factors that have shaped this migration process. A crucial addition to our analysis is the incorporation of a gender perspective, allowing us to illuminate distinct experiences and implications for both men and women involved in these migration patterns. This historical exploration becomes paramount for our ongoing socio-legal analysis. As highlighted in Chapters 2 and 3, migration is a multifaceted phenomenon with regional variations. By delving into the specific context of Zimbabwe–Botswana migration, we can deepen our insights into the human rights issues faced by these migrants, building upon the knowledge gained in Chapter 4, where we detailed the human rights framework. In addition, understanding the drivers behind specific migration patterns can inform more effective and tailored policy interventions. Without this nuanced comprehension, there is a risk of implementing generic policies that may not sufficiently address unique human rights needs.

### 5.2 Zimbabwe–Botswana migration

To begin, it is important to understand that migration from present-day Zimbabwe is not a new phenomenon: it was occurring long before artificial colonial borders were imposed on Africa as a result of the Berlin Conference of 1884–1885.<sup>2</sup> In his article, ‘A history of Zimbabwe migration’, Mlambo aptly notes that, even prior to European colonisation, people in southern Africa moved whenever there was a need to do so, and

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<sup>1</sup> E Campbell & J Crush. (2012). *Unfriendly Neighbours: Contemporary Migration from Zimbabwe to Botswana*. Available at <<http://samponline.org/wp-content/uploads/2016/10/Acrobat61.pdf>>.

<sup>2</sup> Ema Oliver & Willem H Oliver. (2017). The colonisation of South Africa: A unique case. *HTS Theological Studies* 73(3): 1–8. Available at <<https://dx.doi.org/10.4102/hts.v73i3.4498>>.

ethnic boundaries were fluid enough to allow individuals or groups to move in or out of population clusters and ethnic groupings with relative ease.<sup>3</sup>

Such movement did not cease after the colonial powers carved up Africa. However, these boundaries – most of which were arbitrarily drawn<sup>4</sup> – did have the effect of dividing ethnic communities and, at times, families in the region artificially, as they did elsewhere in Africa. Examples are the Kalanga peoples who are found in south-west Zimbabwe and north-east Botswana, as well as the Tsonga, Shangaan and Venda found to the south of Zimbabwe, the south of Mozambique and the north of South Africa. As was to be expected, these communities did not respect these new borders and continued to cross them for either family or economic reasons. They have continued doing so till the present day, albeit under more difficult circumstances.<sup>5</sup> Accordingly, the history of Zimbabwean migration extends beyond the scope of this thesis, but for the sake of brevity I delve only into Zimbabwean migration that occurred after the independence of the country. This is done in order to contextualise the economic and political challenges faced by the new state which have most likely led to the types of Zimbabwean migration that we witness today.

### ***5.2.1 A brief history of Zimbabwean migration (post-independence)***

In order to understand the current increased flow of migrant women from Zimbabwe, it is vital first to understand the political instability and economic decline which has been a feature of the country since the 1980s, as it has been a major contributor to the widescale movement across borders from Zimbabwe. This is the purpose of this section, and it begins with Zimbabwe's economic deterioration, which started in the 1980s.

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<sup>3</sup> AS Mlambo. (2010). *History of Zimbabwean Migration*, 1. Available at <[https://www.academia.edu/9424465/History\\_of\\_Zimbabwe\\_Migration](https://www.academia.edu/9424465/History_of_Zimbabwe_Migration)>.

<sup>4</sup> Emmanuel N Amadife & James W Warhola. (1993). Africa's political boundaries: Colonial cartography, the OAU, and the advisability of ethno-national adjustment. *International Journal of Politics, Culture, and Society* 6(4): 533–54. Available at <<http://www.jstor.org/stable/20007111>> (accessed 18 October 2022).

<sup>5</sup> Mlambo (n 3).

### 5.2.1.1 1980 – Independence

Following a ten-year struggle for liberation, Zimbabwe attained independence from its British colonial rulers on 18 April 1980.<sup>6</sup> The main black nationalist groups at the time were the Zimbabwe African National Union (ZANU), made up predominantly of Shona peoples, and the Zimbabwe African Peoples Union (ZAPU), comprising predominantly Ndebele peoples. Their respective political wings were led by Robert Mugabe and Joshua Nkomo. The two leaders formed a military alliance in 1976 called the Patriotic Front (PF). This alliance signed the Lancaster House Peace Accord 1976 with the British colonisers and brought the ‘Rhodesian Bush War’ to an end.<sup>7</sup> This was the pathway to the first elections in Zimbabwe, which were based on the principal of universal suffrage. The outcome of this election was that Mugabe was elected prime minister.

Nkomo remained a cabinet minister until 1982, the year that Robert Mugabe attempted to turn the country into a one-party state. When part of the populace, who were predominantly ZAPU supporters, expressed disapproval of this plan, he infamously deployed the Fifth Brigade<sup>8</sup> to Matabeleland to crush dissenting Zimbabweans. This action is commonly known as the ‘Gukurahundi campaign’ and it lasted from 1982 to 1987. During this campaign, believed to have been a genocide<sup>9</sup> of the Ndebele peoples, 20 000 people in Matabeleland were killed and an estimated one million Zimbabweans escaped to South Africa. This massacre led to one of the greatest migrations in the history of independent Zimbabwe.<sup>10</sup> In 1987, in an effort to quell the violence, Nkomo agreed to a Unity Accord which subsumed the PF and ZAPU into what is now known as ZANU-PF, the current ruling party.

During this post-independence period, the newly formed government was under pressure from the populace to fulfil the promises made during the election in order to deal with the inequalities created by colonisation. As a result, the Zimbabwean government put in place various socialist

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<sup>6</sup> K Law. (2021). ‘We wanted to be free as a nation, and we wanted to be free as women’: Decolonisation, nationalism and women’s liberation in Zimbabwe, 1979–85. *Gender and History* 33(10): 249–268.

<sup>7</sup> Law (n 6).

<sup>8</sup> Created in 1981 the Fifth Brigade was an elite unit of a specially trained infantry brigade of the Zimbabwean National Army (ZNA).

<sup>9</sup> N Ndlovu. (2019). *The Gukurahundi ‘Genocide’: Memory and Justice in Independent Zimbabwe*. University of Zimbabwe, Faculty of Humanities, Department of Historical Studies. Available at <<http://hdl.handle.net/11427/30431>>.

<sup>10</sup> Peter Orner & Annie Holmes (eds). (2010). *Hope Deferred: Narratives of Zimbabwean Lives. Voice of Witness*. Harare: McSweeney’s Books.

redistributive policies,<sup>11</sup> such as free access to health services and primary education, and various social welfare programmes. Accordingly, from 1979 to 1984 primary school enrolment rose from 82 000 to 2.25 million and secondary school enrolment increased from around 66 000 to approximately 500 000.<sup>12</sup> The government constructed roads and clinics, improved sanitation in rural parts of the country and ensured that major areas of Zimbabwe had access to safe drinking water. These initiatives had the effect of reducing infant mortality and increasing life expectancy.<sup>13</sup> The implementation of these policies also caused certain sectors to expand rapidly and, consequently, employment in the public sector increased.

Despite these positive developments, the Lancaster House Agreement is still widely believed to have delayed Zimbabwe's progression from colonialism, because under the agreement talks about land redistribution had to wait for ten years, which effectively protected the land ownership of white farmers for the years preceding independence.<sup>14</sup> In addition, since the bulk of the industrial expansion which occurred at this time was monopolised by multinational companies, profits from this growth were not shared equally by the country, going instead to a small number of elite locals or corporations in the Global North. Some studies indicate that during the 1980s more than 60% of the country's wealth was in the hands of 3% of the Zimbabwean population, who were predominantly either white farmers or the black elite aligned to the ruling party, ZANU-PF.<sup>15</sup>

In addition and, importantly, this 'growth' occurred without increased government revenue, and in the end the government increasingly financed free social services through international debt.<sup>16</sup> The result was a state budget deficit which eventually grew to unsustainable levels and led the economy into a recession by the mid-1980s.<sup>17</sup> Estimates are that during this time Zimbabwean international loans amounted to close to US\$3 billion, causing the country to grind to a standstill

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<sup>11</sup> Available at <<https://reliefweb.int/report/zimbabwe/undp-presents-comprehensive-economic-recovery-zimbabwe-working-paper-series>>

<sup>12</sup> Orner & Holmes (n 10) 483.

<sup>13</sup> Orner & Holmes (n 10).

<sup>14</sup> The Lancaster House Agreement, 21 December 1979. Southern Rhodesia Constitutional Conference Held at Lancaster House, London, September–December 1979, Report. Available at <[https://sas-space.sas.ac.uk/5847/5/1979\\_Lancaster\\_House\\_Agreement.pdf](https://sas-space.sas.ac.uk/5847/5/1979_Lancaster_House_Agreement.pdf)>.

<sup>15</sup> L Mazingi & R Kamidza. (2010). *Inequality in Zimbabwe*. Alternative Policy Options.

<sup>16</sup> P Bond. (1998). *Uneven Zimbabwe. A Study of Finance, Development and Underdevelopment*. Africa World Press.

<sup>17</sup> Orner & Holmes (n 10) 483.

economically. This economic downturn was aggravated by a decrease in the demand for Zimbabwe's exports, reduced foreign direct investment (FDI) and by the droughts of 1982–1983 and 1984–1985.<sup>18</sup>

#### 5.2.1.2 Economic Structural Adjustment Programme – beginnings of an economic breakdown

In 1991, as a result of these economic challenges and under pressure from Bretton Woods Institutions,<sup>19</sup> the government put in place a structural adjustment programme – the Economic Structural Adjustment Programme (ESAP) – to attempt to manage the situation. The main motivations for the ESAP were:

- The protectionist policies which restricted investments and limited the ability of foreign companies to remit money out of the country discouraged investments coming into the country, which in turn led to a shortage of foreign exchange. Consequently, companies were unable to upgrade obsolete equipment and it also greatly restricted the creation of jobs in various sectors.
- The subsidies and credit available from the government were such that businesses were able to function but were not necessarily commercially viable.
- The sharp increase in social service spending and public service employment, without concomitant public revenue, led to higher taxes and a huge deficit in the budget, which the government increasingly financed through debt.
- In real terms, the fixed minimum wages and the need for Cabinet approval to retrench workers resulted in less employment.<sup>20</sup>

It was hoped that by removing price controls and deregulating wages, the ESAP would encourage increased facilitation of trade and ultimately improve the national debt situation.<sup>21</sup> The programme was also intended to: bring down social spending by doing away with the food subsidy programmes; recover costs in the health and education sectors by charging for these services; and drastically reduce the number of public-sector workers.

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<sup>18</sup> T Brett & S Winter. (2003). *Origins of the Zimbabwe Crisis*. Johannesburg: Helen Suzmen Foundation.

<sup>19</sup> AS Mlambo. (1997). *The Economic Adjustment Programme – The Case of Zimbabwe: 1900–1995*. Harare: University of Zimbabwe.

<sup>20</sup> Brett & Winter (n 18).

<sup>21</sup> C Madebwe & V Madebwe. (1998). Contextual background to the rapid increase in migration from Zimbabwe since 1990. *Inkanyiso, Jnl Hum & Soc Sci* 9.



Unfortunately, this neo-liberal strategy was not successful in its aims, and by 1995 the public debt was still more than 8% of Zimbabwe's gross domestic product (GDP) – way above the target of 5% which had been set by the ESAP. In addition, the International Monetary Fund (IMF) and the World Banks' plan of devaluing the Zimbabwean dollar, cutting down on social spending, removing import controls and export incentives and privatising state-owned entities<sup>22</sup> had a catastrophic impact on Zimbabwean people. The effect of these measures caused food prices to escalate, real wages to decline, poverty and unemployment to increase and life expectancy to decrease.

In addition, as the deregulation of the labour market permitted collective bargaining between employers and workers, particularly in the area of wage determination, this had the impact of driving down incomes to pre-independence levels, wages plummeting as follows:<sup>23</sup>

- civil servants by 65%;
- domestic workers by 62%;
- construction workers by 56%; and
- farm workers by approximately 48%.<sup>24</sup>

Furthermore, in a country once hailed as the breadbasket of the SADC, without food subsidies, many Zimbabweans were faced with great hardships and experienced food insecurity, and many expressed their discontent by striking and taking part in food riots. The ESAP also had a distinct gender dynamic, which had a disproportionately large impact on the women of Zimbabwe, as is discussed later in this chapter.

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<sup>22</sup> L Zeilig. (2002). Crisis in Zimbabwe. *International Socialism* 2(94).

<sup>23</sup> United Nations Development Program (UNDP). (2008). The potential contribution of the Zimbabwe Diaspora to economic recovery. UNDP Comprehensive economic recovery in Zimbabwe Working Paper Series. Working Paper No 11; T Chagonda. (2010). Dollarization of the Zimbabwean economy: Cure or curse? The case of the teaching and banking sectors. Paper presented at the Codesria Conference on the Renaissance of African Economies. Dar es Salam, Tanzania, 20–21 December 2010.

<sup>24</sup> P Bond & M Manyanya. (2003). *Zimbabwe's Plunge: Exhausted Nationalism, Neoliberalism and the Search for Social Justice* Pietermatitzburg: University of Natal Press, 35.

However, despite the difficulties experienced by most Zimbabweans, the country's elite (particularly white farmers) continued to thrive during this time because of the low wages and the continuing profits from exports.

Many scholars regard the ESAP one of the factors of the 'origins of the Zimbabwe crisis',<sup>25</sup> although some maintain it was rather because it was not implemented appropriately.<sup>26</sup> Others have said it was the discontinuation of the trade agreement between Zimbabwe and South Africa,<sup>27</sup> and yet others have touted the various droughts and the global recession of 1991–1992<sup>28</sup> as the main reasons. However, many also consider the crisis to have been a combination of all of these factors.

This was not the end of the story, however, because after experiencing substantial increases in exports, investments and growth, the country managed a robust recovery during 1996–1997.<sup>29</sup> But these gains were reversed when the country decided to repay war veterans. At the time the initial amount was close to ZimD4 billion and payments to them are still ongoing.<sup>30</sup> Concomitantly, the Zimbabwean government made the very expensive decision of sending the army to the Democratic Republic of the Congo (DRC).<sup>31</sup> This action plunged the country into yet another economic breakdown, which is essentially ongoing.<sup>32</sup>

#### 5.2.1.3 Political repression causing migration

Another driver of the large numbers of Zimbabweans leaving the country has been the political instability. This factor inadvertently produced the economic and social challenges which when combined, created a country that was essentially unliveable for many.

The political violence in Zimbabwe, which is at endemic levels even now, is believed to stem from the fact that as far back as independence, a central pillar of Mugabe's presidency had been his

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<sup>25</sup> Brett & Winter (n 18).

<sup>26</sup> Brett & Winter (n 18).

<sup>27</sup> Brett & Winter (n 18).

<sup>28</sup> There were disastrous droughts in 1992 and 1995, and a global recession in 1991–1992.

<sup>29</sup> Brett & Winter (n 18).

<sup>30</sup> Brett & Winter (n 18).

<sup>31</sup> Zimbabwean Human Rights NGO Forum. (1998). *Military Action by Zimbabwe in the DRC*. Available at <<https://www.hrforumzim.org/press-releases/military-action-by-zimbabwe-in-the-drc/>>.

<sup>32</sup> Brett & Winter (n 18).

relentless use of military force. This began immediately after the war of liberation, when Mugabe combined the Zimbabwe People's Revolutionary Army (ZIPRA), the Zimbabwe African National Liberation Army (ZANLA) and the previous Rhodesian armed forces to create a super army: the Zimbabwean National Army (ZNA). ZANU-PF then went on to facilitate the creation of ad hoc paramilitaries such as youth militia, war veteran militia, and the capturing of the Zimbabwean intelligence agency or Central Intelligence Organisation (CIO) and the police force.<sup>33</sup>

#### 5.2.1.4 Repressing the opposition politicians and the general populace

Writers have attributed ZANU-PF's flagrant use of violence and intimidation tactics largely to the fact that the party refuses to accept democratic pluralism in the country. This began as far back as in 1982 during the Gukurahundi massacres (mentioned above) as this campaign essentially had the purpose of annihilating ZAPU as a political opposition.<sup>34</sup>

In his 2013 article, 'Regime survival strategies in Zimbabwe in the 21st century', Moyo notes that the ruling ZANU-PF used the 'security structures to mobilize support, campaign and organize elections'.<sup>35</sup> Masunungure describes the ZANU-PF rule as 'a militarized form of electoral authoritarianism',<sup>36</sup> where the survival of the ZANU-PF government has been contingent on its use of military violence.

For decades the ruling party was the only party in Zimbabwe and from 1999, when the Movement for Democratic Change (MDC) was formed, it was seen as a serious threat by ZANU-PF.<sup>37</sup> The watershed moment was when the MDC led an anti-constitution movement, defeating ZANU-PF in a country-wide referendum which was seeking a new constitution. This marked the first time ZANU-PF had been defeated politically in 20 years. The ruling party was enraged by the strong performance of the MDC in the parliamentary elections of June 2000. Therefore, in an effort

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<sup>33</sup> SJ Ndlovu-Gatsheni. (2007). Nationalist-military alliance and the fate of democracy in Zimbabwe. *African Journal on Conflict Resolution* 6(1). doi: 10.4314/ajcr.v6i1.39398.

<sup>34</sup> N Ndlovu. (2019). *The Gukurahundi 'Genocide': Memory and Justice in Independent Zimbabwe*. University of Zimbabwe, Faculty of Humanities, Department of Historical Studies. Available at <<http://hdl.handle.net/11427/30431>>.

<sup>35</sup> S Moyo. (2013). Regime survival strategies in Zimbabwe in the 21st century. *African Journal of Political Science and International Relations* 7: 67–78.

<sup>36</sup> E Masunungure. (2009). *Defying the Wind of Change: Zimbabwe's 2008 Elections*. Johannesburg: Weaver Press.

<sup>37</sup> A Mlambo & B Raftopoulos. (2010). *The Regional Dimensions of Zimbabwe's Multi-layered Crisis: An Analysis*. Election processes, liberation movements and democratic change in Africa Conference. Maputo, 8–11 April 2010.

prevent them from gaining momentum politically, ZANU-PF turned to violence and intimidation against the opposition and those who supported them.<sup>38</sup> Every election since has been marred with episodes of violence in an effort to repress the opposing side. Mlambo explained this by stating that ‘political violence has become entrenched in the ruling party’s psyche’.<sup>39</sup>

In June 2002, with the conflict entrenched the majority of urban voters refused to accept the draft constitution during the urban local elections and voted the ruling party out.<sup>40</sup> Up to this point ZANU-PF had held the majority in both local and national elections. Now, seeing the populace as a political risk which jeopardised their power, the ruling party responded by ruthlessly unleashing trained militia against them.<sup>41</sup>

ZANU-PF’s desire to be an unopposed party in Zimbabwe has also been a major cause of violence that the government unleashes on its own people. Maroleng states that this

[p]olitical repression takes many forms, ranging from murder of opponents to rape, mutilation, violence, repression and intimidation. All these tactics aim to suppress opposing views.<sup>42</sup>

The situation is aggravated by the fact that even when those who have suffered violence are able to identify their perpetrators, due to a severe breakdown in the rule of law in Zimbabwe, many will never see justice in the country.<sup>43</sup> As a result of these tactics, Zimbabweans have for decades lived under a cloud of repression at the hands of the ZANU-PF regime. Several notable instances have been when in 1988 the government responded with state torture and violence after the food riots;<sup>44</sup> in 2000, the state used military force against uprisings in the Midlands and Matabeleland South

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<sup>38</sup> Bond & Manyanya (n 24).

<sup>39</sup> Mlambo (n 4).

<sup>40</sup> H Melber. (ed). (2002). Zimbabwe's Presidential Elections: Evidence, Lessons and Implications. Uppsala: Nordiska Afrikainstitutet. Available at <<http://nai.diva-portal.org/smash/get/diva2:241803/FULLTEXT01.pdf>>.

<sup>41</sup> A Kamete. (2002). In defence of national sovereignty? Urban governance and democracy in Zimbabwe. *Journal of Contemporary African Studies* 21(2): 192–213.

<sup>42</sup> C Maroleng. (2008). Political developments in Zimbabwe and scenarios for migration. In S Johnston, A Bernstein & R de Villiers (eds), *Migration from Zimbabwe: Numbers, Needs and Policy Options*. Centre for Development and Enterprise, 23–26.

<sup>43</sup> A Hammar. (2008). Reflections on displacements in Zimbabwe. *Concerned Africa Scholars* 80(Winter): 28–35.

<sup>44</sup> UNDP (n 23).

(through to 2001). Even educators were not spared, because from 2002 to 2012 the Zimbabwe Human Rights non-governmental organisation (NGO) reported multiple human rights violations, including incidents of torture used against teachers by state forces.<sup>45</sup>

#### 5.2.1.6 Commercial farm seizures

Another prominent incident that occurred under the leadership of Robert Mugabe was when the ZANU-PF regime infamously implemented their fast-track land-reform agenda, the so-called ‘commercial farm seizures’ or ‘land grabs’,<sup>46</sup> which began in 2000. The government accomplished this operation by subsidising ‘new farmers’ who invaded and expropriated mainly commercial white-owned farms – this has been seen by many scholars as another major driver of migration. Sachikonye writes that white farmers were targeted by the government due to their assumed support of MDC which had eventually led to the rejection of the new constitution.<sup>47</sup> During this campaign, around 3 000 farms were reserved for expropriation. The chaotic and violent acquisition of farms, which was led by young paramilitaries, coupled with the revocation of many white Zimbabwean citizens’ citizenship under provisions of the Citizenship Act<sup>48</sup> – essentially making many stateless – caused an unprecedented movement of white farmers out of Zimbabwe.<sup>49</sup> As a result of the seizures, more than 2.5 million Zimbabwean farm workers lost their employment.<sup>50</sup>

The impact of the land seizures was far-reaching because agriculture had always been a significant part of the Zimbabwean economy: making up 60% of raw materials used by industry in Zimbabwe, 45% of all exports, and accounting for between 11% and 14% of the gross national product

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<sup>45</sup> United States Department of State. (2012). *Zimbabwe 2012: Human Rights Report*. Available at <https://2009-2017.state.gov/documents/organization/204395.pdf>; also see L Pswarayi & T Reeler. (2012). ‘Fragility’ and education in Zimbabwe: Assessing the impact of violence on education. Research and Advocacy Unit. Available at [https://protectingeducation.org/wp-content/uploads/documents/documents\\_fragile\\_state\\_and\\_education\\_in\\_zimbabwe\\_december\\_2012.pdf](https://protectingeducation.org/wp-content/uploads/documents/documents_fragile_state_and_education_in_zimbabwe_december_2012.pdf).

<sup>46</sup> NH Thomas. (2003). Land reform in Zimbabwe. *Third World Quarterly* 24(4): 691–712. Available at <http://www.jstor.org/stable/3993432>.

<sup>47</sup> L Sachikonye. (2003). *The Situation of Commercial Farm Workers After Land Reform in Zimbabwe*. A report prepared for the Farm Community Trust of Zimbabwe. CIIR.

<sup>48</sup> The government revoked the citizenship rights of 31 people, nine born in Zimbabwe to parents of foreign origin. This rendered many commercial farmers and farm workers stateless. See J Muzondidya. (2007). Jambanja: Ideological ambiguities in the politics of land and resource ownership in Zimbabwe. *Journal of Southern African Studies* 33(2): 325–341.

<sup>49</sup> B Rutherford. (2008). An unsettled belonging: Zimbabwean farm workers in Limpopo Province, South Africa. *Journal of Contemporary African Studies* 26(4): 401–415.

<sup>50</sup> Rutherford (n 49).

(GNP).<sup>51</sup> In addition, it employed the most workers in the country's formal economy. The land seizures also had a ripple effect as they reduced the raw material supplies required for the textile and agro-processing industries. As a result, the utilisation levels of the country's industrial capacity dropped to less than 19% by 2007.<sup>52</sup> Finally, the disastrous implementation of the land reforms left many without livelihoods.<sup>53</sup> With reduced exports leaving the country, as a result Zimbabwe's debt rose to increasingly higher levels and caused a shortage of foreign currency reserves.

#### 5.2.1.7 Operation Murambatsvina

Further migration of people from Zimbabwe occurred when in 2005 the state implemented Operation Murambatsvina (translated as: 'Operation clean out the rubbish/restore the order'). After the seizures of commercial farms, the contraction of the economy caused unemployment levels to rise to 70%. As a survival mechanism, many Zimbabweans in the urban areas turned to the informal economy to make ends meet.<sup>54</sup> However, the government rapidly initiated Operation Murambatsvina, with the aim of forcibly managing the unrestricted expansion of the informal economy and clearing out informal settlements situated in the urban regions of the country. As part of the campaign the Zimbabwean army confiscated goods and demolished slums and business structures which were operating 'illegally'.<sup>55</sup>

The areas targeted were believed to be those districts where people who opposed the ZANU-PF government lived and worked.<sup>56</sup> Therefore, this retaliatory operation was conducted to penalise the urban voters who had sided with the opposition during the 2000 and 2005 elections. The United Nations estimated that Operation Murambatsvina resulted in 700 000 Zimbabwean citizens losing their livelihoods and homes and had the indirect effect of having a negative impact on close to 2.5 million people in Zimbabwe.<sup>57</sup> Many migrated elsewhere to escape the hardship and violence.

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<sup>51</sup> D Weiner, S Moyo, B Munslow & P O'Keefe. (1985). Land use and agricultural productivity in Zimbabwe. *Journal of Modern African Studies* 23(2): 251–285.

<sup>52</sup> Confederation of Zimbabwe's Industries (CZI). (2008). *Manufacturing Sector Survey*. Harare: CZI.

<sup>53</sup> House of Commons International Development Committee. (2010) DFID's assistance to Zimbabwe. Eighth Report Session 2009–2010.

<sup>54</sup> Bond & Manyanya (n 24).

<sup>55</sup> A Tibaijuka. (2005). Report of the fact-finding mission to Zimbabwe to assess the scope and impact of Operation Murambatsvina by the United Nations Special Envoy on human settlement issues in Zimbabwe.

<sup>56</sup> M Bratton & E Masunungure. (2006). Popular reactions to state repression: Operation Murambatsvina in Zimbabwe. *African Affairs* 106.

<sup>57</sup> Tibaijuka (n 55).

#### 5.2.1.8 2008 elections migration push

The largest migration of Zimbabweans to date took place following the 2008 elections.<sup>58</sup> The results clearly showed that Mugabe had not garnered the majority of the votes, but ZANU-PF refused to hand over power to the opposition. Their claim was that the opposing side had not obtained the 51% of votes as was required by the Zimbabwean Constitution. As a result of the dispute, the country underwent a presidential runoff. In order to influence the outcome of the runoff, the ruling party initiated a violent campaign which was ‘backed by the army, war veterans and youth militia [who] targeted opposition supporters, many of whom were arbitrarily arrested, forced into hiding, maimed or killed’.<sup>59</sup> The violence forced the opposition to pull out of the running in June 2008, which incited nation-wide attacks against their sympathisers. Mlambo writes that ‘the political polarisation and repression that followed caused many people to migrate to flee the violence’.<sup>60</sup> Many fled to Botswana, and it was at this time that Botswana recorded the highest influx of Zimbabwean refugees in its modern-day history.<sup>61</sup> It is in this context that scholars have noted that the Zimbabwean government has used political violence as a way of both mobilising supporters and concomitantly demobilising dissenters. The continued instability in the political environment since 2000 has led many Zimbabweans to migrate out of their country.<sup>62</sup>

#### 5.2.1.9 Social factors causing migration

In the face of severely restricted resources, the Zimbabwean government decreased spending on social services such as education, housing and health to the extent that after 2000 the public service system deteriorated to the point of complete collapse. The situation caused medical staff to migrate from the country and with no doctors, nurses or medication, hospitals in the country shut down. The United Nations Development Program (UNDP) estimates that by 2003 the Zimbabwean health

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<sup>58</sup> They were harmonised presidential, parliamentary and local government elections.

<sup>59</sup> Mlambo (n 4).

<sup>60</sup> Mlambo (n 4).

<sup>61</sup> A Betts. (2013). Botswana: The division of Zimbabweans into refugees and migrants. In *Survival Migration: Failed Governance and the Crisis of Displacement*. Cornell University Press, 78–89. Available at <<http://www.jstor.org/stable/10.7591/j.ctt32b5cd.9>>.

<sup>62</sup> A Bloch. (2006). Emigration from Zimbabwe: Migrant perspectives. *Social Policy & Administration* 40(1): 67–87.

system had lost more than 1 950 nurses and a further 2 100 doctors.<sup>63</sup> The disintegration of the health sector had a gender bias, because maternity services became the first to suffer cuts.<sup>64</sup>

The education sector faced a similar fate. A 2012 report by the Research and Advocacy Unit found that between 2000 and 2008, approximately 70 000 trained teachers fled Zimbabwe to seek refuge in neighbouring countries due to a combination of factors such as deteriorating wages, runaway inflation, and political violence. In addition, the situation worsened as educators in rural areas, suspected of supporting the opposition, were forcefully expelled from schools by ZANU-PF paramilitaries. As a result, approximately 82% of farm schools were permanently closed, exacerbating the educational crisis.<sup>65</sup>

Owing to the lack of basic medical services, a severe cholera outbreak occurred in the country, resulting in the deaths of 4 000 individuals of the 100 000 who were infected. The epidemic was linked to the country's inability to procure water-treatment equipment due to a severe shortage of foreign currency. This issue was worsened by the electricity outages which had a critical impact on the ability to pump fresh water.<sup>66</sup> Compounding matters further, the country experienced food insecurity to the extent that 7.5 million Zimbabweans relied on food aid, and at the time Zimbabwe was the only country on the globe where more than 50% of the population depended on donor aid for food.<sup>67</sup>

For those who were working and had money to buy food, a loaf of bread cost ZimD3 330 000. In addition, people were unable to draw their salaries from banks because of the severe shortage of banknotes, which effectively made working not worth the effort. It was this disastrous blend of worthless money, restricted access to foreign currency and a lack of food which forced many to

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<sup>63</sup> UNDP (n 23).

<sup>64</sup> R Musarandega, S Ngwenya, G Murewanhema et al. (2022). Changes in causes of pregnancy-related and maternal mortality in Zimbabwe 2007–08 to 2018–19: Findings from two reproductive age mortality surveys. *BMC Public Health* 22: 923. Available at <<https://doi.org/10.1186/s12889-022-13321-7>>.

<sup>65</sup> L Pswarayi & T Reeler. (2012). 'Fragility' and Education in Zimbabwe: Assessing the Impact of Violence on Education. *Research and Advocacy Unit*. Available at <[https://protectingeducation.org/wp-content/uploads/documents/documents\\_fragile\\_state\\_and\\_education\\_in\\_zimbabwe\\_december\\_2012.pdf](https://protectingeducation.org/wp-content/uploads/documents/documents_fragile_state_and_education_in_zimbabwe_december_2012.pdf)>.

<sup>66</sup> D Makina. (2010). Historical perspective on Zimbabwe's economic performance: A tale of five lost decades. *Journal of Developing Societies* 26(91): 99–123.

<sup>67</sup> Oxfam International. (2009). *Zimbabweans Face Grim Hunger Season*, 15 January 2009. Available at <<https://www.oxfam.org/en/press-releases/zimbabweans-face-grim-hunger-season>>.



migrate from Zimbabwe. Furthermore, with the HIV pandemic still raging, aggravated by the low standard of living and a lack of access to healthcare, life expectancy dropped to 43 after 2000 (from 61 in 1992).<sup>68</sup>

As poverty levels and unemployment rose, coupled with the lack of opportunities and low wages, migration became the only option for many in the country. Soon Zimbabweans were leaving in droves<sup>69</sup> to neighbouring countries such as Botswana.

#### 5.2.1.10 A ‘non’ coup – Mugabe’s removal

True to his militarised leadership style, President Mugabe was ousted from power by a military coup d’état in 2017. He officially stepped down on 21 November 2017, just days after Zimbabwean Defence Force (ZDF) tanks were seen rolling through Harare, Zimbabwe’s capital city, after key state bodies such as the Zimbabwe Broadcasting Corporation (ZBC) were captured and Mugabe was placed under house arrest.<sup>70</sup> On 24 November, former first vice-president Emmerson Mnangagwa was sworn in as the second president of Zimbabwe since independence.<sup>71</sup>

Mugabe’s forced resignation sparked joy among many in Zimbabwe who had suffered under his ‘iron-fisted rule’<sup>72</sup> and for a short while there was hope that the new president would bring much-needed change to the country. However, as time would tell, this has not been the case, because Zimbabwe under the rule of Mnangagwa bears a striking resemblance to the country when it was

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<sup>68</sup> ML Sachikonye. (2006). *Political Parties and the Democratisation Process in Zimbabwe. Electoral Institute of Southern Africa (EISA) Research Report No 16*. EISA; G Simpson. (2008). Neighbours in need. *Human Rights Watch*; Mlambo & Raftopoulos (n 36).

<sup>69</sup> A Betts & E Kaytaz. (2009). *National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime. New Issues in Refugee Research. Research Paper No 175*. UNHCR, Policy Development and Evaluation Service.

<sup>70</sup> Available at <<https://www.bbc.com/news/world-africa-41997982>>.

<sup>71</sup> RTÉ. (2017). *Zimbabwe's Mnangagwa Sworn in as President*. 24 November 2017. Archived from the original on 24 November 2017. Zimbabwe’s Emmerson Mnangagwa has been sworn in as the country’s president, bringing the final curtain down on the 37-year rule of Robert Mugabe.

<sup>72</sup> Available at <<https://www.aljazeera.com/news/2020/11/21/zimbabwe-3-years-after-mugabes-ouster-in-500-words>>.

ruled by Mugabe. State violence against the opposition and its supporters,<sup>73</sup> economic hardship<sup>74</sup> and social problems<sup>75</sup> have continued.

Many countries in southern Africa have experienced similar challenges: for instance, Zambia also endured catastrophic consequences as a result of its economic liberalisation policies;<sup>76</sup> and Mozambique has spent most of its time after independence in a prolonged state of political and humanitarian crisis.<sup>77</sup> In the case of Zimbabwe, however, a unique combination of various challenges has caused unprecedented large-scale movement from the country. As a result, Zimbabwe continues to be a significant migrant-producing country to this day. In 2021, the International Organisation for Migration (IOM) reported Zimbabwe to be the highest migrant-sending country in southern Africa, accounting for 14% of international migration in the sub region.<sup>78</sup>

### **5.2.2 Increased migration from Zimbabwe to Botswana – tensions begin**

We have seen that from around 2000 Zimbabwe was embroiled in one political, social and economic crisis after another. The consequence was that between 2000 and 2008 the country's economy contracted by almost 50%, unemployment levels climbed to a staggering 80%, while soaring hyperinflation destroyed the livelihoods of most Zimbabwean households. To this end, by 2009, the purchasing power of many ordinary Zimbabweans fell to levels the country had not seen since the 1950s.<sup>79</sup> Production, life expectancy and living standards dropped progressively in Zimbabwe, accompanied by safety concerns due to the tyrannical actions of the ZANU-PF government. Therefore, what was first an economic crisis that started in the early 1990s ultimately

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<sup>73</sup> Henning Melber & Roger Southall. (2021). Zimbabwe's foreign policy under Mnangagwa. *Journal of Asian and African Studies* 56. 002190962098657. 10.1177/0021909620986579.

<sup>74</sup> Alexander Noyes. (2020). *New Zimbabwe? Assessing Continuity and Change After Mugabe*. RAND Corporation. Available at <[https://www.rand.org/pubs/research\\_reports/RR4367.htm](https://www.rand.org/pubs/research_reports/RR4367.htm)>.

<sup>75</sup> Noyes (n 74).

<sup>76</sup> L Rakner. (2003). *Political and Economic Liberalisation in Zambia 1991–2001*. Nordic Africa Institute. Available at <[http://saipar.org/wp-content/uploads/2015/12/Political-and-Economic-Liberalisation-in-Zambia\\_Lise-Rakner.pdf](http://saipar.org/wp-content/uploads/2015/12/Political-and-Economic-Liberalisation-in-Zambia_Lise-Rakner.pdf)>.

<sup>77</sup> World Bank. (2016). *Acceleration Poverty Reduction in Mozambique: Challenges and Opportunities*, 21 December 2016. Available at <[www.worldbank.org](http://www.worldbank.org)>. and Stephanie Regalia. (2017). The resurgence of conflict in Mozambique: Ghosts from the past and brakes to peaceful democracy. *IFRI: Notes de l'Ifri*.

<sup>78</sup> IOM Migration Portal. Available at <<https://www.migrationdataportal.org/regional-data-overview/southern-africa>>.

<sup>79</sup> Available at <<https://www.zawya.com/en/economy/africa/zimbabwes-annual-inflation-surges-to-191-in-june-h16q0mhe>>.

became a cumulative breakdown of the country. Consequently, after 2000, migration numbers out of Zimbabwe began to increase sharply as Zimbabwe sank deeper and deeper into crisis, which, for the most part, is still ongoing.

Botswana, known for its high standard of living, strong economy and peaceful reputation, was a desirable destination for Zimbabweans seeking relief from their hardships. Migration was facilitated by the countries' close proximity and movement between the two was relatively easy as their common border of 813 km and is quite poorly demarcated.

### ***5.2.3 Rising xenophobia in Botswana and 'the fence'***

The general trend with migration flows is that, initially, when migrants arrive in small numbers, they are welcomed by the host population; but as their numbers increase, the host population soon becomes threatened. This is common throughout the world.<sup>80</sup> It was no different in Botswana because, as the numbers of Zimbabweans began to climb, these increased migration flows were not greeted with open arms by the less than two million (at the time) people of Botswana. And although on the face of it the two countries are friendly diplomatically, animosity between them on the question of migration, most especially irregular migration, has grown steadily since this time. A prime example of this is when the countries were embroiled in often public disagreements over the erection of 800 km of electrified fences by Botswana on the Zimbabwe–Botswana border in the early 2000s. The Government of Botswana maintained that the fences were put up for phytosanitary reasons: to curb the spread of foot and mouth disease, which was spreading from Zimbabwe to Botswana. However, it was soon widely assumed that the fences were aimed at the uncontrolled influx of irregular migrants from Zimbabwe.<sup>81</sup> Tensions were so high on this topic that in 2003 the then Zimbabwean High Commissioner to Botswana, Mr Phelekeza Mphoko, publicly stated that 'Botswana is trying to create a Gaza Strip'.<sup>82</sup>

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<sup>80</sup> Available at <<https://www.iom.int/>>.

<sup>81</sup> D Kopiński & A Polus. (2012). Is Botswana creating a new Gaza Strip? An analysis of the 'fence' discourse. In *Crossing African Borders: Migration and Mobility*. [online]. Centro de Estudos Internacionais. Available at <<http://books.openedition.org/cei/235>> (accessed 11 May 2022).

<sup>82</sup> *Daily Mail & Guardian*, 8 September 2003.

Given that the border between Botswana and Zimbabwe has always been poorly delineated and that border communities on either side have generally coexisted in peace<sup>83</sup> – to the extent of sharing water sources and common family links – at the time, the Botswana government’s decision to erect a fence of this magnitude was seen as astonishing in modern-day African politics. The decision was especially surprising because, historically, African countries have generally been sympathetic to migrants. This was particularly so during the liberation period; and although it was commonplace to erect fences in order to protect livestock from diseases and predators in the region, traditionally, large-scale infrastructure projects such as this fence were only associated with war or conflict with the purpose of protecting the country. Therefore, the Botswana government, and in particular the president at the time, Festus Mogae, was criticised internationally for this decision.<sup>84</sup>

The erection of the fences forms a very pivotal period in the Zimbabwe–Botswana migration discourse and the collective memory of both countries. Since then, the Government of Botswana has implemented various policies to curb irregular migration, specifically targeting Zimbabweans. These measures include a controversial ‘arrest-and-deport policy’ which is discussed in greater detail in the next chapter. Another approach which has been used is the automatic detention of undocumented or irregular Zimbabwean immigrants. The detention of Zimbabwean immigrants in Botswana is such a commonplace that the country’s only immigration detention centre in the northern city of Francistown goes by the local nickname ‘*Teronko ya MaZimbabwe*’ which when translated means ‘Jail/Prison for Zimbabweans.’<sup>85</sup>

Xenophobia, particularly against Zimbabwean nationals, is not only limited to government structures but is also widespread at a community level. In their 2015 article, ‘They don’t want foreigners: Zimbabwean migration and the rise of xenophobia in Botswana’, Campbell and Crush note that in Botswana ‘xenophobic attitudes are highly prevalent amongst the citizenry and within

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<sup>83</sup> A Betts. (2013). Botswana: The division of Zimbabweans into refugees and migrants. In *Survival Migration: Failed Governance and the Crisis of Displacement*. Cornell University Press, 78–79. Available at <<http://www.jstor.org/stable/10.7591/j.ctt32b5cd.9>>.

<sup>84</sup> Available at <<https://www.smh.com.au/world/fence-likened-to-african-gaza-strip-20030917-gdhej0.html>>.

<sup>85</sup> Treasa M Galvin. (2015). ‘We deport them but they keep coming back’: The normalcy of deportation in the daily life of ‘undocumented’ Zimbabwean migrant workers in Botswana. *Journal of Ethnic and Migration Studies* 41(4): 617–634. doi: 10.1080/1369183X.2014.957172.

government and manifested in a range of negative stereotypes'.<sup>86</sup> Zimbabweans have become increasingly associated with criminal behaviour, the spread of diseases and driving down market wages since they are generally known to work for lower wages than nationals are.<sup>87</sup>

A 2003 study by Campbell found that 60% of Botswana respondents felt that Zimbabwean migrants take jobs away from nationals, whereas 48% of them blamed these same migrants for the increase in crime.<sup>88</sup> Another research study conducted in 2001 by the Southern African Migration Programme (SAMP) explored the opinions and feelings of people in Botswana towards immigrants living in the country. The findings showed that the majority of Botswana citizens hold strong negative views about irregular migrants. Almost 70% of the respondents gave a rating of zero (on a scale of 0 to 10; 0 being most negative) for their attitudes to irregular immigrants. In addition, the data in the table below show that 95% of the nationals surveyed opposed granting freedom of speech and other fundamental rights to irregular immigrants in Botswana.

**Botswana's support or otherwise for government granting rights to illegal immigrants and methods of controlling illegal immigration (in percentage)**

	Support	Neutral	Oppose	Total
Right to freedom of speech	2.4	2.7	94.9	100.0
Right to vote	0.5	1.2	98.3	100.0
Right to legal protection	27.0	13.4	59.6	100.0
Right to police protection	20.1	14.5	65.4	100.0
Right to social services	16.0	6.7	77.3	100.0
Increase funds for border control	66.5	10.6	22.9	100.0
Use army to patrol border	94.5	1.9	3.6	100.0
Police should detain illegal immigrants	86.8	7.0	6.2	100.0
Prosecute employers of illegal immigrants	94.8	3.1	2.1	100.0
Turn on the electric fence	58.9	7.6	33.5	100.0
Deport illegal immigrants	93.3	1.5	5.2	100.0

Number of respondents in each case is 781.

Source:<sup>89</sup>

<sup>86</sup> Eugene Campbell & Jonathan Crush. (2015). 'They don't want foreigners': Zimbabwean migration and the rise of xenophobia in Botswana. *Crossings: Journal of Migration & Culture* 6: 159–180. 10.1386/cjmc.6.2.159\_1.

<sup>87</sup> Available at <<https://www.migrationinstitute.org/files/events/lesetedi.pdf>>.

<sup>88</sup> EK Campbell. (2003). Attitudes of Botswana citizens towards immigrants: Signs of xenophobia? *International Migration* 41(4): 71–111.

<sup>89</sup> Available at <<file:///C:/Users/mandipa.machacha/Downloads/340-Article%20Text-562-1-10-20131028.pdf>>.

### 5.3 Characteristics of Zimbabwe–Botswana migration to the present

In the recent decades the number of Zimbabweans living outside the country has grown significantly and migration from Zimbabwe has reached what is termed ‘unprecedented’ levels. The country now ranks among the top ten migrant-producing countries in Africa.<sup>90</sup> Current estimates are that there are now between three and four million Zimbabweans living in destinations such as South Africa, Botswana, the United Kingdom, the United States, Australia, New Zealand and Canada, to name a few. This number represents between 25% and 30% of the Zimbabwean population of 12 million people.<sup>91</sup>

Botswana is home to the second-largest population of Zimbabwean migrants after South Africa. Zimbabweans also constitute the largest number of migrants in Botswana, with recent estimates stating that they make up almost 60% of all migrants in Botswana.<sup>92</sup> However, determining the exact number of Zimbabwean migrants in Botswana is challenging as many of them engage in irregular and circular migration. Zimbabweans working in Botswana can be found across a variety of industries, including health, education, construction, agriculture, financial services and manufacturing. Some run successful businesses, whereas others work in low-wage jobs or engage in informal cross-border trade or as ‘day trippers’ who go to Botswana to buy groceries before returning home.

#### 5.3.1 Irregular migration

A defining characteristic of contemporary migration between Zimbabwe and Botswana is its irregularity, commonly known as ‘illegal migration’.<sup>93</sup> Although no universally agreed definition

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<sup>90</sup> M Mutava. (2023). An analysis of trends and patterns of migration in Africa. *New South Institute*. Available at <<https://nsi.org.za/wp-content/uploads/2023/11/An-analysis-of-trends-and-patterns-of-migration-in-Africa.pdf>>.

<sup>91</sup> Betts & Kaytaz (n 67); *Women’s Voices from the Zimbabwean Diaspora: Migration and Change*. Available at <[https://africamigration.com/issue/june2015/Elaine\\_McDuffIJM2015.pdf](https://africamigration.com/issue/june2015/Elaine_McDuffIJM2015.pdf)>.

<sup>92</sup> In 2020, the migrant population in Botswana totalled 110 268 inhabitants. 43% of them were female, whereas 57% were male. The most represented nationalities among them were Zimbabwean (58.31%), followed by South African (5.20%), Indian (5.12%), Chinese (4.33%) and Zambian (4%). Available at <[https://migrants-refugees.va/country-profile/botswana/#:~:text=In%202020%2C%20the%20migrant%20population,%2C%20and%20Zambian%20\(4%25\)](https://migrants-refugees.va/country-profile/botswana/#:~:text=In%202020%2C%20the%20migrant%20population,%2C%20and%20Zambian%20(4%25))>

<sup>93</sup> The move away from terming migrants who have either entered a country without the requisite permissions or overstayed as ‘illegal’ and rather irregular was motivated by several factors including that (i) calling a certain

of irregular migration exists, the IOM defines it as ‘movement of persons that takes place outside the laws, regulations, or international agreements governing the entry into or exit from the State of origin, transit or destination’.<sup>94</sup>

It must be stated from the outset that just because some migrants travel irregularly does not absolve states of their responsibility to protect these migrants’ rights.<sup>95</sup> In fact, various categories of migrant such as victims of trafficking, refugees and unaccompanied children in many cases have no choice but to migrate irregularly. States therefore have a heightened obligation under international law to ensure such persons’ rights are protected, promoted and fulfilled. For example, denying an asylum-seeker who is fleeing persecution entry into a country, whether they are doing this irregularly or not, violates the international-law principle of *non-refoulement*.<sup>96</sup>

As stated above, given its nature, it is difficult to estimate how many irregular migrants from Zimbabwe there are in Botswana. What is certain, however, is that irregularity is a key characteristic of Zimbabwe–Botswana migration. Although such migration is not new in the context of Zimbabwe and Botswana, and in fact in the region at large, the scale of irregular migration has increased substantially in recent years.<sup>97</sup>

In general, the main cause of irregular migration is the same as that of regular migration: to seek better economic opportunities. Often, many factors increase the likelihood of a person taking

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group of people ‘illegal’ denies them their humanity. There is no such thing as an ‘illegal’ person, (ii) ‘Illegality’ as a form of status has been deliberately assigned to undocumented migrants to justify a category of people who are undeserving of rights, (iii) language shapes people’s perceptions. Discriminatory language in reference to undocumented migrants leads to perceptions and actions which negatively impact the daily realities of undocumented migrants. Available at <[https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet\\_EN\\_PICUM.pdf](https://www.unhcr.org/cy/wp-content/uploads/sites/41/2018/09/TerminologyLeaflet_EN_PICUM.pdf)>.

<sup>94</sup> Available at <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)>.

<sup>95</sup> C O’Cinneide. (2020). The human rights of migrants with irregular status: Giving substance to aspirations of universalism. In S Spencer & A Triandafyllidou (eds), *Migrants with Irregular Status in Europe. IMISCOE Research Series*. Cham: Springer. Available at <[https://doi.org/10.1007/978-3-030-34324-8\\_4](https://doi.org/10.1007/978-3-030-34324-8_4)>.

<sup>96</sup> The prohibition for states to extradite, deport, expel or otherwise return a person to a country where their life or freedom would be threatened, or where there are substantial grounds for believing that they would risk being subjected to torture or other cruel, inhuman and degrading treatment or punishment, or would be in danger of being subjected to enforced disappearance, or of suffering another irreparable harm.

<sup>97</sup> IOM. (2005). *Current Migration Themes in Southern Africa: An IOM Perspective*. Available at <[https://sarpn.org/documents/d0001355/P1613-MigrationInSA\\_IOM\\_May2005.pdf](https://sarpn.org/documents/d0001355/P1613-MigrationInSA_IOM_May2005.pdf)>.

irregular routes. In discussing this, it is important first to analyse the regular migration routes available to migrants in order for them to enter the labour force in the host country.

Generally, when the demand for foreign workers in a country is higher than the availability of regular migration channels, this is when irregular migration steps in to fill the gap. This applies in the case of Botswana. The country has not adopted specific policies which acknowledge the importance of labour migration and, in fact, it has very restrictive policies in place. Most of these policies favour skilled labour over low-wage labour which means that the majority of migrants are excluded, and this leads to an influx of irregular lower-wage migration.<sup>98</sup>

Another factor which leads to the irregular migration of Zimbabwean nationals is that many Zimbabweans do not have passports,<sup>99</sup> which is a requirement for crossing the Botswana border. This phenomenon has arisen for three reasons:

- Challenges experienced by the government in issuing passports due to the economic crisis.<sup>100</sup>
- Passports are extremely expensive for the average Zimbabwean.<sup>101</sup>
- For some time, no decentralised mode of delivering passports at a local level existed,<sup>102</sup> although this has now changed.

Without passports, Zimbabweans cannot enter Botswana regularly or acquire employment visas in the country and this in turn leaves little choice for many Zimbabwean migrants but to enter and remain in Botswana irregularly. The social networks discussed in Chapter 2 have also been identified as a driving factor for irregular migration as such movements are not possible without

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<sup>98</sup> J Crush, V Williams & S Peberdy. (2005). *Migration in Southern Africa*. Global Commission on International Migration. Geneva: ILO.

<sup>99</sup> Global Press Journal Passport. (nd). *Application Backlog Grounds Many Zimbabweans, Endangering Livelihoods*. Available at <<https://globalpressjournal.com/africa/zimbabwe/passport-application-backlog-grounds-many-zimbabweans-endangering-livelihood>>.

<sup>100</sup> *The Guardian*. (2019). No ticket to ride: Zimbabweans trapped for months without passports. Available at <<https://www.theguardian.com/global-development/2019/jul/08/no-ticket-to-ride-trapped-without-passports-zimbabwe>>.

<sup>101</sup> At the time of writing US\$150 for a normal one and US\$250 for expedited one.

<sup>102</sup> M Kiwanuka & T Monson. (2009). *Zimbabwean Migration into Southern Africa: New Trends and Responses*. Forced Migration Studies Programme, University of the Witwatersrand. 40; A Mawadza. (2008). The nexus between migration and human security Zimbabwean migrants in South Africa ISS Paper 162. (May 2008), 4; Republic of Zimbabwe. (2009). *Draft National Migration Management and Diaspora Policy*. Harare: Government of Zimbabwe, 38–39.



the assistance of and information from friends and family. The human-smuggling industry, especially in the case of women, has also been found to play a role.<sup>103</sup> And in this way it is important to note that irregular migration leads to heightened vulnerabilities. Matose et al put it succinctly when they state:

Irregular mobility demonstrates migrant agency in response to conditions of precarity in their home countries. It is driven by the stringent mobility control measures restricting free movement between countries. Such conditions as demands for passports and visa policies push many to the irregular migrant status, denying them access through official migration routes. Furthermore, states create vulnerability as they enact policies that regulate against informal mobility and safeguard territorial sovereignty through stringent inclusion and exclusion criteria for the formal migration. This orchestration of vulnerability is further demonstrated when state authorities such as the police, soldiers and immigration officials become active actors in and perpetrators of corruption, violence and abuse against irregular migrants.<sup>104</sup>

#### 5.3.1.1 Types of irregular migrant

In general, when we speak of irregular migrants from Zimbabwe in Botswana, we are speaking of two types of people. First, those who travel into the country through unofficial routes and, second, those who enter the country through official routes and then eventually overstay or violate their visa conditions. Although both types are present in Botswana, given that Zimbabweans possessing a passport can enter Botswana freely on a 90-day visa, the majority of irregular migrants in Botswana from Zimbabwe fall into the latter category.

#### 5.3.1.2 Irregular employment

Given that most Zimbabwean migrants travel to Botswana to work, it is important to highlight another key characteristic of the situation of many Zimbabwean migrants in Botswana: *irregular employment*.<sup>105</sup> This situation arises from the fact that although most SADC countries (including

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<sup>103</sup> IOM. (2009). *Migration in Zimbabwe: A Country Profile*. Available at <[https://publications.iom.int/system/files/pdf/mp\\_zimbabwe.pdf](https://publications.iom.int/system/files/pdf/mp_zimbabwe.pdf)>.

<sup>104</sup> Tsitsi Matose, Gracious Maviza & Wilfred Nunu. (2022). *Pervasive Irregular Migration and the Vulnerabilities of Irregular Female Migrants at Plumtree Border Post in Zimbabwe*. 10.1016/j.jmh.2022.100091.

<sup>105</sup> A Triandafyllidou & L Bartolini. (2020). Irregular migration and irregular work: A chicken and egg dilemma. In S Spencer & A Triandafyllidou (eds), *Migrants with Irregular Status in Europe. IMISCOE Research Series*. Cham: Springer. Available at <[https://doi.org/10.1007/978-3-030-34324-8\\_8](https://doi.org/10.1007/978-3-030-34324-8_8)>.

Botswana) will allow Zimbabweans entry into the country for 90 days<sup>106</sup> under the SADC Protocol on the Facilitation of Movement of Persons visa scheme, this type of visa does not allow them to work. In this way there can be Zimbabweans who are legally present in Botswana but who become irregular because they violate the employment restrictions of their immigration status by working. This is largely true of the many Zimbabweans who engage in low-wage labour after entering Botswana on a 90-day visa.<sup>107</sup>

### 5.3.2 Circular migration

Another central aspect of Zimbabwe–Botswana migration is its circularity. Again, whereas no universal agreement has been reached on how to define *circular* or *repeat* migration, the most common definition, adapted from the European Commission,<sup>108</sup> is that it is ‘a form of migration in which people repeatedly move back and forth between two or more countries’.<sup>109</sup>

Zelinsky<sup>110</sup> states that circulation in migration usually denotes a wide range of movements, which are generally short-term, cyclical or repetitive; yet they all have in common a lack of intention to change one’s residence permanently. Circular migration speaks to the recent trend of speaking of people’s mobility rather than migration per se, given its fluidity and unpredictability. Consequently, it is generally difficult to arrive at actual numbers of those who migrate in a circular fashion. One of the greatest advantages of circular migration, most especially in the context of developing countries, is that it facilitates the regular transfer of skills between countries without resulting in the permanent depletion of skills and knowledge from the sending state. It therefore effectively curbs any ‘brain drain’.<sup>111</sup> On the matter of circular migration the IOM has stated:

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<sup>106</sup> Pursuant of the the SADC Protocol on the Facilitation of Movement of Persons visa scheme.

<sup>107</sup> N Kiwanuka & T Monson. (2009). Zimbabwean migration into southern Africa: New trends and responses. *Computer Science* 40.

<sup>108</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Circular Migration and Mobility Partnerships between the European Union and Third Countries (16 May 2007) (COM 2007) 248 final, 8.

<sup>109</sup> Available at <[https://publications.iom.int/system/files/pdf/iml\\_34\\_glossary.pdf](https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf)>.

<sup>110</sup> W Zelinsky. (1971). The hypothesis of the mobility transition. *Geographical Review* 61(2): 219–249. Available at <<https://doi.org/10.2307/213996>>.

<sup>111</sup> S Dodani & LaPorte. (2005). Brain drain from developing countries: How can brain drain be converted into wisdom gain? *JR Soc Med* 98(11): 487–491. doi: 10.1258/jrsm.98.11.487. PMID: 16260795; PMCID: PMC1275994.

Circular migration is increasingly being recognised as a key form of migration that, if well managed, can help to match the international supply of and demand for labour, thereby contributing to a more efficient allocation of available resources and to economic growth.

Circular migration also allows for regular contact between migrants and those family members they left behind.

In the context of our study, the most recent estimates of circular migration, used by Campbell and Crush in a study on Zimbabwean migration in Botswana, indicate that approximately 13% of migrants residing in Botswana return to Zimbabwe at least once a month, whereas nearly 25% return every few months. In addition, more than 80% of migrants go back home annually, and only 9% of migrants never return to Zimbabwe – which shows that very few Zimbabweans ever really intend to make Botswana their permanent place of residence.<sup>112</sup> It is, however, important to contextualise these numbers in the situation of this study because the circular migration of Zimbabwean migrants in Botswana is not always voluntary: it commonly also happens because of deportation. The deportation of undocumented Zimbabweans in Botswana has become commonplace in Botswana and in 2019 it was reported that the Botswana government spent US\$100 000 (more than 1 million Botswana Pula at the time) a year deporting Zimbabwean migrants.<sup>113</sup> In her article, Galvin notes that ‘undocumented’ Zimbabwean migrant workers ‘do not experience deportation as a single event but as a constant threat to their transnational livelihoods and an unwelcome interruption in their daily life.’<sup>114</sup>

Deported Zimbabweans frequently return very soon after they are deported, which results in high levels of circular migration.

#### **5.4 Presence of remitting behaviour**

Another notable feature of Zimbabwe–Botswana migration is the high level of remitting behaviour. The importance and impact of remittances was discussed in Chapter 2, where it was noted that remittances are a central pillar in and often a driving force for migration. Zimbabweans

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<sup>112</sup> Campbell & Crush (n 1).

<sup>113</sup> Available at <[https://www.voanews.com/a/africa\\_botswana-battles-influx-zimbabwean-illegal-immigrants/6173868.html](https://www.voanews.com/a/africa_botswana-battles-influx-zimbabwean-illegal-immigrants/6173868.html)>.

<sup>114</sup> Galvin (n 85).

all over the world, and not only in Botswana, remit at a very high rate. In 2021 it was estimated that Zimbabweans in the diaspora remitted close to US\$1.4 billion to the country.<sup>115</sup> This money serves the very important purpose of supporting the many Zimbabweans in the country who are struggling to make ends meet due to the economic conditions in the country.

#### 5.4.1 How much is remitted?

In the context of this study, Campbell and Crush note in their paper that 80% of Zimbabwean migrants in Botswana reported to have remitted some money in the previous year, 32% saying that they remitted monthly and a further 35% a couple of times in a year. The study also found a relationship between the incidence of remitting and the amount of time spent in Botswana: the longer someone stayed in the country, the more likely they were to remit: more than 33% who had migrated in less than a year had not sent remittances, and 16% who had been present in Botswana for between one to two years who had not, compared to the 1% who had been in the country for three to five years and did not remit. These data indicate that a certain level of stability increases the likelihood of higher levels of remitting behaviour.

In a more recent (2018) study, the Finmark Trust<sup>116</sup> put the number of Zimbabweans in Botswana who sent money home regularly at 72%, with more than 70% of participants in the study saying that they had remitted once every three months and 44% reporting that they remitted once a month.

Regarding how much and when they remitted funds, the study revealed:

- 9% said they do not send any money at all;
- 1% said they send less than P20 a month;
- 3% reported that they send between P20 and P50;
- 10% said they sent between P51 and P100.
- 5% said they remitted P101 and P200;
- 10% said they send between P201 and P400; and
- 61% stated they send more than P400.

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<sup>115</sup> Available at <<https://www.newzimbabwe.com/new-alliance-targets-zimbabwes-us1-billion-remittance-market/>>.

<sup>116</sup> Available at <[https://finmark.org.za/system/documents/files/000/000/195/original/Understanding-remittances-from-Botswana-to-Zimbabwe\\_July2018.pdf?1601972069](https://finmark.org.za/system/documents/files/000/000/195/original/Understanding-remittances-from-Botswana-to-Zimbabwe_July2018.pdf?1601972069)>.

Therefore, a large proportion (almost two-thirds) of Zimbabwean migrants send more than P400 home every month, and 71% send more than P200.

#### 5.4.2 Reasons for remitting

The reasons that Zimbabweans give for sending money home are predominantly in relation to supporting their families to meet their basic needs in the context of the economic crisis in Zimbabwe. Moreover, some studies show that as many as 57% of participants state this as the primary reason. These necessities are usually the purchase of food, medical costs, school fees, transportation and clothing.<sup>117</sup> Very few stated that they are sending money for secondary needs such as starting businesses or accumulating savings.<sup>118</sup> This indicates strongly that the money remitted to Zimbabwe from migrant family members in Botswana is largely for the *day-to-day survival* of those they left behind.

Although not financial remittances as such, many Zimbabweans also send goods home, most especially food parcels due to the rising food prices and erosion of the value of the currency in Zimbabwe.<sup>119</sup> This again aptly indicates that those who remit either funds or goods to their families in Zimbabwe are doing so in order to fulfil their basic needs. Some studies put the number of those who send goods home to be as high as 70%, although goods are generally remitted less frequently than money.

### 5.5 Feminised migration

Another important dynamic of modern-day Zimbabwe–Botswana movements is that, in line with the international trend, it has become increasingly feminised – or at least women are now being seen as independent migrators. But, as discussed in Chapter 3, whereas the SADC region has a long history of migration, there has been less documentation about its feminisation.

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<sup>117</sup> Campbell & Crush (n 1).

<sup>118</sup> Campbell & Cush (n 1). Only 7% of the migrants said they remitted in order to start or run a business and even fewer (3%) said that remittances were for savings.

<sup>119</sup> Available at <[https://finmark.org.za/system/documents/files/000/000/195/original/Understanding-remittances-from-Botswana-to-Zimbabwe\\_July2018.pdf?1601972069](https://finmark.org.za/system/documents/files/000/000/195/original/Understanding-remittances-from-Botswana-to-Zimbabwe_July2018.pdf?1601972069)>.

In Chapters 1 and 2 it was noted that on average international statistics demonstrate that in recent years women migrants make up close to 50% of those who cross borders. This, though, has not been found to be the case in southern Africa, where women account for less than 15% of cross-border or international migrants.<sup>120</sup> To this statistic, however, the exception is Zimbabwe, where estimates tell us that 44% of those crossing from Zimbabwe are women.<sup>121</sup> Therefore we are seeing a much higher rate of cross-border migration of women from Zimbabwe than from other southern African states, and the reasons for this are explored below.

### 5.5.1 Causes of feminised migration from Zimbabwe

Aside from the political and economic challenges faced by Zimbabwe which have been detailed above, the increased movement of women from the country can also be ascribed to various socio-economic developments in Zimbabwe. The explanations of the contemporary migration of women find their roots as far back as early post-independence, when Zimbabwe implemented free compulsory education. This had the effect of increasing literacy among women and, consequently, making them more independent.<sup>122</sup> In addition, the rise of the women's rights movement in the 1970s and 1980s in the context of the women in development movement<sup>123</sup> and the Beijing Platform for Action<sup>124</sup> encouraged gender equality in Zimbabwe, as it did elsewhere in the world. This was seen through the progressive abolishment of laws which were harmful to the status of women – such as those which limited women's right to own property<sup>125</sup> – and the implementation of affirmative action policies in the public sector.<sup>126</sup> This saw women become increasingly emancipated and more and more equal in status to men.

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<sup>120</sup> B Dodson, H Simelane, D Tevara, T Green, A Chikanda & F de Vletter. (2008). *Gender, Migration and Remittances in Southern Africa*. Southern African Migration Programme (SAMP) Migration Policy Series No 49, i–52.

<sup>121</sup> J Crush & D Tevara. (2010). *Zimbabwe's Exodus: Crisis, Migration, Survival*. International Development Research Centre, 10.

<sup>122</sup> YK Gibbs. (2005). Zimbabwe's public education system reforms: Successes and challenges. *International Education Journal* 6(1): 65–74. Available at <<http://iej.cjb.net>>.

<sup>123</sup> K Law. (2014). Shereen Essof: Shemurenga – the Zimbabwe women's movement 1995–2000. *International Feminist Journal of Politics* 16(1): 166–168. doi: 10.1080/14616742.2013.876294.

<sup>124</sup> Available at <<https://www.un.org/womenwatch/daw/beijing/platform/>>.

<sup>125</sup> Under the Matrimonial Causes Act 35 of 1985.

<sup>126</sup> Affirmative action constitutes an exception to the general prohibition of discrimination. Therefore, the same section of the Constitution of Zimbabwe prohibits discrimination while simultaneously permitting it in the form of affirmative action. Section 56 subsection 6's affirmative action allows differentiation of treatment on prohibited grounds but for causes specified therein.

The HIV/AIDS pandemic in the 1990s also had an impact. It was around this time that women-headed households became increasingly more prevalent in Zimbabwe and this social rearrangement forced women to migrate and seek livelihood opportunities in order to support their families. This was also coupled with a growing number of women who were more open to separating from their spouses or remaining unmarried altogether.<sup>127</sup>

The economic and political instability which began to intensify after 2000 was, however, probably the most compelling factor to force women in Zimbabwe to look to alternative survival strategies such as international migration in order to seek viable livelihoods. The economic liberalisation programmes introduced under the ESAP, for instance, had a disproportionately negative impact on women as they resulted in limited access to employment opportunities in addition to reduced access to basic services. And this caused an increase in the demands on women's time in order to make up for these gaps, which were the result of cuts in services. Tekere goes so far as to say that 'women were the casualties of liberalisation' in Zimbabwe.<sup>128</sup> Therefore, as the standard of living continued to drop in Zimbabwe and the lives of women became increasingly more difficult, many were forced to leave the country in search of a better life, many of them choosing Botswana as their destination. However, owing to the discriminatory practices in Botswana – against Zimbabwean migrants in particular – the situation of women migrants in the country is often quite precarious. The state they find themselves in is as a result of various factors which can have an impact on their migration experience.

The next section of this chapter is therefore dedicated to discussing the sociological context of Zimbabwean women migrants who are the case study of this research.

### **5.6 Case study's sociological context: Zimbabwean migrant women in Botswana**

This socio-legal study requires examining the personal social factors that drive women's migration and that shape their experience of migration. As a feminist study, this section pays specific

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<sup>127</sup> M Haralambos & M Holborn. (1991). *Sociology: Themes and Perspectives* (3 ed). New York: HarperCollins, 307.

<sup>128</sup> M Tekere. (2001). *Trade Liberalisation under Structural Economic Adjustment – Impact on Social Welfare in Zimbabwe*. The Poverty Reduction Forum: Structural Adjustment Program Review Initiative.

attention to the way in which gender interacts with other social factors and how this has an impact on Zimbabwean women migrants who cross into Botswana.

### **5.6.1 Life stage and educational/‘skills’ level**

#### 5.6.1.1 Age and life stage

In their study, Campbell and Crush found that 42% of the study’s women participants were under the age of 30, and that many of them (around 46%) were also married. It must be noted that the study also showed that women Zimbabwean migrants in Botswana are usually younger than their male counterparts, the median age being between 24 and 40 years.<sup>129</sup> This age is the common reproductive age range, which means that Zimbabwean migrant women in Botswana will have specific health needs. In their study entitled ‘Impact of internal female migration on unmet need for modern contraception in Zambia’, Almonte and Lynch indicate that migrant women are often left out of family-planning programmes and as a result may have unmet contraception needs in situations where they may want to delay childbirth.<sup>130</sup> Therefore, migrant women are at a higher risk of unplanned pregnancies. Studies also show that due to their exclusion from primary healthcare systems, migrant women are also at more risk of poorer pregnancy outcomes.<sup>131</sup> This is discussed in greater detail in the context of the case study in the next chapter.

#### 5.6.1.2 Educational and/or ‘skills’ level

Concerning skills, in 2016 it was reported that, whereas Zimbabwe’s adult literacy rate was an impressive 96%, making it the highest in the SADC region, when this number was disaggregated by gender it was found that women made up only 60% of the adult population who were literate. In addition, the school dropout rate of young women is particularly high.<sup>132</sup> Research on women migrants who leave to go to Botswana reflects this statistic as there are many women in the country

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<sup>129</sup> Campbell & Crush (n 1).

<sup>130</sup> MT Almonte & CA Lynch. (2019). Impact of internal female migration on unmet need for modern contraception in Zambia. *Reprod Health* 16: 169. Available at <<https://doi.org/10.1186/s12978-019-0803-9>>.

<sup>131</sup> F Fair, L Raben, H Watson, V Vivilaki, M van den Muijsenbergh, H Soltani H et al. (2020). Migrant women’s experiences of pregnancy, childbirth and maternity care in European countries: A systematic review. *PLoS ONE* 15(2): e0228378. Available at <<https://doi.org/10.1371/journal.pone.0228378>>.

<sup>132</sup> Available at <<https://www.mewc.org/index.php/gender-issues/education/10059-zimbabwe-many-girls-have-no-access-to-education#:~:text=Zimbabwe's%20adult%20literacy%20rate%20of,female%20students%2C%20still%20remains%20high>>.



who occupy low-wage labour positions due to their level of education. In numerous cases, women have at most an O-level (secondary high school) education.<sup>133</sup>

In their study, ‘Migrants’ self-perception of technical skills and occupational realities: A case of Zimbabwean school-leaver migrants in Botswana’,<sup>134</sup> Hondonga et al have found that education and skills level greatly affect the type of employment Zimbabweans can secure in Botswana. Having a lower level of education means that women migrants are unlikely to be able to obtain work visas as these are earmarked for those with ‘formal skills’. This inevitably relegates woman migrants from Zimbabwe into the unregulated informal sector in Botswana. This also means that they do not have the protection of the labour laws in the country. In this way, many Zimbabwean women migrants will find themselves engaging in activities such as domestic work, informal trade, hairdressing or sex work where they may face exploitation at the hands of employers and officials.

Language also appears to be barrier for many Zimbabwean migrants, at least when they first enter the country. In their research, Hondonga et al found that some of the participants in their study stated that the inability to speak the main local languages had a negative impact on their ability to find a job and this ‘prolonged durations without work and hampered negotiation skills’.<sup>135</sup> This is because, although there are many communities in Botswana who speak various indigenous languages, such as Kalanga and Ndebele (mostly in the northern parts of the country), which are also spoken in Zimbabwe, the dominant language in the country is Setswana, which is not a native language in Zimbabwe.<sup>136</sup> However, it is common that after a prolonged stay in the country, migrant women learn to speak Setswana, most likely as a survival skill.<sup>137</sup>

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<sup>133</sup> J Hondonga. (2020). Migrants’ self-perception of technical skills and occupational realities: A case of Zimbabwean school-leaver migrants in Botswana. *European Journal for Research on the Education and Learning of Adults*. 10.3384/rela.2000-7426.3385.

<sup>134</sup> Hondonga (n 133).

<sup>135</sup> Hondonga (n 133)

<sup>136</sup> A Chebane. (2016). Found and lost languages: A survey of the past and current situation of Botswana ethnic and linguistic communities. *Botswana, Notes and Records* 48(1): 160–175. Available at <<http://journals.ub.bw/index.php/bnr/articles/viewFile/862/489>>.

<sup>137</sup> Hondonga (n 133).

### 5.6.2 *Economic status – multi-dimensional poverty*

In recent years there has been a shift from understanding poverty in exclusively economic terms to a more intersectional and multi-dimensional conceptualisation. This accounts for how numerous inequalities reinforce, overlap and exacerbate one another and have an impact on the way in which people experience poverty.<sup>138</sup> In his article, ‘Can the MDGs provide a pathway to social justice? The challenge of intersecting inequalities’, Kabeer<sup>139</sup> showcases the ways in which gender cuts across inequalities and results in a particular sort of disadvantage that African women commonly face. These inequalities include a lack of access to education, nutrition, employment, decent housing and experiencing higher levels of violence. Therefore, as stated by Newman and Adesini, as it is elsewhere in most parts of the developing world, the face of multi-dimensional poverty in Zimbabwe is mainly a ‘female’ one.<sup>140</sup>

In a longitudinal study entitled ‘Multidimensional poverty in Zimbabwe: A gender perspective’ the researchers found that 16.8% of male-headed households in Zimbabwe were multi-dimensionally poor, whereas 17.3% female-headed households experienced multi-dimensional poverty in the same year. In later years this situation worsened for women: in 2017 the results were 13.3% and 19% respectively, with female-headed households facing greater multi-dimensional poverty than male-headed ones.<sup>141</sup>

The level of poverty women endure has a great impact on their migration experience. First, because in the context of Zimbabwe, where travel documents are expensive (US\$120–US\$250),<sup>142</sup> it may mean that the prospective migrant woman may not be able to afford a passport. This factor forces them to travel via irregular routes (which poses gender-specific risks, as will be discussed) and then having irregular status in Botswana, which leads them to being in irregular employment. Poverty also influences migrants’ possible travel destinations. As Murrugarra et al state, poorer

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<sup>138</sup> N Kabeer. (2010). *Can the MDGs Provide a Pathway to Social Justice? The Challenge of Intersecting Inequalities*. IDS/UN MDG Achievement Fund.

<sup>139</sup> Kabeer (n 138).

<sup>140</sup> Tekwa Newman & Jimi Adesini. (2018). Gender, poverty and inequality in the aftermath of Zimbabwe’s land reform: A transformative social policy perspective. *Journal of International Women’s Studies* 19(5): 45–62.

<sup>141</sup> M Benhura & F Mhariwa. (2021). *Multidimensional Poverty in Zimbabwe: A Gender Perspective Advanced Policy-focused Poverty Analysis in Zimbabwe*. Zimbabwe Reconstruction Fund: Policy Brief. Zimbabwe Economic Policy and Research Unit. Available at <<https://zepari.co.zw/sites/default/files/2022-03/Gender%20and%20Multidimensional%20Poverty.pdf>>.

<sup>142</sup> Cost established by acquaintance, July 2022.

migrants may opt for ‘cheaper’ locations closer to the border. This may result in lower returns,<sup>143</sup> because Gaborone, the capital city offering the greatest economic opportunities, is almost 500 km from the border at Ramakwebena used most often by Zimbabwean travellers. Moreover, poverty often increases the urgency for finding employment, causing individuals with lower income to accept jobs regardless of how exploitative the wages may be. In addition, individuals living in poverty may not have the ability to negotiate as effectively as those who are financially stable.

### ***5.6.3 Gender and factors which motivate the decision to leave***

In this thesis thus far, we have learnt that women migrate for many diverse reasons:

- escaping traditional roles assigned to them because of their gender (e.g., forced marriages);
- reuniting with family;
- fleeing political persecution;
- seeking economic emancipation; or
- sometimes a combination of factors.

The motivations which lead Zimbabweans to migrate to Botswana are equally diverse and often interdependent, as the section below shows.

#### **5.6.3.1 Economic factors and the anticipation of employment in Botswana**

As discussed in Chapter 2, economic motivations are often the main reason why migrants choose to move. In their article, ‘Migrating out of poverty in Zimbabwe’, Dzingirai et al confirm that the desire to break out of poverty is a deciding motivator for women’s migration in Zimbabwe.<sup>144</sup> In her 2019 study, ‘Meeting adversity with resilience: Survival of Zimbabwean migrant women in South Africa’, Ncube reaffirmed this when she stated:

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<sup>143</sup> E Murrugarra, J Larrison & M Sasin. (2011). *Migration and Poverty: Toward Better Opportunities for the Poor. Directions in Development; Poverty*. Washington, DC: World Bank. Available at <<https://openknowledge.worldbank.org/handle/10986/2535>>.

<sup>144</sup> V Dzingirai, E-M Egger, L Landau & N Kefasi. (2015, January). Migrating out of poverty in Zimbabwe. *SSRN Electronic Journal*. doi: 10.2139/ssrn.3300791.

The mass migration of women from Zimbabwe is mainly economic, for better living standards ... Zimbabwean women are ready to take up any available jobs, irrespective of their qualifications.<sup>145</sup>

With real unemployment, especially in rural areas, being as high as 70% in Zimbabwe,<sup>146</sup> it is only natural that women would leave their homes in search of work elsewhere. This leads us to the second part of this motivation: the anticipation of employment in Botswana, which, whether real or perceived, has been seen to be a major push factor for women in Zimbabwe to move to Botswana. As discussed in Chapter 2, such information on prospective work is usually given by contacts that the potential migrant may have in the prospective host space.<sup>147</sup> Women especially rely on family ties for their survival during the first few days that they are in a host country.<sup>148</sup>

#### 5.6.3.2 Personal and household factors

Other studies have also indicated additional factors which encourage women to leave Zimbabwe. In her study, ‘Determinants of feminization of migration in Tsholotsho District of Zimbabwe’, Thebe found that close to 30% of the participants stated that they migrated to leave unhappy marriages.<sup>149</sup> This is because the families in Zimbabwe, as with most African countries, are what she calls ‘spheres of patriarchal dominance where women live under the iron hand of their male counterparts’.<sup>150</sup> Interestingly, although women accredited their migration to failed marriages, they still avowed that they continue to believe in customary family structures where men were the heads of the households. This indicates that even women who practise great autonomy by migrating may still aspire to ascribe to hegemonic patriarchal social orders as they are deeply entrenched.

This confirms that gender informs the complex negotiations that happen in the family level when decisions to migrate are made. This is in line with Oshri’s findings of migration discussed in

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<sup>145</sup> A Ncube & YT Bahta. (2021). Meeting adversity with resilience: Survival of Zimbabwean migrant women in South Africa. *Int Migration & Integration*. Available at <<https://doi.org/10.1007/s12134-021-00878-2>>.

<sup>146</sup> Hodonga (n 134).

<sup>147</sup> M Anatol, RM Kirton & N Nanan. (2013). *Becoming an Immigration Magnet: Migrant’s Profiles and the Impact on Human Development in Trinidad and Tobago. Research Report*. The Anatol Institute of Research and Social Sciences, IOM.

<sup>148</sup> V Thebe. (2017). Two steps forward, one step back: Zimbabwean migration and South Africa’s regularising programme (the ZDP). *Journal of International Migration and Integration* 18(2): 613–622. Available at <<https://doi.org/10.1007/s12134-016-0495-8>>.

<sup>149</sup> P Thebe. (2019). Determinants of feminization of migration in Tsholotsho District of Zimbabwe. *Advances in Social Sciences Research Journal* 6(10): 297–306. doi: 10.14738/assrj.610.7297.

<sup>150</sup> Thebe (n 149).

Chapter 2 as it demonstrates how power dynamics can shape decision-making at family sites, and how women being in a subordinate role represents the status quo.

### 5.6.3.3 Providing for children

Some studies estimate that as many as 70% of Zimbabwean migrant women are mothers. Therefore, the high number of female-headed households<sup>151</sup> in Zimbabwe is another motivation for women to migrate to greener pastures so that they can make money in order to attend to their children's many needs. This is especially so in the context of the migration of women in Zimbabwe, where many leave their children at home with family members because childcare in the host country is expensive. The other reason many migrant women also choose to leave their children behind is because they are employed as domestic workers; a profession which often requires them to live in with their employers, who usually do not allow their domestic workers to live with their families. This, and other exploitative aspects of domestic work, were discussed in the southern African context in Chapter 3 and are discussed more specifically in relation to Zimbabwean women working in Botswana in Chapter 6.

The decision to leave one's children is never easy, especially for women, as they are traditionally the primary caregivers. In this regard, the Sokwanele Civic Action Support Group, an NGO based in Zimbabwe, recounted the story of a young woman who left Zimbabwe to Botswana in search of a better life.<sup>152</sup> She lamented that leaving her two starving children with her grandmother was the most difficult decision she had ever had to make:

I just dumped them at my grandmother's place in Highfield density suburb in Harare and told the granny that I am leaving for a better life either in Botswana or South Africa.<sup>153</sup>

She continued to say:

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<sup>151</sup> Female-headed households (% of households with a female head) in Zimbabwe was reported at 40.6% in 2015, according to the World Bank collection of development indicators, compiled from officially recognised sources.

<sup>152</sup> Available at <<https://reliefweb.int/report/zimbabwe/zimbabwean-refugees-suffer-botswana-and-south-africa>>.

<sup>153</sup> Available at <<https://reliefweb.int/report/zimbabwe/zimbabwean-refugees-suffer-botswana-and-south-africa>>.

I shed my tears before embarking on the 760-kilometre journey to Gaborone. Right now, I don't know whether my children have had a decent meal during the past three weeks because my grandmother is poor, and she receives Z\$100 000 per month from the Department of Social Welfare. This is hardly enough to buy two loaves of bread.<sup>154</sup>

From information presented here we can ascertain that the prototypical woman migrant worker who makes the journey from Zimbabwe to Botswana is embarking on a mission filled with perilous challenges and grave uncertainties. With an intricate interplay of social, economic, and personal factors informing her decision to migrate, she is already positioned at a disadvantage. The experiences she brings from her home country, such as the repercussions of poverty, the struggle against traditional patriarchal systems, the urgency to provide for her children, and the low level of formal education or skills, have already set her up against numerous odds. It is also important to remember that each of these individual experiences does not exist in isolation. Instead, they coexist, intertwine, and compound to create a situation of multi-dimensional disadvantage.

Her sociological context, marked by her gender, age, marital status, and level of education, among others, significantly influences her migration experience. They shape her opportunities and vulnerabilities in the host country, ultimately determining her socio-economic outcomes. Her low socio-economic status and formal educational attainment, coupled with language barriers, can relegate her to low-paying, unstable, and often exploitative jobs, further exacerbating her vulnerability.

Even before she sets foot on Botswana's soil, her status and gender have already made her journey much more difficult than that of her male counterparts. Once she arrives, these same factors continue to play a role, influencing her access to services, legal protection, and resources. They also shape her ability to navigate the migration process and adapt to her new surroundings. Therefore, the prototypical Zimbabwean woman migrant worker, who comes to Botswana, already faces a unique set of challenges emanating from her social situation. She not only grapples with her immediate circumstances, but also with the deeply rooted socio-cultural norms and systemic inequalities that have shaped her experiences before, during, and after migration.

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<sup>154</sup> Available at <<https://reliefweb.int/report/zimbabwe/zimbabwean-refugees-suffer-botswana-and-south-africa>>.

#### 5.6.4 Gendered migration journey

It has previously been noted in this thesis, from Chapter 1, that gender has a profound impact on one's migration journey; Zimbabwean women travelling to Botswana are no exception. Given their age and inexperience, women migrants rely on social networks for the economic, psychological and political support they need to undertake an uncharted journey. Information on the best road routes and a communication system are vital to their success, as is knowing what the most affordable way is to travel to their destination countries.<sup>155</sup>

When women travel regularly through official border posts, they are more likely to have a safer migration journey. However, due to the fact they may not have passports for the reasons outlined above, many women opt to travel irregularly – doing what is known informally as ‘border-jumping’. In this situation the risks for a woman migrant escalate substantially.

It has been reported that the way this takes place is that when a bus reaches the Zimbabwe–Botswana border, the bus driver asks those passengers who are ‘not okay’ to leave the bus at this point. They then pay the driver P300 (approximately US\$30) to smuggle them through the clandestine, irregular course into Botswana. Thereafter, the driver returns to the bus to drive to the border with those passengers who can cross legally.<sup>156</sup> Women who undertake this journey face numerous risks. Many report encountering the notorious *amagumaguma* gangs, who routinely ambush those who jump the border through these channels, robbing them of their possessions and in some cases raping them. Even for those women who are lucky enough to not meet the gangs on their journey, there is still the psychological torture that persists throughout their journey as they know they may be ambushed at any time.<sup>157</sup> During the Covid-19 pandemic border closures and lockdowns, these dangers became acutely more widespread because research indicates that the migration of Zimbabweans was not stopped by border closures. The only result was an increase in movement by alternative and more dangerous routes, which had the most impact on women migrants due to the specific vulnerabilities they face.

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<sup>155</sup> United Nations. (2017). *Making Migration Work for All*. Report of the Secretary-General 72 Session. Available at <[https://refugeesmigrants.un.org/sites/default/files/sg\\_report\\_en.pdf](https://refugeesmigrants.un.org/sites/default/files/sg_report_en.pdf)>.

<sup>156</sup> Available at <<https://reliefweb.int/report/zimbabwe/zimbabwean-refugees-suffer-botswana-and-south-africa>>.

<sup>157</sup> Available at <<https://deeply.thenewhumanitarian.org/refugees/articles/2017/03/30/border-jumping-puts-zimbabwean-women-at-risk-of-sexual-abuse-2>>.

### 5.6.5 *Destination country*

#### 5.6.5.1 Gender, irregular status and informal employment

Several factors outlined in this section intersect and culminate in a situation which results in women migrants from Zimbabwe having irregular status in Botswana. These form part of the ‘gendered routes to irregularity’ discussed in the previous chapter. This arises not only because of their age and inexperience with the complex immigration system but also at times from the fact they do not possess official travel documents due to the problems of access and affordability. Even when they do possess passports, they cannot obtain work visas without the necessary qualifying education and skills, and they often enter ‘irregular employment’ because they are forced to work in the informal economy. In addition, many women who have passports may also enter irregularly because they overstay their 90-day visas as they fear returning home and then re-entering Botswana, which will inevitably re-expose them to risks related to transit such as robbery and rape.<sup>158</sup> Life is assuredly a minefield for the Zimbabwean woman migrant in Botswana.

With their irregular status, many Zimbabwean women are unlikely to obtain work in the formal sector in Botswana which means that they operate in the unregulated black or shadow economy.<sup>159</sup> This also means being relegated to working in quintessentially feminised professions such as hairdressing, domestic work, ‘piece jobs’<sup>160</sup> or at times even sex work, which offer little or no legal and social protection. Some will use combinations of these to get by. This is discussed in the next chapter: how working informally exposes women migrants to dangers and risks at the hands of officials and employers.

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<sup>158</sup> T Matose, G Maviza, W Njabulo & N Njabulo. (2022). Pervasive irregular migration and the vulnerabilities of irregular female migrants at Plumtree border post in Zimbabwe. *Journal of Migration and Health* 5. Available at <<https://doi.org/10.1016/j.jmh.2022.100091>>.

<sup>159</sup> A segment of a country’s economic activity that is derived from sources that fall outside of the country’s rules and regulations regarding commerce.

<sup>160</sup> A phrase used to refer to a part-time job when an employer commonly pays a worker a fixed rate per completion of duties (‘piece’) rather than an hourly rate.



## 5.7 Conclusions

In conclusion, this chapter has shed light on the numerous economic, social, and political challenges that have compelled many Zimbabweans, including women, to seek refuge beyond their borders. The deteriorating state of the Zimbabwean economy has driven people from all walks of life to search for better opportunities elsewhere, making migration a common phenomenon for both professionals and low-wage labourers, irrespective of age or gender.

Among this diverse group of migrants, Zimbabwean women, as highlighted in the previous section, often find themselves employed in the informal sector, making them more susceptible to human rights violations. The subsequent chapter will undertake a critical analysis of how the laws and regulations in Botswana impact the ability of Zimbabwean women migrants to realise their rights within the context of their sociological realities.

By examining the legal framework governing migrants in Botswana, we aim to identify the specific barriers and challenges faced by Zimbabwean women in accessing their fundamental human rights. Moreover, we will explore how societal attitudes and prevailing cultural norms in Botswana influence the treatment and opportunities available to these women. This investigation seeks to unravel the interconnectedness between the legal system, societal context, and the well-being of Zimbabwean women in Botswana, with the ultimate goal of proposing actionable solutions and policy adjustments to empower and protect these vulnerable migrants.

## 6: Law and the human rights situation of Zimbabwean migrant women who work in Botswana's informal economy

*The law was against me.*<sup>1</sup>

### 6.1. Introduction

The previous chapters have laid a foundation for the enquiry in this chapter which – through a socio-legal lens – examines the human rights of Zimbabwean women who have migrated to work in Botswana's informal economy. A case-study approach is used. The analysis focuses on the social characteristics of these women as irregular or undocumented migrants, and the impact the regulatory system in Botswana has on their situation. The goal of the analysis is to gain a deeper understanding of the challenges and experiences of these women as migrants in Botswana.

This socio-legal investigation begins by placing Botswana in context and explaining the male-dominated societal structure of the country that disadvantages women disproportionately in various ways. The next part discusses the domestic legislation in place that specifically regulates Zimbabwean women migrants who work in Botswana's informal economy. The chapter discusses the international law human rights framework applicable to migrant women in Botswana. Next, the chapter examines how laws in Botswana impact the extent to which women Zimbabwean migrants in Botswana have their human rights realised (or not) at different stages of the migration process (in transit, in the host country, at deportation stage). This is done by using the thematic approach, based on the information gathered from the literature we have reviewed, and the findings presented in the previous five chapters. The specific rights discussed include the right:

- to dignity
- to non-discrimination
- to security of persons
- to be free from sexual exploitation, protections against trafficking
- to asylum
- to health

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<sup>1</sup> Human Rights Watch. (2012). *The Law Was Against Me: Migrant Women's Access to Protection from Family Violence in Belgium*. Available at <<https://www.hrw.org/report/2012/11/08/law-was-against-me/migrant-womens-access-protection-family-violence-belgium>>.

- to nationality of children borne to migrant women
- to work and protections against labour exploitation
- to family life
- to protection against arbitrary arrest and detention, procedural safeguards in collective expulsion proceedings
- to protection against cruel, inhuman and degrading treatment.

Finally, the chapter analyses this information through the lens of the research question, followed by presenting conclusions based on the information that has been presented.

## **6.2. Botswana country profile**

### **6.2.1. Background**

The Republic Botswana is a landlocked country located in southern Africa that is surrounded by Zambia, Zimbabwe, South Africa and Namibia. It has a parliamentary republic form of government and holds elections every five years.<sup>2</sup> Previously a British protectorate, Botswana gained its independence in 1966.<sup>3</sup> The country's Constitution,<sup>4</sup> which was put in place a year before independence, establishes the laws that govern the state. A significant feature of the Constitution is the Bill of Rights,<sup>5</sup> which ensures the fundamental rights and freedoms of individuals, including freedom of expression,<sup>6</sup> freedom of conscience,<sup>7</sup> and protection of personal liberty.<sup>8</sup> However, the Constitution of Botswana does not explicitly mention economic, social and cultural rights.

Botswana has gained recognition from the global community for its impressive transformation from a least-developed country with a low gross domestic product (GDP) per capita at the time of its independence in 1966 to one of the fastest-growing economies in the world today, boasting

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<sup>2</sup> E Botlhale & K Lotshwao. (2013). The uneasy relationship between parliament and the executive in Botswana. *Botswana Notes and Records* 45: 39–51. Available at <<http://www.jstor.org/stable/90024373>>.

<sup>3</sup> Botswana Independence Act 1966.

<sup>4</sup> Constitution of Botswana, 30 September 1966.

<sup>5</sup> Chapter II of the Constitution of Botswana.

<sup>6</sup> Section 12.

<sup>7</sup> Section 11.

<sup>8</sup> Section 5.

upper-middle-income, developing-country status.<sup>9</sup> Prior to independence, Botswana was one of the poorest countries in the world with an annual GDP per capita of approximately US\$70.<sup>10</sup> At independence, Botswana was described as ‘destined to be an international charity case’.<sup>11</sup> However, through good governance, revenue from diamond mining and effective economic management, Botswana has experienced significant economic growth and now has a GDP per capita of around US\$7 347 per year<sup>12</sup> – currently one of the highest in Africa. (In contrast, Zimbabwe’s GDP per capita in 2021 was US\$1 737.)<sup>13</sup> The country’s economy is driven primarily by mineral mining, beef production and tourism.<sup>14</sup>



### 6.2.2. Botswana and human rights

Botswana has a reputation for promoting and respecting human rights, which has contributed to its success in the international community. This commitment to human rights has played a significant role in the country’s development and has been cited as a key factor in its economic growth and political stability. Some analysts attribute Botswana’s success to its responsible

<sup>9</sup> M Lewin. (nd). *Botswana’s Success: Good Governance, Good Policies, and Good Luck*. Washington, DC: World Bank. Available at <[https://documents1.worldbank.org/curated/en/304221468001788072/930107812\\_201408253094647/additional/634310PUB0Yes0061512B09780821387450.pdf](https://documents1.worldbank.org/curated/en/304221468001788072/930107812_201408253094647/additional/634310PUB0Yes0061512B09780821387450.pdf)>.

<sup>10</sup> Lewin (n 9) 1.

<sup>11</sup> Charles King. (nd). *Southern News Services* (see newspaper insert).

<sup>12</sup> Statista. (nd). *Botswana: Gross Domestic Product (GDP) per Capita in Current Prices from 1987 to 2027*. Available at <<https://www.statista.com/statistics/407841/gross-domestic-product-gdp-per-capita-in-botswana/>>.

<sup>13</sup> The World Bank. (nd). *GDP per Capita (Current US\$) – Zimbabwe*. Available at <<https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZW>>.

<sup>14</sup> Lewin (n 9).

governance, but it can also be argued that the incorporation of human rights into policymaking has been instrumental in the country's success.<sup>15</sup>

Recognising the insurmountable economic and developmental challenges faced by the young state in 1966, Seretse Khama's<sup>16</sup> government ensured that the values of a 'free, tolerant, and rights-respecting' nation were embedded in its policy agenda.<sup>17</sup> Because it was a small country with little geopolitical power, Botswana chose to concentrate rather on building its *moral* power base. As the former president, the late Quett Masire, famously asserted: 'When you are weak, you have to stick to principles.'<sup>18</sup> This approach was so fundamental that Kirby has stated that 'for Botswana, a strong reputation of human rights became essential for *survival*'.<sup>19</sup> Kirby notes that the country achieved this in two ways: first, at liberation the Botswana Democratic Party (BDP) committed itself to liberal-democratic freedoms through democratic pluralism. This was at the time when many African states were opting for one-party models; claiming that authoritarian states<sup>20</sup> were better for development<sup>21</sup> and national security. Second, the BDP enunciated the importance of individual rights. At a time when black Africans were being racially discriminated against in all spheres of life, the BDP resisted the temptation to adopt anti-white sentiments, instead it chose to embrace non-racialism as a policy. Equal rights for people of all races are therefore enshrined in the Bill of Rights of the Constitution. Everyone in Botswana enjoys individual rights to 'life and personal liberty; freedoms of expression, assembly and association, and protections against racial discrimination and inhuman treatment'.<sup>22</sup> Since then, Botswana has managed to maintain one of

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<sup>15</sup> JC Kirby. (2019). 'When you are weak, you have to stick to principles': Botswana and anticolonialism in human rights history. In J Quataert & L Wildenthal (eds), *The Routledge History of Human Rights*. London: Routledge. Available at <<https://doi.org/10.4324/9780429324376>>.

<sup>16</sup> The first democratically elected president of Botswana; see S Khama. (1970). *Botswana and Southern Africa*. Pretoria: Government Printer.

<sup>17</sup> JC Kirby. (2021). More than a united kingdom: How Botswana became a powerful example for human rights in Africa. *Open Global Rights*. Available at < <https://www.openglobalrights.org/how-botswana-became-a-powerful-example-for-human-rights-in-africa/>>

<sup>18</sup> Kirby (n 15).

<sup>19</sup> Kirby (n 17).

<sup>20</sup> A Kalu. (2019). How colonial rule predisposed Africa to fragile authoritarianism. *The Conversation*, 15 January 2019. Available at <<https://theconversation.com/how-colonial-rule-predisposed-africa-to-fragile-authoritarianism-109398>>.

<sup>21</sup> Rhoda E Howard-Hassmann. (1983). The full-belly thesis: Should economic rights take priority over civil and political rights? Evidence from sub-Saharan Africa. *Political Science Faculty Publications* 17. Available at <[https://scholars.wlu.ca/poli\\_faculty/17](https://scholars.wlu.ca/poli_faculty/17)>.

<sup>22</sup> Constitution of Botswana, 30 September 1966.

the most respected human rights records in Africa and is known internationally as a country associated with democracy, freedom and racial equity.<sup>23</sup>

This section is not meant to present Botswana as a perfect model of human rights, but rather to illustrate that the country was founded on human rights principles and demonstrate the benefits of incorporating human rights in policymaking can have on a state's core interests. It is important to note that, as the rest of this chapter explains, Botswana is not without its human rights challenges.

### **6.2.3. Women's rights in Botswana**

In 1995 Botswana endorsed the Beijing Platform for Action,<sup>24</sup> the outcome of the Fourth World Conference on Women held from 4 to 15 September 1995 in Beijing, China,

Thus, committing itself to changing the status of women through promoting their full and equal participation in development including enjoyment of their rights.<sup>25</sup>

Of the 12 critical areas of concern<sup>26</sup> identified at Beijing, Botswana chose to concentrate on six:

- women and poverty including economic empowerment;
- women, power-sharing, and decision-making;
- education and training of women;
- women and health;
- violence against women; and
- the girl child.

After choosing these six key areas, Botswana went on to formulate the National Gender Programme Framework (NGPF).<sup>27</sup> Several documents emerged from the NGPF:

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<sup>23</sup> Lewin (n 9).

<sup>24</sup> United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995. Available at <<https://www.refworld.org/docid/3dde04324.html>>.

<sup>25</sup> UNDP Botswana & Women's Affairs Department. (2003). *Report of the Gender Mainstreaming Project with the Four Pilot Ministries*. Botswana: UNDP, 3.

<sup>26</sup> Women and Poverty, Education and Training of Women, Women and Health, Violence against Women, Women and Armed Conflict, Women and the Economy, Women in Power and Decision Making, Institutional Mechanisms for the Advancement of Women, Human Rights of Women, Women and the Media, Women and Environment, The Girl Child.

<sup>27</sup> Government of Botswana. (1998). *National Gender Programme Framework*. Gaborone: Government Printers.

- the popular version;
- the advocacy and social mobilisation strategy; and
- the short-term plan of action 1999–2003.

All interventions planned by the government based on these documents were coordinated by the then Women’s Affairs Department (WAD) and the Ministry of Home Affairs. Various initiatives followed. In 1996, Botswana acceded to the Convention on the Elimination of Discrimination against Women (CEDAW), which was also translated into Setswana in the same year. Again in 1996, the country put in place a National Policy on Women in Development which had the goal of ‘effective integration and empowering of women in order to improve their status, enhance participation in decision making and their role in the development process’.<sup>28</sup> In 1997, the *Vision 2016*<sup>29</sup> document acknowledged the importance of gender in development. The subsequent *Vision 2036*<sup>30</sup> document includes specific targets for increasing the participation and representation of women in leadership and decision-making roles, and for addressing issues such as gender-based violence and discrimination. It also emphasises the importance of promoting gender-responsive policies and programmes in sectors such as education, health and economic development.<sup>31</sup>

#### 6.2.3.1 A patriarchal society

Despite current government efforts to enhance women’s rights, male domination is the prevailing social culture of Botswana – as in many other African countries. ‘Popular culture forms, folkloric elements, and other traditional narrative formations’<sup>32</sup> operate in the country to create a patriarchal society, characterised by beliefs, cultural norms and practices that perpetuate gender inequalities.<sup>33</sup> For example, patrilineal succession, in which males are sole heirs, is still widely practised under customary law systems (despite being overturned by the High Court). A bride price or *Bogadi* – a disbursement to a would-be bride’s family by a would-be husband for transferring of ownership

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<sup>28</sup> Government of Botswana. (1996). *National Policy on Women in Development*. Gaborone: Government Printers.

<sup>29</sup> Government of Botswana. (1996). *Vision 2016: A Long-term Vision for Botswana*. Gaborone: Government Printers.

<sup>30</sup> Government of Botswana. (2016). *Vision 2036: Achieving Prosperity for All*. Gaborone: Government Printers.

<sup>31</sup> Government of Botswana (n 30).

<sup>32</sup> C Rapoo. (2013). Constructions of traditional womanhood in Botswana myths and popular culture. *PULA: Botswana Journal of African Studies* 27(48): 5–25.

<sup>33</sup> Rapoo (n 32).

of the woman from one family to another – is exchanged in nearly all marriages in the country.<sup>34</sup> Moreover, many cultural idioms reflect women in a lesser light than men. For example, a common saying, ‘*ga di nke ke etelelwa ke manamagadi pele, di ka wela selomo – Banna ke baeteledipele ka tholego*’, translates as ‘a group of oxen is never led by females, otherwise the oxen will fall into a ditch’. This reinforces the cultural perception that men are natural leaders, whereas a woman leader would lead people astray.<sup>35</sup> It is in this context that although Botswana has always scored highly in other social indicators, it has not done so in terms of gender parity, even though there have been some improvements. The 2019 Gender Inequality Index (GII) ranked Botswana 116 among 162 countries, with a GII of 0.465.<sup>36</sup> In this way, it can be claimed that the human rights of women in Botswana are not fully realised. Although the country has made strides in closing the gender gap in education,<sup>37</sup> women still make up the larger proportion of the unemployed in the country.<sup>38</sup> As far as healthcare is concerned, they are also twice as likely as men to be infected with HIV in Botswana and represent the majority of those infected by the disease.<sup>39</sup> Women also experience widespread endemic levels of gender-based violence, as the most recent statistics state that more than two-thirds of women in Botswana are reported to have suffered some form of violence. Similarly, although women make up the larger percentage of the voting populace,<sup>40</sup> they constitute less than 15% of political leadership, with women parliamentary membership standing at a mere 11% in 2022.<sup>41</sup> Women in Botswana also face discrimination in the workplace as they are often paid less than men for the same work and are under-represented in organisational leadership positions.<sup>42</sup>

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<sup>34</sup> Rapoo (n 32).

<sup>35</sup> Rapoo (n 32).

<sup>36</sup> UNDP. (2019). *Gender Inequality Index (GII), Human Development Reports*. Available at <<https://hdr.undp.org/data-center/thematic-composite-indices/gender-inequality-index#/indicies/GII>>.

<sup>37</sup> *Sunday Standard*. (nd). *Botswana Achieves Parity in Education, Health*. Available at <<https://www.sundaystandard.info/botswana-achieves-parity-in-education-health/>>.

<sup>38</sup> Mufaro Matandare. (2018). Botswana unemployment rate trends by gender: Relative analysis with upper middle income southern African countries (2000–2016). *Dutch Journal of Finance and Management* 2. 10.20897/djfm/3837.

<sup>39</sup> UNICEF. (nd). *Botswana: HIV*. Available at <<https://www.unicef.org/botswana/hiv>>.

<sup>40</sup> MB Phirinyane (ed). (2013). *Elections and the Management of Diversity in Botswana*. Botswana Institute for Development Policy Analysis, No 101, 40. Available at <<https://econpapers.repec.org/RePEc:bid:books1:101>>.

<sup>41</sup> Gender Quotas Database, Botswana. (nd). Available at <<https://www.idea.int/data-tools/data/gender-quotas/country-view/71/35>>.

<sup>42</sup> TS Modesto. (2016). Women in management: The case for Botswana. *Journal of Social Sciences* 47(3): 123–134. Available at <<https://www.idpublications.org/wp-content/uploads/2016/03/Full-Paper-WOMEN-IN-MANAGEMENT-THE-CASE-FOR-BOTSWANA.pdf>>.



#### 6.2.4. *Gender and migration in Botswana*

International inward migration in Botswana has traditionally been dominated by men, with women making up a minority of migrants.<sup>43</sup> However, recent years have seen a shift to a more gender-balanced pattern of migration. This change is due in part to increased opportunities for women in the job market and the fact that women are increasingly taking on the role of primary breadwinners in their families. One reason for this trend is the high demand for women workers in certain industries such as healthcare and education,<sup>44</sup> where positions have been filled by migrant women – specifically Zimbabwean women. Another factor driving this change is the great demand for domestic workers in Botswana<sup>45</sup> and women migrants often take up these positions. Many women from neighbouring countries such as Zimbabwe and Namibia migrate to Botswana to work as nannies, housekeepers and caregivers. Consequently, Peberdy and Dinat report that ‘migrancy [is] a defining feature of the lives of a majority of the domestic workers.’<sup>46</sup>

Women also engage in other types of informal work such as sex work and hairdressing. This is supported by Kiwanuka and Monson who identified that: ‘Some female (Zimbabwean) migrants are reported to be engaged in commercial sex for survival and to supplement meagre incomes.’<sup>47</sup> As these jobs are mostly informal and do not offer the same protections or benefits as formal employment, this leads to vulnerability and the exploitation of many women migrants. The rights of Zimbabwean migrant women in Botswana have therefore often been a subject of concern as they may face various forms of discrimination and abuse. Migrant women, particularly those who are undocumented or working in the informal sector, are particularly vulnerable to exploitation and abuse because they lack legal protection and have limited access to justice. This is also true

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<sup>43</sup> K Lefko-Everett. (2004). *Botswana’s Changing Migration Patterns*. Available at <migrationpolicy.org>.

<sup>44</sup> O Nkomazana, W Peersman, M Willcox, R Mash & N Phaladze. (2014). Human resources for health in Botswana: The results of in-country database and reports analysis. *Afr J Prim Health Care Fam Med* 6(1): e1–8. doi: 10.4102/phcfm.v6i1.716. PMID: 26245420; PMCID: PMC4564932; Betty Jean Brown & Salomé Schulze. (2007). Teacher migration to Botswana: Causes and implications for human resources management in education. *Africa Education Review* 4: 1–25.

<sup>45</sup> Ditshwanelo. (1996). *Domestic Workers in Botswana: An Action Research Report*. Gaborone: Ditshwanelo.

<sup>46</sup> Sally Peberdy & Natalya Dinat. (2005). *Migration and Domestic Workers: Worlds of Work, Health and Mobility in Johannesburg*. Migration Policy Series No 40. Johannesburg: South African Migration Project.

<sup>47</sup> M Kiwanuka & T Tamlyn Monson. (2009). *Zimbabwean Migration into Southern Africa: New Trends and Responses*. Forced Migration Studies Programme at the University of the Witwatersrand. Available at <<https://www.semanticscholar.org/paper/Zimbabwean-migration-into-Southern-Africa%3A-new-and-Kiwanuka-Monson/12847e6e1df31cc63788c267e6221a1b1e70cf96>>.

for those working in low-skilled and informal occupations, such as domestic work and agriculture, where they may be subject to long working hours, low pay and poor working conditions.<sup>48</sup>

### **6.3. Legal and normative framework applicable to Zimbabwean women migrants in Botswana**

#### ***6.3.1. Status of international law in Botswana: low ratification rates and domestication challenges***

Before examining the legal and normative human rights framework that governs women migrants in Botswana, it is practical to first recognise the challenges that the country faces in the context of international law. Two of the greatest challenges that Botswana faces in applying the human rights framework in the country is that, first, it has not ratified all key human rights instruments. The three leading examples of instruments relevant to this thesis are:

- the International Covenant on Economic, Social and Cultural Rights;
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; and
- the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Second, even when they are ratified, Botswana, as is the case in many other countries in the Southern African Development Community (SADC) that follow a common-law legal system, has a dualist approach to international agreements that it has ratified. This means that these agreements are not considered part of domestic law unless they are specifically incorporated through national legislation. In this way, Botswana's weak protection of the human rights of migrant women falls in the 'rights: rhetoric vs reality' trap discussed in Chapter 4 where rights exist in theory but are not enforced due to lack of domestication into national law. However, even if these international agreements have not been fully adopted into domestic law, courts in Botswana<sup>49</sup> have increasingly considered them and awarded them persuasive value when making decisions. These agreements may also be used by the courts for interpretation purposes, in the same way as foreign

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<sup>48</sup> E Campbell & J Crush. (2012). *Unfriendly Neighbours: Contemporary Migration from Zimbabwe to Botswana*. Available at <<https://scholars.wlu.ca/samp/33/>>.

<sup>49</sup> See *Mmusi & Others v Ramantele & Another* 2012 Mahlb-000836-10; *Botswana – Attorney-General v Dow*, Appeal Court, 1994 (6) BCLR 1.

jurisprudence.<sup>50</sup> Therefore, while a migrant whose rights has been violated may not be able to bring a case based solely on international standards that have been ratified by Botswana, these standards can still be used to support the argument that Botswana should uphold its domestic legal framework and in line with its obligations under international law.

### 6.3.2. Domestic legislative and policy framework

This section explores the laws of Botswana that affect the rights of Zimbabwean women who have migrated there. Because Botswana follows a dualist system that necessitates the incorporation of international standards into domestic law before they can be enforced, the domestic legal framework within the country is the most significant factor in protecting the human rights of migrant women. It is important to acknowledge that the list of laws and policies used for the purpose of this thesis may not cover all the regulations that could potentially affect Zimbabwean women migrants.

#### 6.3.2.1 *Botho* as overarching national human rights principle: What is *botho*?

*Botho* is an ethical concept present in many African cultures which derives from an age-old Setswana phrase ‘*motho ke motho ka ba bangwe*’, this loosely translates as ‘a person is a person through other persons’.<sup>51</sup> Authors have generally described *botho* as a philosophy of life which represents ‘humaneness, personhood, morality and humanity’<sup>52</sup> – it is believed to be the ultimate form of African humanism. In Zimbabwe, where it is called *hunhu*, it is said to mean ‘humanness to the fullest and noblest sense’. Samkange and Samkange state that in context of Zimbabwe it is understood as

the attention one human being gives to another: the kindness, courtesy, consideration and friendliness in the relationship between people, a code of behaviour, an attitude to others and to life.<sup>53</sup>

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<sup>50</sup> CM Fombad (2013). The Botswana legal system. In MM Modiri & MRM Mokgethi (eds), *The African Union and Its Institutions*. Pretoria: Pretoria University Law Press, 435–458.

<sup>51</sup> TM Gareegope. (nd). *Aspect of Botho/Ubuntu in Botswana*. Gaborone: University of Botswana. Available at <<https://journals.ub.bw/index.php/ubl/article/view/2055/1318>>.

<sup>52</sup> Gareegope (n 51).

<sup>53</sup> SJ Samkange & TM Samkange. (1980). *Hunhuism or Ubuntuism: A Zimbabwe Indigenous Political Philosophy*. Harare: Graham Publishing. Available at <<https://philpapers.org/rec/SAMHOU>>.

*Botho* has also been described as humanity, encompassing humaneness or the way in which people can understand and emulate the ideal behaviour of human beings.<sup>54</sup> However, given its presence in many African cultures, nations often devise their own unique understanding of this concept.<sup>55</sup> On this topic, Dolamo has said: ‘African nations should craft their respective constitutions in a way that enshrines *botho/ubuntu* principles, with an ethic of communalism underpinning them.’<sup>56</sup> The communal nature of *botho* as an Africa principle is expressed by the fact that the foremost African human rights document, the African Charter, is called the African Charter on Human and Peoples’ Rights (my emphasis).

The concept of *botho* appears in various African countries under different guises, such as *botho* in Botswana (in Tswana tribes), consciencism in Ghana, uhuru in Kenya, negritude in Senegal, ubuntu in South Africa (in Nguni languages such as isiZulu, isiNdebele, isiXhosa and siSwati), *ujamaa* in Tanzania, humanism in Zambia, and *hunhu* in Zimbabwe.<sup>57</sup>

### 6.3.2.2 *Botho* in the Botswana context

In Botswana, *botho* is a cultural concept that is an integral to and deeply ingrained in the traditional values of the Batswana<sup>58</sup> that have been passed down from generation to generation. It refers to the idea of showing respect and consideration for others, and it is often used to describe the way in which people interact with one another in daily life. *Botho* is also seen as a key factor in maintaining social harmony and cohesion within the country. Maria Lungu states that:

The Batswana use the term ‘*botho*’ to describe a person who is courteous, disciplined, and realizes his or her full potential both as an individual and as a part of the community to which he or she belongs. In a sense, it is a social contract by which one lives.<sup>59</sup>

An important aspect of *botho* is that it rejects individualism or egotism and upholds communal responsibilities towards others in that we find our own identities through a shared identity, or as

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<sup>54</sup> Gareegope (n 51).

<sup>55</sup> The concept appears to be unique to the African continent.

<sup>56</sup> R Dolamo. (2013). *Botho/ubuntu: The heart of African ethics. Scriptura* 112: 1–3.

<sup>57</sup> Gareegope (n 51).

<sup>58</sup> ‘Batswana’ here is noted as a nationality and not tribal affiliation.

<sup>59</sup> M Lungu. (nd). *Botho a Philosophy of Life and Law*. Available at <<https://law.utk.edu/2015/07/13/botho-a-philosophy-for-life-and-law/>>.

Modie-Moroka et al state: ‘Botho is a community-building ethic that urges individuals to define their identity by caring, welcoming, affirming, and respecting the *Other*’<sup>60</sup> – that ‘one is a person through others’.<sup>61</sup> This point is highlighted because any form of prejudice, including xenophobia towards migrants has no place in a culture that has *botho* at its centre.

In Botswana *botho* is present not only in unwritten customs and practice but has also been codified in various domestic instruments as a national principle. For instance, in *Vision 2016: The Long-term Vision for Botswana*, an initiative which articulates the country’s long-term development aspirations and provides a broad framework for development states that ‘*botho* must permeate every aspect’ of life in Botswana.<sup>62</sup> The vision poignantly states that *botho* is the ‘process of earning respect by first giving it, and of gaining empowerment by empowering others’.<sup>63</sup> Steyn states that the vision identifies core values of *botho* as ‘solidarity, respect, compassion, humanness, conformity, human dignity, sharing, unity and solidarity, communalism, universal brotherhood, hospitality and interdependence’.<sup>64</sup> *Botho* as a principle was carried over into the subsequent national vision, Vision 2036, in which a person with *botho* is defined as

a well-rounded character, well-mannered, courteous and disciplined, who realizes his or her full potential both as an individual and as part of the community to which he or she belongs.<sup>65</sup>

### 6.3.2.3 *Botho*, law and human rights in Botswana

The concept of *botho* is closely related to the concept of human rights, as it emphasises the importance of treating others with dignity and respect. Garegope notes that an interesting feature of *botho* – expanded upon in Vision 2036 – is that it makes specific reference to ‘social inclusion and equality’, giving it an obvious human rights dimension. He observes that ‘inclusivity in the nation includes the marginalized and those with disability, by ensuring that “social protection” is

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<sup>60</sup> Musa Dube, Tirelo Modie-Moroka, Senzokuhle Setume, Elizabeth Motswapong, Malebogo Kgalemang, Seratwa Ntloedibe, Rosinah Gabaitse, Tshenolo Madigele, Sana Mmolai, Mmapula Kebaneilwe & Doreen Sisero. (2016). *Botho/Ubuntu, Community Building and Gender Constructions in Botswana*. Available at <Botswana.pdf>.

<sup>61</sup> David Matsinhe, final email at Amnesty International titled ‘Moving on –’. 14 December 2022.

<sup>62</sup> Botswana Government. (1996). *Vision 2016: Towards Prosperity for All*. Gaborone. Government Printers.

<sup>63</sup> Botswana Government (n 52).

<sup>64</sup> G Steyn. (2012). The influence of *botho* on social space in Botswana since independence. *SAJAH* 112.

<sup>65</sup> Government of Botswana. (2016). *Vision 2036: Achieving Prosperity for All*. Gaborone: Government Printers.

provided'.<sup>66</sup> This indicates a direct link between the concept of *botho* as understood in Botswana and the doctrine of human rights as it underpins the obligations that the state and people have to one another. As stated briefly in Chapter 4, *botho* has been closely associated with the right to dignity. In the words of Gareegope: 'Botho is ... an African concept which promotes humanness, personhood and it goes hand in hand with the human dignity.'<sup>67</sup>

Although few courts in Botswana have used *botho* as a basis for legal reasoning in judgments, in *Attorney-General v Oatile*, Kirby JP stated:

We have a history of moderation in distribution of the limited resources available for the benefit of the nation, and generally the spirit of 'Botho' prevails – that is, mutual respect and compassion for the young, the elderly, women, and the disadvantaged.<sup>68</sup>

In the more recent case of *Precious Kaje v Oreneile Mhotsha*, Lot Moroka, J, said this of the principle of *botho*:

the people of Botswana subscribe to strong cultural values. The principle of Botho – 'You are because I am'; is the over-arching value that holds the nation together. It is based on self-respect, self-restraint and respect for others and sacred institutions. Batswana respect the law not out of fear of sanctions, but out of self-respect.<sup>69</sup>

This indicates that there is a growing inclusion of the principle in the reasoning of Botswana courts. However, it must be noted that *botho* is still largely aspirational in the Botswana context and, as discussed above, an indication of this is the continuing high level of gender inequality in the country. In this context, Chitando stated the following:

Sexual and gender-based violence is prompted by the problematic socialisation of the boy child. Brought up to command and dominate, boys regard women and girls as being permanently available to meet their desires. Whereas Ubuntu expresses the notion that, 'I am because we are,

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<sup>66</sup> Gareegope (n 51).

<sup>67</sup> Gareegope (n 51).

<sup>68</sup> *Attorney-General v Oatile* [2011] (2) BLR 209 CA.

<sup>69</sup> *Precious Kaje v Oreneile Mhotsha* CVHFT-000237-17.

and we are because I am,' in practice, the personhood in African cultures has been construed and constructed in a hierarchical manner, with men enjoying a fully privileged status. The full membership of women in a community that place emphasis on the solidarity has not been taken as given. Indeed, as women activists ... have argued, African societies need to accept this simple but profound truth: A woman is a human being.<sup>70</sup>

Despite this, *botho* can still be used as a framework in life and law that shapes the country's approach to human rights – that does not condone the mistreatment of migrants. Rather, it should be used as a guiding principle of how to treat all members of the community, including migrants, with respect and dignity. Through *botho*, it is the responsibility of not only the government but also of the larger community to ensure that the human rights of migrants are upheld and protected.

### 6.3.3. *The Constitution*

The Constitution of Botswana, as adopted in 1966, is the supreme law of the country and sets out the rights and duties of citizens, and the structure and functioning of the government. The Constitution guarantees the protection of fundamental human rights, including the rights of migrants. Chapter 2 of the Constitution – 'Protection of Fundamental Rights and Freedoms of the Individual' – states:

Whereas *every person* in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;<sup>71</sup>
- (b) freedom of conscience, of expression and of assembly and association;<sup>72</sup>
- (c) protection for the *privacy* of his or her home and other property and from deprivation of property without compensation.<sup>73</sup> (my emphasis)

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<sup>70</sup> E Chitando. (2015). Do not tell a person carrying you that she stinks: Reflections on ubuntu and masculinities in the context of sexual and gender-based violence and HIV. In Elna Mouton et al, *Living with Dignity: African Perspectives on Gender Equality*. Stellenbosch: Sun Press, 276.

<sup>71</sup> Subsection 3(a).

<sup>72</sup> Subsection 3(b).

<sup>73</sup> Subsection 3(c).

The inclusion of *every person* in Botswana indicates that these freedoms extend to non-citizens. The Constitution also prohibits discrimination on the basis of race, tribe, place of origin, political opinions, colour, creed or sex. However, this provision is qualified by section 15(4) which states: ‘Subsection (1) of this section shall not apply to any law so far as that law makes provision (b) with respect to persons who are not citizens of Botswana’.<sup>74</sup> This has important implications for migrants in Botswana.

#### **6.3.4. *The Immigration Act***

Botswana has a complex and multifaceted immigration system that is regulated by the Immigration Act of 2011.<sup>75</sup> The Act grants the government the authority to regulate the movement of people across its borders and to establish policies and procedures for managing immigration. In the Act the procedures for obtaining visas and other forms of permission to enter, reside and work in Botswana are defined. The Act enables migrants to apply for work permits and both temporary and permanent residence permits provided that they meet the necessary criteria.

A key aspect of this Act for migrants are the provisions on the *right to remain in Botswana* under Part III of the Act that requires non-citizens to travel into Botswana through authorised points of entry<sup>76</sup> and Part II that makes entry contingent on producing an official travel document.<sup>77</sup> As stated in Chapter 5, many Zimbabwean migrant women are unable to meet these requirements due to the expense involved obtaining a passport.

Section 19 on residence permits delineates the process under which non-citizens can obtain visas which enables them to remain in the country legally. The process involves applying to the Immigrants Selection Board. Section 19(4) of the Act states that:

In determining an application for a residence permit, the Board shall have primary regard to the interests of Botswana and in this connection shall take into account the character of the applicant and whether –

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<sup>74</sup> Section 15(4).

<sup>75</sup> Botswana: Act 3 of 2011; Immigration Act, 14 October 2011.

<sup>76</sup> Section 17.

<sup>77</sup> Section 6.



- (a) in the case of an applicant who proposes to take up employment or engage for reward in any business, profession, or other occupation in Botswana, he has or has not the qualifications, education, training, and experience likely to render him efficient in that employment, business, profession or occupation and sufficient prospects of obtaining that employment or sufficient capital to engage in that business, profession, or occupation, as the case may be.

The provision in question, which assesses the qualifications, education, training, experience, and capital of applicants seeking employment or engagement in Botswana, poses significant challenges for many Zimbabwean migrant women. This provision disproportionately affects women who, traditionally, have limited access to capital and formal education. Consequently, it creates barriers that hinder their ability to enter the immigration system and pursue opportunities for employment or economic advancement. The requirement for qualifications, education, training, and experience, coupled with the need for sufficient prospects of obtaining employment or capital, presents a significant disadvantage for Zimbabwean migrant women. Women who may possess valuable skills or talents but lack documented training find themselves excluded from opportunities that would otherwise be accessible to them. The provision perpetuates systemic inequalities, reinforcing gendered barriers that impede the economic empowerment and self-sufficiency of migrant women. Furthermore, the absence of prescribed time limits in the Act compounds the challenges faced by Zimbabwean migrant women. The uncertainty surrounding the length of the immigration process adds to the already daunting nature of seeking employment or engaging in business in Botswana. For women who are migrating in search of immediate income to support their survival, as previously established in Chapters 1 and 5 of this thesis, this provision becomes an additional deterrent, discouraging them from navigating the immigration system altogether.

In essence, the provision functions as a prohibitive measure for Zimbabwean migrant women, particularly those seeking to earn income quickly to meet their basic needs. By imposing stringent criteria related to qualifications, education, training, experience and capital, and by lacking clear time limits for the immigration process, this provision perpetuates gendered inequalities and reinforces the marginalisation of migrant women.

Another significant feature of the Act that has implications for the human rights of migrants are the provisions on deportation. Under the Act, the minister has the authority to deport any non-citizen who is deemed to be ‘undesirable’<sup>78</sup> on various grounds, including:

- if they do not have sufficient means to support themselves while in Botswana;<sup>79</sup>
- if they are the spouse or child of a prohibited immigrant;<sup>80</sup> or
- if they are a sex worker.<sup>81</sup>

Following the receipt of a notice declaring a migrant undesirable, provision is made for an appeals procedure, however, an appeal must be made within three days of the notice being served.<sup>82</sup>

### **6.3.5. *The Employment of Non-Citizens Act***

The Botswana Employment of Non-Citizens Act 1981<sup>83</sup> is legislation that regulates the employment of non-citizens in the country. Officially, it is said to be ‘an Act to regulate the employment and other engagement in occupations for reward or profit of certain persons who are not citizens of Botswana’.<sup>84</sup> The Act applies to both skilled and low-wage labour non-citizens who are employed in Botswana, and it sets out the procedures non-citizens must undergo to work legally in the country. Section (4) of the Act, entitled ‘Control of employment, etc, of non-citizens’,<sup>85</sup> states that:

(1) No non-citizen shall engage in any occupation for reward or profit unless:

(a) he is the holder of a work permit issued to him under this Act permitting him to be employed or to engage in and he is employed or otherwise so engaged in accordance with the terms thereof and the conditions, if any, attached thereto;<sup>86</sup> or

(b) he is the holder of a certificate of exemption issued to him under this Act.<sup>87</sup>

(2) No person shall employ a non-citizen unless:

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<sup>78</sup> Section 50(2).

<sup>79</sup> Section 50(b).

<sup>80</sup> Section 50(c).

<sup>81</sup> Section 50(e).

<sup>82</sup> Section 52.

<sup>83</sup> Employment of Non-Citizens Act (No 11) [Cap 47:02].

<sup>84</sup> Preamble to the Employment of Non-Citizens Act.

<sup>85</sup> Section 4.

<sup>86</sup> Section 4(1)(a).

<sup>87</sup> Section 4(1)(b).

- (a) the non-citizen is the holder of a work permit issued to him under this Act permitting him to be employed and he is employed in accordance with the terms thereof and the conditions, if any, attached thereto;<sup>88</sup> or
- (b) the non-citizen is the holder of a certificate of exemption issued to him under this Act.<sup>89</sup>

Subsection 3 then makes it an offence punishable by a fine not exceeding P1 000 or to imprisonment for a term not exceeding 12 months (or both) for contravening these provisions.<sup>90</sup> There is also a presumption during offence proceedings that the person party to the proceedings is a non-citizen unless proved otherwise.<sup>91</sup> The Act therefore applies to both potential employers and potential employees and its punitive nature (12-month prison sentence) dissuades potential employers from hiring non-citizens as they may be liable for hefty punishments if they do so in a manner that contravenes the Act.

Section 5 of the Act titled, ‘Applications for work permits and renewals thereof and determination of same’,<sup>92</sup> outlines the process of applying for and/or renewing work permits and refers to the process outlined in section 18 of the Immigration Act, discussed above.

Section 5(6) is a provision particularly prejudicial to migrants, and states:

For the purpose of determining an application placed before it in accordance with subsection (1), the Board shall take into account:

- (a) the effect of issuing a work permit or renewing the existing work permit upon the opportunities for employment or for other engagement for reward or profit in the occupation in question, as the case may be, open to citizens of Botswana;<sup>93</sup> and
- (b) where the application relates to employment, the arrangements made or to be made by the employer to train a citizen of Botswana to replace the person in respect of whom the

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<sup>88</sup> Section 4(2)(a).

<sup>89</sup> Section 4(2)(b).

<sup>90</sup> Section 4(3).

<sup>91</sup> Section 4(3) of the Employment of Non-Citizens Act.

<sup>92</sup> Section 5.

<sup>93</sup> Section 5(6)(a).

application is made in the event of a work permit being issued to him or his existing work permit being renewed.<sup>94</sup>

These provisions benefit Batswana disproportionately over non-citizens, particularly those who engage in low-wage labour. This means migrant workers have difficulty in obtaining work permits for these jobs, as many more Batswana perform this work. A 2022 study by Nyagadza et al,<sup>95</sup> highlights the existing disadvantages faced by Zimbabwean women in formal employment opportunities, therefore it is crucial to consider the gendered impact of the provisions mentioned. These laws, focusing on evaluating the effects of work permits on opportunities for Botswana citizens and training arrangements for potential replacements, unintentionally favour Batswana citizens, particularly those engaged in low-wage labour.

However, it is essential to acknowledge that while protecting citizens' job market is a valid concern, outright discrimination can perpetuate existing gender inequalities and further marginalise Zimbabwean migrant women. Instead, alternative strategies can be implemented to safeguard employment opportunities without discriminating against specific groups. These strategies include: Skills Development Programmes,<sup>96</sup> Fair Labour Market Testing,<sup>97</sup> Sector-Specific Regulations,<sup>98</sup> Supporting Entrepreneurship,<sup>99</sup> and Enhancing Labour Market Integration.<sup>100</sup> By adopting these alternative strategies, the country can address labour market

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<sup>94</sup> Section 5(6)(b).

<sup>95</sup> Brighton Nyagadza, Aaram Gwiza & Precious Kuziva Hove. (2022). Workplace diversity, equality and inclusivity in Zimbabwean labour market. *Cogent Social Sciences* 8: 1. doi: 10.1080/23311886.2022.2033456. The study found that Zimbabwean women are at a disadvantage in terms of formal employment opportunities. In 1999, Zimbabwe's labour participation rate (LPR) was estimated at 69.8% for both men and women; the female LPR represented 90% of the male rate. The study found that women were over-represented in informal employment and made up only 22.3% of those people in paid employment in 1999. This increased to a mere 23.9% in 2002. Women were particularly under-represented in high-level employment sectors such as legislators, senior officials and managers. Women occupy only 18% of these roles, whereas 40% of these were professionals and technicians.

<sup>96</sup> Investing in comprehensive skills development programmes to upskill and reskill the domestic workforce, enabling citizens to compete effectively in the job market.

<sup>97</sup> Implementing transparent labour market testing processes to assess the availability of suitable domestic candidates before considering non-citizen workers, ensuring a fair balance between protecting jobs and addressing labour shortages.

<sup>98</sup> Tailoring regulations to specific industries where citizens face significant competition, allowing for targeted protection without affecting all non-citizen workers indiscriminately.

<sup>99</sup> Fostering an environment that encourages entrepreneurship and supports small business development to stimulate economic growth and job creation, benefiting both citizens and non-citizens.

<sup>100</sup> Implementing policies that facilitate the integration of non-citizen workers into the local labour market through language training, cultural orientation programmes and recognition of foreign qualifications.

concerns while promoting inclusivity and reducing gender disparities. It ensures that both citizens and non-citizens have access to employment opportunities, without exacerbating the disadvantage faced by Zimbabwean migrant women due to pre-existing gender inequalities and limited formal employment prospects.

In addition, it is unrealistic to expect migrants who may have low levels of formal education and who may have migrated under difficult circumstances to be aware of the process for applying for work permits in Botswana, especially since information about how to do so is not easily accessible to all migrants. While, indeed, ‘ignorance of the law is no excuse’,<sup>101</sup> it is understandable that these individuals may not be aware of the necessary steps to take in order to obtain a work permit.

### **6.3.6. *The Public Health Act*<sup>102</sup> and other health-related provisions**

While the Botswana National Strategic Framework III recognises that migrants and undocumented foreigners are vulnerable populations in terms of HIV services (and the Government of Botswana has recently announced a policy decision to provide antiretroviral therapy (ART) to all deserving foreign nationals living in Botswana),<sup>103</sup> the Botswana Public Health Act is silent on general health obligations that government has to migrants. It is in this context that health services – with the exception of HIV treatment – are provided free to Botswana citizens; non-citizens are required to pay a subsidised fee for these services.<sup>104</sup>

In addition, the state of health of a migrant can restrict their access to Botswana, because section 50 of the Immigration Act<sup>105</sup> states that non-citizens who are HIV-positive or have tuberculosis (TB) may be denied entry or be required to leave the country.<sup>106</sup> The Minister of Immigration has the authority to issue deportation orders against ‘undesirable immigrants’<sup>107</sup> who do not comply,

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<sup>101</sup> The legal principle of *ignorantia legis neminem excusat*.

<sup>102</sup> Public Health Act 44 of 1971 [Cap 63:01].

<sup>103</sup> UNAIDS. (2019). *Botswana Extends Free HIV Treatment to Non-citizens*, 24 September 2019. Available at <[https://www.unaids.org/en/resources/presscentre/featurestories/2019/september/20190924\\_Botswana\\_treatment\\_non-nationals](https://www.unaids.org/en/resources/presscentre/featurestories/2019/september/20190924_Botswana_treatment_non-nationals)>.

<sup>104</sup> R Tapera, S Moseki & J January. (2018). The status of health promotion in Botswana. *J Public Health Afr* 9(1): 699. doi: 10.4081/jphia.2018.699.

<sup>105</sup> Immigration Act 3 of 2011.

<sup>106</sup> Section 50 of the Immigration Act prohibits entry and presence of persons suffering from prescribed diseases unless they have permission.

<sup>107</sup> Section 50(d).

which can lead to involuntary removal. While this provision may appear to be neutral on the surface, it harbours implicit discrimination. Its impact is particularly concerning in the southern African context, where the prevalence of HIV is alarmingly high,<sup>108</sup> and it is widely acknowledged that young women in the region face a higher risk of contracting the virus due to social factors.<sup>109</sup> Consequently, the deportation orders associated with this law can affect women living with HIV or TB disproportionately, further stigmatising them and impeding their access to essential healthcare services. In line with this, a study conducted in Zimbabwe in 2020 revealed that the rate of HIV infection among women was higher than among men, with 15.3% of women being infected compared to 10.2% of men, despite the overall adult HIV rate being 12.9%.<sup>110</sup> Therefore, even though this law may seem impartial on the surface, its implementation can perpetuate implicit gender bias and exacerbate the challenges faced by Zimbabwean migrant women in accessing healthcare and support services.

### 6.3.7. *The Citizenship Act*<sup>111</sup>

This Act has implications for children born to migrant women and their right to nationality. Botswana adheres strictly to the *jus sanguinis*<sup>112</sup> principle and, according to the Citizenship Act 1998, citizenship may be obtained under the following conditions:

- by birth in Botswana to a Botswana citizen (section 4);<sup>113</sup>
- by descent when born outside Botswana to a Botswana citizen (section 5);<sup>114</sup>
- by settlement when born to a person who has become a Botswana citizen due to having lived as or been customarily accepted as a member of a tribe or community (section 6);<sup>115</sup>

<sup>108</sup> PN Gona, CM Gona & S Ballout *et al.* (2020). Burden and changes in HIV/AIDS morbidity and mortality in Southern Africa Development Community Countries, 1990–2017. *BMC Public Health* 20: 867. Available at <<https://doi.org/10.1186/s12889-020-08988-9>>.

<sup>109</sup> G Ramjee, B Daniels. (2013).. Women and HIV in sub-Saharan Africa. *AIDS Res Ther* 10: 30. Available at <<https://doi.org/10.1186/1742-6405-10-30>>.

<sup>110</sup> United States Embassy. (nd). *National HIV Survey (ZiMPHIA 2020) Results Indicate Zimbabwe is on Track to Achieve HIV Epidemic Control by 2030*. [Embassy Website]. Available at <<https://zw.usembassy.gov/national-hiv-survey-zimphia-2020-results-indicate-zimbabwe-is-on-track-to-achieve-hiv-epidemic-control-by-2030/#:~:text=The%20prevalence%20of%20HIV%20among,10.2%20percent>>.

<sup>111</sup> Botswana: Citizenship Act 8 of 1998 [Cap 01-01].

<sup>112</sup> *Jus sanguinis* is a principle of citizenship law where a person's nationality is based on the citizenship or ethnicity of one or both of their parents. Under this principle, a child may be considered a citizen of a particular state if one or both of their parents hold citizenship of that state.

<sup>113</sup> Section 4 of the Citizenship Act.

<sup>114</sup> Section 5.

<sup>115</sup> Section 6.

- by adoption when a child not more than the age of three years is adopted by a Botswana citizen (section 7);<sup>116</sup>
- by registration when parent is a naturalised Botswana citizen or granted citizenship in recognition of exceptional circumstances (section 10);<sup>117</sup> and
- by naturalisation when the person has been resident in Botswana for not less than ten years (section 12).<sup>118</sup>

In terms of the legislative requirements for naturalisation, the applicant must:

- have been resident in Botswana for 11 years (10+1) or five years for spouse;<sup>119</sup>
- have sufficient knowledge of Setswana or any language spoken by any ‘tribal community’ in Botswana;<sup>120</sup> and
- be of good character.<sup>121</sup>

The language requirement, however, may be waived under ‘special circumstances’. The Act also recognises limited dual citizenship for persons under the age of 21 but such persons need to renounce the citizenship of the second country before they reach the age of 21. This is done through taking an oath of allegiance to Botswana and making a declaration concerning future residency if the person wishes to keep their Botswana citizenship.<sup>122</sup>

Botswana does not follow the principle of *jus soli*,<sup>123</sup> which means that children born in Botswana to non-Batswana parents are not automatically granted citizenship. In addition, there is no provision in Botswana’s citizenship law that allows for children without other options to acquire nationality. This can lead to the situation of these children being stateless, as is discussed further in the section on the right to nationality.

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<sup>116</sup> Section 7.

<sup>117</sup> Section 10.

<sup>118</sup> Section 12.

<sup>119</sup> Section 13(1)(c).

<sup>120</sup> Section 13(1)(d).

<sup>121</sup> Section 13(1)(e).

<sup>122</sup> Section 15.

<sup>123</sup> *Jus soli*, also known as birth right citizenship, is the principle that anyone born within the territory of a state is entitled to citizenship or nationality of that state.

### 6.3.8. *Trafficking Act*<sup>124</sup>

The Botswana Anti-Human Trafficking Act 2014 is a law that was passed in Botswana to domesticate the provisions of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.<sup>125</sup> Section 9(1) of the Act makes it an offence punishable by a fine not exceeding P500 000 or a prison sentence not exceeding 25 years, or both, for committing the crime of trafficking in persons which is defined as

any person who recruits, transports, transfers, harbours or receives another person by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation of that person.

Certain aggravating factors increase the penalty and they are set out in section 9(2) which states:

Any person who during the commission of the offence under section (1)

- (a) removes an organ from a person's body;
- (b) forces a woman to fall pregnant and takes the child away;
- (c) subjects a person to slavery or forced labour;
- (d) instigates a person to commit an act of prostitution;
- (e) instigates a person to take part in an obscene publication or obscene display; or
- (f) commits a sexual offence against a person commits an offence and is liable to a fine not exceeding P1 000 000 or to imprisonment for a term not exceeding 30 years, or to both.

The Act also provides for the confiscation of assets that are derived from or used in the commission of human-trafficking offences.<sup>126</sup> The Act also establishes a Human Trafficking (Prohibition) Committee which is responsible for coordinating the implementation of the Act and for providing assistance to victims of human trafficking.<sup>127</sup> It requires that the government aid victims of human

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<sup>124</sup> Anti-Human Trafficking Act 32 of 2014.

<sup>125</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

<sup>126</sup> Section 25.

<sup>127</sup> Part II.



trafficking, including medical and psychological treatment, legal assistance, and support for their recovery and rehabilitation.<sup>128</sup> The Act also provides for the establishment of shelters and other support services for victims of human trafficking.<sup>129</sup> It also requires the government to take steps to prevent the occurrence of human trafficking in the country.<sup>130</sup>

While the Act is a commendable effort in the right direction, the 2022 US Department of State's *Trafficking in Persons Report: Botswana* still found certain instances in which Botswana's anti-trafficking response is below international standards, including the lack of

standard operating procedures (SOPs) to identify trafficking victims and refer them to care, and train stakeholders on their use to increase victim identification and screening among vulnerable populations, including migrants.

The report also advised the government to 'support the provision of legal identity documents among vulnerable populations, including at-risk undocumented migrants'.<sup>131</sup> This indicates that migrants still remain disproportionately at risk of trafficking under the current regulatory system.

### **6.3.9. *The Refugee Act***<sup>132</sup>

Botswana's domestic refugee legislation, the Refugees Recognition and Control Act of 1968, enacted before ratifying the 1951 Refugee Convention, regulates all matters relating to refugees in the country. The law domesticated the reservations which were voiced concerning the 1951 Convention (discussed above) and in section 14(1)<sup>133</sup> the right to work is restricted, while section 13 concerning the right of refugees to apply for citizenship states:

For the purposes of any other written law, other than a taxation law, any period during which an immigrant has resided in Botswana as a recognized refugee shall not, unless a Minister in writing

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<sup>128</sup> Section 15(1).

<sup>129</sup> Part V.

<sup>130</sup> Section 5.

<sup>131</sup> US Department of State. (2022). *Trafficking in Persons Report: Botswana*. Available at <<https://www.state.gov/reports/2022-trafficking-in-persons-report/botswana/>>.

<sup>132</sup> Refugees (Recognition and Control) Act of 1968 [Cap 25:03].

<sup>133</sup> Which states: 'Subject to the provisions of subsection (2), sections 3 to 6 of the Employment of Visitors Act, 1968, shall apply to refugees as they apply to visitors and any regulations made under the provisions of section 7 of that Act shall, unless the context otherwise requires, apply to refugees as they apply to visitors.'

otherwise directs, be regarded as a period during which he has been ordinarily resident in Botswana.<sup>134</sup>

Being ‘ordinarily resident’ is therefore a requirement when applying for citizenship. The law, however, does not prescribe an encampment policy and this was developed only after the law was promulgated.

It is important that section 14(2) of the Refugee Act does allow refugees with rare skills which are needed in the country to apply for a work permit to enable them to take up employment.<sup>135</sup> In reality, this avenue is rarely used because most refugees do not have the type of special skills which would qualify them for a work permit. Some do, and in such cases, they are granted a work permit and permission to leave the camp. However, few qualify and in 2021 only approximately 62 refugees were granted permission to reside in Gaborone and other urban areas for work, medical, education or safety reasons.<sup>136</sup>

Moreover, in the current form of the Act, section 8 only recognises individuals as ‘political refugees.’<sup>137</sup> However, as mentioned earlier in Chapter 4, this terminology carries an implicit bias. Women often face persecution that does not fall under the narrow definition of ‘political,’ such as instances of female genital mutilation (FGM) and gender-based violence. Consequently, fewer women are recognised as refugees in Botswana, despite the global trend where women constitute a significant proportion of forcibly displaced individuals.<sup>138</sup> The limited scope of section 8 undermines the protection of women who flee their countries due to non-political forms of persecution. By neglecting to acknowledge and address these forms of violence and discrimination, the Act fails to provide adequate support for and recognition to women in need of asylum.

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<sup>134</sup> Section 13 of the Refugees (Recognition and Control) Act.

<sup>135</sup> Section 14(2).

<sup>136</sup> Email correspondence from UHNCR office in Botswana dated 24 February 2021.

<sup>137</sup> Section 8 of the Refugees (Recognition and Control) Act.

<sup>138</sup> Available at <<https://www.iom.int/news/women-and-girls-account-majority-migrants-east-and-horn-africa-iom-report>>.

Data on the number of refugees in Botswana in January 2021 further highlights the disparities and implications of the Act. The Table below provides information on the distribution of refugees in the country during that period. Analysing the data, it becomes evident that the Act's narrow definition of 'political refugees' contributes to an imbalanced representation of displaced individuals. It disproportionately affects women who are more likely to experience non-political persecution and displacement.

Demographic Breakdown by Age Cohort, Location and Sex

Sex Country of Origin	Female					Total	Male					Total	Total
	0-4	5-11	12-17	18-59	60+		0-4	5-11	12-17	18-59	60+		
Somalia	21	27	26	67	1	142	21	35	21	111	11	199	341
Zimbabwe	17	19	19	66	3	124	10	25	10	85	3	133	257
Democratic Republic of the Congo	15	27	16	46		104	17	23	11	83		134	238
Burundi	4	5	2	12		23	3	6	3	28		40	63
Uganda		1		4	1	6	1	1	1	12		15	21
Rwanda				2	1	3	1	5	1	8		15	18
Namibia		1		1		2	1	2	2	4	2	11	13
Angola				3		3				5		5	8
<b>Total</b>	<b>57</b>	<b>80</b>	<b>64</b>	<b>202</b>	<b>7</b>	<b>410</b>	<b>54</b>	<b>97</b>	<b>49</b>	<b>353</b>	<b>17</b>	<b>570</b>	<b>980</b>

Source: UNHCR<sup>139</sup>

Since 2014, the Government of Botswana has on numerous occasions stated that the Refugees Act is under review. This commitment was also noted in the government's *Second Periodic Report* submitted to the Human Rights Committee, where it reported that the Attorney-General's Chambers were currently drafting an updated Refugee Recognition and Control Bill.<sup>140</sup> At the time of writing no draft of the reviewed legislation was available to the public.

## 6.4 International human rights framework

This section briefly outlines the various international treaties that Botswana has ratified which are relevant for the protection of migrant women in the context of this study. Given how vast, interrelated and interdependent international law is, this list is in no way exhaustive and includes only those instruments which are used in the analysis in this chapter. Given the challenges described above regarding low ratification and domestication this section concentrates on treaties ratified by Botswana and in some cases discusses the level of implementation from treaty-monitoring bodies and other similar reports.

<sup>139</sup> On request by author in email, dated 24 February 2021

<sup>140</sup> *Human Right Committee Second Periodic Report* submitted by Botswana under article 40 of the covenant pursuant to the optional reporting procedure, 17 November 2020.

### **6.4.1 *The Universal Declaration of Human Rights***

The Universal Declaration of Human Rights (UDHR) is a comprehensive document that covers a wide range of rights, including civil, political, economic, social and cultural rights. One of the key principles of the UDHR is that all human beings are entitled to these rights, regardless of their race, religion, nationality or any other characteristic. In the context of migrant women's rights, the UDHR is crucial as it affirms the rights of all individuals to move freely<sup>141</sup> within their own country and to seek asylum in other countries.<sup>142</sup> The UDHR affirms the right to equality and non-discrimination, which is particularly relevant in the case of migrant women. Article 1 of the UDHR states that 'all human beings are born free and equal in dignity and rights',<sup>143</sup> whereas article 2 states that 'everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind'.<sup>144</sup> This includes the right to equal treatment under the law and the right to protection from discrimination. As established under article 23, migrant women also have the right to work. This includes the right to just and favourable conditions of work, including equal pay for equal work. Migrant women also have the right to an adequate standard of living, as established in article 25 of the UDHR. This includes the right to adequate housing, food, clothing and medical care. Despite this, as this study shows, migrant women often face significant barriers to finding decent work, and face additional discrimination based on their gender or migrant status.

### **6.4.2 *The International Covenant on Civil and Political Rights***

Botswana has ratified the International Covenant on Civil and Political Rights (ICCPR) that protects a wide range of rights, which are relevant to our discussion, such as the right:

- to life;<sup>145</sup>
- to equality and non-discrimination;<sup>146</sup>
- to security of the person;<sup>147</sup> and
- to not be arbitrarily arrested and detained.<sup>148</sup>

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<sup>141</sup> Article 13(1) of the Universal Declaration of Human Rights.

<sup>142</sup> Article 13(2).

<sup>143</sup> Article 1.

<sup>144</sup> Article 2.

<sup>145</sup> Article 6 of the ICCPR.

<sup>146</sup> Article 26.

<sup>147</sup> Article 9.

<sup>148</sup> Article 9.

The Human Rights Committee (HRC), the committee which oversees the implementation of ICCPR by Member States has identified various instances where Botswana falls short of its commitments in the Covenant regarding the human rights of migrants. In its concluding observations on Botswana's *Second Periodic Report*, the HRC noted its concern of 'reports of expulsions of migrants and asylum seekers, including those in need of international protection, without carrying out the necessary individual assessments'.<sup>149</sup> This indicates that Botswana does not observe procedural safeguards in collective exclusion proceedings, as required by international law standards. In addition, the Working Group on Arbitrary Detention, which visited Botswana most recently in 2022, expressed serious concern about the country's policy to automatically detain irregular migrants, often indefinitely and in dire conditions. The Working Group clarified that in terms of international law:

Detention in the course of migration must be an exception and is only permissible for the shortest period of time, following an individualised assessment of the need to detain.<sup>150</sup>

At the time of writing, Botswana has also not yet ratified the ICCPR's sister treaty, the International Covenant on Economic, Social and Cultural Rights.<sup>151</sup>

### 6.4.3 *Statelessness conventions*

Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons<sup>152</sup> defines a stateless person as someone 'who is not considered as a national by any state under the operation of its law'. Conservative estimates put the number of stateless persons worldwide at between ten and 12

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<sup>149</sup> Human Rights Committee. (nd). *Concluding Observations on the Second Periodic Report of Botswana*. Available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/352/66/PDF/G2135266.pdf?OpenElement>>.

<sup>150</sup> United Nations Working Group on Arbitrary Detention. (2022). Available at <<https://www.ohchr.org/en/press-releases/2022/07/botswana-must-urgently-embrace-further-safeguards-against-arbitrary>>.

<sup>151</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol 993, 3. Also see, United Nations Human Rights Treaty Bodies: Ratification Status for Botswana. Available at <[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=23&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=23&Lang=EN)>.

<sup>152</sup> UN General Assembly, Convention Relating to the Status of Stateless Persons, 28 September 1954, United Nations, Treaty Series, vol 360, 117.

million people affected.<sup>153</sup> Statelessness can have a devastating impact on the lives of individuals. People who are stateless may be detained arbitrarily because they are stateless. Among other things, they can be denied re-entry to or expelled from the country where they live, denied access to education and health services, and are frequently discriminated against or prevented from obtaining employment.<sup>154</sup>

Botswana signed the 1954 Convention on the Status of Stateless Persons with reservations concerning articles 7(2), 12(1) and 31. These reservations are:

- (a) Article 31 of the said Convention shall not oblige Botswana to grant to a stateless person a status more favourable than that accorded to aliens in general.
- (b) Articles 12(1) and 7(2) of the Convention shall be recognized as recommendations only.

Importantly, the Convention has not yet been ratified. Botswana has also not acceded to the 1961 Convention on the Reduction of Statelessness.<sup>155</sup>

#### **6.4.4 *The African Charter on Human and Peoples' Rights*<sup>156</sup> and Resolution 114 on Migration and Human Rights<sup>157</sup>**

The African Charter on Human and Peoples' Rights which has been ratified by all SADC Member States – including Botswana – protects civil and political rights. In addition, the African Charter, as is the case with the ICCPR, protects some economic, social and cultural rights such as the right to work in article 15,<sup>158</sup> the right to health in article 16<sup>159</sup> and the right to education in article 17.<sup>160</sup> It is important that the Charter also explicitly prohibits discrimination on the basis of numerous grounds which include race, ethnic origin, language, social status and other status.<sup>161</sup> This right to

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<sup>153</sup> UNHCR. (nd). *Statelessness Around the World*. Available at <<https://www.unhcr.org/ibelong/statelessness-around-the-world/>>.

<sup>154</sup> UNHCR (n 153).

<sup>155</sup> UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol 989, 175. Available at <<https://www.refworld.org/docid/3ae6b39620.html>>

<sup>156</sup> Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

<sup>157</sup> African Union Resolution 114 on Migration and Human Rights ACHPR/Res.114(XXXXII)07.

<sup>158</sup> Article 15.

<sup>159</sup> Article 16.

<sup>160</sup> Article 17.

<sup>161</sup> See articles 2, 3 & 19 of the African Charter.

non-discrimination can also be inferred to extend to migrant women. Article 25 of the Charter makes it a binding obligation that Member States ‘promote and ensure the respect of the rights and freedoms contained in the Charter’,<sup>162</sup> meaning that Botswana is required to uphold these norms.

The African Commission on Human and Peoples’ Rights has gone further and explained what the rights of migrants are. This is laid out in Resolution 114 on migration and human rights. In it the Commission recognised the gendered nature of migratory movements when it expressed its concern that ‘women constitute 47% of all migrants within sub-Saharan Africa and that women and children constitute 70% of the refugees and IDPs on the continent’.<sup>163</sup> The Commission also recommends that Member States

recognize the importance of the human rights of all migrants, including refugees and IDPs, and to ensure that national legislation relating to migration issues is consistent with and does not conflict with international human rights standards and conventions.

In line with this, the Commission recommends:

Those States which have not done so, to ratify and implement the main regional and international instruments relating to migrants and refugees, in particular, the Geneva Convention relating to the Status of Refugees, the United Nations Convention on the Protection of Rights of All Migrant Workers and members of their families and the African Union Convention Governing the Specific Aspects of Refugee Problems in Africa; implement the Protocol to the African Charter on the Rights of Women, as well as the UN Convention on the elimination of All forms of Discrimination Against women and its additional Protocol allowing individual complaints or communications, in order to respect the rights of migrant women.

Despite this, Botswana has yet to ratify the Migrants Workers Convention and the African Charter on the Rights of Women (Maputo Protocol). Botswana is one of only three Member States of the

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<sup>162</sup> Article 25.

<sup>163</sup> Article 75.

African Union who have not both signed and ratified the Maputo Protocol at the time of writing in September 2023,<sup>164</sup> and the only country in southern Africa.

#### **6.4.5 *The Convention on the Elimination of all Forms of Discrimination Against Women,*<sup>165</sup> *General Recommendation 26*<sup>166</sup> *and General Recommendation 38*<sup>167</sup>**

Botswana is party to the CEDAW which means that the country is legally obligated to eliminate all forms of discrimination against women – including migrant women. As stated in Chapter 4, this discrimination includes sexual and gender-based violence against all women in Botswana’s borders and other human rights violations.<sup>168</sup> The Committee on the Elimination of all Forms of Discrimination Against Women has further clarified the protection afforded particularly to migrant women:

- General Recommendation 26 delineates how to protect migrant worker women.
- General Recommendation 38 outlines how to protect women and girls from trafficking in the context of migration.

During Botswana’s reporting to the Committee in 2019,<sup>169</sup> several issues were raised regarding the human rights situation of migrant women including the concern of the detention of migrant women and girls in detention centres which often led to family separation from male family members. The Committee recommended that Botswana:

ensures access to education and health, sanitation and legal services for migrant women and girls in or outside of transit centres and adopt an alternative solution in order to prevent the separation of family members.<sup>170</sup>

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<sup>164</sup> The other two countries are Morocco and Egypt.

<sup>165</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, 13.

<sup>166</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No 26 on women migrant workers, 5 December 2008, CEDAW/C/2009/WP1/R.

<sup>167</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No 38 (2020) on trafficking in women and girls in the context of global migration.

<sup>168</sup> UN (n 167).

<sup>169</sup> *Concluding Observations on the Fourth Periodic Report of Botswana*. Available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N19/071/79/PDF/N1907179.pdf?OpenElement>>.

<sup>170</sup> *Concluding Observations* (n 169).



#### **6.4.6 *The Refugee Conventions***

The Government of Botswana has ratified key human rights instruments on refugee protection. Botswana is a state party to the 1951 United Nations Convention on the Status of Refugees<sup>171</sup> and has ratified both its 1967 protocol<sup>172</sup> and the 1969 African Union Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>173</sup> However, the Government of Botswana included reservations about seven articles in the 1951 Convention:

- article 7 – Exemption from reciprocity
- article 12(1) – Personal status
- article 17 – Employment
- article 26 – Freedom of movement
- article 31 – Refugees unlawfully in country of refuge
- article 32 – Expulsion
- article 34 – Naturalisation.

The most far-reaching of these reservations are:

- article 17 which ensures that refugees do not have right to seek employment in Botswana;
- article 26 which entrenches the camp-based system and restricts the movement of refugees to Dukwi Refugee camp; and
- article 34 which prohibits refugees from applying for citizenship.

#### **6.4.7 *The United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children***<sup>174</sup>

This instrument, which supplements the United Nations Convention against Transnational Organized Crime (UNTOC), is the primary legal instrument concerning trafficking in persons. It was adopted by the General Assembly under Resolution 55/25 on 15 November 2000 and came

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<sup>171</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol 189, 137.

<sup>172</sup> UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol 606, 267.

<sup>173</sup> Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa ('OAU Convention'), 10 September 1969, 1001 UNTS 45.

<sup>174</sup> UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

into force on 25 December 2003. The Protocol contains a preamble and 30 articles. The Preamble recognises that:

Despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there is no universal instrument that addresses all aspects of trafficking in persons.

The Preamble also acknowledges that:

Effective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and detention that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking including by protecting their internationally recognized human rights.

The purposes of the Protocol are prescribed in article 2:

- to prevent and combat trafficking in persons, paying particular attention to women and children;<sup>175</sup>
- to protect and assist the victims of such trafficking, with full respect for their human rights;<sup>176</sup>
- to promote cooperation among States Parties in order to meet those objectives.<sup>177</sup>

To date, 48 African countries, including Botswana, have signed the Protocol.

#### **6.4.8 *The Convention Against Torture***<sup>178</sup>

Botswana is party to the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This means that the country has agreed to work to prevent torture and other cruel, inhuman, or degrading treatment or punishment within its borders, and to hold accountable those who engage in such activities. As a signatory to the Convention, Botswana is required to take steps to implement its provisions, including:

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<sup>175</sup> Article 2(a).

<sup>176</sup> Article 2(b).

<sup>177</sup> Article 2(c).

<sup>178</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol 1465, 85.

- Making torture a crime under its national law, with penalties that are commensurate with the gravity of the offence.<sup>179</sup>
- Ensuring that all acts of torture are investigated and those responsible are brought to justice.<sup>180</sup>
- Providing victims of torture with effective remedies, including compensation and rehabilitation.<sup>181</sup>
- Taking steps to prevent the occurrence of torture, including by ensuring that all detention facilities are subject to regular inspections by independent bodies.<sup>182</sup>

Despite this, Botswana has yet to establish a definition of torture as a specific offence in the laws of the country. This is because Botswana asserts that there are already existing local laws that can be used to investigate and prosecute conduct that would be considered as ‘torture’ according to the definition in article 1 of the Convention.<sup>183</sup> However, the CAT Committee, a body that monitors state compliance with the CAT, has criticised this approach, stating that differences between the Convention’s definition of torture and a country’s domestic laws can lead to potential or actual gaps in accountability.<sup>184</sup> They clarified this in their General Comment No 2.

Furthermore, the CAT Committee has noted that it is deeply concerned about the treatment of migrants in Botswana, as evidenced by the dedicated section in the 2022 *Concluding Observations on the Initial Report of Botswana*<sup>185</sup> to the CAT Committee, which is entitled ‘Treatment of refugees, asylum-seekers and migrants’. The CAT Committee outlined in this section their concerns regarding the treatment of these groups in Botswana, and specifically highlighted their concerns about the conditions of detention at Centre for Illegal Immigrants and Dukwi refugee camp,<sup>186</sup> particularly regarding children.

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<sup>179</sup> Article 4 of CAT.

<sup>180</sup> Article 12.

<sup>181</sup> Article 14.

<sup>182</sup> Article 2.

<sup>183</sup> CAT, General Comment No 2: Implementation of article 2 by States Parties, 24 January 2008, CAT/C/GC/2.

<sup>184</sup> Articles 1, 2(2) and (4).

<sup>185</sup> Committee Against Torture. (2022). *Concluding Observations on the Initial Report of Botswana*, 23 August 2022. Available at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FCO%2FBWA%2FCO%2F1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2FCO%2FBWA%2FCO%2F1&Lang=en).

<sup>186</sup> Committee Against Torture (n 185) para 37.

Following this, the CAT Committee made several recommendations to Botswana about the situation of migrants in 2022:

- Refrain from detaining asylum-seekers and irregular migrants for prolonged periods; use detention as a measure of last resort and only for as short a period as possible, by ensuring individualised assessments; and promote the application of non-custodial measures.<sup>187</sup>
- Take the measures necessary to ensure appropriate reception conditions for asylum-seekers and irregular migrants and strengthen its efforts to ensure adequate living conditions in all immigration centres.<sup>188</sup>
- Ensure that unaccompanied and separated children and families with children are not detained solely because of their immigration status and adopt security measures to protect the children who are placed in camps.<sup>189</sup>

The CAT Committee also requested that the government provide, by 29 July 2023, information on the follow-up to these recommendations.<sup>190</sup>

#### **6.4.9 International Labour Organization conventions**

Given that the case study of this research is the migrant worker, International Labour Organization (ILO) standards are important to the discussion. At the time of writing, Botswana had ratified 17 ILO Conventions,<sup>191</sup> however, two<sup>192</sup> were still to come into force.

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<sup>187</sup> Paragraph 38(a).

<sup>188</sup> Paragraph 38(b).

<sup>189</sup> Paragraph 38(c).

<sup>190</sup> Paragraph 45.

<sup>191</sup> Forced Labour Convention, 1930 (No 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 8); Right to Organise and Collective Bargaining Convention, 1949 (No 98); Equal Remuneration Convention, 1951 (No 100); Abolition of Forced Labour Convention, 1957 (No 105); Discrimination (Employment and Occupation) Convention, 1958 (No 111); Minimum Age Convention, 1973 (No 138); Worst Forms of Child Labour Convention, 1999 (No 182); Labour Inspection Convention, 1947 (No 81) (will enter into force for Botswana on 22 December 2023); Labour Inspection (Agriculture) Convention, 1969 (No 129) (will enter into force for Botswana on 22 December 2023); Tripartite Consultation (International Labour Standards) Convention, 1976 (No 144); Weekly Rest (Industry) Convention, 1921 (No 14); Equality of Treatment (Accident Compensation) Convention, 1925 (No 19); Protection of Wages Convention, 1949 (No 95); Labour Relations (Public Service) Convention, 1978 (No 151); Protection of Workers' Claims (Employer's Insolvency) Convention, 1992 (No 173); Safety and Health in Mines Convention, 1995 (No 176).

<sup>192</sup> Labour Inspection Convention, 1947 (No 81) (will enter into force for Botswana on 22 December 2023); Labour Inspection (Agriculture) Convention, 1969 (No 129) (will enter into force for Botswana on 22 December 2023).

International law prescribes that the following eight fundamental Conventions – all of which have been ratified by Botswana – apply to migrants, regardless of migration status:<sup>193</sup>

- Worst Forms of Child Labour Convention, 1999 (No 182)
- Minimum Age Convention, 1973 (No 138)
- Discrimination (Employment and Occupation) Convention, 1958 (No 111)
- Equal Remuneration Convention, 1951 (No 100)
- Right to Organise and Collective Bargaining Convention, 1949 (No 98)
- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87)
- Abolition of Forced Labour Convention, 1957 (No 105)
- Forced Labour Convention, 1930 (No 29).

However, Botswana has not ratified the four migrant workers' international labour standards,<sup>194</sup> the specific international labour standards related to migrant workers' social protection<sup>195</sup> or any of the international labour standards containing specific provisions on migrant workers.<sup>196</sup> This includes the Convention Concerning Decent Work for Domestic Workers,<sup>197</sup> despite the large number of both national and migrant domestic workers in Botswana. The low ratification rate of international law standards pertaining to migrants indicates a disregard for their rights by the Government of Botswana.

### ***6.5 Gendered challenges experienced by Zimbabwean women migrants and the implications for the realisation of their human rights***

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<sup>193</sup> Available at <<https://www.ilo.org/africa/areas-of-work/labour-migration/relevant-standards/lang-en/index.htm>>.

<sup>194</sup> Migration for Employment Convention (revised), 1949 (No 97); Migration for Employment Recommendation (revised), 1949 (No 86); Migrant Workers (Supplementary Provisions) Convention, 1975 (No 143); Migrant Workers Recommendation, 1975 (No 151).

<sup>195</sup> Maintenance of Social Security Rights Convention, 1982 (No 157); Maintenance of Social Security Rights Recommendation, 1982 (No 167); Employment Injury Benefits Convention, 1964 (No 121); Equality of Treatment (Social Security) Convention, 1962 (No 118); Social Security (Minimum Standards) Convention, 1952 (No 102); Equality of Treatment (Accident Compensation) Convention, 1925 (No 19).

<sup>196</sup> Decent Work for Peace and Resilience Recommendation, 2017 (No 205); Transition from the Informal to the Formal Economy Recommendation, 2015 (No 204); Domestic Workers Convention, 2011 (No 189); Domestic Workers Recommendation, 2011 (No 201); Private Employment Agencies Convention, 1997 (No 181); Private Employment Agencies Recommendation, 1997 (No 188).

<sup>197</sup> C189 – Domestic Workers Convention, 2011 (No 189) – ILO.

The regulatory system has serious implications for the human rights of the Zimbabwean woman migrant working in Botswana's informal economy. The next section draws on available literature to analyse the impact that Botswana's laws and practices have on the rights of Zimbabwean migrant workers engaging in informal employment.

### **6.5.1 *In transit***

#### **6.5.1.1 Right to dignity**

The right to dignity is a fundamental human right that is protected by various international human rights instruments, including the UDHR and the International Covenant on Civil and Political Rights and Botswana's own Constitution. It is a right that is essential to the well-being and integrity of every individual, and it is particularly important for marginalised and vulnerable populations such as women migrants. Despite this, the dignity of Zimbabwean women migrants in Botswana is often violated due to the various forms of discrimination and exploitation that they face.

In Chapter 4, the link between dignity and migration was discussed. Indeed, the Special Rapporteur on the human right of migrants once declared that 'migration is an exercise of seeking dignity'.<sup>198</sup> Despite this, Botswana's stringent laws which make it difficult for women to migrate, criminalise their existence and relegate them to the unprotected informal economy and infringe on their right to dignity. In addition, Zimbabwean women migrants may also face discrimination and abuse in their daily lives in host countries, which do not value them, leading to feelings of isolation, marginalisation and powerlessness – further undermining their dignity.

#### **6.5.1.2 Right to non-discrimination**

The right to non-discrimination is a fundamental human right recognised by international law. Discrimination is the unjust or prejudicial treatment of people based on their race, gender, nationality, religion or other characteristics. Zimbabwean women migrants in Botswana are particularly vulnerable to discrimination and face multiple challenges due to their gender and migration status.

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<sup>198</sup> François Crépeau & Ranabir Samaddar. (2011). Recognizing the dignity of migrants. *Refugee Watch – A South Asian Journal on Forced Migration* 37: 55–67.

The UDHR states that ‘all human beings are born free and equal in dignity and rights’<sup>199</sup> and that

everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>200</sup>

Article 2 of the International Covenant on Civil and Political Rights also prohibits discrimination on the basis of gender, race, nationality and other grounds. CEDAW is the key international human rights instrument that specifically addresses discrimination against women. CEDAW defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>201</sup>

This Convention requires states parties to take measures to eliminate discrimination against women and to ensure their equal access to education, employment, healthcare and other services.<sup>202</sup>

The African Charter on Human and Peoples’ Rights is another important treaty that protects the rights of women migrants in Africa. Adopted in 1981, the Charter recognises the importance of protecting human rights and fundamental freedoms in Africa and requires states to take measures to ensure that these rights are respected and protected. Article 2 of the Charter prohibits discrimination on any grounds, including race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth, or other status.

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<sup>199</sup> Article 1 of UDHR.

<sup>200</sup> Article 2.

<sup>201</sup> Article 1 of CEDAW.

<sup>202</sup> Article 2.

In addition, article 2 of the Convention on the Rights of the Child (CRC) – the most widely ratified treaty globally – recognises the vulnerability of children, including migrant children, to discrimination and requires states to take measures to protect their rights.<sup>203</sup>

Botswana’s own Constitution also explicitly prohibits discrimination on the grounds of race, tribe, place of origin, political opinions, colour, creed or sex.<sup>204</sup> This means that migrants who are in Botswana are in principle entitled to the same legal protections as citizens, and they cannot be discriminated against based on their nationality or immigration status. Although, as stated above, this provision is qualified.<sup>205</sup>

Despite these protections, as this part of the thesis demonstrates, Zimbabwean women migrants in Botswana often face discrimination based on their gender and migration status. They may be subject to gender-based violence, exploitation and abuse, and unequal access to healthcare and decent employment opportunities.

#### 6.5.1.3 Right to security of persons and protection against sexual exploitation and/or violence

International law recognises the right to security of persons as a fundamental human right. This right is protected by various international treaties, including the UDHR<sup>206</sup> and the International Covenant on Civil and Political Rights.<sup>207</sup> This right is essential for the well-being and dignity of every individual, and its protection is crucial for the establishment of a just and peaceful society. The right to security of the person is defined as the right of every individual to be free from fear and to live in safety. It encompasses the protection of individuals from physical harm, and from psychological and emotional abuse. This includes protection from acts of violence such as murder, assault and rape, as well as from other forms of abuse such as domestic violence and human trafficking. The freedom from violence is also a crucial aspect of the right to security of persons. This includes acts of domestic violence, sexual violence and hate crimes.<sup>208</sup>

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<sup>203</sup> Article 2 of CRC.

<sup>204</sup> Chapter II of the Botswana Constitution.

<sup>205</sup> Section 15(4).

<sup>206</sup> Article 3 of UNDR.

<sup>207</sup> Article 9 of ICCPR.

<sup>208</sup> UN Human Rights Committee (HRC), General Comment No 35, Article 9 (Liberty and security of person), 16 December 2014, CCPR/C/GC/35.



The protection of the right to security of persons is the responsibility of the state. This includes the duty to prevent and investigate acts of violence, and to provide victims with appropriate support and services. It also includes the duty to hold perpetrators accountable for their actions and to ensure that justice is served.<sup>209</sup> However, the state is not the only responsible party. Society also plays a role in protecting the right to security of persons and freedom from violence. This includes promoting a culture of non-violence and respect for human rights and holding individuals and groups accountable for acts of violence.<sup>210</sup>

In their General Comment 35, the Human Rights Committee has clarified article 9 to mean that the right to security of persons extends to

girls and boys, soldiers, persons with disabilities, lesbian, gay, bisexual and transgender persons, aliens, refugees and asylum seekers, stateless persons, *migrant workers*, persons convicted of crime, and persons who have engaged in terrorist activity.<sup>211</sup> (my emphasis)

In addition, as stated in Chapter 4, given the heightened vulnerabilities they experience during their irregular migration journey, women migrants in particular have additional protection under various treaties<sup>212</sup> and general comments<sup>213</sup> protecting their rights to security of persons.

Despite this, a substantial body of scholarship indicates that migrant women in irregular situations commonly encounter sexual assault, psychological abuse and physical violence.<sup>214</sup> The case study

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<sup>209</sup> HRC (n 245).

<sup>210</sup> HRC (n 245).

<sup>211</sup> HRC (n 245).

<sup>212</sup> CEDAW, Maputo Protocol.

<sup>213</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No 26 on women migrant workers, 5 December 2008, CEDAW/C/2009/WP1/R. Available at <<https://www.refworld.org/docid/4a54bc33d.html>>; UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No 38 (2020) on trafficking in women and girls in the context of global migration, 20 November 2020.

<sup>214</sup> F Maphosa. (2012). Irregular migration and vulnerability to HIV&AIDS: Some observations from Zimbabwe. *African Development* 37(2): 119–135. Available at <<https://www.semanticscholar.org/paper/Irregular-Migration-and-Vulnerability-to-HIV%26AIDS%3A-Maphosa/780a6d58c2ebc7d5f25c37afc0290dd9849f19a6>>; J Andall. (2018). Intra-African female labour migration: Common issues, work and rights migration for structural transformation. *African Journal of Migration & Society* 4(1): 1–19. doi: 10.31920/2516-1088/2018/4n1a1.

of this research is no different as it has long been documented that women migrants from Zimbabwe experience serious violations of their right to security of the person when in transit. This is due in part to the stringent immigration laws discussed in the previous section which often force women to undertake their migration journey in an irregular manner.

In their 2022 study, ‘Pervasive irregular migration and the vulnerabilities of irregular female migrants at Plumtree border post in Zimbabwe’,<sup>215</sup> Matose et al document these violations experienced by specifically Zimbabwean women migrants at the Plumtree–Rramakgwebana border in the north-east part of Botswana. They conclude that:

Females also migrate using the informal routes and have heightened vulnerabilities as their rights are violated by males who assist them in crossing the borders and prey on them.<sup>216</sup>

They documented the various ways in which women face both physical and emotional violence when travelling in transit to Botswana. Similarly, in another study, exposure to robbery and violence was identified as a common risk associated with Zimbabwean women migrants who travel irregularly. It found that women were at a considerably disproportionate risk due to specific challenges they related to clandestine ways of travel such as being violently robbed by the notorious armed robber and rapist *amagumaguma* gangs. These attacks by the *amagumaguma* are well documented in media and other literature.<sup>217</sup> The participants in the study specified that they experienced violent dispossession of their belongings while travelling to Botswana with some stating that they had been stabbed with knives or even beaten with logs if they were perceived to be resisting the attacks.

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<sup>215</sup> Tsitsi Matose, Gracious Maviza & Wilfred Nunu. (2022). *Pervasive Irregular Migration and the Vulnerabilities of Irregular Female Migrants at Plumtree Border Post in Zimbabwe*. 10.1016/j.jmh.2022.100091 Available at <<https://www.sciencedirect.com/science/article/pii/S2666623522000149>>.

<sup>216</sup> Matose, Maviza & Nunu (n 215) 1.

<sup>217</sup> G Ncube. (2010). *Migrant Remittances, Household Livelihood Strategies and Local Development: A Case Study of Village 2 in Ward 19 of Tsholotsho District in Zimbabwe*. Research Paper submitted for a Master of Arts in Development Studies at the International institute for Social Studies (ISS); J McGregor & R Primorac. (2010). *Zimbabwe's New Diaspora: Displacement and the Cultural Politics of Survival*. Berghahn Books, 31; G Ncube, N Dube & M Sithole. (2104). Immigration policy reforms and pervasive illegal migration: A case of the illegal border jumpers (Beitbridge Border post). *IOSR J Hum Soc Sci* 19(5): 114–121.

These incidents which the study stated were ‘prevalent’ among those interviewed. Members of the armed forces were also indicated as perpetrators of sexual violence, often raping women migrants ‘in return’ for entry into Botswana. A key informant from the IOM said this of this reality:<sup>218</sup>

We have had cases of women who have been raped by men who pretended to assist them in crossing over into the receiving country. Some rape survivors report being raped by security personnel (soldiers and the police) who man the boundary between the two countries. Most of these cases go unreported because the migrants are undocumented and fear going to the police will result in their deportation.

Zimbabwean women in this study also reported being subjected to other forms of gender-based violence by various actors through their transit journey, indicating that instances of psychological and emotional abuse were common. Such cases involved women being branded as bad mothers and called derogatory names such as ‘prostitute’<sup>219</sup> by soldiers, gangs and smugglers. These instances indicate that women migrants in Botswana are subjected to grave human rights violations, exacerbated by their intersecting vulnerabilities brought about by their gender and irregular status.<sup>220</sup>

#### 6.5.1.4 Protections against trafficking

Human trafficking, also known as trafficking in persons, is a form of irregular migration that affects nearly 25 million people worldwide.<sup>221</sup> According to the ILO, women are disproportionately at risk of being trafficked and make up the majority of reported victims of all types of trafficking streams.<sup>222</sup> The age range of those trafficked is typically between 19 and 50, and they are often trafficked for the purposes of sexual exploitation, domestic servitude and

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<sup>218</sup> Matose, Maviza & Nunu (n 215).

<sup>219</sup> The author uses this word for context but is aware that this term is no longer appropriate, and the term ‘sex worker’ is the one preferred.

<sup>220</sup> Matose, Maviza & Nunu (n 215).

<sup>221</sup> Emma Ecker. (2022). *Breaking Down Global Estimates of Human Trafficking: Human Trafficking Awareness Month, January 2022*. The Trafficking Institute. Available at <<https://traffickinginstitute.org/breaking-down-global-estimates-of-human-trafficking-human-trafficking-awareness-month-2022/>>.

<sup>222</sup> UN Women, statement by Ms Sima Bahous, UN Women Executive Director, for the World Day against Trafficking in Persons, 30 July 2022. Available at <<https://www.unwomen.org/en/news-stories/statement/2022/07/statement-crises-drive-an-increase-in-human-trafficking-heres-how-we-stop-it>>.

marriage.<sup>223</sup> In Africa, women also make up the largest number of those trafficked both within the country and internationally.<sup>224</sup> While women are often involved in human trafficking, they tend to act as intermediaries rather than primary perpetrators, who are usually men.<sup>225</sup> In this way feminist analysis considers trafficking in persons to be a ‘gender-based phenomenon’<sup>226</sup> with an estimated 79% of all detected victims of trafficking being women and children, whereas the human traffickers are depicted as being ‘overwhelmingly male’.<sup>227</sup>

Trafficking also affects women and girls disproportionately as they experience multiple forms of discrimination such as a lack of access to property rights, education, political representation and economic inequality. This intersectional bias within trafficking means that, whereas individuals of all genders and backgrounds can be victimised, certain groups are more vulnerable than others to exploitation.<sup>228</sup> In Africa, a greater likelihood of trafficking happens to women and girls also because of how little value many African cultures place on them and the often-sparse investment in girls, as

the view in some societies is that females can be used to advance a family’s economic position results in girls in many societies being sold off to repay a family’s debt, provide cash for a medical emergency, or compensate for an absence of revenue when crops have failed.<sup>229</sup>

In this way it is discrimination against women and girls that is a major contributor to their being trafficked.

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<sup>223</sup> E Cockbain & K Bowers. (2019). Human trafficking for sex, labour and domestic servitude: How do key trafficking types compare and what are their predictors? *Crime Law Soc Change* 72: 9–34. Available at <<https://doi.org/10.1007/s10611-019-09836-7>>.

<sup>224</sup> UNODC Global Report on Trafficking in Persons. Available at <[https://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](https://www.unodc.org/documents/Global_Report_on_TIP.pdf)>.

<sup>225</sup> UNDOC (n 224).

<sup>226</sup> G Fernandez & K Yoshida. (2018). *Human Trafficking as a Gendered Phenomenon – Part I*, 28 June 2018. Available at <<https://ilg2.org/2018/06/28/human-trafficking-as-a-gendered-phenomenon-part-i/>>.

<sup>227</sup> Fernandez & Yoshida (n 226).

<sup>228</sup> International Women and Girls Series. (nd). *Human Trafficking and Its Impact on Women, Girls, and Children*. Available at <<https://ecpat.org/story/international-women-and-girls-series-5-how-does-trafficking-affect-women-girls-and-children/>>.

<sup>229</sup> L Shelly. (2011). Human trafficking: Why it is such an important women’s issue? In Debra Bergoffen, Paula Ruth Gilbert, Tamara Harvey & Connie McNeely (eds), *Confronting Global Gender Justice: Women’s Lives, Human Rights*. Oxford: Routledge, 35–49.

Trafficking in persons is a serious violation of human rights that can have profound negative impacts on the victims. These impacts can be exponential and may include exposure to physical and psychological coercion, violence, and abuse. In terms of definition, the Trafficking Protocol<sup>230</sup> is the first global legally binding instrument with an agreed definition on trafficking in persons:

‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude, or the removal of organs.

#### 6.5.1.5 Trafficking of Zimbabwean women to Botswana

Their desperate need for work and the difficulties faced by Zimbabwean women in entering Botswana legally due to strict immigration policies make them particularly vulnerable to trafficking. Certain individuals or groups known as ‘enablers’ such as *malaichas* (drivers who assist migrants to cross borders illegally) or *amagumagumas* have been identified as both smugglers and traffickers. In this vein, the Borgen Project noted that: ‘Human trafficking in Zimbabwe is prevalent as thousands of women fall victim to human trafficking under the guise of job opportunities.’<sup>231</sup> In addition, there have been instances where girl children from Zimbabwe have been trafficked, often in cooperation with their families, to become domestic workers in Botswana. Such a story is recounted in an appeal by Rumbidzai Chakamba<sup>232</sup> who spoke of a 23-year-old domestic worker who was trafficked into Botswana when she was 15 to work as a domestic worker in order to assist her family who were struggling financially in Zimbabwe.

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<sup>230</sup> United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children.

<sup>231</sup> The Borgen Project. (2022). *Human Trafficking in Zimbabwe*, 26 August 2022. Available at <<https://borgenproject.org/human-trafficking-in-zimbabwe/>>.

<sup>232</sup> R Chakamba. (nd). *SADC and EU Intensify Efforts to Combat Human Trafficking*. SADC-EU Journalists Hub. Available at <<https://sadc-eu.sardc.net/877-2/>>.

Essentially living under conditions of domestic servitude,<sup>233</sup> as she was not getting paid for work, the young woman said this of her experience:

It was not a nice place, she (her employer) would not give me anything and she would get angry if she saw me eating a lot or resting. She always wanted to see me working.<sup>234</sup>

Similarly, literature indicates that Zimbabwean women migrants are the most likely people to be trafficked into Botswana because the 2021 US Department of State *Trafficking in Persons Report: Botswana* stated that in the reported year ‘the government [of Botswana] initiated three trafficking investigations ... *All three cases* involved Zimbabwean traffickers who allegedly exploited Zimbabweans in labour and sex trafficking within Botswana’.<sup>235</sup> (my emphasis). This confirms that Zimbabwean migrants in Botswana are more likely to be exploited and trafficked, most likely because of the challenging circumstances that may have prompted their migration and their fear of being caught by authorities due to their unauthorised status, which can lead to violations of their rights. Further, a report by the US Department of State in 2022 on human trafficking in Botswana<sup>236</sup> revealed that the authorities in Botswana have inadequate procedures for identifying and addressing cases of human trafficking involving migrants. This indicates that the measures in place to combat trafficking under the Act do not adequately consider the situation of Zimbabwean migrants, and especially migrant women, who are at a greater risk of trafficking than men, as mentioned earlier in this section.

## **6.5.2 In host country**

### **6.5.2.1 Right to asylum and problematic distinction between refugees and ‘economic migrants’ in Botswana**

Although there is an important international law distinction between migrants and refugees, it is important to discuss the right to asylum in the context of Zimbabwe–Botswana migration because the stringent formulation of the national Refugee Act is often a reason why genuine Zimbabwean

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<sup>233</sup> Domestic servitude typically involves victims working in a private family home where they are ill-treated, humiliated, subjected to unbearable conditions or working hours and made to work for little or no pay.

<sup>234</sup> Chakamba (n 232).

<sup>235</sup> US Department of State. (2021). *Trafficking in Persons Report: Botswana*. Available at <<https://www.state.gov/reports/2021-trafficking-in-persons-report/botswana/>>.

<sup>236</sup> US State Department (n 235).

refugees opt to rather be deemed economic migrants instead of applying for refugee status, thereby limiting their right to asylum. As previously discussed, the political climate in Zimbabwe has caused many citizens to suffer severe humanitarian hardships as a result of violence inflicted upon them by their government. In addition, the concept of persecution has been expanded to include economic persecution in recent years. This means that individuals who suffer greatly due to a country's poor economic conditions can arguably be considered refugees under international law.<sup>237</sup> However, Botswana's legal system differentiates between economic migrants and refugees, making it difficult for those who have not experienced political persecution to apply for refugee status.

In addition, and perhaps more importantly, the asylum space is extremely restricted in Botswana. In many respects refugees have very limited rights, particularly in seeking livelihoods, owing to the reservations that the country entered when ratifying the 1951 Convention. In this way many Zimbabweans who may qualify as refugees prefer to avoid the asylum procedures and opt to be undocumented economic migrants due to the hardships that they undergo in Botswana (as discussed below in this section). Betts summarised this succinctly in his article, *Botswana: The Division of Zimbabweans into Refugees and Migrants*, when he stated that:

This dichotomy [between refugees and migrants] has had significant human consequences for the many desperate Zimbabweans outside the asylum system. Eager to earn money to remit to family back home rather than be trapped in detention or the refugee camp, most have bypassed the asylum system.<sup>238</sup>

#### 6.5.2.2 Exclusionary refugee status determination procedures for asylum-seekers

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<sup>237</sup> See J Falkler. (2007). Comment – economic mistreatment as persecution in asylum claims: Towards a consistent standard. *U Chi Legal F* 471–501; see also LM Ramos. (2021). A new standard for evaluating claims of economic persecution under the 1951 Convention Relating to the Status of Refugees. *Vanderbilt Law Review* 499: 44. Available at <<https://scholarship.law.vanderbilt.edu/vjtl/vol44/iss2/6>>; K Jastram. (2010). Economic harm as a basis for refugee status and the application of human rights law to the interpretation of economic persecution. In J Simeon (ed), *Critical Issues in International Refugee Law: Strategies toward Interpretative Harmony*. Cambridge: Cambridge University Press, 143–173. doi: 10.1017/CBO9780511762864.007.

<sup>238</sup> Alexander Betts. (2013). Botswana: The division of Zimbabweans into refugees and migrants. In *Survival Migration: Failed Governance and the Crisis of Displacement*. Ithaca, NY: Cornell University Press, 78–89. Available at <<https://doi.org/10.7591/9780801468964-007>>.

Section 3(1) of the Refugee Act prescribes that the minister may ‘establish one or more Refugee Advisory Committees’ (RAC). These committees are charged with the responsibility of assessing refugee claims and typically consists of staff from the then Ministry of Defence, Justice, and Security (MoDJS), police officers, immigration officers and an officer from UNHCR who sits in an *ex-officio* advisory capacity (with no voting rights). The RAC takes decisions by consensus. Routinely, the RAC in Botswana refuses to consider the validity of asylum claims made by refugees based solely on the fact that they passed through another country before arriving in Botswana,<sup>239</sup> even though this practice is not supported by the 1951 Convention or any of Botswana’s laws or policies. This approach, known as the ‘first country of asylum’ principle, is derived from the EU Asylum Procedures Directive,<sup>240</sup> which is not considered international law. Botswana also applies this principle incorrectly<sup>241</sup> as under the directives it should be applied only when an asylum-seeker has been recognised as a refugee in the first country of transit and would be readmitted there. However, the RAC in Botswana does not follow this requirement, resulting in many rejections of refugee status for asylum-seekers who have fled from countries not bordering on Botswana.<sup>242</sup> According to article 27(1) of the Asylum Procedures Directive (APD),<sup>243</sup> the RAC is required to conduct an investigation to determine if an applicant will be readmitted to the first country of asylum before denying their status, but this requirement is not being followed. In addition, there is also no formal appeal process in place for those who are denied refugee status.<sup>244</sup>

### 6.5.2.3 Automatic detention of asylum-seekers

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<sup>239</sup> United Nations Working Group on Arbitrary Detention. (nd). Available at < <https://www.ohchr.org/en/press-releases/2022/07/botswana-must-urgently-embrace-further-safeguards-against-arbitrary>>.

<sup>240</sup> European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, OJL. 180/60–180/95; 29.6.2013, 2013/32/EU. Available at <<https://www.refworld.org/docid/51d29b224.html>>.

<sup>241</sup> Despite the fact that UNHCR regularly conducts a workshop for members and alternate members of the RAC on the principles of refugee status determination (RSD).

<sup>242</sup> Available at <<https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=4846&file=EnglishTranslation>>. Also see Elizabeth Macharia-Mokobi & Jimcall Pfumorodze. (2013). Advancing refugee protection in Botswana through improved refugee status determination. *Afr Hum Rights Law J* 13(1): 1– 26. Available at <[http://www.scielo.org.za/scielo.php?script=sci\\_arttext&pid=S1996-20962013000100008&lng=en&nrm=iso](http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962013000100008&lng=en&nrm=iso)>. ISSN 1996-2096>.

<sup>243</sup> Article 27(2) of the Asylum Procedures Directive.

<sup>244</sup> Not stipulated in the Refugee Act.



The policy and practice in Botswana are to detain asylum-seekers while their status is being determined.<sup>245</sup> Owing to a lack of dedicated transit or reception centres, these detentions often take place at a Centre for Illegal Immigrants (CII), where asylum-seekers are housed with people who have entered or remained in the country irregularly. The facilities at these centres do not meet internationally recognised standards for the purposes for which they are being used. Asylum-seekers often see these facilities as similar to prisons, and they have a sense of being held awaiting trial. However, they are in fact awaiting protection. This experience is particularly difficult for children, who are often detained with their parents and denied access to education and other social services, which contravenes the Children's Act.<sup>246</sup>



Source: Photograph by author, on an observational site visit, 22 November 2022.

#### 6.5.2.4 Restrictions on right to work for refugees

Section 14(1) of the Refugee Act provides that refugees have to apply for work permits. If granted, these permits can be extended at the discretion of the minister as per section 14(2). In practice, however, unless refugees possess scarce skills, these applications are rarely successful. Owing to the lack of viable economic activities in the camp, the community faces innumerable social ills, from alcohol and drug abuse to gender-based violence and commercial sex work. The encampment policy has also rendered livelihood programming challenging as accessing market opportunities is

<sup>245</sup> Amnesty International. (2022). *Botswana: Positive Reputation Belies Hidden Violations*. Amnesty International: Submission to the 43rd session of the UPR Working Group, 3 May 2023, 11 October 2022. Index Number: AFR 15/6088/2022.

<sup>246</sup> Section 18 of the Children's Act 8 of 2009. See also E Macharia Mokobi. (2020). Child asylum seekers in Botswana: A critique of the *Ngezi* and *Iragi* decisions. In Mark Klaasen, Stephanie Rap, Peter Rodrigues & Ton Liefwaard (eds), *Safeguarding Children's Rights in Immigration Law*. Cambridge: Cambridge University Press, 217–233.

curtailed by restricted freedom of movement. This has a particular impact on women because, as noted by the West Asia-North Africa Institute:

The employment of refugee women is a recurrent concern for international organisations and NGOs whose programmes provide protection and basic needs. Refugee women are commonly viewed as more vulnerable and at greater risk of poverty than their male counterparts.<sup>247</sup>

In this way, due to the lack of economic activities in the camp, refugee women and girls are routinely forced into under-employment, commonly undertaking informal work as domestic workers for short periods as they are not allowed to be out of the camp for extended periods of time. They also take on ‘piece jobs’, which are odd jobs such as cleaning, ironing, gardening, etc. Limited work opportunities also mean refugee women and girls are prone to innumerable social ills, including alcohol and drug abuse, gender-based violence, teenage pregnancy and commercial sex work.<sup>248</sup> Young girls commonly get involved in intergenerational transactional relationships in order to obtain money or presents from their older partners (or ‘blessers’).<sup>249</sup>

#### 6.5.2.5 Violations of right to family life of refugees

The right to family unity is not among the provisions included in the Refugee Act, consequently, spouses of recognised refugees are not entitled to derivative refugee status.<sup>250</sup> In Botswana, non-refugee foreigners who are married to refugees are not allowed to live with them in the Dukwi settlement. This leads to refugees married to non-refugees residing outside of the settlement, breaking the policy of living in an encampment. Even though the government recognises the children of these unions as refugees, the non-refugee spouse is subject to immigration laws. Recently, the UNHCR has observed an increasing trend of refugees married to foreign non-

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<sup>247</sup> Dorsey Lockhart, Katrina Barker & Shaddin Alhajahmad. (2018). *Syrian Refugee Women and the Workforce in 2017*. London: West Asia–North Africa Institute (WANA).

<sup>248</sup> UNHCR Botswana. (nd). *Findings of the Participatory Assessment with Children in Dukwi Refugee Camp in Botswana*. Available at <<https://www.unhcr.org/44c8ba082.pdf>>.

<sup>249</sup> Njabulo Banda. (2022). The transactional phenomenon of ‘sugar daddies’, ‘blessers’ and its dangers. *Daily Maverick*, 10 August 2022. Available at <<https://www.dailymaverick.co.za/article/2022-08-10-the-transactional-phenomenon-of-sugar-daddies-blessers-and-its-dangers/>>.

<sup>250</sup> Under the Procedural Standards for RSD under UNHCR’s mandate, family members and/or dependents of a recognised refugee may apply for derivative refugee status in accordance with their right to family unity. Available at <<https://www.unhcr.org/43170ff81e.pdf>>.

refugees whose permit to stay in the country are not being renewed, resulting in the separation of families.<sup>251</sup>

#### 6.5.2.6 Limited durable solutions for refugees

Being a refugee is not meant to be a permanent status. In light of this, refugees are to be given access to three durable solutions: repatriation,<sup>252</sup> local integration<sup>253</sup> and resettlement.<sup>254</sup> Traditionally, resettlement is a limited option and less than 1% of refugees globally are resettled.<sup>255</sup> Section 13 of the Refugee Act, coupled with the naturalisation reservation that Botswana has made to the 1951 Convention,<sup>256</sup> also effectively bars refugees from applying for citizenship which also makes local integration a limited option. Therefore, the remaining option – repatriation – is the durable solution which has been imposed on refugees in the recent years, often against their will<sup>257</sup> and after litigation.<sup>258</sup> However, many refugees in Botswana come from countries which are still in conflict (Democratic Republic of Congo (DRC), Somalia and Ethiopia) and therefore cannot be repatriated, as this would amount to *refoulement*, which results in them being so called ‘protracted cases’, that is, being refugees for 20 years or more.

#### 6.5.2.7 Encampment system applied to refugees

The Government of Botswana has a strict policy for confining refugees to camps, even though the Refugee Act does not prescribe it. They argue that this policy is in line with their reservation to article 26 of the 1951 Convention on the Status of Refugees.<sup>259</sup> As a result, a minority of people of concern reside outside the camp. Some individuals are hosted in the Mogoditshane urban

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<sup>251</sup> Information known by the author as they worked at the UN refugee agency in Botswana for four years.

<sup>252</sup> Voluntary repatriation is the return of any refugee and asylum-seeker to their country of origin based on a free and informed choice.

<sup>253</sup> Local integration occurs when refugees seek to attain rights similar to those enjoyed by the citizens of the country in which they have sought refuge.

<sup>254</sup> Resettlement is the selection and transfer of refugees from a state in which they have sought protection to a third state that has agreed to admit them – as refugees – with permanent residence status.

<sup>255</sup> Available at <<https://news.un.org/en/story/2020/11/1078052#:~:text=UNHCR%20is%20mandated%20by%20its,refugees%20are%20resettled%20each%20year>>.

<sup>256</sup> Article 34.

<sup>257</sup> Available at <<https://www.amnesty.org/en/latest/news/2018/07/botswana-caprivi-refugees-should-not-be-forced-to-return-home/>>; <<https://www.voanews.com/africa/zimbabwe-refugees-lose-fight-remain-botswana-0>>.

<sup>258</sup> Available at <<https://africanlii.org/article/20190912/concern-over-impact-botswanas-appeal-decision-refugees>>.

<sup>259</sup> On freedom of movement.

refugee compound in Gaborone. A few refugees are granted permission to reside outside the camp for either educational purposes, health reasons or if they possess a specialised skill not available among the nationals (e.g., teachers of French language). However, in the recent years the government has clamped down on issuing and renewing residence and/or work permits, and very few have been granted.

Some refugees also receive short-term (maximum three days) exit permits to leave the camp on business-related activities. However, it is also recognised that some people of concern (PoC)<sup>260</sup> leave the camp to find temporary work ('piece jobs') in villages neighbouring the camp, or in bigger urban centres, such as Francistown and Maun. This is in breach of the reservations to freedom of movement and right to work. PoC in mixed marriages with nationals or with nationals of other countries, also reside outside the camp, since persons who are not refugees are not permitted to reside in the camp.

Encampment presents peculiar challenges, particularly for women refugees and the situation for encamped refugees is unique in terms of vulnerability to gender-based violence. Years of life in camps among other uprooted people from a mixture of nationalities – marked by dependency, the lack of livelihoods, and educational opportunities, meaningful activities and durable solutions creates a high-risk environment. It is acknowledged worldwide that sexual and gender-based violence increases during situations of forced displacement because traditional support systems break down and people's economic and social rights may not be met in some countries of asylum.<sup>261</sup>

In the Dukwi Camp in Botswana, the main form of GBV identified by respondents is domestic violence.<sup>262</sup> In a UNHCR study participants in a focus group of both sexes labelled domestic

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<sup>260</sup> A term used by UNHCR to describe refugees, asylum-seekers, internally displaced persons and stateless persons the term 'others of concern' is used to describe spouses and children of these groups.

<sup>261</sup> AL Wirtz, K Pham & N Glass et al. (2014). Gender-based violence in conflict and displacement: Qualitative findings from displaced women in Colombia. *Confl Health* 8: 10. Available at <<https://doi.org/10.1186/1752-1505-8-10>>; Japheth Kwiringira, Marion Mugisha, Firminus Mugumya, Edward Kaweesi, Deogratias Munube & Joseph Rujumba. (2018). Experiences of gender-based violence among refugee populations in Uganda: Evidence from four refugee camps. *Eastern Africa Social Science Research Review* 34. 10.1353/eas.2018.0010.

<sup>262</sup> Johannes John-Langba. (2007). The relationship of sexual and gender-based violence to sexual-risk behaviour among refugee women in sub-Saharan Africa. *World Health & Population* 9(2): 26–37. 10.12927/whp.2007.18957.

violence as the most common type of violence perpetrated against women and children. The participants estimated that 70% of women had experienced physical or other forms of violence in the home. Responses by community leaders and service-providers corroborated this observation. Women state that they feel that they are vulnerable to this violence because of the dependence that they have on male partners as they do not have the ability to support themselves.<sup>263</sup>

#### 6.5.2.8 Revocation of status amounting to refolement of refugees

As detailed under article 4.8.1 of the ‘Procedural Standards for Refugee Status Determination under UNHCR’s Mandate’,<sup>264</sup> revocation applies when subsequent to recognition a refugee engages in conduct that would bring them within the exclusion clauses of article 1(f)(a) or 1(f)(c) of the 1951 Convention. Of note, revocation does not apply, if, as per 1(f)(b),<sup>265</sup> the refugee has committed a serious non-political crime outside the country of refuge prior to their admission to that country as a refugee.

Despite this, section 41 of the Immigration Act<sup>266</sup> provides that any migrant including refugees and asylum-seekers who were tried, convicted and sentenced to imprisonment without an option of a fine are declared prohibited immigrants and are liable to deportation. The application of prohibited immigrant’s status also leads, in practice, to the revocation of refugee status. Afterwards, these refugees are forcibly returned to their countries of origin, which amounts to refolement. Refugees who have been declared prohibited immigrants and who cannot be deported, are detained indefinitely in the CII. The Government of Botswana is aware that revocation of status should apply only when, subsequent to recognition, a refugee engages in conduct that would bring them within the scope of the exclusion clauses of article 1(f)(a) or 1(f)(c) of the 1951 Convention. However, the prohibited immigrant provision (which leads to withdrawal of status) is applied even if a refugee commits a common crime, and this is not in line with international standards.

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<sup>263</sup> UNHCR Botswana. (nd). *Findings of the Participatory Assessment with Children in Dukwi Refugee Camp in Botswana*. Available at <<https://www.unhcr.org/44c8ba082.pdf>>.

<sup>264</sup> UN High Commissioner for Refugees (UNHCR). (2020). *Procedural Standards for Refugee Status Determination under UNHCR’s Mandate*, 26 August 2020. Available at: <<https://www.refworld.org/docid/5e870b254.html>>.

<sup>265</sup> Article 1(f)(b) 1951 Convention.

<sup>266</sup> Immigration Act 3 of 2011.

The process also leads to specific consequences related to gender, as even though refugee women are not legally permitted to work, many do so in order to provide for themselves as the aid they receive from organisations such as the UNHCR and other non-governmental organisations (NGOs) is not always sufficient. A permit is required from the settlement commandant's office in order to exit the camp and these permits are typically only issued for a short period of time. Many refugee women leave the camp to do work and may overstay their permits. If they are caught violating the terms of their permits, they are detained in an immigration detention centre with prison-like conditions until they are sent back to the camp. In some cases, authorities may also use the absence from the camp without permission as a reason to revoke the refugee status of these women, thereby denying them international protection.

#### 6.5.2.9 Revocation of status when refugee leaves the country

Another ground that the Government of Botswana uses to revoke citizenship is if refugees leave the country. This is articulated in section 10(2) of the Refugee Act which states 'a recognized refugee shall on his departure from Botswana cease to be a recognized refugee'. This has particular implications for Zimbabwean refugees in particular as it was noted in the previous chapter that Zimbabwe–Botswana migration movements are highly circular, so this provision is particularly prejudicial to Zimbabwean women refugees who often want to return home.

#### 6.5.2.10 Refugees barred from citizenship

The laws of Botswana provide specifically that a refugee is not regarded as being ordinarily resident (other than for the purposes of taxation), and therefore in terms of section 13 of the Refugee Act refugees are excluded from normal naturalisation procedures. As stated above, under the Citizenship Act anyone resident in Botswana for ten years (five if they are a spouse) can apply for citizenship.<sup>267</sup> However, the domestic refugee legislation makes an exception for refugees who will not be considered as residents for the purpose of naturalisation. This means that it is difficult for refugees, who seek to reintegrate locally or for stateless refugees, to become citizens of Botswana.

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<sup>267</sup> Citizenship Act 8 of 1998 [Cap 01-01].

Considering the complex and confusing regulations present in the national Refugee Act, many Zimbabweans facing persecution in their home country and in need of international protection choose to instead become irregular migrant workers rather than navigate the asylum system. This choice, however, effectively denies them their right to seek asylum.

#### 6.5.2.11 Right to health

As stated previously in Chapter 4, the right to the highest attainable standard of health – more simply referred to as the right to health – is a commonly recognised right present in various human rights standard. The right was first mentioned in the Constitution of the World Health Organisation (WHO),<sup>268</sup> which states the following:

Health is a state of complete physical, mental, and social well-being, not merely the absence of disease or infirmity. The enjoyment of the highest attainable standard of health is one of the fundamental rights of all human beings without distinction as to race, colour, and religion.

Following this, the right was guaranteed in the UDHR under article 25 which purports that:

everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.

Botswana has ratified several international standards that should allow migrants access to health services, including:

- the International Covenant on Civil and Political Rights;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention Relating to the Status of Refugees;
- the African Charter on Human and Peoples' Rights;
- the OAU Refugee Convention; and
- the SADC Protocol on Health.<sup>269</sup>

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<sup>268</sup> The Constitution of the WHO was adopted by the International Health Conference, New York, 19–22 June 1945; opened for signature on 22 July 1946 by the representatives of 61 states; 14 UNTS 185.

<sup>269</sup> Available at <[https://www.sadc.int/sites/default/files/2021-08/Protocol\\_on\\_Health1999.pdf](https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Health1999.pdf)>.

The African Charter proclaims that:

*every individual shall have the right to enjoy the best attainable state of physical and mental health. State Parties to the present charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.*<sup>270</sup>

Health rights of children in Africa, including migrant children, are further entrenched in article 14 of the African Charter on the Rights and Welfare of the Child (ACRC) which provides that ‘every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health’. A similar provision exists in the Convention on the Rights of the Child (CRC), the most widely ratified treaty in the world.

In line with international standards, healthcare services must be available, accessible, acceptable and of decent quality.<sup>271</sup>

#### 6.5.2.12 Right to health for migrants in Botswana

Despite the fundamental nature and widescale protection of the right to health in international law, the Constitution of Botswana does not contain an express reference to a right to health. The Botswana’s Public Health Act<sup>272</sup> also does not provide explicitly for the right to health, it rather puts an obligation on the Ministry of Health to ‘carry out activities that could contribute to the realisation of the right to health’. Furthermore, Botswana’s national health policies and immigration legislation do not have provisions on obligations that the government has in relation to providing health services to migrants in the country. Because of these lacunas in the law, the right to health of migrants can be inferred from constitutional provisions on right to life,<sup>273</sup> protection from cruel and degrading treatment<sup>274</sup> and protection from discrimination<sup>275</sup> as the Bill of Rights does not differentiate between nationals and those who are not. In this vein a 2017 report on migrants’ right to health in southern Africa noted that:

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<sup>270</sup> Article 16.

<sup>271</sup> UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No 14: The Right to the Highest Attainable Standard of Health (Art 12 of the Covenant), 11 August 2000, E/C12/2000/4. Available at <<https://www.refworld.org/docid/4538838d0.htm>>.

<sup>272</sup> Public Health Act 44 of 1971 [Cap 63:01].

<sup>273</sup> Section 4 of the Constitution of Botswana.

<sup>274</sup> Section 7.

<sup>275</sup> Section 15.



Given that Botswana does not discriminate against all those who live in it, in terms of enjoyment of fundamental human rights, save for political rights, migrants are in theory equally entitled to benefit from the activities of the Health Ministry on provision of health services.<sup>276</sup>

#### 6.5.2.13 Limited access to public health services for migrants

In their study, ‘Barriers to and use of healthcare services among cross-border migrants in Botswana: Implications for public health’,<sup>277</sup> Moroka and Tshimanga examined the extent to which cross-border migrants can access healthcare services in Botswana. As discussed in Chapter 3, cross-border migrants are a sub-group of migrants who trade goods over borders informally. Cross-border migrants in southern Africa are traditionally an extremely feminised group and statistics indicate that between 70% and 80% of cross-border migrants in our region are women.

The study, which assessed various levels of healthcare needs and access to services of Zimbabwean cross-border migrants in Botswana concluded that: ‘Cross-border migrants are of great public health concern as many of the undocumented migrants do not have access to health services.’<sup>278</sup> Because of this, cross-border migrants could have increased likelihoods of morbidity, and other health vulnerabilities which can frequently go unnoticed and untreated because of the costs associated with healthcare in Botswana. Added to this is the fear of apprehension and deportation if undocumented. The study found that the high mobility of cross-border migrants can often put them at a heightened risk of HIV and other sexually transmitted diseases (STDs) as they do not have access to prevention and treatment methods despite the prevalence of these health needs.

Similarly, the National Strategic Plan to Reduce Human Rights – Related Barriers to HIV and TB Services: Botswana 2020–2025<sup>279</sup> found that, whereas approximately 30 000 non-citizens in

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<sup>276</sup> International Organisation for Migration (IOM). (nd). *Migrants’ Right to Health in Southern Africa*. SIDA Available at <<https://www.migration.org.za/wp-content/uploads/2017/08/Migrants-Right-to-Health-in-Southern-Africa.pdf>>.

<sup>277</sup> T Moroka & M Tshimanga. (2009). Barriers to and use of healthcare services among cross-border migrants in Botswana: Implications for public health. *International Journal of Migration, Health and Social Care* 5(4): 33–42.

<sup>278</sup> Moroka & Tshimanga (n 277).

<sup>279</sup> The Global Fund, UNAIDS, NAHP. (nd). *National Strategic Plan to Reduce Human Rights – Related Barriers to HIV and TB Services: Botswana 2020–2025*. Available at <[https://www.theglobalfund.org/media/10418/crg\\_humanrightsbotswana2020-2025\\_plan\\_en.pdf](https://www.theglobalfund.org/media/10418/crg_humanrightsbotswana2020-2025_plan_en.pdf)>.

Botswana are living with HIV, only about 27% of them are receiving antiretroviral therapy (ART),<sup>280</sup> which is one-third of the average national coverage rate.<sup>281</sup> Several risk factors have been identified as contributing to vulnerability to HIV and hindering access to services, such as legal and policy barriers, immigration detention conditions, and stigma and discrimination when seeking care. Some undocumented foreign migrants have reported negative experiences when trying to access HIV services, including encountering healthcare workers who are unable or unwilling to help them, causing fear among those seeking assistance.<sup>282</sup>

In addition, a 2022 study of six southern African countries indicates that ‘inequalities exist in utilisation of sexual and reproductive healthcare (SRH) services between migrants and non-migrants’.<sup>283</sup> This is because it has been shown repeatedly that being a migrant is associated with less-than-optimal use of healthcare services, including SRH. Certain barriers experienced by migrant women included fear of deportation due to improper or a lack of legal papers, financial constraints, a lack of health information, language barriers and discrimination by service-providers.<sup>284</sup> These realities exist in Botswana as various studies have indicated that migrants have limited access to maternal healthcare services in Botswana, which puts them at a higher risk of both maternal morbidity and mortality. This not only violates such people’s right to health but also their right to life. This was confirmed in a study by Mogobe et al called ‘non-citizens and maternal mortality in Botswana: A rights perspective’, which states:<sup>285</sup>

Non-citizens in Botswana may be at higher risk of maternal mortality than citizens. There are considerable disparities between citizens (Botswana) and non-citizens who are economically disadvantaged, such as refugees and low-income migrants. Non-citizens are not entitled to free or subsidised healthcare, so only have access to services if they can pay cash or have medical

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<sup>280</sup> Global Fund et al (n 279) 22.

<sup>281</sup> Global Fund et al (n 279) 14.

<sup>282</sup> The Global Fund. (2018). *Baseline Assessment: Botswana: Scaling up Programmes to Reduce Human Rights-Related Barriers to HIV Services*. Geneva: The Global Fund, 26.

<sup>283</sup> C Chawhanda, J Levin & L Ibisomi. (2020). Factors associated with sexual and reproductive health service utilisation in high migration communities in six Southern African countries. *BMC Public Health* 22: 876. Available at <<https://doi.org/10.1186/s12889-022-13308-4>>.

<sup>284</sup> Chawhanda, Levin & Ibisomi (n 283).

<sup>285</sup> Keitshokile Dintle Mogobe, Sunanda Ray, Farai Madzimbamuto et al. (2014). Non-citizens and maternal mortality in Botswana: A rights perspective. *International Journal of Migration, Health, and Social Care* 10(4): 220–230. doi: 10.1108/IJMHS-08-2013-0029.

insurance, whereas Botswana pay a nominal fee of less than US\$1 per clinic visit and receive free ART regardless of their income. Maternal and child health (MCH) and family planning services are exempted from this nominal fee for citizens (Mills et al 2010). A survey in 2005 of health professionals working in Botswana showed that non-citizens had less access to pregnancy-related health services in that immigrants and refugees had to: pay higher fees for health care; once identified as HIV positive, were not followed up to assess CD4 counts or clinical condition since they were not eligible for subsidised ART; did not have referral rights to higher levels such as hospitals for investigations or procedures (Oucho & Ama 2009). Disparities in pregnancy-related care are in violation of these women's human rights.

#### 6.5.2.14 Right to nationality of children borne to migrant women

Botswana has adopted several human rights agreements that affirm the right to nationality, including:

- the ICCPR;
- the CEDAW;
- the Convention on the Elimination of Racial Discrimination (CERD);
- the Convention on the Rights of the Child (CRC); and
- the African Charter on the Rights and Welfare of the Child (ACRWC).

These treaties all contain provisions recognising the right to nationality. Despite this, a major challenge facing women migrants – exacerbated by the problems that confront them in the healthcare system – is the increased risk of the children they give birth to in Botswana being regarded as stateless and denied their right to nationality. Although no official records of the number of stateless people exist, the situation in Botswana means that many are at risk of being classified as such. A 2011 UNHCR study on statelessness in southern Africa<sup>286</sup> cited Botswana as a country with 'particularly weak legal protections against statelessness'.

The previous and current chapters highlight the fact that Zimbabwean women migrants in Botswana are typically of childbearing age, increasing the likelihood of pregnancy and childbirth. However, due to the lack of free public maternal healthcare available to foreign women in

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<sup>286</sup> Available at <<https://www.refworld.org/pdfid/50c1f9562.pdf>>.

Botswana, who are often forced to pay high fees for access, Zimbabwean migrant women may be forced to give birth in public facilities. If they are unable to pay for services, they may be denied birth certificates, or even abandon their babies, fearing punishment from the state if they are undocumented or irregular. This can lead to statelessness and the denial of basic rights such as nationality for the children.

A major risk factor for the children born to undocumented or irregular woman migrants is that no default provision for children exists and there is no other option to acquire nationality under Botswana citizenship law. Even though Botswana is a signatory to the ACRWC which states that states must have in place legislation for an explicit right to nationality for children who would otherwise become stateless, the Botswana laws on nationality do not provide automatic access to nationality to such children. In saying that, the law does provide some protection for such cases. The laws under section 21<sup>287</sup> of the Citizenship Act do allow an individual to obtain a ‘certificate of nationality’ in cases where there may be any doubt about their status. This is a useful protection against a situation of undetermined nationality, which, if it persists over time, can mean that the person is stateless. However, the issue of the certificate is at the discretion of the administrative authorities (the minister), and not provided through a process that is subject to sufficient due-process guarantees. Ideally, a person should be able to go to a court with relevant documentation and testimony, in order to obtain a legal ruling on whether they are a national, which is not presently the case.<sup>288</sup>

Second, as stated at the beginning of the chapter where the Citizenship Act is discussed, the requirements to obtain citizenship in Botswana are quite stringent and the granting of citizenship is discretionary. Such processes can put people at increased risk of foundling babies being stateless. Botswana has established an administrative procedure by which the decision to grant or deprive citizenship is made by a citizenship ‘board’ appointed by the relevant minister or the president; though providing a measure of protection from abuse, it should not justify the exclusion of review by the normal courts.

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<sup>287</sup> Section 21 of the Citizenship Act 8 of 1998 [Cap 01-01].

<sup>288</sup> Section 22. It is an administrative decision which is not subject to review by the courts. Section 22 of this Act states explicitly: ‘The Minister shall not be required to assign any reason for any decisions under any provision of this Act and no such decision shall be subject to appeal or review in any court.’

#### 6.5.2.15 Right to work and protection against labour exploitation

The right to work is acknowledged in several ILO Conventions and the African Charter, but for migrants this right is limited in many countries, including Botswana. In Botswana, foreign workers are required to obtain an employment visa to work in any sector, and there are various reasons that lead to Zimbabwean migrant women lacking proper documentation. Added to this, is the great demand for ‘the undemanding and docile Zimbabwean migrant worker and also the bureaucracy by the concerned government departments which could not expedite the documentation processes’. Furthermore, the main objective of a migrant woman in Botswana is to work immediately in order to make ends meet, in this vein Mutenheri writes that:

It is within this context that many migrant workers hurriedly and grudgingly signed otherwise ‘quasi legal’ contracts which always impinged on their labour rights and their rights as residents (legal and illegal) in the duration of their contracts.<sup>289</sup>

Such situation necessarily leads to migrants having reduced bargaining power with prospective employers and accepting exploitative work conditions:

In one account an employee feared to be reported and handed over to authorities for lack of proper documentation while on the other hand they feared to lose their job. It therefore meant the employer could dictate the salary/wage and the working conditions especially the working hours. In some instances, information was collected from Zimbabwean migrant workers who mentioned that they would be forced to undergo 10-hour working day without a wage/salary increment within the life of a contract. This is against international labour laws.<sup>290</sup>

#### 6.5.2.16 Domestic servitude of Zimbabwean migrants in Botswana

Domestic workers from Zimbabwe are prevalent in Botswana and have become more so in recent years as more Botswana women enter the formal sector and require domestic workers to take up care responsibilities in the home. Some Zimbabwean women with skills may take up domestic work as a means of survival, essentially deskilling themselves. The high number of Zimbabwean

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<sup>289</sup> F Mutenheri. (2019). Greener pastures or banished to slavery: The case of Zimbabwean migrant workers in Botswana and South Africa (2000–2018) in the context of ILO Standards and Peoples’ Rights. *Texila: International Journal of Management* 5: 212–218. 10.21522/TIJMG.2015.05.02.Art021.

<sup>290</sup> Mutenheri (n 289).

domestic workers in Botswana is controversial as they are often perceived as lowering wages by being willing to work for less pay than local domestic workers. The issue has become known as the ‘Zimbabwean illegal problem’.

The Regulations under the Botswana Employment Act restrict domestic work to only citizens of the country. This means that non-Batswana individuals, including Zimbabwean women who work as domestic workers, are all essentially in a position of irregular employment. This allows the possibility of exploitation by some families who can abuse their domestic workers and subject them to servitude, a severe form of labour exploitation. This situation has long been documented by various organisations in Botswana, despite the fact that article 8 of the ICCPR prohibits slavery or servitude.

Similarly, a 2022 treaty body report of the Committee on the Elimination of Racism noted that:

Some Zimbabwean women who voluntarily migrated to Botswana were subjected to involuntary domestic servitude by their employers. Families sometimes employed domestic workers without proper work permits, failed to pay adequate wages, and restricted or controlled the movement of their employees.<sup>291</sup>

Another article described how:

Zimbabwean women cannot report the sexual abuse they suffer at the hands of employers because they would be detained and deported for flouting immigration and labour laws.<sup>292</sup>

#### 6.5.2.17 Care burden and implications for the right to family life

Within households, migration often leads to an unequal distribution of household chores and unpaid care work, with migrant women often taking on a disproportionate amount of these responsibilities. This can be due to a lack of local support networks, limited access to care services and difficulties in enrolling children in school in their new country of residence. A large number

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<sup>291</sup> OHCHR. (2022). Experts of the Committee on the Elimination of Racial Discrimination Commend Botswana on Providing HIV/AIDS Treatment to Foreign Citizens, Ask about Evictions of Indigenous Persons from Ancestral Lands and Minority Language Education, 22 November 2022.

<sup>292</sup> Available at <<https://www.mmegi.bw/ampArticle/1304>>.

of migrant women often find employment in the informal economy which typically involves unstable and insecure work conditions. These jobs are often related to domestic tasks such as cleaning and caring for others, which reinforces gender-based job segregation and often requires them to neglect their own children. In addition, these jobs often expose them to a higher risk of domestic violence. The disruption of family and community life, particularly in situations of poverty and crisis, can also lead to an increase in risky sexual behaviour and the risk of contracting STDs. Such conditions violate the migrant woman's right to family life.

### **6.5.3 At deportation stage**

#### **6.5.3.1 Protection against arrest and arbitrary detention**

Under international law, arrest and arbitrary detention refers to detention without a valid legal basis or without the necessary due process.<sup>293</sup> This can occur for various reasons, including a lack of legal status, misunderstandings, or discrimination due to language barriers, or simply being in the wrong place at the wrong time.

The protection against arrest and arbitrary detention is addressed by various international human rights instruments,<sup>294</sup> the most well-known of these is the ICCPR, which establishes the right to liberty and security of the person for all individuals within a state's jurisdiction, regardless of their immigration status. Indeed article 9 of the ICCPR states: 'Everyone has the right to liberty and security of person' and '*No one shall be subjected to arbitrary arrest or detention.*' This means that states have an obligation to ensure that migrants are not arbitrarily arrested or detained, and that they are provided with a fair and expeditious process to challenge any detention.

In addition, the Constitution and laws of Botswana prohibit the arbitrary arrest and detention of any person, including non-citizens. According to section 5(1) of the Constitution, a person can be deprived of their personal liberty only by law. If a person is arrested or detained, they must be informed of the reasons for their arrest or detention in a language they understand as soon as

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<sup>293</sup> Article 9 of the ICCPR.

<sup>294</sup> The UDHR which states in article 9 that: 'No one shall be subjected to arbitrary arrest, detention or exile.' The ICCPR which sets out the right to liberty and security of person in article 9, and the right to be free from arbitrary arrest and detention in article 9(1). The African Charter on Human and Peoples' Rights, which also protects against arbitrary arrest and detention in article 6. The American Convention on Human Rights, which provides similar protection in article 7.

possible. In addition, if someone is arrested or detained under suspicion of committing or planning to commit a crime, they must be brought before a court as soon as reasonably possible. If they are not tried within a reasonable time, they must be released either unconditionally or on reasonable conditions. However, while not specifically related to detention, section 14(3)(b) of the Constitution does allow for restrictions on the freedom of movement for non-citizens.

Despite these protections, Botswana practises a system of automatic arbitrary detention of irregular or undocumented Zimbabwean migrants. This was corroborated by the Working Group on Arbitrary Detention who, after visiting Botswana in 2022, ‘expressed serious concern over Botswana’s policy to automatically detain irregular migrants, often indefinitely and in dire conditions.’<sup>295</sup>

Francistown		<b>FRANCISTOWN CENTRE FOR ILLEGAL IMMIGRANTS (FCII)</b>		
Status <b>IN USE</b> 2022	Type: Immigration detention centre (Administrative) Custodial Authority: Department of Immigration and Citizenship Management: Botswana Prison Service (Governmental) Detains: Accompanied minors, Adult women, Centre for Illegal Migrants	Capacity <b>504</b>	Reported population <b>534</b> 2022	Deaths at facility <b>YES</b>

Above is an information board on the CII compiled by the Global Detention Project (GDP). As seen, while it is categorised as an administrative facility under the authority of the Department of Immigration and Citizenship, it is managed by the Botswana Prison Service. This arrangement suggests that the detention centre exhibits prison-like conditions, affecting the experiences of individuals held within it, including women. The involvement of the prison service in managing the immigration detention centre implies that certain aspects of the facility’s operations and conditions might resemble those of a prison. This includes factors such as the physical infrastructure, security measures and the overall atmosphere within the facility. It is important to

<sup>295</sup> Office of the United Nations High Commissioner for Human Rights. (2022). *Botswana must Urgently Embrace Further Safeguards Against Arbitrary Detention and Improve Protection of Asylum-seekers and Immigrants*. Available at <<https://www.ohchr.org/en/press-releases/2022/07/botswana-must-urgently-embrace-further-safeguards-against-arbitrary>>.



acknowledge the potential impact of prison-like settings on the well-being and experiences of detainees, particularly women.

Detention centres that resemble prisons can have adverse effects on individuals, including a sense of confinement, restricted movement, and limited access to services and support. For women, these prison-like conditions may exacerbate feelings of vulnerability, anxiety, and distress. The lack of privacy, restricted opportunities for recreational activities or meaningful engagement, and limited access to healthcare services can further contribute to the challenging circumstances faced by detained women. Moreover, women who are pregnant or lactating have heightened vulnerabilities when in detention,<sup>296</sup> and require gender-sensitive and appropriate support within these custodial environments, which does not appear to be the case at CII.

Research by Galvin<sup>297</sup> recounts a testimonial by a Zimbabwean woman who was once held at CII, who described her experience as follows:

They came to the farm with an aeroplane [helicopter] and a minibus. The aeroplane was flying on top ... we were 25. My madam was asleep ... they never saw her. They came into the house. They take me in the house. Then they take us to police station in ... We stayed two days, then they take us to Gerald.<sup>298</sup> ... They deported us Saturday. At the police station in ... no food ... we got water from the toilet. We were 25 in a cell ... just women. We just go to the toilet with them waiting for us at the door. Batswana are very rough. Three days ... no food, no bathing. Baby was trying to breast feed ... I don't have enough milk. Police didn't talk to us.<sup>299</sup>

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<sup>296</sup> F Arshad, M Haith-Cooper & P Pallotti. (2018). The experiences of pregnant migrant women in detention: A qualitative study. *British Journal of Midwifery* 26(9): 591–596. doi: 10.12968/bjom.2018.26.9.591. Available at <[https://www.researchgate.net/publication/327468831\\_The\\_experiences\\_of\\_pregnant\\_migrant\\_women\\_in\\_detention\\_A\\_qualitative\\_study](https://www.researchgate.net/publication/327468831_The_experiences_of_pregnant_migrant_women_in_detention_A_qualitative_study)>.

<sup>297</sup> Treasa M Galvin. (2015). 'We deport them, but they keep coming back': The normalcy of deportation in the daily life of 'undocumented' Zimbabwean migrant workers in Botswana. *Journal of Ethnic and Migration Studies* 41(4): 617–634, doi: 10.1080/1369183X.2014.957172.

<sup>298</sup> Note that while the local name for the CII is *Teronko ya Ma Zimbabwe* ('a prison for Zimbabweans') because it houses predominantly Zimbabwean nationals, however unwilling to accept official categories and labels that stigmatise and demean, and holding a strong sense that they are not criminals, Zimbabwean deportees refer to the centre as 'Gerald'.

<sup>299</sup> Galvin (n 297) 625.

While the report by Galvin was published in 2015, the conditions at CII appear to be the same because in 2022 after a monitoring visit at the CII the abovementioned Working Group on Arbitrary Detention stated in their report that:

[Detainees'] desperate plight was plain to see. The Group was appalled by their conditions of detention, with lock-up time around 4:30 pm when people are confined to the blocks. There are no purposeful activities and provision for children, especially in relation to education, is lacking. There were numerous *credible* accounts of widespread violence, including sexual violence involving children.<sup>300</sup>

#### 6.5.3.2 Procedural safeguards in collective expulsion proceedings

Collective expulsion proceedings refer to the expulsion of a group of individuals from a state, rather than the case-by-case expulsion of individuals. While the expulsion of individuals may be necessary in some cases for the maintenance of public order or national security, collective expulsion proceedings raise serious concerns about the rights of the individuals being expelled. In particular, the lack of individualised assessment in such proceedings may lead to the violation of the rights of individuals who may not pose a threat to the state.

Article 12(5) of the African Charter expressly prohibits 'mass expulsion of non-nationals' based on national, racial, ethnic or religious origin. In Africa collective expulsions were widespread following the post-liberation era. Notable cases involved large-scale deportations by Ghana and Nigeria of one another's nationals,<sup>301</sup> and the expulsion of Ugandans of Asian descent in the Eastern Horn.<sup>302</sup> Despite its explicit prohibition under various international law conventions,<sup>303</sup>

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<sup>300</sup> Office of the United Nations High Commissioner for Human Rights. (2022). *Botswana must Urgently Embrace Further Safeguards Against Arbitrary Detention and Improve Protection of Asylum-seekers and Immigrants*. Available at <<https://www.ohchr.org/en/press-releases/2022/07/botswana-must-urgently-embrace-further-safeguards-against-arbitrary>>.

<sup>301</sup> L Brydon. (1985). Ghanaian responses to the Nigerian expulsions of 1983. *African Affairs* 84(337): 561–585. Available at <<http://www.jstor.org/stable/722328>>.

<sup>302</sup> AK Hundle. (2019). Insecurities of expulsion: Emergent citizenship formations and political practices in postcolonial Uganda. *Comparative Studies of South Asia, Africa and the Middle East* 39(1): 8–23. Available at <<https://doi.org/10.1215/1089201X-7493733>>.

<sup>303</sup> Article 12(4) of the ICCPR), which states that no one shall be arbitrarily expelled from the territory of a State. The European Convention on Human Rights (ECHR), article 4 of Protocol 4, which prohibits collective expulsion of aliens. The American Convention on Human Rights, article 22(8), which similarly prohibits collective expulsion of aliens.

they have continued in the present day and particularly affect Zimbabweans in the southern Africa region.<sup>304</sup>

As has been alluded to many times in this thesis, Botswana currently employs a rigorous policy of apprehending and deporting Zimbabweans in irregular or undocumented situations.<sup>305</sup> The number of arrested and deported Zimbabweans rose from 22 000 in 2015 to nearly 29 000 in 2018.<sup>306</sup> Since the year 2000, after numbers of Zimbabwean migrants travelling to Botswana increased substantially, these arrest and deportation processes have become incrementally more meticulous and the government has invested a considerable amount of time, money and human resources into implementing immigration measures. Tactics such as roadblocks and raids by the police and military in places of work and residences have been employed to identify and apprehend so-called ‘illegal’ Zimbabweans.

The country’s only immigration detention centre, the CII, referred to locally as *Teronko ya ma Zimbabwe* (prison for Zimbabweans) is located just outside of Francistown and is where deportees are housed before being bused to the Ramokgwebana border. The numbers of those deported has continued to rise over the years and a report by Campbell and Crush recounts what comprises a typical deportation operation:

The Departments of Immigration, Labour and Home Affairs and the police and soldiers have started a joint operation to round up illegal immigrants in Selebi-Phikwe and surrounding villages and cattle-posts and lands. The operation is scheduled to take two days. It started yesterday morning with a house-to-house search and roadblocks to vet passengers. The law enforcement officers even went from office to office in search of illegal immigrants. The whole of yesterday, there were very few foreigners in town. Usually the foreigners, mainly Zimbabweans gather in the middle of the town waiting for anybody who could offer them piece jobs. When the sun sets, they travel on foot to Botshabelo where most of them reside. Selebi-Phikwe and surrounding villages like Mmadinare have been hit by alarming numbers of illegal immigrants. By yesterday afternoon, the arrested immigrants were gathered around the Selebi-Phikwe police station for screening to identify those

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<sup>304</sup> Available at <<https://www.cajnewsafrica.com/2020/04/24/botswana-sa-in-mass-deportation-of-zimbabweans/>>.

<sup>305</sup> With either expired or invalid documentation.

<sup>306</sup> Available at <[https://www.voanews.com/a/africa\\_botswana-battles-influx-zimbabwean-illegal-immigrants/6173868.html](https://www.voanews.com/a/africa_botswana-battles-influx-zimbabwean-illegal-immigrants/6173868.html)>.

who were in the country illegally. The station commander Isaiah Makala stated that those found to have violated immigration and labour laws will get four strokes in the buttocks before they are deported.<sup>307</sup>

In line with this, Monson and Kiwanuka noted that, apart from Namibia and South Africa, Botswana was the only southern African country that frequently conducted mass deportations of Zimbabweans during the 2008–2009 elections crisis. By deporting approximately 5 000 people every month,<sup>308</sup> other than South Africa, Botswana during this period was investing more money in deporting people than any other country in the region, spending roughly P2 000 000 monthly.<sup>309</sup>

Zimbabweans who are found to be deported do not have access to due process or any procedural safeguards in these expulsion procedures. Once they are assumed to be without legitimate documentation, they do not have access to processes which can protect them from deportation, as is prescribed by international law and the Immigration Act of Botswana. The HRC, the body responsible for supervising the execution of ICCPR, has also criticised this conduct. In its concluding observations on Botswana's *Second Periodic Report*, the HRC acknowledged 'reports of expulsions of migrants and asylum-seekers, including those in need of international protection, without carrying out the necessary individual assessments'.<sup>310</sup> This is in violation of their right against arbitrary removal.

#### 6.5.3.2 Protection against cruel, inhumane and degrading treatment

As mentioned in Chapter 4, this right has reached the status of *jus cogens* or peremptory norm under international law, meaning that it is binding upon states even if they have not ratified a particular treaty which relates to it. In addition, the protection against cruel, inhuman or degrading treatment (CIDT) is an absolute right, as it cannot be suspended under any circumstances.<sup>311</sup> The

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<sup>307</sup> Campbell & Crush (n 48).

<sup>308</sup> M Kiwanuka & T Monson. (2009). *Zimbabwean Migration into Southern Africa: New Trends and Responses*. Forced Migration Studies Programme at the University of the Witwatersrand.

<sup>309</sup> Approximately US\$285 000.

<sup>310</sup> Human Rights Committee (HRC). (nd). *Concluding Observations on the Second Periodic Report of Botswana*. Available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/352/66/PDF/G2135266.pdf?OpenElement>>.

<sup>311</sup> Natasa Mavronicola. (2017). Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer. *Human Rights Law Review* 17: 479–498. 10.1093/hrlr/ngx019.

Constitution of Botswana also provides for protection against torture, stating in section 7 that ‘no person shall be subjected to torture or to inhuman or degrading punishment or other treatment’.

Despite this, several reports including videos have been circulated on social media indicating the Botswana police force and tribal chiefs are ‘brutalising Zimbabweans who enter that country illegally before deporting them’.<sup>312</sup> This behaviour was recounted by Senator Damian Mumvuri while presenting a Report of the Thematic Committee on Peace and Security on the State of the Country’s Borders in the Senate. He further stated that Botswana officials ‘harass illegal immigrants and assault foreigners before forcing them to walk long distances’.<sup>313</sup> This was revealed during a fact-finding mission undertaken by the committee at the Plumtree border post.<sup>314</sup> This has also been corroborated by Campbell and Crush,<sup>315</sup> who wrote in a report that respondents in their study stated that:

Normally when the police come to arrest Zimbabweans, they come drunk and beat us but if the immigration officers are there, then we would know that we are safe, but if it’s the police and soldiers alone, we would know that we are in trouble. The only problem is that the police may come at any time and harass you because they want to see the documents. At times when we work for someone, they refuse to pay us because we do not have the right papers. Then they would call the police to come and take us.

Tribal chiefs in Botswana have also been implicated in this abuse. As stated briefly in the section on arrest and deportation, it is common that Zimbabweans are brought before chiefs in ‘*kgotlas*’ where they are caned prior to deportation. However, this only happens to men as women do not receive corporal punishment in traditional courts.

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<sup>312</sup> Government of Zimbabwe. (nd). *Report of the Thematic Committee on Peace and Security on the State of The Country’s Borders*. Available at <<https://www.veritaszim.net/node/1784>>.

<sup>313</sup> Government of Zimbabwe (n 312).

<sup>314</sup> Available at <<https://allafrica.com/stories/201607260037.html>>.

<sup>315</sup> Campbell & Crush (n 48) 20.

The argument that also runs through this thesis is that the conditions that women migrants from Zimbabwe find themselves in detention while awaiting refugee status determination or deportation amount to CIDT, as was recounted by Campbell and Crush:<sup>316</sup>

The police do not want to co-operate, they are deporting ladies with small kids and take them to the prison, and the child may be affected because of going to prison at a young age. The food and accommodation (at the detention centre in Francistown) is not welcoming, we will be packed in the truck and the health conditions were not okay with kids, just like the time when I was deported with my child, I didn't appreciate it, the food was horrible, *they treat us like animals*.

A 2022 joint submission by the Global Detention Project (GDP) and Lawyers for Human Rights to the working group on arbitrary detention said this of the conditions in the CII:

there have been reports of murder and rape, including that of children, lack of access to adequate healthcare, and violent suppressions of protests by operatives, including instigators being sent to Francistown maximum security prison.<sup>317</sup>

The submission further noted that the HRC raised concerns that there was no reliable and accessible way to report and investigate allegations of torture and mistreatment of people who have been detained at the CII.<sup>318</sup>

## 6.6 Conclusions

In this chapter, a critical content analysis was employed to examine the laws and policies in Botswana through a gender lens, focusing specifically on the experiences of Zimbabwean women migrants in the informal economy. The analysis aimed to uncover the underlying gender dynamics and power structures within the legal framework and shed light on their implications for the realisation of human rights.

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<sup>316</sup> Campbell & Crush (n 48) 20.

<sup>317</sup> Available at <<https://www.globaldetentionproject.org/botswana-submission-to-the-un-working-group-on-arbitrary-detention>>.

<sup>318</sup> Human Rights Committee (n 310).

By scrutinising the laws and policies, including their language, provisions, and implementation, the critical content analysis revealed the intersection of gender with the legal framework in Botswana. It showed how these laws and policies can perpetuate gender-based discrimination, inequality, and the marginalisation of Zimbabwean women migrants. The analysis uncovered that there are at times implicit gender biases embedded within the legal texts, or instance where the language or interpretation of the laws may reinforce stereotypes, patriarchal norms, or restrict access to rights for Zimbabwean migrant women in Botswana. In addition, the analysis identified gaps and limitations in the legal framework that fail to adequately address the unique challenges faced by Zimbabwean women migrants, particularly in the informal economy.

*The Zimbabwean* used the phrase, ‘from the frying pan into the fire’, to describe the situation of Zimbabwean migrant women.<sup>319</sup> This is because their precarious circumstances are:

- caused by political repression and economic insecurity in their home country, and make them vulnerable and encourage them to migrate;<sup>320</sup>
- the result of multiple, intersecting socio-economic inequalities that are built into the structure and dynamics of society, resulting in high levels of poverty and vulnerability to risks and shocks to their livelihoods;<sup>321</sup>
- those that lead to migration and which often result in people having to take irregular, covert routes to reach their destinations<sup>322</sup> – during the journey, Zimbabwean women migrants may be exposed to risks, violence and abuse, and their vulnerability may be compounded by factors such as their gender, age and nationality;<sup>323</sup>
- a cause of vulnerability both as a result of their irregular status and their personal characteristics.

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<sup>319</sup> Available at <<https://www.thezimbabwean.co/2010/02/women-targeted-en-route-to-city-of-gold/>>.

<sup>320</sup> J Crush & D Tevera. (2010). *Zimbabwe’s Exodus: Crisis, Migration, Survival*. Ottawa: International Development Research Centre.

<sup>321</sup> Idil Atak, Delphine Nakache, Elspeth Guild & François Crépeau. (2018). ‘*Migrants in Vulnerable Situations and the Global Compact for Safe Orderly and Regular Migration*’ (15 February 2018). Queen Mary School of Law Legal Studies Paper No 273/2018.

<sup>322</sup> C Mainwaring & N Brigden. (2016). Beyond the border: Clandestine migration journeys. *Geopolitics* 21(2): 243–262; T Zack, S Matshaka, K Moyo & KP Vanyoro. (2019). *My Way? The Circumstances and Intermediaries that Influence the Migration Decision-making of Female Zimbabwean Domestic Workers in Johannesburg*. Working Paper 57, Migrating out of Poverty, University of Sussex.

<sup>323</sup> Atak et al (n 321).

Irregular women migrants are more likely than men to experience abuse and violations due to their irregular status and gender.<sup>324</sup> These factors can increase their vulnerability and risk during migration, their stay in the receiving country and their eventual detention and/or deportation. Botswana, as a country claiming to respect human rights, has a duty to safeguard and enforce the rights of women, and her authorities should strive to prevent violence and mistreatment instead of perpetuating it. However, the government's actions are not helping the situation, rather exacerbating it. This is seen in legislation such as:

- the strict Immigration Act<sup>325</sup> which forces women to travel by irregular routes and risk violations of their security of person in transit;
- the Citizenship Act<sup>326</sup> that puts migrant's children at risk or of statelessness;
- the poor implementation of the Anti-Human Trafficking Act which has a disproportionate impact on Zimbabwean women in particular;
- the restrictive Refugee Act<sup>327</sup> which limits rights to asylum.

Added to these laws, are gaps in health services that put Zimbabwean women's *lives* at risk, and harsh provisions in immigration and refugee laws that lead to frequent apprehension as well as unjust and inhumane detention. Moreover, discriminatory and complex employment provisions cause widespread violations of women's rights to decent employment.

Zimbabwean migrant women's human rights in Botswana are therefore a pressing issue that demands attention and action from both government and society. It is crucial to establish effective laws and policies that safeguard the rights of migrant women and allow them to live and work with dignity and safety – and to implement them. In addition, in raising awareness of the difficulties faced by migrant women and promoting respect for their rights it is necessary to combat xenophobia. Through this gender-focused critical content analysis, the chapter provided a comprehensive understanding of how laws and policies either enable or constrain the realisation

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<sup>324</sup> F Maphosa. (2005). *The Impact of Remittances from Zimbabweans Working in South Africa on Rural Livelihoods in the Southern Districts of Zimbabwe*. Forced Migration Studies Programme, Oxford University; Atak et al (n 6).

<sup>325</sup> Immigration Act 3 of 2011.

<sup>326</sup> Citizenship Act 8 of 1998 [Cap 01-01].

<sup>327</sup> Refugees (Recognition and Control) Act.



of human rights for Zimbabwean migrant women in Botswana. The next chapter offers an author's findings and suggestions for creating a regime that respects the rights of migrants in Botswana.

## 7: Main findings, final conclusions and recommendations

*All too often migrants are vulnerable because of state action. States must ensure that they deliver on their human rights obligations in ways which reduce the vulnerability of migrants.*<sup>1</sup>

### 7.1 Author's analysis in the context of the research question

The central concern of this thesis – *Socio-legal perspectives on the realisation of human rights for migrant women: A case study of Zimbabwean women migrants who work in Botswana's informal economy* – focuses on the dynamics between Botswana's legal system and gender, and how these interactions affect the protection of human rights of Zimbabwean migrant women employed in the country's informal economy. The previous chapters' findings clearly demonstrated that this group faces significant obstacles in the realisation of their human rights as a result of the interaction between law and gender. This discovery was not based solely on a literal interpretation of the law but also used socio-legal methodologies.

As discussed in Chapter 1, socio-legal perspectives include an interdisciplinary approach that examines the interplay between law and society. Rather than viewing law purely as a collection of rules and regulations, this perspective recognises law as a social institution that is both influenced by and influences the society it operates in. Socio-legal perspectives explore the intricate relationship between legal norms and institutions, social norms, cultural values and power dynamics within a given society. They examine the implementation and enforcement of laws, and the differentiated impact they have on individuals and various societal groups. This approach acknowledges that legal decisions and practices are shaped by social, economic and political factors, and that the law can either reinforce or challenge social inequalities.

In this thesis, gender has been used as an analytical tool to assess the effects that Botswana's laws have on the realisation of human rights of a specific group of migrants in the country. As gender encompasses various dimensions, including economic, political and cultural rights, a socio-legal analysis of human rights requires a comprehensive understanding how these various aspects

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<sup>1</sup> Idil Atak, Delphine Nakache, Elspeth Guild & François Crépeau. (2018). *'Migrants in Vulnerable Situations' and the Global Compact for Safe Orderly and Regular Migration*, 15 February 2018. Queen Mary School of Law Legal Studies Research Paper No 273/2018.

interact with the legal system in complex ways and how gender influences and shapes the implementation and effectiveness of legal provisions and protections.

In Chapter 4 we learnt that, although human rights are extra-legal, their enforcement relies on legal frameworks that are inevitably influenced by social contexts. Therefore, whereas human rights, in essence, transcend the domain of legality and embody fundamental principles and entitlements that are basic to every individual, it is through legal structures and institutions that these rights are recognised and safeguarded within society. However, the efficacy of these legal structures is intricately interwoven with the prevailing social conditions, including cultural norms, power dynamics and socio-economic factors. Therefore, understanding the interplay between human rights and the legal system requires a comprehensive examination of the broader social context in which both operate. By examining these dynamics, this thesis highlights the intricate relationship between human rights, legal structures and the social conditions that shape their implementation and effect. In employing a socio-legal approach to human rights, this thesis therefore unearthed the complex dynamics between gender, the legal system and the realisation of human rights for the specific group of migrants under investigation. It is in this context that this thesis began by first understanding the gendered nature of migration, and then conducted a feminist analysis of human rights and legal systems. The historical background of Zimbabwean migration was then examined in order to understand the specific situation of Zimbabwean women migrants and the circumstances in which they leave their country.

Through this approach, the primary finding of this study emerges, highlighting the distinct vulnerability faced by women migrants from Zimbabwe in Botswana. Although it can be argued that male Zimbabwean migrants also face difficulties due to their migrant status, they do not have to confront the same gender-specific barriers that face their women counterparts. As discussed in Chapters 2, 3 and 5, the notion of gender in the context of migration encompasses various challenges specific to women. These include limited access to education and resources, multi-dimensional poverty and being within the reproductive age range. In contrast, male migrants may encounter distinct obstacles related to their migration status but are not subject to the same heightened vulnerability as women who are confronted with, among other things, gender-based violence, gendered economic exploitation and limited access to maternal health services.

Furthermore, it is significant that whereas women migrants of other nationalities may encounter similar challenges in relation to gender, they do not face the specific nationality-related obstacles that Zimbabwean migrants experience because Botswana display societal and institutional-xenophobic sentiments towards Zimbabweans particularly. In addition, the fact that Zimbabwean migrants flee their country due to unique circumstances, also distinguishes them from migrants from other sending countries. Therefore, the heightened vulnerability of Zimbabwean women migrants is influenced by multiple factors. These include historical factors within Zimbabwe and gender and political factors, and gender dynamics as well as societal and institutionalised xenophobia within Botswana's patriarchal society. These factors, in turn, interact with the legal system, creating significant barriers for these women in accessing their rights and legal protections. It is in this context that this thesis contends that these challenges stem from an inadequate regulatory framework in Botswana, particularly concerning migrant women. Zimbabwean women, however, are specifically affected due to significant numbers of them being present in the country.

Chapter 4 outlined the relevant international human rights standards applicable to women migrants and the previous chapter focused on those standards that Botswana, as a party to various international agreements, is expected to uphold. However, it is evident that Botswana's actions fall short of meeting the expected level of protection for migrant women. This is despite the existence of international legal standards that advocate equality before the law. However, the non-compliance with these standards poses unique challenges for Zimbabwean women migrants who are disproportionately at risk of facing legal conflicts. These deficiencies are connected to factors previously identified in Chapter 4 and are examined in greater depth below.

### **7.2 *De facto* discrimination: gendered laws and Zimbabwean women migrants in Botswana**

As discussed in Chapter 4, *de facto* discrimination in migration laws refers to the unintended consequences of laws and policies that have a disproportionate impact on certain groups such as women migrants. This type of discrimination can have a significant impact on the realisation of human rights by women migrants, as it can limit their ability to practically access legal protections and opportunities in receiving states. We have further seen in Chapter 4 that *de facto* discrimination results from gendered laws or laws that are structured based on gender. These types of law can

create legal barriers that ultimately undermine the ability of women migrants to realise their human rights.

The research has identified a set of gendered laws that impede the realisation of human rights for the case study under examination. Botswana's immigration policies have specifically been found to be restrictive, characterised by stringent entry and stay requirements, and these policies disproportionately affect particularly Zimbabwean women. The previous chapter revealed that the circumstances under which Zimbabwean women leave their politically unstable country make them more susceptible than other migrants to experiencing gender-based violence and falling prey to trafficking. This is especially the case when they are compelled to resort to irregular means of travel due to Botswana's restrictive policies. The findings presented in Chapters 5 and 6 demonstrate that Zimbabwean women often lack access to travel documents due to the high levels of multidimensional poverty they experience, which is rooted in the political and economic instability in their home country. When these conditions are combined with restrictive immigration policies, the risk of trafficking is further increased. This is shown by the fact that Zimbabwean women consistently constitute the largest proportion of trafficking victims detected in Botswana. Studies have also documented other forms of violence these women endure during transit to the receiving country.

Furthermore, as discussed in Chapter 6, Botswana has laws and policies that prioritise certain groups of migrants – such as highly skilled workers – over others, by requiring work permits. However, as stated in Chapter 5, many Zimbabwean women have historically faced discrimination, both in access to education and formal employment. This means that they are less likely to possess the necessary skills to apply for work permits under Botswana laws. As a result, women migrants may be excluded from these categories or face additional obstacles in meeting the eligibility criteria. This can mean that it is increasingly difficult for them to access legal pathways to migration. In addition, the process of applying for the required documentation is itself intricate and lacks clear timelines, leading to potentially lengthy waiting periods for decisions. This poses a *practical* challenge to women who have embarked on their journeys, desperately needing to find a means of survival. They therefore seek immediate entry into the job market to earn money and support their families in their sending country. Consequently, the realisation of human rights for

the case study under examination is significantly hindered. This situation underscores the importance of implementing comprehensive immigration policies that do not affect women migrants disproportionately. Such policies should consider the specific needs and circumstances of these individuals, enabling them to navigate the immigration process easily and gain access to employment opportunities without unnecessary delays or barriers. By addressing these issues, the protection and fulfilment of the human rights of women migrants can be better ensured.

This analysis has also revealed that gendered laws can play a role in perpetuating discrimination against Zimbabwean women migrants within the labour market of Botswana. The Employment of Non-Citizens Act,<sup>2</sup> in particular, and other related legislation are formulated in a stringent manner that effectively confines a significant portion of Zimbabwean migrant women to specific types of work or industry, primarily within the informal sector. This restriction has far-reaching consequences, as it denies women migrants the opportunity to access a wider range of job opportunities and, as a result, limits their potential earnings and exacerbates their financial insecurity. By confining them to the informal sector, these laws effectively reinforce a system of inequality and perpetuate gender-based disadvantages, ultimately impeding the full realisation of their rights within the context of the labour market.

The situation is further exacerbated by the absence of comprehensive laws in Botswana that protect these workers against workplace discrimination and sexual harassment within the informal sector adequately. This regulatory gap has resulted in an increased vulnerability of women working in this sector, particularly those engaged in domestic work. Of particular concern are Zimbabwean migrant women who are over-represented as domestic workers in Botswana. Consequently, they face a heightened risk of abuse and exploitation, often encountering limited avenues for legal recourse to seek justice. As highlighted in the section on labour protection, the absence of specific legal provisions addressing these gendered issues leaves Zimbabwean migrant women without adequate safeguards against such abuses. The lack of appropriate legal frameworks to tackle these forms of workplace discrimination and exploitation underscore the urgent need for policy reforms that can provide stronger protection for the human rights of these women employed in Botswana's informal economy.

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<sup>2</sup> Employment of Non-Citizens Act (No 11) [Cap 47:02].

In addition, it has been observed that gendered laws in Botswana create barriers against Zimbabwean women migrants when accessing healthcare services. This has significant implications for their overall health and well-being. These laws restrict healthcare based on immigration status or citizenship and effectively prevent Zimbabwean women migrants from receiving vital healthcare services, including reproductive healthcare. Consequently, they are required to bear the cost of healthcare services in both the public and private sectors, which is often unaffordable given their economic circumstances. This situation is particularly concerning for Zimbabwean migrant women, who, as discussed in Chapter 5, are typically in their reproductive years and therefore face an elevated risk of maternal health complications. The lack of access to essential healthcare services *puts their lives at risk*. Moreover, these laws inadvertently contribute to an additional risk, leaving the children of migrant women vulnerable to statelessness. We have observed that there can be instances where women who give birth in public healthcare facilities hesitate to acquire birth certificates for their children due to fear of government repercussions. Consequently, these children may be born without any recognised citizenship or nationality, which, as we have explored, has long-term implications for their access to education, healthcare and other essential services.

This thesis highlights the adverse effects of Botswana's gender-based laws which increase the likelihood of arrest and deportation of Zimbabwean women. The lack of proper documentation is a significant factor that exacerbates the vulnerability of women to apprehension, detention or deportation. As discussed in Chapter 5, women from Zimbabwe are more likely to come from multidimensionally poor backgrounds, limiting their access to expensive passports, which are necessary for legal migration. Moreover, women constitute a majority of forcibly displaced individuals, which means that they are at a higher risk of encountering the restrictive asylum system in Botswana. As a result, women seeking asylum may face detention as part of the asylum process. Detention can be particularly distressing for women who may also be separated from their children, which has significant emotional and psychological impacts on both mother and child. Alternatively, it is common for women to be detained alongside their children, which can have an adverse effect on the children's well-being.

In order to tackle the impact gendered laws have on women migrants, it is essential to recognise the ways in which gender intersects with other factors such as economic status and migration status to create unique barriers and challenges. This requires a comprehensive approach that addresses the systemic inequalities underlying gendered laws and policies.

### **7.3 Hidden cost of claiming rights and Zimbabwean women migrants in Botswana**

In Chapter 4 we discussed the ‘hidden cost of claiming rights’. The second challenge refers to the difficulties that individuals face when attempting to claim their human rights, particularly in the context of marginalised groups such as women migrants. It was shown that this challenge can have a significant impact on women migrants realising their human rights, as it can prevent them from accessing the legal protections and remedies available to them. This leaves them vulnerable to varying levels of human rights violations.

As has been seen in the context of our case study, this challenge manifests itself in the lives of Zimbabwean women migrants primarily through the fear of reprisals. Information reported here has shown that Zimbabwean women migrants who are present irregularly in Botswana believe that if they attempt to claim their rights, they may face retaliation from their employers or others in positions of power, which can result in deportation or loss of employment. This fear of reprisals can prevent women migrants from reporting violations of their rights, which in turn can perpetuate a culture of impunity for those who violate their rights.

Another key challenge to asserting rights is the cultural and societal norms that foster discrimination, particularly against Zimbabwean migrant women in Botswana. Chapter 5 highlighted that the Botswana have become increasingly intolerant of Zimbabwean migration, leading to xenophobic attitudes towards them on both a societal and institutional level. Chapter 6 noted further that Botswana’s society is primarily patriarchal. This particularly exacerbates the plight of women migrants, as they are discriminated against for being both Zimbabwean *and* women. Consequently, migrant women who are subjected to abuse or exploitation may hesitate to report their cases or seek legal remedies; choosing instead to ‘keep a low profile’ and blend in, out of fear of retaliation or social stigma. Furthermore, those who do come forward may be perceived as drawing undue attention to Zimbabweans, potentially leading to ostracism from their



communities or families. This poses a significant challenge to promoting and protecting the rights of Zimbabwean migrant women in Botswana, as it creates a culture of fear and undermines their ability to access justice and support.

Addressing the cultural and societal norms that perpetuate discrimination against Zimbabwean migrant women is critical to ensuring that they can assert their rights and live free from fear and discrimination in Botswana. It is imperative to promote an inclusive and respectful culture that upholds the rights and dignity of all individuals, regardless of their background or nationality. The cost of claiming individual rights is a challenge that will therefore require a multi-faceted approach. This may include legal and policy changes that lower the barriers to accessing justice for women migrants, and awareness-raising campaigns that challenge the cultural and societal attitudes to women migrants. It also requires a commitment from governments and civil society organisations (CSOs).

#### **7.4 Rhetoric vs reality of rights of Zimbabwean women migrants in Botswana**

In Chapter 4 it was discussed that the rhetoric-versus-reality challenge refers to the situation in which, while international law has numerous provisions and protections for the rights of migrant women, in reality their rights are often disregarded and violated. The main reason for this discrepancy is the lack of effective implementation and enforcement mechanisms in international law. Chapter 4 showed us that the rhetoric of international law often presents an idealistic picture of how migrant women's rights are protected, but the reality on the ground is often very different. For example, we have seen that, despite the existence of numerous international treaties that protect the rights of migrant women, countries such as Botswana have failed to ratify or implement them. As a result, women migrant workers continue to be vulnerable to mistreatment.

Botswana bears significant responsibility for this, as this thesis has shown that she has failed to ratify essential instruments that safeguard the rights of women. Moreover, even when the country has ratified such instruments, it has often neglected to domesticate them, as required of a dualist state. As a result, international laws that Botswana has endorsed to protect the rights of migrants – including women – are not always enforced or implemented effectively in practice. An example is Botswana's refugee legislation which falls short of the international legal obligations outlined

in the 1951 Convention, or the Anti-Human Trafficking Act<sup>3</sup> which has not been implemented to the extent that it sufficiently protects Zimbabwean migrant women.

In Chapter 6 we learnt that Botswana also often espouses a sympathetic discourse on human rights, while simultaneously implementing policies that prevent migrants, especially women, from accessing their rights. The lack of effective implementation of international laws and policies that protect the rights of women migrants leaves them vulnerable to abuse and violation of their rights. It is crucial to emphasise that without proper implementation and enforcement of these laws, women migrants specifically may be at risk of experiencing severe rights' violations. Therefore, it is imperative that Botswana takes action to ensure that it is fulfilling its legal obligations to protect the rights of Zimbabwean women migrants within her borders.

### **7.5 Gendered routes to irregularity and Zimbabwean women migrants in Botswana**

As discussed in Chapter 4, 'gendered routes to irregularity' refers to the unique experiences faced by women migrants that lead to their irregular migration status. Chapters 5 and 6 have provided evidence that several characteristics are specific to Zimbabwean women. These include multi-dimensional poverty caused by Zimbabwe's economic decline, meaning access to expensive passports is limited or these migrants lack the necessary skills to apply for work authorisation in Botswana, which ultimately results in many of them being in a precarious state of irregularity. For those women who are undocumented, their irregular status may either be due to difficulties in meeting the requirements for legal status or a lack of awareness about the necessary procedures.

The impact irregular status has on the lives of women is significant as it limits their access to social services, decent employment and a dignified life. However, a most significant consequence for Zimbabwean migrant women is their heightened susceptibility to arrest and detention by immigration authorities, as discussed in Chapter 6. Zimbabwean women migrants are regularly stopped at checkpoints, detained at the CII and subjected to deportation proceedings. When incarcerated at CII, the conditions are often poor and the migrants have restricted access to legal representation, medical care or basic necessities. This separation from their families and support networks adds to their vulnerability. These conditions not only affect the well-being of women

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<sup>3</sup> Anti-Human Trafficking Act 32 of 2014.

migrants but also create constant fear of possible deportation, adding to the stress they already face in their daily lives while in Botswana.

Addressing the gendered routes to challenging irregularity requires a comprehensive approach that recognises the unique vulnerabilities and obstacles that Zimbabwean women migrants face. This may include policies and programmes that address the root causes of irregular migration, as well as initiatives that provide legal protection and support to women migrants who are already in irregular situations. It also requires a change in societal attitudes to women migrants, including a recognition of their contribution to society and the need to uphold their human rights, regardless of their migration status.

## **7.6 Chapter summaries**

Chapter 1 presented the research questions which were: ‘What way does Botswana’s legal system interact with gender to impact the realisation of human rights of Zimbabwean migrant women who work in Botswana’s informal economy? and How can the Botswana legal system be reformed or adjusted to promote gender equality and enhance the realisation of human rights for Zimbabwean migrant women working in Botswana’s informal economy?’ The method used for the investigation is described as socio-legal, which helps to gain a comprehensive understanding of the case study, including social, economic, historical and political factors. The significance of the research lies in the fact that migration is a pertinent issue, and some countries may formulate policies that do not align with human rights principles. A brief literature review in this chapter revealed that research on how law has an impact on the human rights status of women migrants in Botswana is sparse, making this study a valuable contribution to the field.

Chapter 2 provides an overview of the discourse surrounding migration in a global context, highlighting its complex nature and the various factors that influence it, including political, economic and social issues. The chapter emphasises the gendered experience of migration, demonstrating how men and women face different risks and opportunities when migrating for reasons such as pursuing economic opportunities, escaping conflict or persecution, or seeking a better quality of life. Moreover, the chapter argues that the impact of migration varies depending on the situation, with evidence showing that it can have both positive and negative outcomes. On

the one hand, migration can have a positive effect on improving human capital, income and development in both sending and receiving communities, by reducing poverty and fostering global change. In addition, host countries can benefit from reduced service costs and potential economic growth due to the presence of migrants, whereas sending countries can benefit from remittances that contribute to poverty-alleviation, access to education and women's empowerment. However, the chapter challenges the notion that migration is always wholly beneficial to the sending state. On the other hand, negative social consequences may include disruptions to family life and challenges faced by migrants in transit or while adapting to new environments. Migrant workers in host countries might also experience abuse, limited mobility and low wages, especially women who are traditionally relegated to the informal sector. Therefore, it is essential to consider the various factors, especially gender, that influence migration and the impact it has in order to understand its complexities and potential outcomes fully.

Chapter 3 investigates regional migration in the Southern African Development Community (SADC) region and considers how the Covid-19 pandemic has affected regional movement. The chapter examines two groups of women migrant: informal cross-border traders and migrant domestic workers, as their experiences help us better understand the wider impacts of regional migration on women in the SADC. The chapter shows that although these types of migration can offer financial benefits to women, they often face unique challenges related to their gender and increased vulnerability. While this kind of migration can provide women with economic opportunities that may not be available in their home countries, they often experience specific gender-based discrimination and greater vulnerability in their chosen jobs.

Chapter 4 acknowledges that vulnerable groups such as women and girls often face hardships during their migration journey. It highlights that the unique intersectional challenges and risks these groups encounter necessitates the importance of treating migration as a human rights issue. The chapter explores the human rights protections provided to migrant women under international law and emphasises the significance of recognising migrants as subjects of human rights. To set the context, the chapter connects migration to the human rights discourse, acknowledging the heightened vulnerability migrants often face. It underscores the crucial role of dignity as a fundamental component of migrants' rights. The chapter then examines various global, regional

and sub-regional frameworks designed to safeguard the human rights of migrants, focusing specifically on migrant women. Whereas the chapter covers an extensive range of legal safeguards, it recognises that the current system has its shortcomings. One of the flaws discussed is the gendered laws that result in *de facto* discrimination against women which is the effect of these laws. In addition, gendered consequences of the law often result in women avoiding claiming their rights or forcing women to take irregular routes in order to enter a country, thereby undermining the effectiveness of many legal measures.

Chapter 5 offers a contextual background to the historical events and challenges faced by Zimbabwe and its citizens, driving people of all genders, ages, professions and income levels to pursue better opportunities elsewhere. The issues identified include the economic crisis, political repression and social challenges that have made the country unliveable for many. The chapter goes on to provide a brief overview of the history of Zimbabwe–Botswana migration, emphasising the growing xenophobia experienced by Zimbabwean migrants in Botswana. It outlines the characteristics of Zimbabwe–Botswana migration, highlighting its irregularity, circular nature, high remittance behaviour and increasing feminisation. The chapter confirms the presence of a diverse range of Zimbabwean migrants in Botswana across various professions, but states that it is women, especially those with low education and skill levels, who comprise the majority of migrants who move irregularly from Zimbabwe. They migrate mainly for economic reasons and a lack of clear pathways to obtain proper documentation which heightens their vulnerability to human rights abuses. It then confirms that due to the heightened vulnerability these women face they form the case study of the research.

Chapter 6 examines how laws in Botswana impact the human rights situation of Zimbabwean women working in Botswana’s informal economy. Here, the focus is on their conditions as irregular or undocumented women migrants and the impact Botswana’s regulatory system has on them. The analysis uses a case study approach to gain a deeper understanding of the challenges and experiences of these women in Botswana. The chapter discusses the social structure of Botswana, which is male-dominated and disadvantages women disproportionately, as well as the international and domestic laws that regulate Zimbabwean women migrants working in the informal economy. It examines the extent to which women Zimbabwean migrants have their

human rights fulfilled at different stages of the migration process, including during transit, in the host country, and at deportation stage, with a thematic approach. This study reveals that the migration regulatory system in Botswana puts Zimbabwean migrant women at risk of egregious human rights violations due to their gender and other intersecting social factors. These violations include affronts to their rights to security of the person, health and family life, as well as violations of protection against labour exploitation, trafficking in persons and collective expulsion. The study shows that Botswana's restrictive immigration policy forces these women into irregularity, exposing them to sexual abuse, restrictions on their reproductive health, labour exploitation and inhumane conditions while in detention by the administration. Exclusionary health policies also mean that babies born to Zimbabwean migrant women are at risk of being declared stateless – violating their right to nationality.

## **7.7 Recommendations: responses at international level**

### ***7.7.1 Ratification and domestication of treaties***

As discussed in Chapter 6, as a dualist state,<sup>4</sup> Botswana's international treaty obligations do not automatically become part of domestic law. The government must first take steps to incorporate the provisions of the treaty into domestic law before they can be enforced in domestic courts. This means that the ratification of the treaty alone does not automatically lead to changes in the treatment of women migrant workers. Botswana confirmed this in a communiqué issued by the Permanent Mission of the Republic of Botswana to the United Nations (UN/Bot/83(80)P3) stating:

Internationally, Botswana has ratified several treaties containing the principle of universal jurisdiction. However, few of these have been domesticated to give them effect in Botswana's national legislation. Botswana has a dual legal system that requires that all Treaties that have been ratified by the country be domesticated first and incorporated into national legislation. Therefore, any international Treaty that Botswana is party to ... will not be recognised by the courts of Botswana nor have legal effect within Botswana if it has not been made into law by an Act of Parliament.<sup>5</sup>

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<sup>4</sup> Dualist states do not apply international law directly in their domestic courts unless such law has been domesticated.

<sup>5</sup> Available at <[https://www.un.org/en/ga/sixth/66/ScopeAppUniJuri\\_StatesComments/Bostwana.pdf](https://www.un.org/en/ga/sixth/66/ScopeAppUniJuri_StatesComments/Bostwana.pdf)>.

However, under international law, countries are obligated to comply with various treaties, that that they have ratified. These international obligations apply to states, regardless of whether they have domestic legislation in place to implement these obligations. In other words, a lack of domestic legislation cannot be used as an excuse for non-compliance with international law. This principle is enshrined in the Vienna Convention on the Law of Treaties. Article 27 of the Convention states that ‘a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’.<sup>6</sup>

In the same communiqué Botswana further acknowledged this principle. However, it continued by describing the process the country is undergoing in incorporating the provisions of international law into the domestic legal system, stating:

There are several circumstances that make the domestication of Treaties a slow process. Botswana is aware of the principle of international law that a country cannot use lack of domestic legislation as an excuse for noncompliance, her treaty obligations. A number of issues such as lack of capacity in implementing the obligations of treaties so signed and inadequate resources are some of the obstacles in domesticating a majority of treaties.

This means that Botswana understands her obligations to implement treaties that she has signed under international law. In this connection, however, the Government of Botswana is advised to take various steps at a global and regional level to protect the rights of Zimbabwean migrant women. Therefore, Botswana should immediately:

- withdraw its reservations concerning articles 7, 31 and 32 of the 1951 Convention on the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees and ensure that these treaties and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa can be fully incorporated into national law;
- domesticate the signed 1954 Convention Relating to the Status of Stateless Persons;
- sign, ratify and implement the 1961 Convention on the Reduction of Statelessness;

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<sup>6</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol 1155, 331. Available at <<https://www.refworld.org/docid/3ae6b3a10.html>> (accessed 21 March 2023).

- sign, ratify and implement the UN Convention on the Rights of Migrant Workers and their Families;
- sign, ratify and implement the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa;
- sign, ratify and implement the ILO Domestic Workers Convention;
- sign, ratify and implement the International Covenant on Economic, Social and Cultural Rights;
- ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- remove its reservation to article 7 of the Convention against Torture regarding the ban on torture.

### ***7.7.2 Embrace non-binding options in the international community***

While it is still advised that Botswana ratify and implement treaties that protect Zimbabwean women migrants, it is also clear that in the context of Botswana this may not be enough. There are, however, other approaches: countries across the globe have different policies and laws regarding migration, and some have begun to embrace non-binding options in migration governance rather than relying solely on international law. Non-binding options in migration governance have several advantages. The first is that they allow countries to have greater flexibility in their policies. International laws and agreements can be rigid and may not account for the specific needs of individual countries.<sup>7</sup> Therefore, by adopting non-binding options, countries can create policies that are tailored to their specific needs and can be adjusted as those needs change over time.<sup>8</sup> Non-binding options can also help countries to maintain their sovereignty. It was discussed in Chapter 4 that countries often, especially in relation to migration governance, adopt the position that international laws and agreements infringe on their sovereignty, as they may require countries to adhere to certain standards or rules that they do not agree with.<sup>9</sup> This appears to be the case in

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<sup>7</sup> DG Victor. (1997). The use and effectiveness of nonbinding instruments in the management of complex international environmental problems. *Proceedings of the Annual Meeting (American Society of International Law 91: 241–250*. Available at <<http://www.jstor.org/stable/25659125>>.

<sup>8</sup> Victor (n 7).

<sup>9</sup> S Talmon. (2021). *Germany Directs Attention to Questions Surrounding Non-legally Binding International Agreements*. German Practice in International Law (GPIL). Available at <<https://gpil.jura.uni->



Botswana which has been very conservative in relation to becoming party to international agreements that protect migrants' rights. Therefore, by adopting non-binding options, Botswana can maintain more control over her migration policies and ensure that they are in line with her own national interests.

In addition, non-binding options can be more responsive to changing circumstances. International laws and agreements can take years to negotiate and ratify, and they may not be able to keep up with the rapidly changing circumstances of migration. By adopting non-binding options, countries can respond more quickly to emerging trends and issues in migration, such as changes in economic conditions or political crises.<sup>10</sup> Finally, non-binding options can encourage greater cooperation between countries.<sup>11</sup> On the one hand, international laws and agreements can sometimes create tension between countries, as they may be seen as imposing one country's will on another. Non-binding options, on the other hand, can create a more collaborative approach to migration governance, as countries can work together to find solutions that benefit everyone.<sup>12</sup> In considering this, Botswana can consider several non-binding options as discussed below.

#### 7.7.2.1 The Dhaka Principles on Migration with Dignity

The Dhaka Principles for Migration with Dignity,<sup>13</sup> established in 2012, are a set of human rights-based principles that aim to guide businesses and employers in ensuring that the rights of migrant workers are respected and protected throughout the entire process of migration, from recruitment to repatriation. The principles were developed in response to the growing number of migrant workers worldwide who face exploitation, discrimination and abuse during their migration experiences. By providing a clear framework for businesses and other stakeholders to follow, the Dhaka Principles seek to promote ethical and responsible practices that uphold the dignity and rights of all migrant workers, including women.

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bonn.de/2021/05/germany-directs-attention-to-questions-surrounding-non-legally-binding-international-agreements/>.

<sup>10</sup> T Höflinger. (2020). Non-binding and therefore irrelevant? The global compact for migration. *International Journal* 75(4): 662–672. Available at <<https://doi.org/10.1177/0020702020975108>>.

<sup>11</sup> Höflinger (n 10).

<sup>12</sup> Talmon (n 9).

<sup>13</sup> Institute for Human Rights and Business. (2012). Available at <<https://dhakaprinciples.org/>>.

The principles consist of guiding standards that cover various aspects of migrant workers' experiences, such as ethical recruitment,<sup>14</sup> freedom of movement,<sup>15</sup> fair employment terms,<sup>16</sup> decent working and living conditions,<sup>17</sup> and access to remedies.<sup>18</sup> These principles are designed to be applicable across sectors and geographies, making them a versatile tool for businesses and other organisations working with migrant workers:

- *Ethical recruitment*: The Dhaka Principles emphasise the importance of ethical recruitment practices, which include ensuring transparency, adhering to national and international laws, and eliminating recruitment fees for migrant workers. This is especially crucial for women migrants, who are often more susceptible to exploitation and deception during the recruitment process.<sup>19</sup>
- *Freedom of movement*: Migrant workers, including women, should have the right to move freely within their host country without restrictions. The principles state that this must be facilitated through the non-retention of passports.<sup>20</sup>
- *Fair employment terms*:<sup>21</sup> The principles call for equal treatment of migrant workers, including women, relating to wages, working hours and other terms of employment which are essential to ensuring that women migrant workers are not subjected to discriminatory practices or exploited in the workplace.
- *Decent working and living conditions*:<sup>22</sup> Migrant workers must be provided with safe and healthy working and living conditions, taking into account their specific needs and vulnerabilities. For women migrant workers, this may include ensuring access to gender-segregated facilities, proper sanitation, and protection from harassment and violence.
- *Access to remedies*: The Dhaka Principles highlight the need for migrant workers, including women, to have access to effective remedies in cases of abuse, exploitation or discrimination. This is crucial for women migrant workers, who may be more hesitant to seek help due to fear of retaliation, language barriers or a lack of knowledge about their rights.

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<sup>14</sup> Principle 1(n 15)

<sup>15</sup> Principle 10 (n 15).

<sup>16</sup> Core Principle B (n 15).

<sup>17</sup> Principles 7 and 8 (n 15).

<sup>18</sup> Principle 9 (n 15).

<sup>19</sup> Principle 1 (n 15).

<sup>20</sup> Principles 4 and 8 (n 15).

<sup>21</sup> Principles 2, 5 and 7 (n 15).

<sup>22</sup> Principle 8 (n 15).

By adhering to the Dhaka Principles, businesses and employers can play a critical role in protecting and promoting the rights of women migrant workers. Implementing these principles can help to:

- Empower women migrants by providing them with the necessary information and resources to make informed decisions about their migration journey, reducing their risk of exploitation and abuse.
- Ensure that women migrants have access to decent work opportunities that respect their rights and dignity, and that they are not subjected to discriminatory practices or exploitation in the workplace.
- Foster a safe and inclusive working environment for women migrants, where they are protected from harassment, violence and other forms of abuse.
- Encourage the development of gender-sensitive policies and practices that address the unique needs and vulnerabilities of women migrants, both in the workplace and in their living conditions.
- Promote the inclusion and participation of women migrants in decision-making processes that affect their lives, empowering them to advocate for their rights and well-being.

It is important to emphasise that the Dhaka Principles aim to provide safer and more protected employment opportunities for those who are *formally* employed, and they aim to regularise migrant employment in order to make it safer. Botswana can take this step to benefit women migrant workers. However, in the context of informality, even if only some provisions of the Dhaka Principles are implemented, migrant women working in Botswana's informal economy still stand to benefit. This is particularly true for the core principles of non-discrimination and equality, as well as those related to access to remedies, safe working environments and non-retention of their passports.

#### 7.7.2.2 The Global Compact on Safe, Orderly and Regular Migration

The Global Compact on Safe, Orderly and Regular Migration (GCM)<sup>23</sup> is a non-binding international agreement that was adopted by the United Nations General Assembly in December

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<sup>23</sup> United Nations General Assembly. (2018). Global Compact for Safe, Orderly and Regular Migration, A/RES/73/195. Available at <<https://undocs.org/en/A/RES/73/195>>.

2018. The GCM is a comprehensive framework aimed at promoting safe, orderly and regular migration that protects the rights of all migrants, including women migrants. The GCM recognises that women migrants often face unique challenges during the migration process. These challenges include gender-based violence, discrimination, and exploitation, and seeks to address these challenges through its various objectives and actions.<sup>24</sup>

One of the ways in which the GCM can help women migrants is through its objective to eliminate all forms of discrimination<sup>25</sup> and promote gender equality. The GCM recognises that gender inequality and discrimination are root causes of migration and that women migrants often face multiple and intersecting forms of discrimination based on their gender, race, ethnicity, religion and legal status.<sup>26</sup> In order to address these issues, the GCM calls for the promotion of gender-responsive policies and programmes that account for the specific needs and experiences of women migrants, including access to education, healthcare and employment.<sup>27</sup>

Another keyway in which the GCM can help women migrants is through its objective to prevent and combat trafficking in persons and smuggling of migrants.<sup>28</sup> We have seen in this thesis that Zimbabwean women migrants are particularly vulnerable to trafficking and exploitation, including sexual exploitation and forced labour in the form of domestic servitude. Objective 10 of the Compact acknowledges the vulnerability of women to being trafficked and states:

We further commit to enhance the identification and protection of, and assistance to, migrants who have become victims of trafficking, paying particular attention to *women and children*.<sup>29</sup> (my emphasis)

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<sup>24</sup> Article 15(a).

<sup>25</sup> Article 15(f), 18(b), 23(f), 27(b), 29(g), 31(a), 32(c), 32(i) and entire Objective 17.

<sup>26</sup> Article 17(d).

<sup>27</sup> Article 15(a).

<sup>28</sup> Spoken about in the entire Compact but addressed by Objective 10 which aims to prevent combat and eradicate trafficking in persons in the context of international migration.

<sup>29</sup> Article 26.

The GCM calls for measures to prevent and combat these crimes, including providing protection and support services for victims,<sup>30</sup> and improved legislative measures to ensure prosecution of perpetrators.<sup>31</sup>

The GCM also recognises the importance of addressing the care needs of migrant women and their families. Women migrants often undertake care work, both paid and unpaid, in their destination countries, and may face barriers to accessing social protections and recognition for their contributions to society. The GCM calls for the promotion of policies that recognise and support care work, including access to education and training, flexible working arrangements and social protections.

Finally, the GCM recognises the importance of addressing the root causes of migration, which it speaks to in Objective 2: ‘Minimize the adverse drivers and structural factors that compel people to leave their country of origin’.<sup>32</sup> Some of the drivers named in the compact include:

- poverty
- food insecurity
- health and sanitation
- access to education
- the lack of decent work
- gender inequality
- socio-economic effects of all forms of violence
- break down in the rule of law and good governance
- limitations on access to justice and lack of protection of human rights
- the lack of peace (conflict).<sup>33</sup>

These are similar drivers that we saw in the context of our study of Zimbabwean migrant women. The Compact recognises that women migrants are often forced to migrate due to these factors and

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<sup>30</sup> Article 26(h).

<sup>31</sup> Article 26(g).

<sup>32</sup> Objective 2.

<sup>33</sup> Article 18(b).

may face increased risks during their migration journey. It therefore calls for measures to address these root causes, including:

- promoting sustainable development;
- addressing gender inequality and social exclusion; and
- promoting access to education, healthcare and decent work.<sup>34</sup>

### 7.7.2.3 Dignity and migration framework – injecting *botho* into migration

Migration with dignity is a conceptual and policy framework developed by Daly et al<sup>35</sup> with the aim of promoting dignified migration for all individuals and communities. The framework is based on six core principles, which are freedom of movement, security, equality, right to a basic quality of life, access to services, and civil and political rights.<sup>36</sup> The authors make a convincing argument that the safeguarding of these aspects in the migration process is inherently tied to the protection of the dignity of migrants.

The framework is intended to apply to all migrants, however, particularly women migrants stand to benefit from the implementation of the Migration with Dignity Framework. This because the principles of the framework seek to address the issues women frequently face by promoting freedom from sexual violence,<sup>37</sup> access to services,<sup>38</sup> and civil and political rights.<sup>39</sup>

The first principle of the framework, movement, recognises the right of all individuals to choose when to leave and when to return. The framework notes that this principle consists of four parts:

- (1) freedom to leave one's country of origin;
- (2) freedom to return to one's country of origin;
- (3) admission to a foreign country; and

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<sup>34</sup> Article 18(b).

<sup>35</sup> E Daly, JR May, SN McClain et al. (2021). *Migration with Dignity: A Conceptual and Policy Framework*. Available at <<https://static1.squarespace.com/static/5f384e3445a5af3e6c13d27b/t/611f87299ee743046ddb8768/1629456318247/MIGRATION+WITH+DIGNITY+FRAMEWORK.pdf>>.

<sup>36</sup> Daly et al (n 36) 16.

<sup>37</sup> Daly et al (n 36) 20.

<sup>38</sup> Daly et al (n 36) 32.

<sup>39</sup> Daly et al (n 36) 37.

(4) freedom of movement within country of origin or country of destination.<sup>40</sup>

For women migrants, this means having the ability to migrate safely and on their own terms, without fear of violence or exploitation to which this thesis has shown they are frequently exposed. Importantly, the principle also encompasses having access to information and resources that enables them to make informed decisions about their migration. The authors poignantly state that:

Freedom of movement is at the core of migration and an essential aspect of human dignity. This does not mean that all persons have to be admitted to a new country as citizens, but rather that countries' immigration policies must be designed and implemented with respect for each person's inherent and equal worth, regardless of a person's status or reasons for migrating.<sup>41</sup>

The second principle of the framework, security, is particularly important in the context of the case study as it aims to protect migrants, including women, from sexual violence,<sup>42</sup> trafficking, slavery, forced labour (domestic servitude),<sup>43</sup> and arbitrary and abusive detention.<sup>44</sup> We have seen in this thesis that Zimbabwean women migrants in Botswana are particularly vulnerable to these forms of exploitation, which can have long-lasting physical, emotional and psychological effects. The framework seeks to address these issues by promoting measures to prevent and respond to gender-based violence and exploitation by espousing that the security of a person is ultimately linked to their dignity.<sup>45</sup>

The third principle of the framework, equality, recognises the right of all individuals to be treated in a non-discriminatory manner, regardless of their gender, nationality or legal status. Clearly Zimbabwean women migrants face discrimination and marginalisation in Botswana which, as we have seen, limits their access to services, decent employment and other opportunities. The framework proposes that such discrimination is an affront to dignity as: 'Equality is intrinsic in the idea of human dignity.'<sup>46</sup>

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<sup>40</sup> Daly et al (n 36) 17.

<sup>41</sup> Daly et al (n 36) 20.

<sup>42</sup> Daly et al (n 36) 20.

<sup>43</sup> Daly et al (n 36) 22.

<sup>44</sup> Daly et al (n 36) 23.

<sup>45</sup> Daly et al (n 36) 25.

<sup>46</sup> Daly et al (n 36) 25.

The fourth principle of the framework, the right to a basic quality of life, recognises the right of all individuals to have access to decent employment, housing and food. While housing and food were not specifically discussed in this thesis, it can be inferred from the challenges they face that they likely have difficulty accessing these rights. The framework states that it is imperative that states provide migrants with access to basic needs, including employment and housing protections, as they are necessary conditions for living a dignified life.<sup>47</sup>

The fifth principle of the framework, access to services, recognises the right of all individuals to have access to legal services and justice. Here the authors state importance of having access to legal services because they argue that people who are not nationals of a country have limited access to justice, stating that:

access to legal services is all the more crucial for those who migrate, the vast majority of whom do not have the right to vote and thus can only rely on the judiciary to claim and protect their rights.<sup>48</sup>

Therefore, states must ensure that migrants have access to these services so that they can protect themselves.

The sixth and final principle of the framework, civil and political rights, recognises the right of all individuals to freedom of speech, religion, assembly and political participation because women migrants often face restrictions on these rights, which can limit their ability to advocate for themselves and their communities. In this way the framework highlights the need for migrants, including women, to have access to these rights so that they can speak for themselves in countries of destination.<sup>49</sup>

### **7.7.3 Recommendations to the SADC**

#### **7.7.3.1 Harness the potential of the MDSA and make women migrants a priority**

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<sup>47</sup> Daly et al (n 36) 27.

<sup>48</sup> Daly et al (n 36) 36.

<sup>49</sup> Daly et al (n 36) 37.



Migration Dialogue for Southern Africa (MIDSA)<sup>50</sup> is an informal, non-binding, intergovernmental forum for dialogue on migration matters of mutual interest in the SADC region.<sup>51</sup> Established in 2000, MIDSA convenes regular intergovernmental forums attended by senior bureaucrats from Departments of Immigration and Home Affairs in Member States. In 2010, MIDSA was scaled up to ministerial level to drive regional migration and development debates within the SADC.

MIDSA has become the forum that most clearly articulates the relationship between migration and development in regional and national policy discussions. It has developed a Regional Roadmap on Enhancing Intra-Regional Migration for Sustainable Development, which covers a range of development-related areas that are absent from the SADC instruments. As a result of this, Botswana began to draft its first mixed-migration policy based primarily on the contents of the MIDSA roadmap.

MIDSA's informal, non-binding and consultative nature makes it possible to develop recommendations that would not have been made if they were to be binding on participating states. This allows for the identification of development opportunities, potential policy gaps and areas for regional cooperation. In this way the forum has an agenda-setting function, which it could use to make the rights of women migrants a priority in the region.<sup>52</sup>

It must be noted, however, that debates are ongoing about whether and when MIDSA should be incorporated into the formal SADC structures and processes. Also, there is concern whether this could negate the value of the MIDSA process in driving the debate about migration and development in the region. Challenges to the MIDSA such as that it also wholly relies on donors for funding its activities have also been identified. Furthermore, no systematic evaluation of the

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<sup>50</sup> Available at <<https://www.iom.int/migration-dialogue-southern-africa-midsa>>.

<sup>51</sup> J Crush, B Dodson, V Williams & D Tevera. (2017). *Harnessing Migration for Inclusive Growth and Development in Southern Africa*. Southern African Migration Programme. Available at <<https://doi.org/10.2307/j.ctvh8r3q1>>.

<sup>52</sup> Previous priority areas have been unaccompanied children, statelessness, return, border management, protection and labour migration.

achievements and impact of MIDSA has been undertaken in its 16 years of operation; a factor which may affect its sustainability.<sup>53</sup>

### 7.7.3.2 Specific actions that the SADC can take

The SADC should:

- foster regional cooperation by providing a platform that enables Member States to work together to share best practices and coordinate efforts to protect the rights of women migrants, in particular – including sharing information on migration flows and collaborating with regional responses to issues related to the migration of women;
- prioritise the coming into force of the 2005 SADC Protocol on the Facilitation of Movement of Persons, the 2014 MIDSA Action Plan and the SADC Labour Migration Policy Framework;
- establish a common set of cooperation principles for labour migration across Member States to promote consistency and better management of migration flows;
- conduct a mapping and harmonisation of legislation across Member States to create consistent policy frameworks for labour migration at the sub-regional level;
- establish a SADC labour-litigation mechanism to address labour disputes within the region;
- strengthen labour inspectorates across Member States to ensure compliance with labour laws and promote better working conditions for migrant women;
- harmonise required documentation for the SADC migrant workers employed within and outside the region to reduce bureaucratic obstacles;
- work with Member States to provide platforms that inform potential migrants, returning and/or seasonal migrants of their rights and minimum standards, and provide avenues for reporting abuses;
- adopt a binding regional migration policy to protect the rights of migrants in Member States;
- enhance the capacity of local authorities and civil society to advocate for and protect the rights of migrants;
- establish a regional agency to address cross-cutting issues related to social protection, such as facilitating portability of social security benefits across borders and guaranteeing relevant entitlements, rights and obligations across borders;

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<sup>53</sup> Crush et al (n 52).

- conduct training workshops for participants from government, private sector, civil society and worker organisations on mainstreaming migration into national development policies;
- create an environment that encourages circular migration, such as brain circulation; and
- strengthen responses to the specific needs of migrant women, including ensuring their health needs, labour rights, and human rights are respected, and taking steps to counter migrant trafficking and smuggling that specifically target and victimise migrant women.

## **7.8 Recommendations: responses at domestic level**

### ***7.8.1 Ensure approaches are gender-sensitive***

This thesis has shown that, while all migrants face challenging situations, women migrants experience gendered issues and therefore gender-sensitive migration responses are essential to ensure that the needs and rights of migrants are met. Below are key steps that can be taken to make migration responses more gender-sensitive:

- *Conduct gender analysis:* The first step in developing gender-sensitive migration responses is to conduct a gender analysis to understand the different needs and experiences of men, women and gender-diverse people during the migration process. This analysis should include an examination of the social, cultural, economic and political factors that shape gender roles and relations in the contexts of origin, transit and destination.
- *Address the root causes of gender inequalities:* As has been seen in this thesis, gender inequalities are often a root cause of migration and these inequalities can be exacerbated during the migration process. Gender-sensitive migration responses should aim to address the root causes of gender inequalities, including promoting women's economic empowerment, addressing gender-based violence, and promoting women's political participation in both sending and receiving countries.
- *Ensure access to basic services:* While all migrants, regardless of their gender, should have access to basic services such as food, shelter and healthcare, women and girls may face specific barriers to accessing these services, due to the special health needs they have, especially during pregnancy and postpartum. Gender-sensitive migration responses should address these barriers and ensure that all migrants can access basic services.
- *Address gender-based violence:* Gender-based violence is a significant risk for women and girls during the migration process. Gender-sensitive migration responses should prioritise the

prevention of gender-based violence, as well as providing support and services for survivors of violence. This can include providing safe spaces, counselling services, and legal support.

- *Promote gender equality:* Gender-sensitive migration responses should aim to promote gender equality and women's empowerment in all aspects of the migration process. This can include promoting their participation in decision-making processes, supporting women's entrepreneurship and employment opportunities, and addressing gender biases and stereotypes.

## 7.8.2 *Specific measures Botswana can take*

### 7.8.2.1 On discrimination and xenophobia

Botswana should:

- create and implement national strategies or policies that integrate migrants into host societies to enable prevention of discrimination and xenophobia;
- foster respect for and protection of labour migrant rights, while combating discrimination and xenophobia;
- promote information dissemination about migrants through public information campaigns and other means to encourage respect, tolerance, and understanding of migrants and counter anti-immigrant and xenophobic attitudes; and
- implement the relevant provisions of the Programme of Action of the World Conference Against Racism and Xenophobia,<sup>54</sup> such as measures that ensure the fair and non-discriminatory treatment of migrants, including women and children, regardless of immigration status.

### 7.8.2.2 On security of persons and protection from violence

Botswana should:

- provide, in cooperation with Zimbabwe, women migrants with information about their rights, available services and the risks they may face during transit – providing this in a language that women migrants can understand;

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<sup>54</sup> United Nations, Durban Declaration and Plan of Action, Adopted at the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Violence, 8 September 2001. Available at <<https://www.refworld.org/docid/3db573314.html>>.

- provide safe and secure transit facilities for women migrants, including appropriate accommodation, food and medical care, equipping these facilities with trained personnel who can swiftly respond to incidents of violence;
- implement comprehensive legal frameworks that protect the rights of migrant women and hold perpetrators of violence accountable, including laws criminalising all forms of violence against women, including domestic violence, sexual harassment and trafficking;
- ensure that enforcement officials should receive training on the specific needs of migrant women and how to respond to cases of violence against them, and, provide this training in a language accessible to these women;
- ensure that migrant women who are victims of violence should have access to legal aid and other support services, such as counselling and medical care;
- create safe spaces where migrant women can access support services and report incidents of violence without fear of retaliation;
- take measures to address the root causes of violence against migrant women, such as gender inequality, discrimination and poverty; including providing economic opportunities and addressing social norms that perpetuate violence; and
- foster partnerships and collaborations between government agencies, civil society organisations (CSOs) and migrant communities to address violence against migrant women. This includes providing support for community-based organisations that provide services to migrant women.

### 7.8.2.3 On trafficking in persons

Botswana should:

- implement strong measures to investigate and prosecute human traffickers and impose severe punishment on those convicted;
- amend the anti-trafficking law to eliminate the option of fines instead of jail time;
- establish standard operating procedures to identify trafficking victims and provide them with assistance, and train relevant people to spot trafficking cases among vulnerable groups such as migrants and refugees;
- hold training for prosecutors and judges on the 2014 anti-trafficking legislation and hold workshops to improve collaboration and effective handling of trafficking cases;

- fund and carry out the National Action Plan against trafficking;
- increase support for trafficking victims with emergency and long-term shelter, counselling, and medical care by providing adequate funding to NGOs;
- collaborate with NGOs to enhance freedom of movement and job opportunities for trafficking victims in shelters;
- assist in providing legal identity documents for vulnerable groups such as undocumented migrants, refugees and stateless persons;
- enforce strict regulations and oversight of labour recruitment companies, including a ban on recruitment fees charged to migrant workers and holding fraudulent recruiters accountable through criminal charges; and
- conduct public awareness campaigns, particularly in rural areas.

#### 7.8.2.4 On protection of the asylum space

Botswana should:

- make completing the new Refugee Bill a priority and ensure it complies with international human rights law, including the ICCPR, providing proper protection against arbitrary detention, deportation, and refoulement; and continue working with the Office of the UN High Commissioner for Refugees throughout the drafting process;
- implement fair and efficient asylum processes that meet international standards and include an independent appeals process with the ability to temporarily halt negative asylum decisions, as well as measures to prevent arbitrary detention, removal, and forced return;
- swiftly issue and renew identification documents for asylum-seekers to prevent arbitrary detention and removal;
- refrain from detaining asylum-seekers unless necessary, and implement alternatives to detention, especially in the cases of children. If the government still chooses to detain, they must do so at a reception centre and not the CII;
- abolish the encampment system;
- allow refugees unfettered access to employment; and
- provide legal pathways to allow refugees to naturalise.

#### 7.8.2.5 On health rights

Botswana should:

- review health and related laws and policies, prisons law and intellectual property (IP) law, to clearly provide for health rights of migrants and to improve access to medicines;
- provide women migrants with equal access to healthcare services, regardless of their immigration status, including free universal access to sexual and reproductive health services such as family planning, maternal care and HIV testing and treatment;
- take measures to address the discrimination and stigma based on gender and nationality in healthcare and ensure that healthcare-providers are trained to provide non-discriminatory and culturally sensitive care;
- provide language and interpretation services to ensure that women migrants can communicate effectively with healthcare-providers as women migrants may face language barriers that can prevent them from accessing healthcare services; and
- ensure women migrants are provided with accurate and accessible information about their health rights and available healthcare services, and providing this in a language understandable to women migrants.

#### 7.8.2.6 On risk of statelessness of migrant children

Botswana should:

- review law and policy on rights to citizenship and/or residence with a view to relaxing rules where there is a marriage or birth to a citizen;
- conduct a study to ascertain the statelessness situation in Botswana, as due to the lack of data, the extent of statelessness in Botswana is largely unknown and this could be of benefit to the country; and
- adopt necessary laws to prevent statelessness in accordance with international standards, ensuring that citizenship laws provide adequate protection.

#### 7.8.2.7 On decent employment (in the informal economy)

Botswana should:

- provide pathways to legal recognition for informal workers, including migrant women, to ensure that they have access to legal protections, social security and other benefits;

- promote access to education and training programmes to equip migrant women with the skills and knowledge they need to secure decent work in the formal economy;
- ensure that migrant women are paid equal wages for equal work and have access to safe and healthy working conditions, regardless of their immigration status;
- take measures to prevent the exploitation of migrant women in the informal economy, such as forced labour and debt bondage, including enforcing labour laws and providing access to remedies for victims of exploitation;
- promote entrepreneurship among migrant women in the informal economy by providing access to capital, training and other resources; and
- foster social dialogue between employers, workers, and relevant stakeholders to ensure that the voices and concerns of migrant women in the informal economy are heard and addressed.

#### 7.8.2.8 On arbitrary detention

Botswana should:

- put into effect the suggestions made by the Human Rights Committee regarding the creation of an independent body to inspect and monitor places of detention, ensuring all such facilities are subject to regular, independent, and effective monitoring and inspection, without prior notice and unsupervised;
- consider non-custodial alternatives for those undergoing administrative detention procedures to ensure their detention is necessary and proportionate, and not arbitrary (e.g., Botswana can consider alternatives such as community-based programmes or monitoring systems to ensure that women migrants comply with the immigration process);
- enact regulations that ban the detention of vulnerable individuals, including children, families, refugees, pregnant women, persons with disabilities and torture survivors;
- limit the use of detention for asylum-seekers as a last resort and provide alternatives for detaining children and families with children;
- ensure that women migrants in detention are provided with adequate medical care, including reproductive healthcare; including access to feminine hygiene products, prenatal care and contraception;
- ensure that women migrants should have access to legal representation and assistance to guarantee that their rights are protected and to challenge their detention if necessary; and



- have mechanisms in place to prevent and respond to violence and abuse against women migrants in detention; including providing access to safe reporting mechanisms, independent oversight and effective investigations and prosecutions.

7.8.2.9 On procedural safeguards in collective expulsion proceedings, Botswana should:

- ensure that all collective expulsions of migrant women are carried out in compliance with international human rights law and refugee law, including the principle of non-refoulement;
- provide migrant women with access to legal representation and interpretation services during collective expulsion proceedings;
- conduct individual assessments of each woman's case before carrying out collective expulsions; including identifying vulnerable individuals and assessing the risks they may face upon return;
- provide migrant women with accurate and accessible information about the collective expulsion process, their rights, and the available remedies;
- ensure that collective expulsions are carried out transparently and with appropriate oversight to prevent abuse and ensure accountability; and
- explore alternative solutions to collective expulsion, such as individualised assessments, voluntary return, or temporary protected status, to ensure that women's rights are protected.

7.8.2.10 On cruel, inhuman and degrading treatment during arrest and deportation procedures Botswana should:

- respect the human rights of migrants, including women, regardless of their legal status; including ensuring that they are not subjected to arbitrary arrest or detention, and that they have access to legal representation and fair judicial processes;
- ensure the law-enforcement officials, including border patrol officers and immigration officials, should receive training on how to treat migrants, particularly women, with dignity and respect; including training on how to handle sensitive cases which include gender-based violence, trafficking and sexual assault;
- ensure that policies and procedures related to the arrest and deportation of migrants should be gender-sensitive and take into account the unique needs and vulnerabilities of women

migrants; including providing access to women officials during arrest and detention, ensuring privacy during searches and providing adequate medical care;

- monitor detention centres regularly using independent organisations to ensure that detainees, including women migrants, are treated humanely and not subjected to cruel, inhuman or degrading treatment; and
- provide support services to women migrants who have experienced violence or trauma, including access to counselling and healthcare services.

## **7.9 Be a copycat: comparative examples**

Several countries and regional institutions have implemented creative solutions to address the obstacles that migrant women encounter within their borders or regions. Although it is understood that these countries and organisations do not have flawless systems, Botswana and the SADC may gain useful insights from studying their accomplishments. The following are a few examples of such approaches.

### **7.9.1 Canada**

Canada has implemented several policies to support the integration of women migrants into Canadian society. One of the key policies is the Gender-Based Analysis Plus (GBA+),<sup>55</sup> which is a tool used to assess how policies and programmes have an impact on diverse groups of people, including women migrants. The GBA+ ensures that policies and programmes are designed to address the specific needs of women migrants, including access to social services such as healthcare and education as well as employment. Canada has also implemented policies to combat gender-based violence during migration, including the National Action Plan to Combat Human Trafficking,<sup>56</sup> which aims to prevent and respond to trafficking of women and girls.

### **7.9.2 Ghana**

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<sup>55</sup> Government of Canada. (2021). *Gender-Based Analysis Plus. Women and Gender Equality Canada*. Available at <<https://women-gender-equality.canada.ca/en/gender-based-analysis-plus.html>>.

<sup>56</sup> Her Majesty the Queen in Right of Canada. (2012). *National Action Plan to Combat Human Trafficking*. Ottawa, ON: Public Safety Canada. Available at <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf>>.

Ghana has progressive policies in place that support the integration of women migrants into Ghanaian society. One of the key policies is the National Migration Policy,<sup>57</sup> which recognises the importance of gender-responsive migration management and promotes the protection of the rights of women migrants. As an added protective measure, Ghana also has legislation in place to tackle gender-based violence which can protect migrant women in the country. This legislation includes the Domestic Violence Act,<sup>58</sup> which criminalises domestic violence and provides protection and extensive support for survivors.

### **7.9.3 New Zealand**

New Zealand has employed innovative strategies to support the integration of women migrants into New Zealand society. One key feature is a CSO called the Ethnic Women's Trust,<sup>59</sup> which describes itself as

the collective of migrant and refugee women from all parts of the world. Our aim is to provide women with a safe place where they can freely express their views in a supportive environment.

The trust primarily provides support and advocacy services for migrant and refugee women. New Zealand also has legislation in place – Domestic Violence: Victims' Protection Act 2018 – to address gender-based violence and to prevent and respond to domestic violence against women in the country, including migrant women.

### **7.9.4 Rwanda**

Rwanda is a country that has been seen to have a strong commitment to gender equality and is famously known to hold the record for having the highest percentage of women members in parliament compared to any other country in the world, with their Chamber of Deputies having 61.3% women representation and 39% in the Senate.<sup>60</sup> In this vein the country has implemented

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<sup>57</sup> Ministry of Interior, Government of Ghana. (2016). *National Migration Policy for Ghana*. Available at <<http://www.migratingoutofpoverty.org/files/file.php?name=national-migration-policy-for-ghana.pdf&site=354>>.

<sup>58</sup> Ghana: Domestic Violence Act 732 of 2007.

<sup>59</sup> New Zealand Ethnic Women's Trust. Available at <<https://www.nzethnicwomen.org/>>.

<sup>60</sup> Government of the Republic of Rwanda. (2023). *Women Representation. Parliament of Rwanda*. Available at <<https://www.parliament.gov.rw/women-representation>>.

several policies that safeguard the rights and well-being of women migrants in the country. One such major institution is the Gender Monitoring Office,<sup>61</sup> which monitors and promotes gender equality in all areas of society, including migration. The Rwandese also have a multisectoral approach to safeguarding the rights of women and girls who have been forcibly displaced. Their *Beijing +25 Rwanda Country Report*<sup>62</sup> outlines how government works with national and international agencies to provide services to refugee women and girls, including prevention and response services for trafficking. In Rwanda, survivors of violence and trafficking victims have access to shelters, health services, legal assistance and counselling. The multi-sectoral response is available through SGBV/protection partners for victims of SGBV, while general trafficking cases are handled by UNHCR and government agencies.<sup>63</sup>

### **7.9.5 South Africa**

South Africa has one of the most liberal asylum policies in Africa, albeit that the Minister of Home Affairs has recently insisted that South Africa should withdraw from the international refugee law treaties and accede to them only with reservations, and introduce refugee camps, which will arguably result in an asylum system similar to Botswana's. The Refugee Act 130 of 1998, implicitly recognises the importance of protecting the rights of women migrants and provides a progressive framework for the management of refugees and asylum-seekers. In contrast to Botswana, South Africa does not have camps or designated areas for refugees and asylum-seekers. Instead, they live among South African communities in both rural and urban regions. Refugees in South Africa are granted the right to work, as well as basic social services, with the only restriction being their inability to work in private security, as confirmed by the Constitutional Court of South Africa. Asylum-seekers who possess a section 22 permit are also allowed to work and study.

### **7.9.6 Regional: Middle East and North Africa**

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<sup>61</sup> Rwanda Gender Monitoring Office. (2023). Available at <<https://gmo.gov.rw/index.php?id=188>>.

<sup>62</sup> Republic of Rwanda. (2019). *Beijing +25: Rwanda Country Report*. Available at <[https://gmo.gov.rw/fileadmin/user\\_upload/international/Beijing\\_25\\_Rwanda\\_Country\\_Report.pdf](https://gmo.gov.rw/fileadmin/user_upload/international/Beijing_25_Rwanda_Country_Report.pdf)>.

<sup>63</sup> Republic of Rwanda (n 53).

The 2022 *Global Compact for Migration Progress Report*<sup>64</sup> noted some success in the realm of migrant's women's rights when it stated that the Insan Association and Cross-Regional Centre for Refugees and Migrants implemented various measures to safeguard women, children, and other individuals in irregular migration situations. These efforts include:

- using legal pathways and courts to obtain documentation for registration, and access to healthcare, education and other essential services (Insan);
- setting up safe havens that offer protection and assistance to women and children (Insan);
- developing networks that bring together civil society organisations (CSOs) to support migrants on both sides of the Mediterranean (Cross Regional Centre for Refugees and Migrants) such as cross-regional centres for refugees and migrants; and
- integrating transnational mechanisms and inter-state cooperation to locate missing or disappeared migrants.

As a result, vulnerable women and children are better protected from abuse and harm and unifying civil society and improving transnational and inter-state cooperation can significantly increase the likelihood of finding missing migrants, whether alive or deceased.<sup>65</sup> The SADC could benefit from facilitating such a project in the region.

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<sup>64</sup> International Organization for Migration (IOM). (2022). *Global Compact for Migration Implementation in Practice: Successes, Challenges and Innovative Approaches*. International Dialogue on Migration Series, No 33. IOM, Geneva. Available at <[https://www.iom.int/sites/g/files/tmzbd1486/files/idm/final-file\\_v01.pdf](https://www.iom.int/sites/g/files/tmzbd1486/files/idm/final-file_v01.pdf)>.

<sup>65</sup> IOM (n 55).

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