The Protection of the Rights of Migrant Workers in Tanzania

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Declaration

I declare that the thesis for the degree of Doctor of Philosophy at the University of Cape Town hereby submitted has not been previously submitted by me for a degree at this or any other university, that it is my work in design and execution, and that all the materials contained herein have been duly acknowledged.

Juliana Masabo **Date**

Abstract

This study examines the protection of migrant workers in Tanzania, a country which, in terms of current migration discourse, plays a threefold role, since it is a sending country, a transit country, and a receiving country. The study examines the adequacy of the laws that protect the rights of workers who leave their countries to take up employment in Tanzania. The national regulatory framework on labour migration is evaluated by using international, regional and sub-regional legal instruments that provide the standards for the protection of migrant workers. Comparative best practices from various countries are also described in order to examine and identify the gaps in the current legal and institutional framework.

The study examines four key areas, namely, the admission of migrant workers and their access to the labour market, conditions of employment, freedom of association, and social security rights. These areas are examined by means of a thorough contextual, legal and policy analysis and an empirically based validation from which various observations and conclusions are made. The study establishes that pertinent legal and practical protection issues exist. First, there is no comprehensive labour migration policy or regulatory framework. The available framework comprises incoherent pieces of legislation and policy documents which sometimes differ, depending on what they seek to achieve. Second, the current regulatory framework, apart from being fragmented, is largely inadequate and overwhelmingly orientated towards immigration control. Third, the supervisory institutions are similarly uncoordinated and notoriously inefficient. All these factors impact negatively on the livelihood of migrant workers.

The study consistently maintains that Tanzania can reap the economic benefits of international labour migration only if her regulatory framework is rational and responsive to the protection needs of migrant workers. With the guidance of international standards on migrant workers and comparative best practices from other countries, the study provides some suggestions to facilitate the formulation of a rational labour migration framework that addresses socio-economic realities without negating the rights of migrant workers. To achieve this goal it is recommended that the labour migration framework should be integrated into the overarching national socio-economic development strategies. In addition, the framework should adopt a rights-based approach and be aligned with international, regional and sub-regional norms on the protection of migrant workers.

Dedication

To Wales, Karen and Collins

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Table of Cases

Tanzania

Republic v Mbushuu @ Dominic Mnyaroje and Kalai Sangula [1993] TLR 159

Transport Equipment Limited and Reginald John Nolan v Devram P Valambhia Court of Appeal of Tanzania at Dar es Salaam, Civil Application No 19 of 1993 (unreported)

South Africa

Discovery Health Ltd v CCMA and Others (2008) 29 *ILJ* 1480 (LC)

Georgierva-Deyanova/Craighall Spar 2004 (9) BALR 1143 (CCMA)

Government of the Republic of South Africa v Grootboom 2000 (11) BCLR 1169 (CC)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) BCLR 569 (CC)

Larbi-Odam and Others v Member of the Executive Council of Education (North-West Province) and Another 1998 (1) SA 745 (CC)

Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1033 (CC)

Moses v Safika Holdings (2001) 22 *ILJ* 1261 (CCMA)

Mthembu and Others v Claude Neon Lights (1992) 13 *ILJ* 422 (IC)

SA Union of Journalists v South African Broadcasting Corporation (1999) 20 *ILJ* 2840 (LAC)

Transport and General Workers' Union and Another v Bayete Security Holdings (1999) 20 *ILJ* 1117 (LC)

Vulda and Millies Fashions (2003) 24 *ILJ* 462 (CCMA)

African Commission on Human and Peoples' Rights

Communications 27/89, 49/91 and 99/93 *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, International Commission of Jurists, Union Interafricaine des Droits de l'Homme v Rwanda* reported in (2000) AHRLR 282 (ACHPR 1996)

Communication 17/92 *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* reported in (2000) AHRLR 321 (ACHPR 1996)

Communication 159/96 *Union Interafricaine des Droits de I'Homme, Fédération Internationale des Ligues des Droits de I'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de I'Homme au Sénégal and Association*

Malienne des Droits de I'Homme v Angola reported in (2000) AHRLR 18 (ACHPR 1997)

Communication 292/2004 *Institute for Human Rights and Development in Africa v Republic of Angola* reported in (2008) AHRLR 43 (ACHPR 2008)

Inter-American Court of Human Rights

Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03

ILO Committee on Freedom of Association

Case No 2121 (Spain) *Complaint presented by the General Union of Workers of Spain (UGT) against the government of Spain* ILO Committee on Freedom of Association Report No 327 (23 March 2001)

Case No 2227 *Complaint presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM)* ILO Committee on Freedom of Association Report No 332 (18 October 2002)

Case No 2620 *Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC)* ILO Committee on Freedom of Association Report No 362 (November 2011)

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Table of Statutes

Tanzania

Constitution of the United Republic of Tanzania, 1997

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Master and Native Servants Ordinance, No 11 of 1926

Master and Native Servants (Written Contracts) Ordinance, No 28 of 1942

Master and Servant Ordinance, Cap 32 of 1923

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National Council for Technical Education Act 9 of 1997

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Parastatal Pensions Act 14 of 1978

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Refugees Act 9 of 1998

Social Security Regulatory Authority 8 of 2008

Social Security Laws (Amendments)(No.2) Act, 5 of 2012

Tanganyika Citizenship Ordinance, Act 56 of 1961

Tanganyika Citizenship (Amendment) Ordinance, Act 69 of 1962

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Treaty for the Establishment of the East African Community Act 4 of 2001

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Other jurisdictions

Constitution of the Republic of South Africa, 1996

Compensation for Occupational Injuries and Diseases Act 130 of 1993 (South Africa)

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Immigration (Amendment) Act 13 of 2011 (South Africa)

Constitution of the Republic of Kenya, 2010

Constitution of the Republic of Uganda, 1995

Indian Emigration Act 21 of 1883

Indian Emigration (Amendment) Act 10 of 1902

International legal instruments

African Charter of Human and Peoples' Rights of 1981

COMESA Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, 1998

Convention Governing Specific Aspects of Refugee Problems in Africa of 1969

ECOWAS Protocol on the Free Movement of Persons, Residence and Establishment of 1979

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

International Convention on the Elimination of All Forms of Discrimination against Women, 1979

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990

International Convention Relating to the Status of Refugees, 1951

ILO Convention on Migration for Employment (Revised), No 97 of 1949

ILO Convention on Migrant Workers (Supplementary Provisions), No 143 of 1975

ILO Convention on the Migration for Employment, No 66 of 1939

ILO Convention on Equal Remuneration, No 100 of 1951

ILO Convention on Discrimination (Employment and Occupation), No 111 of 1958

ILO Convention on Equality of Treatment (Accident Compensation), No 19 of 1925

ILO Convention on Equality of Treatment (Social Security), No 118 of 1962

ILO Convention on Maintenance of Migrants' Pension Rights, No 48 of 1935

ILO Convention on Maintenance of Social Security Rights, No 157 of 1982

ILO Convention on Social Security (Minimum Standards), No 102 of 1925

ILO Convention on Freedom of Association and Protection of the Right to Organize, No 87 of 1948

ILO Convention on Private Employment Agencies, No 181 of 1997

ILO Convention on the Right to Organize and Collective Bargaining, No 98 of 1949

Protocol on the Facilitation of Movement of Persons in SADC of 2005

Protocol on the Establishing of the East Africa Community Common Market of 2009

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000

SADC Social Charter of Fundamental Social Rights of 2003

Treaty Establishing the African Economic Community of 1991

Treaty for the Establishment of the East African Community of 1999

Treaty Establishing the Common Market for Eastern and Southern Africa, 1992

Treaty Establishing the Economic Community of the West African States (Revised) 1991

Treaty of the Southern African Development Community of 1992

Universal Declaration of Human Rights, 1948

Abbreviations

ACHPR	African Charter of Human and Peoples' Rights
AEC	African Economic Community
AFL-CIO	American Federation of Labour and the Congress of Industrial Organizations
ATE	Association of Tanzanian Employers
AU	African Union
BWI	Building and Wood Workers' Association
CAEC	Community of States of Central Africa
CARICOM	Caribbean Community
CASS	CARICOM Agreement on Social Security
CBO	Community-based Organization
CCMA	Commission for Conciliation, Mediation and Arbitration
CMA	Commission for Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
COMESA	Common Market for Eastern and Southern Africa
CTM	Confederation of Mexican Workers
DAS	Deposit Administration Scheme
DOAG	Deustche OstAfrica Gazelleschoft
EAC	East African Community
EACJ	East African Court of Justice
EATUC	East African Trade Unions Confederation
ECOWAS	Economic Community for West African States
ELRA	Employment and Labour Relations Act
ERP	Economic Reform Programme
ETUC	European Trade Union Confederation
EU	European Union
FDI	Foreign Direct Investment
GEPF	Government Employees' Provident Fund
GNI	Gross National Income
GUF	Global Union Federation
ICATU	International Confederation of Arab Trade Unions
ICCPR	International Covenant on Civil and Political Rights

ICEDAW	International Convention on the Elimination of All Forms of Discrimination against Women
ICEM	International Federation of Chemical, Energy, Mine and General Workers Union
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICFTU	International Confederation of Free Trade Unions
ICFTU-AFRO	African Regional Organization of the International Confederation of Free Trade Unions
ICMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
IFBWW	International Federation of Building and Wood Workers
ILC	International Labour Conference
ILO	International Labour Organization
IMF	International Monetary Fund
INI	Union Network International
IOM	International Organization for Migration
IRC	International Convention on the Rights of the Child
ITUC	International Trade Union Confederation
IUF	International Union of Food and Agricultural Workers
KCTU	Korean Confederation of Trade Unions
LAPF	Local Authorities Pensions Fund
LC	Labour Court
LEAT	Lawyers' Environment Action Team
LHRC	Legal and Human Rights Centre
MoU	Memorandum of Understanding
MTU	Migrants' Trade Union
NACTE	National Council for Technical Education
NGO	Non-governmental Organization
NHIF	National Health Insurance Fund
nola	National Organization for Legal Assistance
NSSF	National Social Security Fund
NSSP	National Social Security Policy

OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OWWA	Overseas Workers' Welfare Administration
OWWF	Overseas Workers' Welfare Fund
PCIS	Principal Commissioner for Immigration Services
PO-PSM	President's Office, Public Service Management
PPF	Parastatal Pensions Fund
PSI	Public Services International
PSPF	Public Service Pensions Fund
REC	Regional Economic Community
SADC	Southern African Development Community
SATUCC	Southern African Trade Union Co-ordinating Council
SILABU	Sisal Labour Bureau
SLBFE	Sri Lanka Bureau of Foreign Employment
SSRA	Social Security Regulatory Authority
SSS	Social Security System
TaESA	Tanzania Employment Services Agency
TAMICO	Tanzania Mines and Construction Workers' Union
TANU	Tanganyika African National Union
TCU	Tanzania Commission for Universities
TF1	Tanzania Immigration Form
TIC	Tanzania Investment Centre
TUCTA	Trade Union Congress of Tanzania
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNECA	United Nations Economic Commission for Africa
UNHCR	United Nations High Commission for Refugees
USA	United States of America
WB	World Bank
WCA	Workers' Compensation Act
WCL	World Confederation of Labour
WESTADI	Welfare Scheme for Tanzanians in the Diaspora

WLAC	Tanzanian Women's Legal Aid Clinic
ZSSF	Zanzibar Social Security Fund

Chapter 1: Introduction

1.1 Introduction

Tanzania has recently assumed an important role in international labour migration, attracting migrants from all over the world. This is taking place within the context of economic liberalization, increased flow of capital and new technology, and the regional-economic integration processes. However, the country is also struggling to contain high unemployment rates: in 2006, 11.7 per cent of the active population (15 years and above) was unemployed.[1] The major question that emerges is whether it is possible for the country in its current situation to strike a balance between divergent interests without jeopardizing the rights of migrant workers. Hence, the question underlining this study was whether, and to what extent, the laws in Tanzania protect the rights of migrant workers.

Following a thorough contextual legal and policy analysis and an empirically based validation, the study reached two main conclusions. First, there is no comprehensive labour migration policy or regulatory framework. The available framework comprises fragmented pieces of legislation and policy frameworks which sometimes differ, depending on what they seek to achieve. Second, the current regulatory framework, apart from being fragmented, is largely inadequate. It adopts a migration control approach and offers no protection to migrant workers, except for general protection under the labour laws, which do not adequately cover the specific protection needs of migrant workers. This study's thesis is that the weaknesses exhibited in the labour migration regime have a double impact. First, the regime increases the vulnerability of migrant workers to human rights violations, and second, it is an impediment to economic growth and prosperity. As the incumbent ILO Director-General, Juan Somavia, once remarked, 'gains from migration and protection of migrant rights are indeed inseparable. Migrant workers can make their best contribution to host and source countries when they enjoy decent working conditions, and when their fundamental human and labour rights are respected.'[2]

[1] United Republic of Tanzania *Analytical Report for Integrated Labour Market Survey* (URT, 2006) 58.

[2] *Statement by the Director-General of the International Labour Office* Roundtable 3 on Globalization and Labour Migration, 2006 ECOSOC High-Level Segment, Geneva, 5 July 2006, available at http://www.ilo.org/pubcgi/links_ext.pl?http://www.un.org/docs/ecosoc/meetings/2006/hls2006/documents/DG%20ILO-RT3.pdf (accessed on 20 June 2011).

This chapter outlines the general trends and issues in international labour migration to provide an understanding of broader migration issues and how they impact on individual states. It then briefly introduces the state of labour migration in Tanzania and the regulatory framework. The chapter then sets out the research question underlying the study, the significance of the study, the research methodology and the scope of the study. The chapter also provides definitions of key terms and outlines the structure of the study.

1.2 General trends and issues in international labour migration

International migration has been a positive force in the world, creating links across the world, opening up trade opportunities, creating communication links and contributing to the growth of ideas and cultures across the world.[3] Each year, millions of women and men leave their homes and cross internationally recognized borders in what has been described as the 'courageous expression of the individual's will to overcome adversity and to live a better life.'[4] Recently, the number of migrants has grown tremendously, reaching 215.8 million people (3.2 per cent of the world's population) in 2010.[5] Only 16.3 million (7.6 per cent) of these are refugees.[6] This indicates that the majority of migrants are economic migrants. In 2007, the International Labour Organization (ILO) reported that migrant workers and members of their families accounted for about 90 per cent of all migrants.[7] Among these are both skilled and unskilled persons who moved abroad because they believed they would have the opportunity to realize their potential, increase their income, improve their standard of living, and add to the knowledge they had already gained.

The contemporary migration trends present two intertwined scenarios of interest to this study, namely, the diversification of migration direction and the increased participation of countries in migration activities. In the past, migration was directed towards countries in the global north, but now migration between countries in the global south has increased tremendously,

[3] Chelownski, R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford University Press, New York, 1997) 14.
[4] *Dealing with the Global Jobs Crisis* Opinion piece by Juan Somavia (Director-General of the International Labour Office) at the World Economic Forum, Davos, 25 January 2006, available at http://www.oit.org/public/english/bureau/dgo/speeches/somavia/2006/davos.pdf (accessed on 20 June 2011).
[5] World Bank *Migration and Remittances Fact Book 2011* 2 ed (World Bank, Washington DC, 2011) 18.
[6] Ibid.
[7] ILO *International Labour Migration and Development: The ILO Perspective* (ILO, Geneva, 2007) 2, available at http://www.ilo.org/public/english/protection/migrant/download/mig_brief_development.pdf (accessed on 24 May 2012).

accounting for 43 per cent of migrants.[8] Thus, the participation of countries in the global south in migration has not only increased, but their role has also been redefined. In Africa, intra-regional migration is growing rapidly.[9] Some countries, such as Tanzania and South Africa, currently play at least three roles: they are sending countries, receiving countries and transit countries.

This study is particularly interested in the policy issues and challenges accompanying these developments in individual states and in the international community as a whole. The precarious lives of migrant workers are especially pertinent. While the number of migrant workers continues to grow, there are many reports of migrant workers being subject to gross human rights violations. They suffer undue hardship and abuse in the form of low wages, discrimination, poor working conditions, the virtual absence of social protection, denial of freedom of association, discrimination, xenophobia, and social exclusion.[10] As victims of disguised employment relationships they are particularly vulnerable, and therefore have limited access to labour law protection.[11] As Weissbrodt further observes, they 'are made scapegoats for crimes, unemployment, diseases, and other social ills that usually result from domestic causes, including lack of adequate government services.'[12]

The policy shift towards selective and restrictive migration policies aimed at containing devastating unemployment in migrant-receiving countries is responsible for this. Following the economic crisis in the global economy in the 1970s, most labour-importing countries and countries that have traditionally attracted immigrants (and have benefited enormously from their contribution) closed their doors, allowing entry to only a few immigrants.[13] Most affected by these policies are low-skilled and medium-skilled migrants, whose mobility is greatly discouraged and restricted, when compared to highly skilled migrants. The latter are

[8] World Bank op cit.
[9] In Africa, intra-regional migration dominates the migration discourses. See Awad, I *The Global Economic Crisis and Migrant Workers: Impact and Response* (ILO, Geneva, 2009) 21.
[10] Grant, S 'International Migration and Human Rights, Global Commission on International Migration' Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) 7, available at http://www.newwebsite.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/policy_and_research/gcim/tp/TP7.pdf (accessed on 24 May 2012).
[11] Wickramasekara, P *Globalization, International Labour Migration and Rights of Migrant Workers* International Migration Papers Series (ILO, Geneva, 2006) 9.
[12] Weissbrodt, D *The Human Rights of Non Citizens* (Oxford University Press, New York, 2008) 197.
[13] An in-depth analysis on labour migration policy shifts and their impact on migrant workers rights is provided in Schindlmayr, T 'Sovereignty, Legal Regimes and International Migration' (2003) 41(2) *International Migration Review* 109–123 at 115.

encouraged to migrate and sometimes enticed by further offers, such as being permitted to bring family members, and the possibility of permanent residence status and citizenship.[14]

However, whilst the admission of low-skilled and medium-skilled labour is greatly restricted, the need for such labour in markets continues to grow, as a result of ageing and the unwillingness of citizens to engage in agriculture, manufacturing and other labour-intensive jobs. As an alternative, employers in these sectors recruit unauthorized migrants through smaller enterprises that engage migrant workers illegally. This has increased the scale of irregular migration. Faced with constraints to lawful admission, migrants regard these enterprises as the only possible means of accessing the labour market.[15] Migrants are thus forced into the informal sector, which often requires long or irregular hours of work and subjects workers to seasonal layoffs. Such workers have no prospect of decent working conditions or labour law protection. In other words, they become vulnerable to the informal labour markets which are sometimes characterized as the 'bargain basement' of globalization, where employers pay low wages for long working hours to minimize the costs of production.[16]

These conditions are not peculiar to countries with highly developed economies, but are also rampant in growing economies. It is therefore imperative to study the situation of migrant workers in countries such as Tanzania which, despite the infancy of her economy, has been rated as the eighth top migrant-receiving country in sub-Saharan Africa.[17]

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[14] For instance, in Australia, skilled workers are admitted through the 457 work visa (sponsored by an employer) which allows immigrants to work in Australia for a period of between three months to four years and to bring their family if they wish. The European Union also recently adopted a Blue Card Programme which allows highly skilled third-country nationals with a job offer to work in an EU country for a maximum of four years. After 18 months, the migrant can move to another EU country. They can also bring their families. See *Council Directive 2009/50/EC* of 25 May 2009 on the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment. For more examples see Cerna, L *Policies and Practices of Highly Skilled Migration in Times of the Economic Crisis* International Migration Papers Series No 99 (ILO, Geneva, 2010) available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp99.pdf (accessed on 24 May 2012).

[15] Castles describes this as a 'contradiction between market and state', one of nine contradictions of globalization. See Castles, S *Ethnicity and Globalization: From Migrant Workers to Transnational Citizen* (Sage Publications, London, 2000) 126.

[16] Pecoud, A and De Gutchteneire, P *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification of the UN Migrant Workers Convention* Global Migration Perspectives Series No 3 (Global Commission on International Migration, Geneva, 2004) 4, available at http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf (accessed on 24 May 2012). Also see Grant op cit 10–11.

[17] The other top recipient countries in ascending order are Cote d'Ivoire, South Africa, Ghana, Nigeria, Burkina Faso, Kenya, Sudan, Uganda and Ethiopia. See World Bank op cit 33.

1.3 A brief overview of labour migration in Tanzania

Labour migration is an important component of the Tanzanian labour market and the economy at large. As chapter 4 of this study demonstrates, the number of migrant workers has grown significantly. This is partly associated with the economic transformation to a free market economy in the mid-1980s.[18] The liberalization of the country economy through the privatization of state-owned enterprises, and the public sector reforms which formed an important element of this transformation, went hand in hand with the formulation of policies and a legal framework to create an environment conducive to foreign direct investment (FDI).[19] This opened up the country to an increased flow of goods, ideas and services and an increased flow of capital and labour.[20] The number of workers from within Africa and beyond increased as a result.[21]

Also responsible for this growth is ongoing regional economic integration, which has increased the rate of intra-regional migration. As chapter 3 of this study indicates, Tanzania currently belongs to two regional economic integration blocks: the Southern Africa Development Community (SADC) and the East Africa Community (EAC). Both of these acknowledge the importance of labour migration as an important driver in realizing successful regional economic integration. More importantly, legal instruments to facilitate labour mobility have been adopted in both regions.[22]

In addition, Tanzania has for decades been host to many refugees from neighbouring countries in the Great Lakes region, mainly Rwanda, Burundi, Uganda, the Democratic Republic of Congo (DRC) and Somalia, and also from neighbouring countries in the south, mainly Angola, Mozambique and South Africa. In 1995, when the number of refugees was at

[18] See Mkenda, BK 'The Impact of Globalization on Tanzania's Labour Market: Evidence from the Manufacturing Sector' Paper prepared for a Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania, Conference Hall, ESRF (28 July 2005) 8.

[19] See Temu, AE and Due, JM 'The Business Environment in Tanzania after Socialism: Challenges of Reforming Banks, Parastatals, Taxation and the Civil Service' (2000) 38(4) *Journal of Modern African Studies* 683–712 at 688.

[20] Mkenda op cit.

[21] See chapter 4, section 4.4.2.

[22] SADC finally adopted a Protocol on Facilitation of Free Movement of Persons in SADC on 18 August 2005 after a lengthy discussion of about ten years. In East Africa the Protocol on the Establishment of the East African Community Common Market was signed on 20 November 2009 by all five members of the East Africa Community: Kenya, Uganda, Rwanda, Tanzania and Burundi. It came into force in July 2010.

its greatest, Tanzania was hosting close to 1.5 million refugees.[23] With the successful repatriation of refugees to Rwanda and then to Burundi and the DRC, the number of refugees fell significantly to 321,900 in 2008.[24] A further decrease to 118,700 was reported in 2010 following the naturalization of the majority of the 1972 Burundian refugees and continued repatriation.[25] At present, the participation of refugees in wage-earning employment and other economic activities is strictly limited, reinforcing the encampment policy.[26] Nevertheless, the presence of refugees in the labour market certainly cannot be ruled out. There are a few who manage to get employment permits. Also, there are significant numbers of refugees and asylum seekers who have spontaneously settled in urban areas. These refugees engage in different economic activities to earn a living because, unlike refugees in camps, they do not receive any humanitarian assistance.[27] A recent study by Asylum Access Tanzania documented that 3 per cent of urban refugees are in formal employment and 79 percent are in the informal sector.[28]

There has also been an increase in irregular migration and human trafficking which, as demonstrated further in chapter 4, have different origins. Available reports indicate that irregular migrants and victims of human trafficking are mainly from neighbouring countries, particularly Kenya and Uganda.[29] Others are from Malawi, the DRC and Zimbabwe, while others come from as far away as India, Pakistan and China. In addition, there are Ethiopians and Somalis, most of them victims of trafficking who, for various reasons, fail to reach their desired destination, thus ending up in the black market in Dar es Salaam and in other

[23] Rutinwa, B 'The Tanzania Government's Response to the Rwandan Emergency' (1999) 9(3) *Journal of Refugee Studies* 291–302 at 296.
[24] United Nations High Commissioner for Refugees (UNHCR) *2008 Global Trends: Refugees and Asylum Seekers, Returnees, Internally Displaced Persons and Stateless Persons* (UNHCR, Geneva, 2009) 8.
[25] United Nations High Commissioner for Refugees (UNHCR) *2009 Global Trends: Refugees and Asylum Seekers, Returnees, Internally Displaced Persons and Stateless Persons* (UNHCR, Geneva, 2010) 8.
[26] All refugees are required to reside in designated camps which are normally located far away from the villages. Movement to and from these camps is restricted. A permit is required if a refugee wishes to leave the refugee camp. Further authorization is required if a refugee wishes to take up employment. See ss 17 and 32 of the Refugees Act 9 of 1998.
[27] A survey conducted in 2005 estimated that they were approximately 3,000 refugees in Dar es Salaam in that year. See Masabo, J 'Report on the Survey of Refugee Population in Dar es Salaam (Unpublished Report, 2006).
[28] Asylum Access Tanzania 'No Place Called Home: Report on Urban Refugees Living in Dar es Salaam, Tanzania' (Asylum Access Tanzania, Dar es Salaam, 2011) 5, available at http://asylumaccess.org/AsylumAccess/wp-content/uploads/2011/11/No-Place-Called-Home.pdf (accessed on 24 May 2012).
[29] Shitundu, MJ *A Study on Labour Migration Statistics in East Africa* International Migration Papers No 81 (ILO, Geneva, 2006) 11, available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp81.pdf (accessed on 24 May 2012).

regions.[30] The numbers of such irregular migrants are unknown. The only available data is based on border apprehension, which does not offer any real indication of irregular labour migrants in the country.

The growth of labour migration, while imperative in addressing the skills gaps and thus contributing to economic growth, has attracted an uneasy reaction from the public. This is because the growth has coincided with rapidly growing unemployment in the local market. For this reason, the admission of migrants is seen as having a negative impact on the efforts to contain unemployment. Besides, the government is at present faced with three major challenges: a paucity of statistics, the absence of a coherent labour migration policy, and the poor protection of migrant workers. The first two have great significance for the third challenge, which is the focus of this study. The paragraphs that follow reflect briefly on each challenge.

The state of migration data is in Tanzania is appalling. An empirical study conducted in 2006 concluded that migration data is seriously limited and fragmented. The data is collected from different sources, which fall under different departments and ministries, with the latter tending to use different variables, thereby producing different and inaccurate statistics.[31] Contributing to this is the problem of collecting accurate statistics for irregular migration, which is very difficult, even in countries with sophisticated data collection mechanisms. These limitations have two potential effects on migrant workers. On the one hand, there is the possibility of the numbers of migrants being underestimated, leading to marginalization, while on the other hand, there is the possibility of the numbers of migrants being over-estimated and the issue of migration becoming highly politicized. The latter creates a danger of increasing anti-migration sentiments, stigmatization, and xenophobia, thus lowering the chances for social integration. The recent xenophobic attacks on African immigrants in South Africa were largely the result of media reports and the statements of politicians that for no apparent reason cited huge and unsubstantiated statistics of irregular migrants. Such reports created the impression that there are too many irregular migrants who are putting undue

[30] Most of these are en route to South Africa and other countries in Europe or America. See Johnson, B 'The Phenomenon of Mixed Migration into and through Tanzania' Paper presented at the 11th Session of the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam, 28 September to 9 October 2009.
[31] Shitundu op cit 16–18.

pressure on the already strained social services and increasing competition in the unemployment-stricken labour market.[32]

The second challenge points to the absence of a coherent labour migration policy. At present, Tanzania has no single coherent labour migration policy in place. Issues related to labour migration are found in different policies which lack coordination and which, as the discussion in chapter 4 demonstrates, are sometimes contradictory, depending on what they want to achieve. For example, the approach to labour migration in the National Employment Promotion Services Act 9 of 1999 and the Immigration Act 5 of 1995 is rather too restrictive.[33] These Acts co-exist with the National Investment Promotion Policy, 1996, and the National Investment Act 26 of 1997, which offer a facilitative approach. The National Investment Act entitles investors an initial automatic immigrant quota of up to five persons during the start-up period and an opportunity to employ extra migrants.[34] There are thus two different admission standards, one for investors, who can easily employ foreigners in their enterprises, and a second standard for other employers whose chances of employing non-citizens are very limited. The latter group may thus regard irregular migration as the most viable option to meet their labour needs. Consequently, the protection of migrant workers' rights can be hugely undermined. The contexts on which these laws are premised also differ significantly. For instance, the Immigration Act is premised on the security context, whereby labour migration and other forms of migration are perceived as threats to national security whereas under the Employment Promotion Services Act labour migration is conceptualized as a labour market issue.

The third challenge is the limited protection of the rights of migrant workers. Apart from being fragmented, the laws available are very limited in their scope. The Employment Promotion Services Act and the Immigration Act, which are currently the major legal

[32] See Crush, J and Williams, V 'Making up the Numbers: Measuring Undocumented Migration in Southern Africa' SAMP Migration Policy Brief (2002) 12–14, available at http://www.idasa.org/media/uploads/outputs/files/Measuring%20Illegal%20immigration%20to%20SA.pdf (accessed on 24 May 2012). Also see Crush, J et al 'Migration in Southern Africa' Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) 13, available at http://www.gcim.org/attachements/RS7.pdf (accessed on 24 May 2012).

[33] This approach was also preferred under the Employment Policy, 2003 and its predecessor, the National Employment Policy, 1997. The latter was recently replaced by the Employment Policy, 2008.

[34] See section 24 of the Tanzania Investment Act 26 of 1997. Other facilitative legislation were the Mining Policy, 1997 (replaced by the Mineral Policy, 2009) and the Mining Act 6 of 1998 (repealed and replaced by the Mining Act 14 of 2010).

provisions, address only issues of entry, admission, residence and exit. Their provisions are much more regulatory than facilitative, and they regard labour migration as the last alternative in the country's labour market.[35] Indeed, they discourage labour migration. Foreign workers may be admitted into the country only when it is proven that there are no nationals with similar qualifications. Even then, this is only permitted in terms of a fixed-term contract, during which time a national worker must be trained to enable him or her to occupy the post in question.[36] Provisions for the renewal of contracts and mobility within the job market are complicated and highly restrictive. Any change of employment terminates the validity of the work permit.[37]

In brief, there is no specific regulatory framework for the protection of migrant workers who are already in the labour market. The assumption is probably that migrant workers enjoy the general protection of the labour and employment laws. This study is therefore an attempt to examine the situation of migrants and to question this assumption. The study proceeded with a full understanding of the fact that migrant workers have specific protection needs which are distinct from those of national workers. Because of their *alienage* and migration status, they are vulnerable to various forms of exploitation and abuse to which national workers are not necessarily exposed.

1.4 Research questions

This study addresses one major question: 'Do the laws in Tanzania adequately protect the rights of migrant workers?' This question comprises four specific questions:

- Is there any legal or policy framework on labour migration in Tanzania?
- What is the nature of the current labour migration regime? Does it protect the rights of migrant workers?
- What is the nature of the protection offered in the regime? Is it adequate?
- Are there any prospects for legal or policy reform? What are the better options for reform? Are they realistic in the Tanzanian socio-economic context?

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[35] Musonda, FM *Migration Legislation in East Africa* International Migration Papers Series No 82 (ILO, Geneva, 2005) 7, available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp82.pdf (accessed on 24 May 2012).
[36] See the National Employment Promotion Services Act 9 of 1999 Act, s 27(5) and (6).
[37] See the Immigration Act 5 of 1995, s 20.

The study consists of eight chapters, four of which critically examine specific protection issues. In each of these chapters, the adequacy of the relevant provisions of the law is measured against the norms pertaining to the protection of the rights of migrant workers as outlined in the international and regional legal instruments, which are discussed in chapters 2 and 3 of the study. Of specific relevance among these are the United Nations Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990 (ICMW), the [ILO] Migration for Employment (Revised) Convention, 1949 (Convention No 97) and the [ILO] Migrant Workers (Supplementary Provisions) Convention, 1975 (Convention No 143). Other relevant international and regional legal instruments and comparative best practices are also used to support the thesis.

1.5 Significance of the study

Several factors can be cited to validate the significance of this study. The first factor is the specific protection needs of migrants. Migrant workers are vulnerable to various human rights violations, yet the specific human rights violations and abuses are less well known. Even when these violations are known they receive minimal attention. Migrant workers also have limited access to formal legal enforcement mechanisms. As aliens they are unlikely to avail themselves of the protection of the law because they are unaware of their rights, and because they fear retribution from their employers and the authorities.[38] In countries like Tanzania, where labour migration law is uncertain and fragmented, migrant workers can hardly seek legal address. Some may relinquish their rights to legal redress because of the long wait for redress, and because of serious corruption in law enforcement systems. It is therefore imperative to examine the situation of migrant workers and their specific protection needs.

The second factor is the prevailing socio-economic reality in the country. At present, there is an increased labour flow, yet there is no comprehensive regulatory framework. As noted above, the scale of labour migration in Tanzania has steadily increased and is likely to increase even more as a result of regional economic integration. Yet the current policy and legal regime is fragmented, poor and limited. There is also growing hostility towards migrants. The perception of the public is that labour migration is more of a threat than an opportunity. Migrants are seen to be taking the jobs of Tanzanians and are therefore

[38] Grant op cit 3.

unwelcome. The impact of this state of affairs is far reaching. One of the major dangers of these negative perceptions is that, if left unchecked, they may hinder labour mobility and ultimately fuel irregular migration, corruption, and human trafficking, undermine the rights of migrant workers and deprive the country of taxes and other benefits that might be obtained through legal migration.

For all these reasons, a thorough study of the current regime needed to be conducted. The findings in each chapter are supported by recommendations, where necessary, to assist the authorities in formulating a rational labour migration policy which takes into account the diversity and vulnerability of migrant workers.

Also related to this is the significance of rational migration policies in economic growth and prosperity. Economic theories suggest that labour migration is of great benefit to the global economy and to the economies of individual states because it relocates scarce human resources to places where their skills can efficiently be utilized. In this way it is seen as a rational way to improve an area or worldwide economic efficiency by transferring labour from surplus to shortage areas.[39] Nevertheless, this can be achieved only if migrant workers are assured of decent working conditions and the full protection of their rights. It is therefore imperative to study the regulatory frameworks and to ensure that they are modelled in a way that protects migrants from human rights abuses.

1.6 Research methodology

This study primarily constitutes contextual legal and policy analysis. It applies comparative legal analysis to determine the adequacy of the protection offered to migrant workers by measuring the current legal regime against international legal standards. This method has proved to be useful in examining whether national laws comply with international minimum standards.[40] The study also reflects on comparative best practices from foreign jurisdictions, whose legal frameworks and practices offer relatively better protection to migrant workers. This method was preferred because it informs the domestic legal framework and has the

[39] Martin, P 'Labour Migration Theory and Reality' in Papademetriou, DG and Martin, P (eds) *Unsettled Relationship: Labour, Migration and Economic Development* (Greenwood Press, West Point CT, 1999) 26.

[40] See Valticos, N 'Comparative Law and the International Labour Organisation' (1977) *Comparative and Policy Labour Law* 284–286. Also see Blainpain, R 'Comparativism in Labour Law and Industrial Relations' in Blainpain, R *Comparative Labour Law and Industrial Relations in Industrialized Market Economy* 10 ed (Kluwer Law International, The Hague, 2010) 3–24 at 9.

considerable potential to improve legal reform. The method provided an opportunity to understand the universal protection standards and to see how these norms have been developed and applied in other jurisdictions and whether it is possible to apply them successfully in Tanzania. Suggestions for reform are made after a thorough analysis of these rules, their application in foreign jurisdictions and the socio-economic conditions in Tanzania.[41]

To achieve this, the study involved an intensive review of primary and secondary data. This included legislation, case law, international legal instruments and existing literature, namely, books, periodicals, unpublished materials, and internet resources. Literature reviews were conducted at different libraries, including the Brand van Zyl Law Library at the Faculty of Law, University of Cape Town and the main library of the University of Dar es Salaam.

For empirical purposes, field research was conducted in three regions: Dar es Salaam, Arusha and Mwanza. By using this method, the study gathered valuable information about and explanations of the practical aspects of the labour migration framework; such information could not be found in legal texts and scholarly literature. These three regions were chosen because of their social and economic status. Dar es Salaam is the major business city and a *de facto* capital city. All government ministries except one are situated in Dar es Salaam.[42] Similarly, the headquarters of the major government departments and the offices of international organizations and multinational companies are all situated in Dar es Salaam. Arusha and Mwanza are the major business centres after Dar es Salaam. The industries and enterprises that currently employ the majority of migrant workers (tourism, English-medium schools, and mining and construction firms) are located mainly in these three cities. Furthermore, their geographical position makes them attractive to migrants. Arusha and Mwanza are situated in the northern part of the country and are therefore easily accessible to migrants from all the East African countries. Arusha is also the main route for Somali and Ethiopian migrants who travel through Kenya. It was therefore felt that the three regions host an adequate mix of regular and irregular migrant workers.

[41] For a detailed analysis of comparative legal research methodology and its benefits, see McConville, M and Chui, WH *Research Methods for Law* (Edinburgh University Press, Edinburgh, 2007) 88–89.
[42] Only the office of the Minister of State under the Prime Minister's Office – Regional Administration and Local Government (PMO-LARG) is situated in Dodoma, which is the official capital city.

In Dar es Salaam the research was conducted from August to October 2010 and from February to May 2011, while in Arusha and Mwanza research was conducted in November and December 2010. The following offices were visited during the course of this study: the Ministry of Labour and Employment, the Ministry of Home Affairs (Department of Immigration Services), the Tanzania Investment Centre (TIC), the Tanzania Employment Services Agency (TaESA), the Trade Union Congress of Tanzania (TUCTA) and its affiliate unions, the Association of Tanzania Employers (ATE), the National Social Security Fund (NSSF), the Parastatal Pensions Fund (PPF), and the offices of the International Labour Office (ILO) and the International Organization for Migration (IOM) in Dar es Salaam. These offices provided the researcher with official documentation, reports, statistics and other information relevant to the topic.

The researcher used structured and unstructured face-to-face interviews with the participants, who included officials in the above-mentioned offices, migrant workers, employers and other members of public. The researcher had intended to use questionnaires and face-to-face interviews as complementary data collection techniques. However, during the course of the study the use of questionnaires proved ineffective because of the sensitivity of the topic and because they were not conducive to gathering much information from the participants. Therefore, the questionnaires were not administered, but were used only to guide the face-to-face interviews. A total of 80 individuals from the above-mentioned government institutions, companies, enterprises and individual migrant workers participated in the research. The participants and their institutions were selected based on their occupations, thus ensuring that they had a comparatively better knowledge of the subject. The migrant workers were randomly selected with the assistance of labour officers, immigration officers, fellow migrants, fellow employees and friends. By their nature, migrants tend to avoid outsiders. For this reason, it is difficult to gain access to them and to administer questionnaires or face-to-face interviews without the assistance of an intermediary. It was therefore felt that the use of fellow migrants, fellow employees and friends as intermediaries was imperative to create a link with respondents and in establishing trust.

For validation purposes, the respondents selected were of different nationalities and were also from different sectors or occupations. Information collected from the participants during the interviews varied, depending on their individual occupations and the approach of their respective institutions to labour migration issues. The information collected from migrant

workers touched upon their personal experiences and perceptions of the admission process, their access to the labour market, their treatment and general conditions of employment, and their social life in general. The information gathered during the study was generally qualitative and is presented in a narrative and descriptive form. The quantitative presentation of data is employed only in chapter 4 to report on the statistics of migrant workers and their profiles.

The collection of data, analysis and presentation was done in accordance with the research protocol developed by the researcher. This protocol complied with the UCT Faculty of Law Research Ethics Guidelines for Research Involving Human Participants, and was approved by the Faculty of Law Research Ethics Committee on 25 June 2010. It will be noted, for example, that, in compliance with the research protocol, the names of respondents are withheld except in cases where respondents explicitly consented to have their names, occupations, titles or the names of their offices revealed.

1.7 Scope of the study

This study covers international migrants ie its scope is limited to workers who traverse internationally recognized borders to take up employment in Tanzania. Internal labour migration, while also significant and widespread, is beyond the scope of this study. The study addresses employment-related rights and non-employment rights. Generally, it covers rights which are categorized as economic and social rights ie rights falling under the second generation of Vasak's categorization of human rights.[43] However, given the interrelatedness and indivisibility of human rights, the study refers to other rights whenever necessary.

With regard to geographical scope, the study covers only Tanzania-mainland because, although immigration is one of the Union matters in the First Schedule to the Constitution of the United Republic of Tanzania, labour and employment issues are not.[44] Thus Zanzibar has her own legal and institutional framework on labour and employment issues, distinct from

[43] The other two generations of rights in ascending order are civil and economic rights, and collective rights. See Vasak, K 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' *UNESCO Courier* 30:11 (United Nations Educational, Scientific and Cultural Organization, Paris, November 1977).

[44] See article 4(3) of the Constitution of the United Republic of Tanzania, 1977, read together with the First Schedule to the Constitution.

that of Tanzania-mainland.[45] Since labour and employment-related policies and legislation have a great bearing on labour migration and yet are not Union matters, it was deemed prudent and more feasible to limit the scope of this study to Tanzania-mainland.

It is also important at this juncture to underline that, because of the constitutional status of labour matters, Zanzibar is accorded full representation in the ILO forums. Zanzibar has full representation in the International Labour Conference, submits her own reports and is reviewed separately from the Tanzanian mainland. Nonetheless, Zanzibar has no capacity to conclude international treaties, since that mandate falls under international relations, which is a Union matter and therefore exercised only by the Union government. In other words, the government of Zanzibar, although represented in the ILO forums, has no capacity to sign and ratify ILO treaties. The acts of signing and ratifying ILO instruments are within the exclusive mandate of the Union government, and are carried out after consultation with Zanzibar. However, from the information available on the ILO website, it would appear that two of the four ILO instruments that were ratified by Zanzibar before Union or immediately after Union (before the Union structures were put in place) have not been denounced and continue to bind Zanzibar. One of these instruments is Convention No 97.[46] This means that Convention No 97 is binding only on Tanzania-Zanzibar, and not on Tanzania- mainland.

1.8 Definition of terminology

Migration

'Migration' means 'spatial movement' ie movement from one place to another or from one social, administrative or political unit to another. Given its complex form, scholars have tended to categorize migration according to the distance involved in the movement, the motive behind the movement (voluntary or forced), and its duration (permanent or

[45] Employment and labour issues in Zanzibar fall under the Ministry of Labour, Youth, Women and Children Development, which has its own policy framework and structure, differing from the Ministry of Labour and Employment on the Tanzanian mainland. Zanzibar has two major statutes, the Employment Act and the Labour Relations Act, both enacted in 2005, while on the Tanzanian mainland the major statutes are the Employment and Labour Relations Act, 6 of 2004 and the Labour Institutions Act 7 of 2004. There are also separate laws on social security, which are also addressed in this study.

[46] The other four are the Minimum Age (Industry) Convention, 1919 (No 5); the Minimum Age (Sea) Convention, 1920 (No 7); the Minimum Age (Sea) Convention (Revised), 1936 (No 58); and the Migration for Employment (Revised) Convention, 1949 (No 97). All of these were ratified on 22 June 1964, only two months after the birth of the union between Tanganyika and Zanzibar. The first two instruments were denounced on 16 December 1998. See the ratification for Tanzania and Zanzibar, available at http://www.ilo.org/ilolex/english/newratframeE.htm (accessed on 24 May 2012). In addition, the government of Tanganyika had ratified six conventions before the union. One of these was denounced in 1983.

temporary).[47] Some have defined migration as movement which is relatively long term and definite, based on geographical context and the extent to which social units break with the area of origin. According to the latter definition, migration may take one of four forms: (a) local migration (movement which takes place within a geographically short distance, with the migrant maintaining a link with his or her household); (b) circular migration (migration which takes a migrant to a destination by means of arrangements that return the migrant to the origin after a well-defined interval); (c) chain migration (movements which take place following information exchange, assistance and arrangements between related individuals or households); and (d) career migration (migration which takes place in response to opportunities in a different geographical area).[48] These movements are further categorized as internal and international to differentiate between those which take place within a country (within administrative units, a province, a municipality or a region) and those which involve crossing one or more internationally recognized borders.[49]

Labour migration

The term 'labour migration', though widely used in academic and non-academic literature, has not been universally defined. Nonetheless, the term is generally used to refer to movement for the purpose of employment. In the context of international migration, it refers to cross-border movement for the purpose of employment in a country other than a migrant's own country. In some literature, the term 'economic migration' is used to describe the movement. However, if used in their strict sense, these two terms may have different connotations. 'Economic migration' may be broadly interpreted to include migration for employment and for other economic purposes, such as trade and investment.[50] More often than not, 'labour migration' involves 'individuals who in their desire to improve their life respond to a real or perceived inequalities in the distribution of economic opportunities by migrating' to other places where they hope to improve their lives.[51] These movements

[47] See Lee, E 'A Theory of Migration' (1966) 3(1) *Demography* 47–57 at 48.
[48] Faist, T *The Volume and Dynamics of International Migration and Transnational Social Space* (Oxford University Press, Oxford, 2002) 8. Also see Oucho, J 'The Relationship between Poverty and Migration in Southern Africa' Paper presented at SMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002.
[49] International Labour Migration *Word Migration 2003: Managing Migration Challenges and Responses For On The Move* (IOM, Geneva, 2003) 8.
[50] IOM *Labour Migration* available at http://www.iom.int/jahia/Jahia/about-migration/developing-migration-policy/migration-labour/labour (accessed on 20 June 2011).
[51] Goss, J and Lindquist, B 'Conceptualizing International Labour Migration: A Structuration Perspective' (1995) 29(2) *International Migration Review* 317–335 at 317–318.

involve highly skilled individuals or professionals, as well as those with medium and low skills. Depending on its duration, labour migration may be permanent (long-term) or temporary (short-term or contract). Temporary migration increased considerably after the global economic stagnation in the 1970s and has remained the most common form of migration. In the 1990s, for example, in the Middle East alone, there were about 6 million contract workers, mainly from other Arab States and from Asia. The majority of these workers were semi-skilled and unskilled immigrants.[52]

Migrant worker

According to article 2(1) of the ICMW, a 'migrant worker' is 'a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national.' This definition includes potential migrant workers who hold work contracts, even if they have not yet left their countries of origin to take up employment in the host states, and workers who remain in their host states after the completion of their contracts.[53] In most cases this term is used interchangeably with terms such as 'foreign worker', 'immigrant worker', and 'guest worker' in Germany and other European countries, where labour migration was seen as a temporary phenomenon.[54] Migrant workers are also referred to in this work as 'labour migrants'. Broadly interpreted, the term 'migrant worker' includes short-term migrants, long-term migrants, regular migrant workers and irregular migrant workers.

Regular migrant

The ICMW defines a 'regular migrant' as a person who is 'authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.'[55] In this work, the term 'regular migrant worker' is used interchangeably with the terms 'migrant worker in a regular situation', 'migrant worker with regular status' and 'documented migrant'.

Irregular migrant

The term 'irregular migrant worker' is simply the opposite of the term 'regular migrant'. It refers to a person who enters and remains in a country, and engages in remunerated activities

[52] Castles op cit 95.
[53] Cholewinski, R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford University Press, Oxford, 1997) 148.
[54] Ibid 2.
[55] Article 5(a) of the ICMW.

without the authorization of the host state.[56] The word is used interchangeably with 'undocumented migrant', a term developed during the International Conference on Population and Development in 1994, to replace the word 'illegal migrant', which had a negative connotation of criminality and was thus considered undesirable. Compared to previous terms and definitions, the definition in the ICMW is broader and more inclusive. It covers persons who enter the country without authorization, those who enter with authorization but later violate the conditions for their entry by engaging in remunerated activities without authorization or by overstaying after the expiry of their working permits, and those who enter the country with false or adulterated documents. In this work the term 'migrant worker with irregular status' will sometimes be used.

1.9 Structure of the thesis

The study is divided into eight chapters. Chapter 1 introduces the study. Chapter 2 reflects on the role of international legal instruments in protecting migrant workers. It provides a thorough analysis of the standards underlined in these instruments, in particular their response to the deeply entrenched protection concerns of migrant workers. The chapter observes that although the UN and ILO standards for the protection of migrant workers are inadequately developed when compared to other areas of international concern, the role of these instruments in shaping states' policies and legislation, and in fostering respect for and the humane treatment of migrant workers cannot be over-emphasized. Some of these standards are transplanted into the regulatory frameworks of the African Union, the EAC and the SADC. These frameworks are discussed in chapter 3.

The imperative underlining the discussion in these two chapters is that Tanzania, as a member of the international community, regional and sub-regional bodies, has a legal obligation to respect and uphold the values and principles guiding these bodies and to align her laws with legal norms developed in these organizations. This study required the contents of the international, regional and sub-regional instruments relevant to labour migration to be accorded a deserving and sustained treatment, in order to evaluate the adequacy of the national regulatory framework. The standards outlined in these instruments are used to evaluate the adequacy of the Tanzanian labour migration framework.

[56] Article 5(b) of the ICMW.

Chapter 4 reflects on the origin of international labour migration, noting the labour migration streams in pre- and post-independence Tanganyika (Tanzanian-mainland). A brief description of the factors, trends and patterns of labour migration is provided for each era. The chapter argues that, while the nature and trends of labour migration have been subject to the constantly changing social and economic environment, its significance in national economic growth, although not widely acknowledged, has remained intact. The chapter provides an understanding of the issues underlying the prevailing labour migration regime, and more importantly, it paves the way for a more focused discussion in the chapters that follow.

Chapter 5 examines two issues, namely, access of migrant workers to the labour market and their general conditions of work. The chapter looks at issues related to recruitment, entry and admission to the country; the procedures for obtaining work permits; the nature of the permits and their conditions; the recognition of academic credentials; the admission of family members; and other issues which facilitate or hinder access to the labour market. With regard to conditions of work, the discussion focuses on issues related to remuneration, non-discrimination and equality of treatment, geographical and occupational mobility, and security of tenure. The discussion in this chapter concerns the provisions of the National Employment Promotion Services Act, 1999, the Immigration Act, 1995 and the Employment Relations Act, 2004. With the aid of empirical data, it is argued that the access of migrant workers to the labour market is highly limited and restricted. The general standards and conditions of work vary considerably, depending on immigration status.

Chapter 6 examines the right of migrant workers to join and to form trade unions and to participate in the activities of these organizations. The chapter argues that, while the law does impose any restrictions on the ability of migrant workers to exercise their right to freedom of association, the participation of migrant workers in trade unions is critically low.

Chapter 7 explores the position of migrant workers in the Tanzanian social security system. The chapter proceeds from the understanding that access to social security for migrants is very limited and differs greatly from state to state, depending on the migration policy prevailing in each particular state.[57] Thus, in some states, migrants are completely excluded

[57]Vonk, G 'Migration Social Security and the Law: Observation of the Impact of Migration Policies upon the Position of Migrants in Social Security Law in Europe' in Berghman, J et al *Social Security in Transition* (Kluwer Law International, The Hague, 2002) 77–92 at 78.

from joining social security schemes, while in other states they are allowed to join but are not entitled to the full range of benefits provided by those schemes.[58] The chapter sought to address three major issues, namely, the access of migrant workers to social security schemes, access to benefits, and the portability and exportability of social security rights and benefits.

Chapter 8 comprises a summary of the findings, and the conclusions and the recommendations of the study.

[58] Ibid 84.

Chapter 2: International norms on the protection of migrant workers

2.1 Introduction

Migrants tend to be marginalized the world over, because migration issues fall squarely within the sovereign discretion of states. States have, as a matter of right, broad authority to determine who enters and remains in their territories.[1] They can exclude migrants from entering their territories, or expel and deport those who have already entered.[2] These powers are enormously wide and open to abuse. Therefore, the international community has, through state-to-state relations, negotiations and practices, devised certain norms to set standards and to regulate states' practices in exercising their sovereign rights in this area.[3]

In this chapter, we examine the existing international instruments on labour migration so as to develop an understanding of these norms. The discussion makes the assumption that these norms are important for guiding states' policies, legislation and practices. More importantly, these norms are vital tools for examining domestic protection regimes.

The Tanzanian judiciary has on different occasions stressed the importance of international norms in shaping the Tanzanian legal order. Both the Court of Appeal and the High Court of Tanzania have stressed that 'Tanzania does not exist in isolation. It is part of a comity of nations.'[4] It is therefore imperative to consider existing international norms to resolve certain issues in the national legal system.

The chapter starts by tracing the development of international principles in this area, and then examines the modern international protection standards which have been developed by the International Labour Organization (ILO) and the United Nations (UN) human rights system.

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[1] Chimni, BS 'Development and Migration' in Aleinikoff, TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 255–270 at 255. Also see Schindlmayr, T 'Sovereignty, Legal Regimes and International Migration' (2004) 41(2) *International Migration* 109–123 at 110; and Martin, DA 'The Authority and Responsibility of States' in Aleinikoff, TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 31–44 at 31.

[2] Martin, S *The Legal and Normative Framework of International Migration, Global Commission on International Migration* (2005) 8, available at http://www.gcim.org/attachements/TP9.pdf (accessed on 12 June 2010). Also see Godwin-Gill, GS 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1986) 23(3) *International Migration Review* 526–554 at 530.

[3] Aleinikoff, TA 'International Legal Norms and Migration: A Report' in Aleinikoff, TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 1–30 at 1.

[4] See *Director of Public Prosecutions v Daudi Pete* [1993] TLR 22 and *Christopher Mtikila and Others v The Attorney General* High Court of Tanzania, Dar es Salaam Main Registry, Miscellaneous Civil Cause No 10 of 2005, judgment of 5 May 2006 (unreported) 45.

We observe that there have been considerable efforts to bring the protection concerns of migrants to the fore, within both the UN and the ILO. Thus there is a set of standards which attempts to ensure that labour migrants are treated humanely. The chapter also looks at provisions relating to the protection of the most vulnerable groups of migrants, such as irregular migrants and women migrants. Finally, the position of international law in the Tanzanian legal system is examined.

The chapter concludes by arguing that although the standards for the protection of migrant workers are inadequately developed when compared with the standards for the protection of other persons of concern, such as refugees, there has been significant progress in establishing international standards in this area. A fairly detailed set of international rules now exists, which, if fully implemented, has the potential to transform migrants' lives for the better: they will be in a situation where they can fully enjoy their rights while also making significant economic contributions to the countries of origin, transit and destination.

2.2 Development of international norms on migrants' rights

Modern international norms on the treatment and protection of migrants have evolved over a period of time and have undergone major changes. The literature indicates that modern international standards were the result of attempts to address hostility and prejudice towards migrants in ancient times.[5] Religious and cultural prejudices against migration sanctioned the exclusion of migrants and their inferior treatment in all areas of life.[6] Some of these restrictions were gradually lifted when states began to enter into agreements (known as *isopolites*) which envisaged reciprocal guarantees of some rights and privileges to migrants.[7]

[5] Weissbrodt, D *The Human Rights of Non-Citizens* (Oxford University Press, Oxford, 2008) 18.

[6] Migrants, who were commonly branded 'outsiders', 'enemies', 'aliens' and 'strangers', could not participate in ancient religions and hence had no entitlements. They were completely excluded from participation in the ancient religions of their hosts. They could not marry in their host community, and could not own property, enter into a contract, inherit or pass their properties for inheritance. Access to the legal system was also impossible because migrants could not swear in the names of the local gods. See McDougal, MS et al 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70(3) *American Journal of International Law* 432–469 at 433. Also see Weissbrodt, D op cit 18 and Tiburcio, C *The Human Rights of Aliens under International and Comparative Law'* (Kluwer Law International, The Hague, 2001) 24.

[7] In the Roman Empire migrants progressively started to enjoy some protections through the *jus gentium*, a law which applied solely to migrants. See Cholewinski, R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford University Press, Oxford, 1997) 42.

The most remarkable development occurred with the birth of the modern nation state, in which the entitlement to human rights was acknowledged, giving rise to a more humanitarian attitude towards aliens and the development of customary international law in this area.[8] It was later gradually accepted that the state has, as a matter of right, through the doctrine of diplomatic protection, the primary responsibility to protect the interests of its citizens who have been injured in foreign countries and who were denied justice.[9] To assert this right a state needed to prove three things: the existence of active nationality, that the national has exhausted the local remedies, and that the alleged harm resulted from an internationally recognized wrong directly attributed to the defendant state.[10] The state's intervention was necessary because at that time individuals were not regarded as autonomous subjects of international law, and could not, in the absence of intervention by their states, obtain international status.[11] So the legal fiction was developed that an injury to an alien was an injury to the state of which he or she was a national, which was then entitled to reparation.[12] The doctrine of diplomatic protection emerged from this fiction.[13]

With regard to the standards of treatment, two competing doctrines emerged, namely, the doctrine of equal protection and the doctrine of minimum standards of protection.[14] The doctrine of equal treatment (also referred to as 'national standards') held that migrants should

[8] The idea of fair treatment of aliens was first advocated by Francisco de Victoria, and later expounded by Grotius, who argued that the status of aliens should coincide as far as possible with that of the nationals of the host state. See McDougal et al op cit 440–441.
[9] Tiburcio op cit 24.
[10] Ibid. The International Court of Justice (ICJ), in its advisory opinion on Reparation for Injuries Suffered in the Service of the United Nations, established that it was the obligation of the claimant state to establish that the 'defendant state has broken an obligation towards the national state in respect of its nationals' and that 'only the party to whom an international obligation is due can bring a claim in respect of its breach'. See International Court of Justice *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* ICJ Reports 1949, 181–182.
[11] After a long time of 'doctrinal reticence to accord individuals subjectivity' it has finally being accepted that individuals are subjects of international law as holders of rights and also as bearers of individual obligations under international criminal law. See Clapham, A 'The Role of the Individual in International Law' (2010) 21(1) *The European Journal of International Law* 25–30 at 30. Also see Midlerson, RA 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) 1 *European Journal of International Law* 33–43 at 35, and Brownlie, I 'The Place of the Individual in International Law' (1964) 50(3) *Virginia Law Review* 435–462.
[12] McDougal, MS et al 'The Protection of Aliens from Discriminations and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70(3) *American Journal of International Law* 432–469 at 441. Also see Gaja, G 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21(1) *European Journal of International Law* 11–14.
[13] Tiburcio op cit 67.
[14] McDougal et al op cit 443.

enjoy the same treatment accorded to nationals.[15] The argument was that, when a person goes to a foreign country, 'he must be prepared for all the local conditions, political and physical, as he is prepared for the weather.'[16] Thus, ".....the foreigner who voluntarily moves to a country ..... in search of personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed."[17] In contrast, the doctrine of minimum standards held that, when dealing with migrants, all states, irrespective of how they treat their citizens, should adhere to certain minimum standards of treatment recognized by the law of nations.[18] Therefore, a state should not 'escape responsibility for inhumane treatment of aliens by reasons that it treats its own citizens likewise.'[19] In the words of Kelsen, this doctrine meant that 'the legal status granted to aliens must not remain below a certain minimum standard of civilization.'[20] Intense debates resulting from these divergent approaches preoccupied international law and international relations scholars for many years. With the codification of modern international human rights law, this debate has become redundant.[21]

2.3 Modern protection regimes

In modern international law, the protection of migrant workers has evolved through a two-tier system which is complementary and reinforcing. The one tier of protection is the protection offered by the Conventions and Recommendations of the ILO, and the other tier is the protection under the human rights framework.

2.3.1 The ILO initiative

The ILO's desire to provide remedies and to help find sustainable solutions to poverty through social justice has always been driven by the need to secure universal lasting peace as

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[15] This principle was introduced by a Cuban national, Andress Bello, who drafted the Chilean Civil Code in 1885. It became popular in Latin America. Carlos Calvo and other proponents of this principle argued that aliens cannot expect more favourable or higher standards of treatment than that accorded to the nationals of the receiving state. This means that a state cannot have greater responsibility to aliens than the responsibility it owes to its own citizens. See McDougal et al op cit 444. Also see a detailed analysis of this principle by Freman, AV 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 46 *American Journal of International Law* 121–147.

[16] Borchard, E 'The "Minimum Standard" of the Treatment of Aliens' (1940) 38(4) *Michigan Law Review* 445-461at 445. Also published in (1939) 33 *Proceedings of the American Society of International Law at Its Annual Meeting (1921–1969)* 51–74.

[17] Ibid 55.

[18] Borchard op cit 456-457.

[19] McDougal et al op cit 446.

[20] Kelsen, H *Principles of International Law* (The Law Book Exchange, New Jersey, 2003) 243.

[21] Cholewinski op cit 46.

advanced under its founding instrument, the Peace Treaty of Versailles. In pursuing this ideal, the ILO's main role since its inception in 1919 has been preparing and adopting Conventions and Recommendations ie a standard-setting role.[22] At the heart of the ILO lie not only the protection concerns of workers, but also, more specifically, the concerns of the least advantaged workers, such as those who live and work outside their countries. Thus, Part XIII of the Treaty of Versailles, which established the ILO, incorporated the specific concerns of this group.[23]An introductory section of this part, which later become the Preamble to the ILO Constitution, enshrined the 'protection of the interests of workers when employed in countries other than their own' as part of the ILO's mandate. More specifically, in article 427, the Treaty laid down a general principle that 'the standard set by law in each country with respect to the conditions of labour should have due regard to the equitable economic treatment of all workers lawfully resident in that country.'

To further advance this effort the ILO adopted a Recommendation on Reciprocity of Treatment during the first International Labour Conference in 1919. The Recommendation provided that states should, on condition of reciprocity and upon mutually agreed terms, extend the laws and the protection applicable to their own workers to foreign workers employed within their territories, together with their families.[24] The weak legal status of this instrument notwithstanding, it set forth the two aims of the ILO approach to labour migration, namely, ensuring 'equality of treatment between nationals and migrant workers and coordination of migration policies between States and between governments and employers'.[25] Migration for employment was also included in Part III(c) of the Declaration of Philadelphia.[26]

Currently, under the ILO framework, there are four core instruments on migrant workers, comprising two Conventions – the Migration for Employment (Revised) Convention, 1949 (No 97) and the Migrant Workers' (Supplementary Provisions) Convention, 1975 (No 143),

[22] Wisskirchen, A 'The Standard Setting Role of, and the Monitoring Activity of the ILO: Legal Questions and Practical Experience' (2005) 115 *International Labour Review* 253–289 at 254.
[23] Hansenau, M 'ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and their Genesis' (1991) 25(4) *International Migration Review* 687–697 at 688.
[24] See ILO Recommendation No 2 Concerning the Reciprocity of Treatment of Foreign Workers, 1919. This Recommendation was withdrawn in 2004.
[25] See ILO Report of the Committee of Experts on the Application of Conventions and Recommendations, submitted to the 87th Session of the International Labour Conference, Geneva, 1999, para 32.
[26] See ILO Declaration Concerning the Aims and Purposes of the International Labour Organisation, 1919. This declaration was annexed to the ILO Constitution. It has therefore become part of the ILO Constitution.

and two Recommendations – the Migration for Employment Recommendation (Revised), 1949 (No 86) and the Migrant Workers' Recommendation, 1975 (No 151).

Under the ILO system, Conventions and Recommendations constitute 'the international labour code'. These two sets of instruments, however, have different legal status. Conventions are binding and, once ratified, they impose legal obligations on ratifying states, while Recommendations are not legally binding.[27] Recommendations usually accompany Conventions by providing further detailed definitions of standards in corresponding Conventions, or by setting higher or more advanced standards.[28] This is different from the normal treaty practice, where Conventions are usually followed by additional protocols which, once ratified, are also binding.

The first specialized set of instruments on migrant workers under the ILO system was adopted in 1939. This comprised a Convention – the Migration for Employment Convention, 1939 (No 66) – and its two accompanying Recommendations. The first Recommendation concerned the recruitment, placing, and conditions of labour migrants,[29] while the second concerned cooperation between states on similar matters.[30] These three documents were adopted in 1939, just before the Second World War. They set a record by being the first comprehensive ILO standards on migrant workers. Regrettably, they were unable to secure any ratification due to the prevailing hostilities at the time.[31] Immediately after the war they were revised to ensure they conformed to the socio-economic realities of the time. The outcome of this revision was Convention No 97 and Recommendation No 86.

[27] Under international law, treaties can be binding on a state only if that state has unequivocally expressed its consent to be bound by the particular treaty through an act of 'ratification'. See article 2(1)(b) of the Vienna Convention on the Law of Treaties, 1969. Also see articles 12–16. The effects of ratification in states differ. In some states, once a Convention is ratified it automatically becomes part of the domestic law, while in other states ratification must be followed by the enactment of a law to incorporate the Convention into the domestic legal framework. It is this second stage which gives the Convention legitimacy or legal force in the particular country. See Starke, JG 'Monism and Dualism in the Theory of International Law' (1936) 66 *British Year Book of International Law* 66–81 and McDougal, MS 'The Impact of International Law upon National Law: A Policy-Oriented Perspective' (1954) 4 *South Dakota Law Review* 25–92.

[28] Cholewinski op cit 82. Also see Wisskirchen, A 'The Standard Setting Role of and the Monitoring Activity of ILO: Legal Questions and Practical Experience' (2005) 115 *International Labour Review* 253–289 at 258.

[29] ILO Recommendation No 61 Concerning the Recruitment, Placing and Conditions of Labour of Migrants for Employment, 1939.

[30] Recommendation No 62 Concerning Cooperation between States Relating to the Recruitment, Placing and Conditions of Labour of Migrants for Employment, 1939.

[31] Hansenau op cit 692.

Convention No 97 and Recommendation No 86 contain a more elaborate set of standards when compared with their predecessors. They offer a more flexible response to migrant workers' protection needs.[32] The Convention comprises a general treaty and three annexes. The first annex deals with the recruitment, placing and conditions of migrant workers employed under government sponsorship, while the second annex provides for those employed otherwise. The third annex specifies the mechanisms for the importation of the personal effects, tools, and equipment of migrant workers. In addition, Recommendation No 86 contains a Model Agreement on Temporary and Permanent Migration for Employment, which was basically intended to inspire member states to conclude bilateral agreements to facilitate labour migration.[33] In terms of coverage, the Convention and its accompanying Recommendation apply to regular migrant workers and members of their families.

In 1975, these instruments were supplemented by two instruments: Convention No 143 and Recommendation No 151. These changes came in the wake of the changing atmosphere in the major receiving countries in the West. Growing unemployment in these countries fuelled discrimination against migrants and xenophobia. The laws and policies facilitating permanent labour migration were continually being replaced by regimes which called for temporary migration, while also limiting irregular migration which was rapidly growing because legal migration was becoming increasingly difficult.[34] A more refined international labour code was deemed necessary to provide direction.[35] Convention No 143 is divided into two substantive parts, one dealing with migration taking place in abusive conditions (articles 1 to 9) and the other dealing with equality of opportunity and treatment (articles 10 to 14). In this way, the Convention underscored two reinforcing functions: combating clandestine labour migration while also promoting non-discrimination and effective equality for all migrant workers lawfully admitted to the territories of member states. The two parts are exclusive, which means that, during ratification, a state may express acceptance of one part to the exclusion of the other by making a declaration to that effect.[36]

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[32] Ibid 693.
[33] Cholewinski op cit 100.
[34] Touzenis, K and Cholewinski, R 'The Human Rights of Migrant Workers – Editorial Introduction' (2009) 11(1) *International Journal on Multicultural Societies* 1–18 at 5. Also see the factors underlining the adoption of these instruments in Bohning, WR 'The ILO and Contemporary International Economic Migration' (1976) 10(2) *Migration Review* 147–156 at 147–151 and Hansenau op cit 694–695.
[35] Touzenis and Cholewinski op cit 5. Also see Hansenau op cit 659.
[36] A state making a declaration is required to report on how the excluded part is reflected in its domestic legal framework. See article 16(1) of ILO Convention No 143. Of 23 members, only Albania has made such a declaration. It is documented that this structure was adopted to reconcile the differences between, on the one

Other ILO instruments are similarly significant. Most of the ILO Conventions are of universal application ie they apply to all workers, nationals and non-nationals alike. Their application is not limited by residential or migration status. The use of terms such 'all persons' and 'every person employed' in most of the ILO instruments signifies the universal character of these Conventions.[37] In addition, all members of the ILO undertake, through the Declaration on Fundamental Principles and Rights at Work, 1998, to respect, promote and realize the four fundamental principles: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation. These principles are universal, and apply to all workers and to all states irrespective of the level of development.[38]

2.3.2 The United Nations human rights system

The UN norms on the protection of human rights have evolved from its founding statute, which recognized human dignity as a means of attaining global peace and security.[39] In this spirit, all members of the UN have pledged through article 55 to adhere to 'universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'[40] These commitments were advanced further through the establishment of the UN human rights machinery under which a series of treaties has been adopted. Today, the UN human rights system constitutes seven core human rights treaties which are supplemented by various protocols, declarations, resolutions and other documents. The major human rights treaties are the International Covenant on Civil and Political Rights, 1966 (ICCPR); the International Covenant on Economic Social and Cultural Rights, 1966

hand, the employers and countries of employment who wanted to exclude provisions on equality of treatment and, on the other hand, countries of emigration and workers' representatives. The latter enthusiastically campaigned against the enactment of radical measures against clandestine migration because this would affect economic growth. However, contrary to expectations, the Convention became unacceptable to both groups, as shown by insignificant ratification by both groups. The Convention has been ratified by only 23 countries. See the ratification status available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_ INSTRUMENT_ID:312288 (accessed on 10 August 2012). Also see Hansenau op cit 695.

[37] Cholewinski op cit 98.

[38] These principles are contained in the eight most fundamental Conventions under the ILO system which, according to paragraph 2 of the Declaration, binds all ILO members, even if they have not ratified the Conventions. These Conventions are the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87), the Right to Organise and Collective Bargaining Convention, 1949 (No 98), the Forced Labour Convention, 1930 (No 29), the Abolition of Forced Labour Convention, 1957 (No 105), the Minimum Age Convention, 1973 (No 138), the Worst Forms of Child Labour Convention, 1999 (No 182), the Equal Remuneration Convention, 1951 (No 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No 111).

[39] See the Preamble, article 1(2) and (3) of the UN Charter.

[40] See article 55 (c) of the UN Charter.

(ICESCR); the International Convention on Elimination of All Forms of Racial Discrimination, 1965 (ICERD); the International Convention on Elimination of All Forms of Discrimination against Women, 1979 (ICEDAW); the International Convention on the Rights of the Child, 1989 (ICRC); and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990 (ICMW).

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) distinguishes itself from the other instruments under the UN human rights system by its focus on migrant workers. It was adopted in 1990 and came into force in 2003. The ICMW is deeply rooted in the migratory problems and policies of the 1960s and 1970s.[41] The ICMW brings together in a single text the rights which already protect migrants and have been accepted by most states through the fundamental human rights treaties.[42] Indeed, the ICMW does not offer a new set of rights, but rather offers a more precise interpretation of the rights of migrant workers.[43] For example, most of the provisions in Parts III and IV are covered by the UDHR, the ICCPR, and the IESCR. The provisions are also covered, 'at least partly', by ILO Conventions and Recommendations.[44]

Nafziger accurately observes that the ICMW strives to achieve four distinct but related set of goals: (i) unifying the existing legal norms for the protection of migrant workers so as to establish a coherent and comprehensive framework; (ii) complementing the existing human rights instruments through the expansion and substantive modification of the existing rights; (iii) improving the unique situation of migrant workers and their families by addressing their specific protection needs so as to achieve equal treatment between migrants and nationals; and (iv) reducing clandestine trafficking by encouraging the regularization of irregular

[41] Lonnroth, J 'The International Convention on the Rights of Migrant Workers and All Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation' (1991) 25(4) *International Migration Review* 710–736 at 716. For further details on the factors underlying the adoption of the ICMW see Bohning, R 'The ILO and the New UN Convention on Migrant Workers: The Past and Future' (1991) 25(4) *International Migration Review* 698–709.

[42] Grant, S *International Migration and Human Rights* Paper prepared for Global Commission on International Migration (2005) 5, available at http://www.gcim.org/attacments/TP7.pdf (accessed on 12 September 2011) .

[43] Pecoud, A and Guchteneire, P 'Migration Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers' Convention (2004) 5, available at http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf (accessed on 10 September 2011). Also see Weissbrodt, D 'The Protection of Non-citizens in International Human Rights Law' in Cholewinski, R et al (eds) *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press, The Hague, 2003) 221–235 at 226.

[44] Bohning op cit 705.

migrants and by protecting their rights, while at the same time granting more rights to regular migrants.[45]

The Convention is divided into nine parts which together comprise a total of 93 articles. Part I (articles 1 to 6) provides definitions and outlines the scope of the Convention. Part II (article 7) enshrines the non-discrimination principle. Part III (articles 8 to 35) covers the basic rights enjoyed by all migrants and members of their families. Part IV (articles 36 to 56) is an additional set of rights for regular migrants and members of their families. Part V (articles 57 to 63) prescribes certain human rights standards applicable to frontier workers, seasonal workers, itinerant workers, project-tied workers and self-employed workers. Part VI (articles 64 to71) codifies general guidelines for formulating and implementing equitable labour migration policies and practices. Part VII (articles 72 to 78) establishes a body in charge of monitoring the implementation of the Convention, and, finally, Parts VIII and IX cover the general and final provisions.

The ICMW is a very comprehensive instrument in respect of its scope and the rights included. It covers the entire migration process, which involves three main stages: preparation for migration; departure; transit (pre-admission); the entire period of residence and the remunerated activities in the state of employment (post-admission); and the return to the state of origin or habitual residence.[46] Unlike ILO Conventions No 97 and No 143, where ratifying states have the discretion to limit their obligations to a certain part of the Convention, this is not an option under the ICMW. This means that a ratifying state cannot limit its obligations to one category of migrants, for example, migrants in a regular situation, to the exclusion of another category of migrants.[47] States may enter a reservation only in accordance with the law of treaties.[48]

[45] Nafziger, JAR 'The Migrant Workers Convention: Its Place in Human Rights Law' (1991) 25(4) *International Migration Review* 771–779 at 775–776.
[46] Article 1(2) of the ICMW.
[47] Article 88 of the ICMW. Also see Bosniak, L 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers' Convention' (1991) 25(4) *International Migration Review* 737–770 at 740.
[48] Ibid 763–764.

With the exception of the ICMW, the remaining six core human rights instruments are of general application.[49] They are also widely ratified and serve as important protection tools, particularly in states which have not ratified the Conventions on labour migration. For example, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), one of the most widely ratified human rights instruments, obliges state parties to eliminate all forms of discrimination on the grounds of race, colour, descent or national or ethnic origin against all individuals within their jurisdiction.[50] Besides, specific committees which oversee the implementation of these instruments have also on different occasions addressed protection issues which are specifically relevant to migrant workers.[51] For example, in 2008, the Committee on the Elimination of Discrimination against Women (CEDAW) adopted a general comment on women migrant workers.[52]

2.4 Protection standards under the ILO and the UN human rights framework

The ILO Conventions and UN human rights instruments together set forth numerous rights and impose certain obligations on states to promote and protect these rights. The standards for protection enumerated in these instruments guide states' policies, legislation and practices in relation to migrant workers and hence serve as vital tools in examining the protection regimes in domestic jurisdictions. The standards have been designed to cover the entire migration process, which comprises three main phases: preparation for migration departure (pre-admission), the entire period of residence and remunerated activities in the country of employment (post-admission), and return and reintegration into one's country of origin.[53] In this section, we review the standards applicable to the pre-admission and post-admission stages. We also look at the standards applicable to irregular migrants.

[49] Organisation for Security and Cooperation in Europe (OSCE), IOM and ILO *Handbook on Establishing Effective Labour Migration Policies: Mediterranean Edition* (OSCE, IOM and ILO, Geneva 2007) 23.
[50] Articles 1 to 4 of the ICERD.
[51] International Catholic Migration Commission *UN Treaty Monitoring Bodies and Migrant Workers: A Samizdat* (2004), available at http://www.burmalibrary.org/docs08/Migrant-Samizdat.pdf (accessed on 12 June 2011).
[52] Committee on the Elimination of Discrimination against Women, General Comment No 26/2008. The Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR) and the Committee on the Rights of Children (CRC) have also on different occasions addressed the human rights concerns of migrants. See Slinckx, I 'Migrants' Rights in UN Human Rights Conventions in De Guchteneire et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers Rights* (Cambridge University Press, New York, 2009) 122–149 at 128–142.
[53] Article 1 of the ICMW.

2.4.1 Defining the scope of application

While formulating the standards for the protection of migrant workers, members of the ILO and the UN human rights system have addressed themselves to defining this particular group, in order to determine the scope of the envisaged protection standards. For the first time in its history, the ILO tried to formulate a legal definition of 'migrant workers' in Convention No 97. Referred to as a 'migrant for employment', a migrant worker was defined in article 11(1) as 'a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.' Some specific groups of workers, such as frontier workers, members of liberal professions and artisans who enter on a short-term basis, and seamen, were excluded from the definition, thus making it narrow and exclusive. This limitation notwithstanding, the definition was a great achievement.

The ICMW offered a more comprehensive definition, thus further developing this area. A 'migrant worker' is defined as 'a person who is to be engaged, is engaged, or has being engaged in a remunerated activity in a State of which he or she is not a national.'[54] This definition is more extensive than the definitions in the ILO Conventions and the definitions in other instruments, such as the European Convention on the Legal Status of Migrant Workers.[55] Some categories of migrants, such as frontier workers, project-tied workers and self-employed workers, who were usually excluded from the definition and from the application of the migrant workers' legal framework, are also covered by this definition.[56] Nonetheless, workers employed by international organizations, government employees sent to perform official functions in the host state, persons employed by a state or on its behalf outside the territory to participate in development projects, investors, refugees, stateless persons, students and trainees, seafarers and offshore workers are, for various reasons, excluded from coverage.[57] Whether or not the exclusion is justified, it has slightly limited the application of the Convention.

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[54] Article 2(1) of the ICMW.

[55] Article 1 of the European Convention on the Legal Status of Migrant Workers, 1997, defines a migrant worker as 'a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment.'

[56] Part V (articles 57–63) of the Convention deals with these categories of workers.

[57] See article 3 of the ICMW. The reasons for exclusion and their impact on each specific category of workers have been discussed extensively by Cholewinski. See Cholewinski *Migrant Workers in International Law*, op cit 153–154.

2.4.2 Standards related to the recruitment and admission of migrant workers

Even with fluctuating socio-economic conditions, the provisions regulating the first two phases of migration, namely the pre-departure and the departure periods, have remained consistently guided by the promotion of humane migration. These provisions all incorporate measures aimed at preventing misleading propaganda and promoting the smooth transfer of labour between countries. These measures include the sharing of migration-related information between states;[58] providing aspiring migrants with free, adequate and accurate information regarding prerequisite conditions for admission and the formalities thereof; arrangements for departure, travel, arrival and residence; available remunerated activities; conditions of work; living conditions and other significant information to enable them to make an informed choice about whether to migrate or not.[59]

The commitment to combat disorderly migration has also remained unshaken. States have been continually reminded to adopt appropriate measures to combat clandestine migration and the irregular employment of migrants.[60] Apart from imposing administrative, civil and penal sanctions against employers and the organizers of clandestine migration, a recommendation has proposed that states should vest all recruitment activities in public authorities and should establish effective regulatory mechanisms for private recruiting agents or employers.[61] The regulatory framework should, for instance, require private entities aspiring to engage in recruitment to obtain authorization from a public authority. In addition, a public watchdog should be appointed to monitor the performance of private recruitment agents.[62]

While most of the provisions of Convention No 97 and its Annex II on the government-sponsored transfer of labour have become redundant due to the diminishing role of states in recruitment, Annex II remains relevant in promoting humane conditions for the transfer of labour. The provisions regarding recruitment agents are certainly more important today than they were ever before. Private agents and individuals have increasingly assumed an important recruitment role in both sending and receiving states. In the Philippines, one of the leading

[58] See article 1 of the ILO Convention No 97; article 65(1)(b) of the ICMW.
[59] See article 2 of the ILO Convention No 97; articles 37 and 65(1)(d) of the ICMW..
[60] See article 2 of the ILO Convention No 97. Measures that states should undertake to address clandestine migration are detailed in Part I of Convention No 143, and in articles 68 and 69 of the ICMW.
[61] See Annex I para 3 and Annex II para 2 to Convention No 97. Also see article 69 of the ICMW.
[62] See Annex I paras 3, 4, and 5, and Annex II, paras 4, 5 and 6 of Convention No 97.

sending countries of migrants, 98 per cent of all migrant workers are recruited by private recruitment agents. In Thailand, Pakistan and Bangladesh the estimate stands at 90 per cent, 60 per cent and 50 per cent respectively.[63] Most of these agents employ unethical and abusive practices, including charging exorbitant fees, and deliberately misinforming aspiring migrants about the availability of work, the working conditions and the living conditions in the country of employment.[64]

These and many other challenges, together with the increasing potential of private employment agencies to provide services to a rapidly growing and flexible labour market, prompted the ILO in 1997 to adopt a specific Convention concerning Private Employment Agencies (Convention No 181). The Convention sets the parameters for the regulation, placement, and employment of workers by these agencies. Later, in 2007, the ILO issued a document that provided guidance to states when formulating their domestic frameworks on private employment agencies.[65] Some states, for example, Bahrain had, even before the adoption of Convention No 181, intervened by setting standards for the regulation of private employment agents in their jurisdictions.[66]

2.4.3 Post-admission standards

Post-admission standards in ILO Conventions and the ICMW have been aligned to the need for the equal treatment of migrants and nationals, for obvious reasons. Migrants are more likely to be subjected to inferior treatment in their host countries because of their *alienage*.[67] Unlike national workers, migrant workers are less protected against a state's arbitrariness and against an employer's whims.[68] Article 6(1) of Convention No 97 lays down the standards. In terms of this provision, states undertake to abide by the principle of non-discrimination and equal treatment in respect of employment conditions (including remuneration, hours of work,

[63] ILO *Social and Labour Issues Concerning Migrants in the Construction Industry* (ILO, Geneva, 1995) 71.
[64] Ibid 73. In the Philippines, for example, in 1994 alone, 55,000 prospective migrant workers were reported to have been misled by recruitment agents about the availability of work.
[65] ILO *Guide to Private Employment Agencies – Regulation, Monitoring and Enforcement* (ILO, Geneva, 2007) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/instructionalmaterial/wcms_083275.pdf (accessed on 2 September 2011).
[66] In Bahrain, the Ministry of Labour and Social Affairs supervises private employment agents. In order to operate, a new agent is required to obtain a licence from this Ministry and to obtain a commercial registration licence from the Ministry of Commerce and Industry. See al-Najjar, S 'Women Migrant Domestic Workers in Bahrain' in Esim, S and Smith, M *Gender and Migration in the Arab States: The Case of Migrant Workers* (ILO, Geneva, 2004) 29.
[67] Bohning op cit 698.
[68] Ibid.

and leave with pay), organizational rights, social security rights, employment taxes and dues, and access to legal redress for all migrant workers lawfully present in their countries. In addition, states that have ratified Convention No 143 undertake, in the spirit of article 10, to:

> declare and pursue a national policy designed to promote and guarantee by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, of social security, of trade union and cultural rights and of individual and collective freedoms for persons who as migrant workers or as members of their families are lawfully within its territory.

Recommendation No 151 provides details on the policy approaches that states should adopt to achieve this goal.

The ICMW also maintains that there should be equality of treatment, although in some circumstances it allows for regular migrants to be treated different from irregular migrants, by setting relatively higher standards for regular migrants in Part IV. Articles 1(1) and 7 commit all ICMW members to the principle of non-discrimination. Article 1(1) is of general application and is modelled on corresponding provisions in other core human rights instruments, such as the ICCPR and the ICESCR.[69] The article notes that the ICMW is applicable to all migrant workers and members of their families without distinction as to 'sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.' Article 7 imposes an obligation on states to guarantee the rights enumerated in the ICMW to all migrant workers and members of their families present in their jurisdiction without distinction, on grounds similar to those appearing in article 1.

The ICMW asserts two categories of equality of treatment for migrants in the host state's jurisdiction: equality of treatment between nationals and migrant workers (irrespective of their status), and equality of treatment between regular migrant workers and irregular migrant workers and members of their families. These categorizations result from the ICMW's classification of rights into two sets: one set for all migrant workers (Part III) and an additional set of rights for regular migrant workers (Part IV). The latter accords regular migrants more protection.

[69] See article 2(1) of the ICCPR and article 2(2) of the ICESCR.

Part III is largely a replica of the core human rights instruments. Most of its provisions are drawn from the ICCPR and the UDHR, and are couched in the language of these two instruments. It accords migrant workers, in all spheres of life and regardless of legal status, equality of treatment with nationals in respect of fundamental civil and political rights. These include the right to life;[70] protection against torture,[71] slavery, servitude, and compulsory labour;[72] freedom of thought, conscience and religion;[73] freedom of opinion and expression;[74] the right to be protected from arbitrary or unlawful interference with privacy, family, home or correspondence;[75] the right to property,[76] liberty and security of person;[77] equality before the law,[78] and protection against arbitrary and collective expulsion.[79] The ICMW further demands that migrants who are employed should enjoy equal treatment with nationals in respect of remuneration, overtime, hours of work, weekly rest, holidays with pay, safety, health, minimum age of employment, security of tenure,[80] organizational rights[81] and social security rights.[82]

The ICMW advocates that migrant workers in a regular situation should, in addition, enjoy free mobility in the labour market and security of tenure.[83] However, states may restrict access to certain categories of employment if the said restriction is necessary to foster states' interests and if it is provided for by law.[84] Commenting from the context of *travaux preparatoires*, Cholewinski notes that the restriction is intended to foster a state's sovereign control of areas regarded as sensitive or as having important economic implications.[85] However, this provision means that states' practices will need close monitoring, because 'states' interests' is a broad term that can be interpreted to suit the political situation of each country and can easily be abused. The ICMW also sanctions exclusions based on qualifications acquired abroad. In addition, mobility guarantees for contract or temporary

[70] Article 9.
[71] Article 10.
[72] Article 11.
[73] Article 12.
[74] Article 13.
[75] Article 14.
[76] Article 15.
[77] Article 16.
[78] Article 18.
[79] Article 22.
[80] Article 25.
[81] Article 26.
[82] Article 27.
[83] Article 52(1).
[84] Article 52(2)(a).
[85] Cholewinski op cit 160 and 162.

migrant workers may legitimately be subjected to a certain period of lawful residence in the host country.[86]

2.4.4 Standards applicable to irregular migrant workers

The debates about the extension of human rights norms to irregular migrants have been extensively covered by Bosniak and other scholars and we do not intend to reproduce them here.[87] However, a few important aspects need to be noted. First, as already noted earlier in this work, migrants in irregular status are 'numerous enough to form a recognizable group in nearly every economy in the world'.[88] Second, the growing demand for migrant workers in the host state, and the reluctance of these states to acknowledge this demand, in combination with anti-immigrant ideologies, xenophobia and racism, inevitably guarantee the existence of this group.[89] Third, living on the periphery of society, irregular migrants are very vulnerable to various human rights violations and hazards.[90] In employment circles, they mainly do the 'three-D jobs (dirty, degrading and dangerous)'.[91] The vast majority are in the 'marginally viable and sometimes semi-legal sectors, such as seasonal agricultural work, domestic services and the sex industry, in which the protection of workers is extremely

[86] Article 52(3).

[87] See Bosniak op cit. The conflicting views of members of the Working Group of the Intergovernmental Experts of the Human Rights of Migrants, as reflected in the Report of the Working Group of Intergovernmental Experts on the Human Rights of Migrants, submitted in accordance with Commission on Human Rights Resolution 1998/16. Also see the debate as reproduced in Berg, L 'At the Border and Between the Cracks: The Precarious Position of Migrant Workers under Human Rights Law' (2007) 1 *Melbourne Journal of International Law* 1–34.

[88] See Lyon, B *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows* Villanova University Legal Working Paper Series (2006) available at http:// law.bepress.com/villanovalwps/papers/art45 (accessed on 2 September 2011). The number of irregular migrants is estimated to be between 15 and 30 per cent of the migrant population. Other studies estimate that irregular migrants constitute one-third of migrants from developing countries. See IOM *World Migration Report, The Future of Migration: Building Capacities For Change* (IOM, Geneva, 2011) 110, available at http://publications.iom.int/bookstore/free/WMR_2010_ENGLISH.pdf (accessed on 2 September 2011). Also see International Council of Human Rights Policy *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* (International Council of Human Rights Policy, Geneva, 2010) 13, available at http://www.ichrp.org/files/reports/56/122_report_en.pdf (accessed on 2 September 2011).

[89] See the Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, submitted on 30 December 2005 to the Commission on Human Rights of the United Nations, available at http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx (accessed on 10 September 2011)

[90] Friedrich-Ebert-Stiftung *Challenges of Irregular Migration* Conference Report (2008) 2, available at http://www.fes-globalization.org/geneva/documents/HumanRights/6March08_Report_Migration.pdf (accessed on 2 September 2011).

[91] De Guchteneire, P and Pécoud, A 'Introduction: The UN Convention on Migrant Workers' Rights' in De Guchteneire, P et al *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 1–48 at 4.

underdeveloped.'[92] These and many other factors have finally pushed the protection concerns of this group to the centre of the international agenda.

ILO Convention No 143 was the first to issue binding standards in favour of irregular migrants. The Convention laid down three important regulatory procedures. First, there must be respect for the basic human rights of migrant workers, irrespective of their status.[93] Second, states should collaborate in ensuring that migrants are not transported or employed under abusive conditions.[94] Third, even where there are no prospects for regularization, migrant workers and their families should not be denied their rights arising out of past employment. Instead, they should be treated equally with nationals of host states in respect of remuneration, social security and other rights arising out of past employment.[95] Generally, the goal of these provisions was to ensure that migrant workers enjoy a basic level of protection even when they have emigrated or are employed illegally and their situation cannot be regularized.

A more elaborate set of employment-related standards applicable to irregular migrant workers is provided in article 25 of the ICMW. The provision explicitly provides that irregular migrant workers should, like regular migrant workers, be accorded equal treatment with nationals in respect of remuneration and other basic terms and conditions of work. This means that they should enjoy the same protection with regard to working hours, weekly rest entitlement, paid holidays, safety, health and termination.[96] States are further urged to take precise measures to ensure that migrants in irregular situations are not deprived of the enjoyment of these rights because of their irregular status. Employers should not, as a matter of principle, 'be relieved of any legal or contractual obligation', nor should their obligation be limited by reason of the employee's irregular status.[97]

The extension of this protection to irregular migrant workers is related to the fact that labour rights are acquired through the employment relationship, as opposed to the migration status.

[92] Pécoud A and De Guchteneire, P *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification Record of the UN Migrant Workers' Convention* (Global Commission for Migration, 2004) 3, available at http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf, also available at http://portal.unesco.org/shs/en/files/6611/10962899451GCIM.pdf/GCIM.pdf (accessed on 24 May 2012).
[93] See article 2 of ILO Convention No 143.
[94] Article 2.
[95] Article 9.
[96] See article 25 of the ICMW.
[97] *Ibid*, art. 25(3).

The Inter-American Court of Human Rights correctly held that, when a migrant (regular or irregular) is employed, he or she 'acquires rights that must be recognized and protected because he is an employee, irrespective of his regular or irregular status' in the state where he or she is employed.[98] States or employers cannot, therefore, use individuals' irregular migration status to deprive them of these rights. The court concluded:

> The migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment. On assuming an employment relationship, the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment. These rights are a consequence of the employment relationship.[99]

This position was recently echoed in South Africa. The Labour Court, holding in favour of an immigrant who was dismissed because of his failure to produce a valid work permit, held that the existence of employment contract was not dependent on one's immigration status.[100] Arguably, therefore, the rights and responsibilities arising from the employment relationship are not affected by immigration status either.

The norms for non-employment-based rights are set out in Part III of the ICMW. As already mentioned, this part enshrines a series of substantive civil and political rights, which all migrants, regular and irregular, should enjoy equally with nationals of their host state.[101] These provisions, however, did not completely overrule the sovereign right of states in respect of the admission of non-nationals. An attempt to draw a balance is evident in article 79, which provides, inter alia:

> Nothing in the present Convention shall affect the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. Concerning other matters related to their legal situation and treatment as migrant workers and members of their families, States Parties shall be subject to the limitations set forth in the present Convention.

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[98] Inter-American Court of Human Rights *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03, para 133.
[99] Ibid para 134.
[100] *Discovery Health Ltd v CCMA and Others* (2008) 29 *ILJ* 1480 (LC).
[101] Equality of protection is guaranteed in respect of the right to life; protection against torture, slavery, servitude, and compulsory labour; freedom of thought, conscience and religion; freedom of opinion and expression; the right to be protected from arbitrary or unlawful interference with one's privacy, family, home or correspondence; the right to property, liberty and security of one's person; equality before the law; and the right to be protected against arbitrary and collective expulsion. See articles 9 to 22 of the ICMW.

Commentators argue that the marriage of these two conflicting domains, regulation of admission on the one hand, and substantive protection of the rights of migrant workers on the other, has seriously negated the effectiveness of the Convention in providing meaningful protection to irregular migrants.[102] This is because the prerogative powers of the state over immigration are enormously wide and in most cases can easily infiltrate the irregular migrant's protection in other areas of domestic law and hence defeat the enforceability of their rights.[103] While this argument is correct, it cannot be over-emphasized that the existing standards, if fully embraced in domestic legal frameworks and practices, have a great potential to safeguard the wellbeing of irregular migrants. As already indicated, workers in this group are prone to exploitation due to their *alienage* but also because of their irregular status.

The laws and practices of states are, however, significantly far behind. In most countries, both in the developed and the developing world, irregular migrants are not treated humanely and with dignity. In fact, most of them are reticent to assert their rights because, by doing so, they definitely bring their irregular status to the attention of the authorities and hence they are exposed to detention, expulsion, deportation or other risks.[104] Some fail to assert their rights because of language barriers, ignorance of the laws and procedures, and other difficulties associated with being a foreigner.[105] Those who have the courage to access the courts meet another barrier: the nullity of their employment contracts. For example, in a recent US case, *Hoffman Plastic Compounds, Inc v National Labor Relations Board*, the Supreme Court overturned a ruling of the National Labor Relations Board granting reinstatement and a back-pay award to a Mexican migrant irregularly employed in the USA, because his employment constituted a serious breach of the immigration laws.[106] In some countries, such as South Korea, Cameroon and Mozambique, these limitations are incorporated in legislation.[107] Even if legislation does not prescribe these limitations, they are often found deeply entrenched in practice. The Committee on the Rights of Migrant Workers, when considering the initial report of Algeria, said the following regarding Algeria's claim that her legal enforcement

[102] Berg, L 'At the Border and Between the Cracks: The Precarious Position of Migrant Workers under Human Rights Law' (2007) 1 *Melbourne Journal of International Law* 1–34 at 19.
[103] Ibid. Also see Bosniak op cit 761–762. Bosniak provides several examples that show how government, through its powers over immigration, can defeat the protection of migrant workers.
[104] ILO *Migrant Workers: Report of the Committee on the Application of Standards* International Labour Conference, 87th Session, Geneva, 1999, para 302.
[105] Ibid.
[106] *Hoffman Plastic Compounds, Inc v National Labor Relations Board* (00-1595) 535 U.S. 137 (2002).
[107] ILO *Migrant Workers* para 305.

organs had not received any complaints about the rights of migrant workers being violated: '[The] lack of cases on record is reflective of the difficulties faced by migrant workers and members of their families, particularly those in an irregular situation, in seeking redress for violations of their human rights.'[108] This is an absolute reality in many other countries.

The current situation is very unfortunate because the unfair treatment of irregular migrants is not only inimical to human and labour rights; it is also detrimental to the interests of the state and the economy. As will be noted in section 2.7 of this chapter, one of the major reservations cited by states in relation to the ratification of the ICMW is that calling for the fair treatment of irregular migrants encourages the practice of irregular migration. This assertion is not necessarily true. In fact, it could be argued that the fair treatment of irregular labour migrants could contribute towards curbing this phenomenon because, if employers are required to treat irregular migrant workers equally (including paying them equally), they will have no incentive to resort to this type of labour. Employers resort to using irregular labour because they are not required to pay decent wages or maintain decent working conditions, and because irregular workers are mot unionised, making the employment of irregular labour far less costly.

The fair treatment of irregular migrants would be beneficial to the economy as it would remove unfair competition between businesses which employ regular migrants and incur higher labour costs and those which employ irregular migrants at a reduced cost.[109] The ICMW noted in its preamble that 'workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers and ... certain employers find this an inducement to seek such labour in order to reap the benefits of unfair competition.' Thus, the promotion of the fair treatment of irregular migrants may serve as a disincentive to irregular migration. It is therefore recommended that the protection of irregular migrants should not be exclusively regarded as a human or labour rights issue. The approach of governments towards the fair treatment of irregular migrants should, in addition to these two concerns, be guided by considerations of its potential

[108] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families *Concluding Observations of the Committee on the Initial Report Submitted by Algeria* CMW/C/DZA/00/1 para 16, available at http://www2.ohchr.org/english/bodies/cmw/docs/co/CMW-C-DZA-CO1.pdf (accessed on 12 June 2010).

[109] Wickramasekara, P 'Globalisation, International Labour Migration and the Rights of Migrant Workers' (2008) 29(7) *Third World Quarterly* 1247–1264 at 1253.

economic benefits. In other words, the authorities should remember that the fair treatment of irregular migrants serves the interests not only of the migrants but also of the state and its economy.[110] By promoting the rights of irregular migrants states may be able to limit the demand for irregular migrants and thereby promote fair market competition.[111]

2.5 Protection of family unity

International labour migration causes serious social, economic and psychological problems for migrant workers and members of their families who are left behind because of migration-induced separation. In 1997 the ILO observed that 'prolonged separation and isolation of family members lead to hardships and stress affecting both the migrants and the dependants left behind, which may give rise to social, psychological and health problems, and even affect workers.'[112] A similar observation was made in 1974 during the preparatory meetings for the adoption of Convention No 143, where it was remarked that 'prolonged separation and isolation of migrants from their families lead to hardship and stress situation affecting both the migrants and the families left behind and prevent them from leading normal life.'[113] Reunifying migrant workers and members of their families is therefore essential not only to the well-being of migrant workers, but also to enhancing labour market efficiency and productivity in the host country.

In international human rights law, family unity is 'regarded as sacrosanct' and accorded wider protection.[114] Regrettably, neither the ILO Conventions nor the ICMW impose any legal obligation on states over the admission of family members. Both the ICMW and Convention No 143 only encourage states to consider taking necessary measures to facilitate the reunification of migrant workers and their family members, leaving it to states to determine whether or not to admit the family members.[115] This approach by the ICMW was rather unexpected and is somewhat contradictory, because, in emulating other human rights

[110] Bosnik op cit 749.
[111] Ibid.
[112] ILO *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* 21–25 April 1997, Annex I, para 6.1.
[113] ILO *Migrant Workers: Report VII (1)* 59th Session, International Labour Conference, Geneva, 1974, 27.
[114] See Cholewinski *Migrant Workers in International Law* 69.
[115] See article 13 of the ILO Convention No 143 and para 13 of Recommendation No 151. Also see article 44(2) of the ICMW.

instruments, the ICMW had recognised the family as a natural and fundamental institution worth of the protection of society and the state.[116]

Generally, the admission of migrant workers' family members has remained an area where destination countries exercise a greater discretion, particularly where migrants are admitted on a short-term basis. Migrant workers with short-term residence status are regarded as temporary labour, which can be recruited, utilized and then sent away when their services are no longer needed. Family reunion for these workers is regarded as unnecessary, and is greatly discouraged and restricted.[117] In countries where the admission of family members is not completely prohibited, it is normally subjected to certain conditions, such as meeting financial requirements or a minimum period of lawful residence in the host country, both of which technically impair the ability of migrant workers to realize this right.[118]

The reasons advanced in favour of restrictions on admission are many, based on economic, social and cultural grounds. We will not dwell much on this area, apart from noting that they include factors such as the perceived fear that family members will exert unnecessary pressure on the labour market and will interfere with efforts to address unemployment. Also, there are concerns that the newcomers will place an extra burden on the host state's social services.[119] In countries with strong cultural and religious beliefs, the admission of migrant workers' family members is regarded as a threat to cultural and religious homogeneity.[120]

The above deficiencies notwithstanding, both the ILO Conventions and the ICMW demand that the rights of family members who have been admitted in the host country should be respected and protected. For example, Convention No 97 provides that family members should not be returned to their countries because of the migrant worker's failure to work for

[116] See article 44(1) of the ICMW. Also see Cholewinski *Migrant Workers in International Human Rights Law* 172.
[117] Castles, S *Ethnicity and Globalization: From Migrant Workers to Transnational Citizens* (Sage Publications, London, 2000) 98.
[118] ILO *Handbook on Labour Migration* (ILO, Geneva, 2007) 150.
[119] Abella, M *Policies and Best Practices for Management of Temporary Migration* Paper presented during the International Symposium on International Migration and Development, Turin, Italy, 28–30 June 2006 24.
[120] In the United Arab Emirates and Bahrain, for example, migrants are perceived as having a negative effect on local and Islamic values. In Singapore, migrant workers in temporary employment are not allowed to marry or to cohabit with a Singaporean or permanent resident. Also see Louer, L 'The Political Impact of Labour in Bahrain' (2008) 20(1) *City and Society* 32–53 at 33, and Ruhs, M and Chang H 'The Ethics of Labor Immigration Policy' (2004) 58 *International Organization* 69–102 at 72.

reasons of illness or injury.[121] Under Convention No 143, members undertake to promote and guarantee equality of opportunity and treatment in respect of migrant workers and their family members who are lawfully present in their territories.[122] The ICMW expands this further. As its name suggests, the ICMW applies not only to migrant workers but also to their family members, irrespective of their nationality. Thus, it explicitly extends several entitlements to family members. In article 45, for example, the ICMW provides that family members shall enjoy equality of treatment with nationals in respect of access to educational institutions and services, access to vocational guidance and training institutions and services, access to social welfare and health services, and access to and participation in cultural life.

2.6 Female migrant workers

Female migrant workers have become more and more present in the global labour market. In the past, female migrants used to play a passive role – migrating as spouses or dependants of their male partners or relatives. Today women migrants play more active roles.[123] With the growing demand for workers in the service sector and the preference for women migrant workers because of their perceived docility and the lower labour costs associated with employing women, an increasing number of women and girls from all walks of life now migrate as sole breadwinners.[124] In fact, the current migration trends prove what Raveinstein asserted about two centuries ago, namely, that a 'woman is a greater migrant than man.'[125] Currently, women constitute nearly half (49 per cent) of the global migration total.[126] In Europe, the number of female migrants is slightly higher than the number of male migrants, constituting about 52 per cent. The percentage of female migrants is even higher when one looks at the numbers in individual countries.[127]

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[121] Article 8.
[122] Article 10.
[123] Jolly, S and Reeves, H *Gender and Migration: Overview Report* (Institute of Development Studies, Brighton, 2005) available at www.bridge.ids.ac.uk/reports/CEP-Mig-OR.pdf (accessed on 10 October 2011).
[124] Satterthwaite, MR 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights and Development Law Journal* 1–60 at 8. Also see Oishi, N *Gender and Migration: An Integrative Approach* Working Paper No 49 (Centre for Comparative Immigration Studies (CCIS), University of California, San Diego, 2002) 1, available at http://www.bridge.ids.ac.uk/reports/CEP-Mig-OR.pdf (accessed on 10 October July 2012).
[125] Ravenstein, EG 'The Laws of Migration' (1885) 48(2) *Journal* of *the Royal Statistical Society* 167–235 at 196, quoted in Pessar, PR 'Transnational Migration: Bringing Gender In' (2003) 37(3) *International Migration Review* 812–846 at 814.
[126] UN Department of Economic and Social Affairs, Population Division *Trends in International Migrant Stock: The 2008 Revision*, 2008.
[127] For instance, in the Philippines and Indonesia, the number of female migrants emigrating each year is estimated to be approximately 75 per cent of the total number of emigrants. See Grant, S *International*

The increased presence of female migrant workers has not been free of consequences. Female migrant workers have emerged as the most marginalized group, and have become victims of heinous human rights violations and inequalities, some of which are rooted in traditional perceptions of gender roles.[128] The prevalence of male-biased admission policies in destination countries has denied women the opportunity to become regular migrants, thus exposing them to irregular migration, human smuggling and trafficking.[129] In most countries, admission policies tend to focus on 'stratified entry', whereby only certain categories of employees are admitted, particularly skilled ones, while the admission of unskilled and semi-skilled migrants is restricted.[130] Even where the admission of the latter group is allowed, it is normally limited to male-dominated sectors, such as construction and agriculture.[131] Consequently, women have no option but to seek the services of human traffickers and smugglers.[132]

The second vulnerability relates to the existence of a dual labour market in which the division of labour between men and women has evolved.[133] In the dual labour market, professional female migrants end up in the 'welfare and social professions' such as education, health and social work, unlike their male counterparts who normally occupy senior managerial posts.[134] Other women are employed in the service industry or what is sometimes known as the 'personal and protective services sector', which includes domestic work, sex work and other informal sectors which are mainly unregulated.[135] Female migrant workers are therefore employed on the lowest rung of the ladder and are often irregularly employed, even if they were legally admitted to the destination countries.[136] The nature of work in these sectors and the absence of legal regulation increase their vulnerability. They become victims of serious human and workers' rights violations, including long working hours, unhealthy working

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Migration and Human Rights Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) 20.

[128] Ibid 8.

[129] Piper op cit 20.

[130] Jolly and Reeves op cit 29.

[131] Piper op cit 20.

[132] Piper op cit 15.

[133] Hune, S 'Rights of All Migrant Workers and Members of Their Families' (1991) 25(4) *International Migration Review* 800–817 at 812.

[134] Piper op cit 7.

[135] Satterthwaite op cit 7. Also see Galloti, G *The Gender Dimension of Domestic Work in Western Europe* International Migration Papers No. 96 (ILO, Geneva, 2009) 27, available at www.ilo.org/public/english/protection/migrant/.../imp/imp96.pdf (accessed on 10 October 2011).

[136] Satterthwaite op cit 7.

environments, sexual abuse, low salaries and the non-payment of salaries.[137] In most cases their travel documents are confiscated to prevent their movement and they are forced to work without contracts.[138] The absence of unionism in these sectors leads to the experiences of female migrant workers being rendered invisible, unlike the experiences of male migrants, which are more likely to be documented and visible because of strong unionism in the sectors where they are mainly employed.[139]

The precarious situation of female migrant workers in the global market certainly demands comprehensive regulatory standards and effective enforcement mechanisms. Nonetheless, the international approach to migration has largely remained gender neutral. The specific protection needs of female migrants have not been 'thoroughly and holistically articulated' in the existing international standards.[140] The standards which are required for the protection of this group are scattered between different instruments, none of which offers comprehensive protection.[141] The development of international labour migration law has basically proceeded from two faulty assumptions: that labour migration is exclusively a man's business and that, to the extent that women do migrate, both female and male migrants have similar migration experiences. The first assumption is not true, particularly when one considers the increasing participation of female migrants in the global labour market, as demonstrated in the preceding paragraph. The second assumption is similarly erroneous, because, as previously indicated, there is abundant empirical evidence to show that the experiences of female migrants are unique. Female migrants 'endure triple oppression'.[142] Hune and Piper share the view that while female migrants, just like their male counterparts, are likely to be disadvantaged in the

[137] Hainsfurther, JS 'A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers' (2009) 24(5) *American University International Law Review* 843–895 at 852. See some case studies on human rights violations against Nicaraguan female migrant workers in Costa Rica in García, AI et al *Costa Rica: Female Labour Migrants and Trafficking in Women and Children* GENPROM Working Paper No 2 (ILO, Geneva, 2002) 16, available at http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_117928.pdf (accessed on 13 September 2011).

[138] Grant op cit 20. Also see the human rights abuse endured by female migrants in individual countries such as Bahrain (Bahrain Centre for Human Rights *Bahrain Youth Society for Human Rights and CARAM-ASIA, The Situation of Women Migrant Domestic Workers in Bahrain* Report submitted to the 42nd session of the CEDAW Committee in October 2008), and Lebanon (Jureidin, Y *Women Migrant Domestic Workers in Lebanon* International Labour Migration Papers No 48 (ILO, Geneva, 2002)).

[139] Piper op cit 27.

[140] Satterthwaite op cit 14.

[141] Ibid.

[142] Hune op cit 807.

job market because of their nationality and lack of skills, they are also subjected to gender inequalities, which 'combine together with racial and ethnic discrimination'.[143]

The ILO Conventions on migrant workers are completely gender blind, while the ICMW demonstrates only a remote consciousness through the use of gender-sensitive terms such as 'he or she' and 'his or her'.[144] Building on the *travaux preparatoires* Hune argues that the use of these words was not in any way coincidental, but the result of a consensus reached after intensive deliberations by members.[145] Although, to a certain extent, this enhances the protection of female migrants, particularly when the liberal approach to interpretation of the provisions of the Convention is preferred omitting the specific protection needs of female migrant workers largely reduces the efficacy of the ICMW in protecting them.[146]

The universal human rights instruments and general international labour law also contain some elements of protection standards for this group, albeit from general human rights or labour law perspectives. Satterthwaite provides a detailed scholarly analysis of how universal human rights law and international labour law can be used to protect the rights of female migrant workers. She remarks that 'through the intersectionality, human rights law can effectively be used by advocates to respond to the myriad aspects of women migrant workers.'[147] She goes on to provide a few case studies on how the provisions of human rights instruments and international labour law can be applied in different cases. Building on this work, Hainsfurther also provides an extensive evidence-based analysis on how CEDAW, which is more widely ratified than the MWC, can be used as a useful protection tool. She asserts that the 'substantive equality guarantees of CEDAW combined with the obligation of the state to take all appropriate measures to eliminate discrimination ... render the Convention a powerful tool to hold both sending and receiving states accountable for violations of migrant workers' human rights.'[148] In keeping with these arguments, we submit that this

[143] Ibid. Also see Piper, N *Gender and Migration* Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) 2, available at http://www.gcim.org/attachements/TP10.pdf (accessed on 10 October 2011).
[144] For example, see articles 2(1), 10, 11, 14 and 15 of the ICMW.
[145] Hune, S 'Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (1991) 25(4) *International Migration Review* 800–817 at 809.
[146] Ibid 813.
[147] Satterthwaite op cit 8.
[148] Hainsfurther op cit 847.

approach is very useful, irrespective of whether or not the country in question has ratified the labour migration instruments.

There have also been some international attempts to address the concerns of female migrant workers. Starting with the UN Decade for Women (1976–1985), the position of female migrants has become a topic worthy of attention on international platforms.[149] The Second Conference, for example, noted the increased prevalence of female migrant workers and the need to address their protection needs.[150] Scholarly attention in this area has also increased, thus unveiling some of the invisible concerns of this group.[151] Within the ILO and the UN human rights system, several activities and labour market studies on the situation of female migrant workers in the labour market have been carried out to assist in a gradual transformation to a more gender-sensitive approach.[152] Building on these initiatives, several decisions and recommendations have been adopted to specifically address the plight of female migrant workers.[153]

Similarly, the UN human rights enforcement mechanisms (the treaty bodies) have demonstrated a proactive role in enhancing protection for this group. Recently, in 2008 and 2011, the two United Nations human rights bodies, the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) and the Committee on the Protection of All Migrant Workers and Members their Families (CMW Committee), adopted guidelines in the form of a General Recommendation[154] and a General Comment,

[149] See, for example, the Report of the World Conference on Human Rights (A/CONF.157/24, part I), chap III.2; Report of the International Conference on Population and Development, Cairo, 5–13 September 1994, chap I, resolution 1. Also see the Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, chap I, resolution 1, annex I and II; the Report of the World Summit for Social Development, Copenhagen, 6–12 March 1995, chap I, resolution 1, annex I and II; and the Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (A/CONF.189/12), chap I).

[150] See the Report of the World Conference to Revise and Appraise the Achievement of the UN Decade for Women: Equality, Development and Peace, held in Nairobi, 15–26 July 1985 (A/CONF.116/22/Rev.1) paras 300 and 301

[151] For a detailed analysis on how scholarly attention to the interface of gender and migration has evolved, see Pessar op cit. Also see Kofman, E 'The Invisibility of Skilled Female Migrants and Gender Relations in Studies of Skilled Migration in Europe' (2006) 6 *International Journal of Population Geography* 45–59 at 54.

[152] See, for example, ILO *Decent Work for Domestic Workers* Report IV(1), International Conference, 99th Session (2010); Ramirez-Machado, JM *Domestic Work, Conditions of Work and Employment: A Legal Perspective* (ILO, Geneva, 2003).

[153] See, for example, the United Nations General Assembly Resolution 56/131 on Violence against Women Migrant Workers, 2002 (A/RES/56/131), and the United Nations, Report of the Secretary General on the Violence against Women Migrant Workers, 2003 (A/58/161).

[154] CEDAW, General Recommendation No 26 on Women Migrant Workers, 2008 (CEDAW/C/2009/WP.1/R).

respectively.[155] These two documents comprehensively unveil the unique experiences of female migrant workers, particularly those who are in sectors which are largely invisible and unregulated.[156] The CEDAW Committee summarizes these experiences as follows:

> Although both men and women migrate, migration is not a gender-neutral phenomenon. The position of female migrants is different from that of male migrants in terms of legal migration channels, the sectors into which they migrate, the forms of abuse they suffer and the consequences thereof. To understand the specific ways in which women are impacted, female migration should be studied from the perspective of gender inequality, traditional female roles, a gendered labour market, the universal prevalence of gender-based violence and the worldwide feminization of poverty and labour migration. The integration of a gender perspective is, therefore, essential to the analysis of the position of female migrants and the development of policies to counter discrimination exploitation and abuse.[157]

With more emphasis on the protection needs of the three most marginalized categories of female migrants, such as non-professional women who migrate independently, women who migrate as dependants and undocumented female migrants, and domestic migrant workers (in the case of the CMW), member states are consistently reminded of their obligation to protect female migrant workers. Both documents outline several measures which states should strive to adopt so as to meet their treaty obligations. CEDAW, for instance, reminds us that it is the responsibility of countries of origin and destination to formulate–

> a comprehensive gender-sensitive and rights-based policy: States parties should use the Convention and the general recommendations to formulate a gender-sensitive, rights-based policy on the basis of equality and non-discrimination to regulate and administer all aspects and stages of migration, to facilitate access of women migrant workers to work opportunities abroad, promoting safe migration and ensuring the protection of the rights of women migrant workers (articles 2(a) and 3).[158]

The CMW further encourages members to repeal all 'sex-specific bans and discriminatory restrictions' which are likely to limit the mobility of female migrant workers and the full realization of their rights.[159] Members are also encouraged to enter into bilateral and regional

[155] Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, General Comment No 1 on Migrant Domestic Workers, 2011 (CMW/C/GC/1).
[156] CMW, General Comment, para 60.
[157] See CEDAW, General Recommendation on Migrant Women, para 5. Also see MWC, General Comment No 1 on Migrant Domestic Workers, para 60.
[158] See CEDAW, General Recommendation on Migrant Women, para 23(a).
[159] See CMW, General Comment No 1 on Migrant Domestic Workers, para 61.

agreements or memoranda of understanding and to share best practices and information so as to enhance the protection of female migrants. The complementary role which these two instruments seek to achieve has the potential to enhance protection in this area. For example, members of CEDAW are now obliged to describe in their reports to this committee specific legal and policy measures which they have undertaken to protect female migrants.[160] These two documents constitute an important form of 'soft law' in this area.

Regrettably, the existing instruments, although together constituting an extensive set of standards, fall short of offering adequate protection to female migrants, because they are too fragmented and too general in their approach. For example, migrant workers' instruments focus on the single variable of 'migration status' rather than on multiple variables relevant to women and men who migrate for work, including race or ethnicity, occupation, and gender.[161] Consequently, while the ILO Conventions and the ICMW provide much protection for migrant workers, their provisions are less effective in protecting female migrants who are subjected to gender-based or sexual violence.[162] This also applies to human rights instruments, even the specialized ones like CEDAW. The lack of explicit references to female migrants in these instruments 'reinforces the invisibility of gender-specific violations' against female migrant workers.[163]

2.7 Ratification status of migrant workers' instruments

States have not shown much interest in instruments relating to migrant workers. Even where relatively flexible nomenclature has been adopted to accommodate diversity, states have remained reluctant to ratify the Conventions. Convention No 97, for example, allows a ratifying state to opt out of one of the annexes or to exclude them altogether, yet its ratification status is considerably limited compared to other ILO instruments.[164] It has been ratified by only 47 countries. Two of these (Kenya and Tanzania-Zanzibar) are in East Africa and five are in SADC (Madagascar, Mauritius, Zambia, and Malawi (in addition to Tanzania - Zanzibar).[165]

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[160] See CEDAW, General Recommendation on Migrant Women, para 28.
[161] Piper op cit 36.
[162] See Jolly and Reeves op cit 31.
[163] Piper op cit 20.
[164] Countries such as the United Kingdom, Kenya, Zambia, Tanzania-Zanzibar, and Cameroon excluded all the annexes during ratification.
[165] See http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242 (accessed on 10 August 2012). As already noted in chapter 1, unlike the United Nations treaty practice, under the

Similarly, Convention No 143 has become a victim of its own structure, as noted before. It is accepted neither by the major receiving countries, nor by the countries of emigration. A sizeable number of countries in each of these groups believe that their economic interests are threatened. Countries of employment perceive the recognition of the rights of irregular migrants in article 14(a) as an encroachment upon their sovereign rights in respect of the admission of non-nationals. On the other hand, countries of emigration feel that the prohibition on clandestine migration in Part I is too radical and unacceptable because this form of migration helps them to ease the pressure of unemployment and supports their economy through remittances.[166] On account of these concerns, ratification by both groups has remained critically low. Convention No 143 has been ratified by only 23 countries.[167]

A similar fate has befallen the ICMW, which has only 45 members today.[168] This progress is insignificant when compared with other instruments under the UN human rights system, particularly those which address the rights of similar vulnerable groups, such as women, refugees, children and persons with disabilities. For example, the Convention on the Elimination of all Forms of Discrimination against Women has now been ratified by 187 countries.[169] The Convention on the Rights of the Child, which was adopted in 1989, only a year before the ICMW, has been ratified by 193 countries.[170] Even the ratification status of the recently adopted Convention on the Rights of Persons with Disabilities, 2006 is far better than that of the ICMW. In its six years of existence the Convention on the Rights of Persons with Disabilities has been ratified by 118 countries.[171]

ILO system Zanzibar retains her autonomy on the ratification of an ILO instrument. The Conventions ratified by Zanzibar in her capacity as an autonomous state do not necessary apply to the Tanzanian mainland. Consequently, this means that Convention No 97 is binding only on Zanzibar.

[166] The adoption of Convention No 143 and its supplementing Recommendation was preceded by a heated debate between migrant-sending countries, which prayed for the extension of protection to irregular migrants, and countries of immigration, which expressed disappointment with any attempt to formulate standards for this group. During the final vote, some migrant-receiving countries abstained. On the part of migrant-sending countries, Morocco and Mexico, voted against the Convention, while Ghana, Jamaica, and Trinidad and Tobago abstained because they felt that irregular migrants were not adequately protected. See Bohning (1991) op cit 699. Also see Bohning (1976) op cit 152.

[167] See http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288 (accessed on 10 August 2012).

[168] See the ratification status at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed on 24 May 2012).

[169] See the ratification status at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en (accessed on 24 May 2012).

[170] See the ratification status at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (accessed on 10 September 2011).

[171] See the ratification status at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en (accessed on 24 May 2012).

This proves that, despite the economic potential of labour migration, migrant workers' protection concerns are still very much on the periphery of states' policies. Attempts to bring them to the fore often encounter challenges and are not welcomed. The hurdles are enormous when issues related to irregular migration are involved, because the protection of this group always collides with the staunch doctrine of sovereignty on issues of nationality and the admission of migrants, which usually negates the protection of migrant workers.[172] The ICMW tried hard to achieve protection for migrant workers in its ten years of protracted negotiations, but states are less than enthusiastic about becoming members. They claim that the Convention has failed to reconcile competing interests by according a series of rights to irregular migrants.

A study conducted in Europe to determine the obstacles to the ratification of the ICMW reports that European states claim that 'the [Convention] would limit the sovereign rights of States to decide upon who can enter their territory and for how long they can remain.'[173] There is also a fear that the Convention will provide for a robust right of family reunification for all regular migrants.[174] On the part of sending states, a study conducted in Asia Pacific revealed that ratification of the ICMW is not preferred due to the fear among the sending countries that it will sour the good relationship that exist between them and the major countries of immigration.[175] There are also general claims that the Convention is too detailed and complex, imposing substantive technical and financial obligations on ratifying states.[176]

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[172] Bosniak op cit 742.

[173] See MacDonald, E and Cholewinski, R *The Migrant Workers' Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* UNESCO Migration Studies 1 (UNESCO, Paris, 2007) 52, available at http://unesdoc.unesco.org/images/0015/001525/152537e.pdf (accessed on 24 May 2012). A revised version of this report has been published as MacDonald, E and Cholewinski, R 'The ICRMW and the European Union' in De Guchteneire, P et al *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009) 360–392.

[174] Ibid. See 52–65 for a more detailed list of the obstacles. Also see Pecoud, A and De Gutchteneire, P *Migration, Human Rights and the United Nations: An Investigation into the Low Ratification of the UN Migrant Workers Convention* Global Migration Perspectives Series No 3 (Global Commission on International Migration, Geneva, 2004) 9–17, available at http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf (accessed on 24 May 2012).

[175] Iredale R and Piper, N 'Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective' (Paris, UNESCO, 2003) 8, available at http://unesdoc.unesco.org/images/0013/001395/139528e.pdf (accessed on 24 May 2012). Also see the revised version of this report published as Piper, N 'Obstacles to, and Opportunities for, Ratification of the ICRMW in Asia' in De Guchteneire et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009) 171–192 at 178.

[176] Martin, S *The Legal and Normative Framework of International Migration* (Global Commission on International Migration, 2005) 14, available at http://www.gcim.org/attachements/TP9.pdf (accessed on 10 September 2011).

In some states, the Convention is perceived as a mere duplication of the rights which have already been subscribed to in previous international and regional Conventions.[177] In Africa, a similar survey was carried out in Nigeria, where the authorities raised concerns over worsening unemployment rates and unsatisfactory guarantees of workers' welfare in the local labour market as the hindering factors.[178]

In a country like Tanzania, which has not ratified any of these instruments, migrant workers have very little chance of protection.[179] If their employment-related rights are threatened, they may invoke the omnibus provisions of the ILO Declaration on Fundamental Principles and Rights at Work, 1998. All members of the ILO undertake, through this Declaration, to promote and realize the four fundamental principles, namely, freedom of association and the effective recognition of the right to collective bargaining; elimination of discrimination in respect of employment and occupation; elimination of all forms of forced or compulsory labour; and effective abolition of child labour. According to para 2 of this Declaration all members of the ILO have an obligation arising from their membership of the ILO to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights, even if they have not ratified any of the eight Conventions through which these principles are provided.[180] A precedent to this effect has already been set by the ILO Committee of Experts on Freedom of Association, one of the ILO supervisory mechanisms, in a complaint submitted by the Union of Workers in Spain challenging a law which restricted migrant workers' organizational rights. The Committee invoked article 2 of Convention 98 in holding that 'all workers irrespective of their status are entitled to organizational rights.'[181] The ILO Decent Work Agenda is also relevant; its major concern is to ensure that all workers enjoy decent working conditions.

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[177] Ibid.

[178] Adedokun, OA 'The Rights of Migrant Workers and Members of their Families: Nigeria' (UNESCO, 2003) 24, available at http://unesdoc.unesco.org/images/0013/001395/139534e.pdf (accessed on 12 June 2010). Nigeria acceded to the Convention on 27 July 2009. Other African states which subscribe to this Convention include Algeria, Benin, Burkina Faso, Comoros, Egypt, Libya, Ghana, Lesotho, Liberia, Mali, Mauritania, Morocco, Niger, Rwanda, Senegal, the Seychelles, Sierra Leone, Togo and Uganda.

[179] Zanzibar is a member of ILO Convention No 97.

[180] These principles are contained in eight ILO Conventions: the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No 87), the Right to Organize and Collective Bargaining Convention, 1949 (No 98), the Forced Labour Convention, 1930 (No 29), the Abolition of Forced Labour Convention, 1957 (No 105), the Minimum Age Convention, 1973 (No 138), the Worst Forms of Child Labour Convention, 1999 (No 182), the Equal Remuneration Convention, 1951 (No 100), and the Discrimination (Employment and Occupation) Convention, 1958 (No 111).

[181] See ILO Committee of Experts on Freedom of Association, Report No 327, Case No 2121. Also see the Complaints against the Government of Korea presented by the Korean Confederation of Trade Unions (KCTU)

2.8 The relevance of non-discrimination provisions under universal human rights instruments

The prohibition of discrimination constitutes the most basic and general principle underlining the protection of human rights and has been incorporated in all core human rights instruments within the UN and in regional human rights systems.[182] On account of this, provisions on non-discrimination carry great potential in defining the human rights entitlement of individuals, including those who for various reasons (voluntary or forced) sojourn in states other than their own. It has been rightly submitted that the UDHR, which has been named the 'Magna Carta' of modern international law and 'the precursor' to all human rights instruments, laid a firm base for the protection of the rights of migrant workers through its use of inclusive language in most of its substantive provisions.[183] The UDHR uses the phrases 'everyone' and 'no-one' in most of its provisions, to describe the equitable entitlement of rights and to prohibit the violation of those rights. The repeated use of these words impliedly refers to all human beings, nationals and non-nationals alike.[184]

Although some argue that the UDHR does not adequately protect migrant workers because of its failure to include 'citizenship' and 'nationality' among the prohibited grounds of discrimination under article 2, we subscribe to the view that a liberal interpretation of this provision indicates that the list of discrimination grounds in article 2 is not exhaustive. The use of the phrase 'such as' at the beginning of the list of prohibited grounds, and the use of the phrase 'or other grounds' at the end of the list, suggests that the list is only illustrative.[185] Undoubtedly, the provisions of the UDHR were meant to apply indiscriminately to all

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and the International Trade Union Confederation (ITUC) (Case No 2620), 355th Report of the Committee on Freedom of Association, ILO Governing Body (GB 306/7), para 705. Also see Complaints against the Government of the United States presented by the American Federation of Labour and the Congress of Industrial Organization (AFL-CIO) and the Confederation of Mexican Workers (CTM) (Case No 2227), 332nd Report of the Committee on Freedom of Association, ILO Governing Body (GB 228/7/(Part II), 288th Session, 2003.

[182] See articles 1 and 8 the United Nations Charter, article 2(2) of the ICESCR, articles 2(1) and 26 of the ICCPR, article 1 of CERD (racial discrimination), article 1 of CEDAW (discrimination against women), article 2 of CMW, article 2 of the African Charter on Human and Peoples Rights, and article 1 of the American Convention of Human Rights.

[183] Lillich op cit 42.

[184] McDougal et al op cit 458. The word 'everyone' appears in 23 articles while 'no-one' appears in six articles. Ouguergouz, F *The African Charter on Human and Peoples Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (Kluwer Law International, The Hague, 2003) 78.

[185] Sivakumaran, S 'The Rights of Migrant Workers One Year On: Transformation for Consolidation?' (2004) 36 *Georgetown Journal of International Law* 113–154 at 124.

individuals, except for article 21 which reserves the right to take part in government for nationals.[186]

Analogous arguments have been advanced in respect of article 2(2) of the ICESCR, which also incorporates the discrimination principle. The grounds for discrimination enumerated in this provision do not include nationality and citizenship. In addition, article 2(3) allows developing countries to determine to what extent they can guarantee economic rights to non-nationals. These two provisions have created controversy and uncertainty.[187] The Limburg principles, which guide the interpretation of the Covenant, have confirmed that the grounds are not exhaustive and that the provisions of the Covenant apply equally to nationals and non-nationals.[188] With regard to article 2(3), it has been observed that it was intended only to rectify situations in newly independent states where the influence of non-nationals on the national economy limited the enjoyment of economic rights by nationals.[189] States are urged to interpret this provision narrowly, limiting its application to 'the notion of economic rights and to the notion of developing countries'. The latter refers to newly independent states which are classified as 'developing countries' by the United Nations.[190]

A more illustrative provision on non-discrimination and equality of treatment is article 2(1) of the ICCPR, which provides, inter alia:

> 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.

[186] Article 21 provides for political rights such as voting, holding public office, and public service. This provision uses the words 'his country', which have been interpreted as limiting these rights to citizens.
[187] Cholewinski Cholewinski, R *Migrant Workers in International Human Rights Law* 56–60; also see Sivakumaran op cit 132–133.
[188] See the Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights, (1987), 9 *Human Rights Quarterly*, 122-135.
[189] Dankwa, EVO 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 230–249 at 235. Also see Weissbrodt, D 'The Protection of Non-Citizens in International Human Rights Law' in Cholewinski, R et al (ed) *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press, The Hague, 2007) 221–236 at 223.
[190] Limburg Principles 43 and 44; also see Touzenis and Cholewinski op cit 2.

The significance of this provision in providing relief for migrants has already been confirmed by the UN Human Rights Committee in its mandate as a supervisory body for the implementation of the ICCPR. In 1986, the Committee unanimously confirmed that:

> In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or Statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof. This guarantee applies to aliens and citizens alike.[191]

Also, through General Comment 31 [80] of 2004 on the Nature of the General Legal Obligation on States Parties, the Committee established that:

> [A] State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. ... [T]he enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or Statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.[192]

This means that migrant workers should be equally treated and protected before the law.[193] The laws of the states must protect them against arbitrary deprivation of life and arbitrary detention, and against being subjected to torture or to cruel, inhuman or degrading treatment or punishment, and against being held in slavery or servitude.[194] They should be guaranteed the full right to liberty and security of person.[195] Their privacy, family, home, correspondence, honour and reputation must be respected and protected from arbitrary interference.[196] Moreover, migrant workers should be accorded freedom of expression, peaceful assembly and association with others.[197] Those of marriageable age should be

[191] United Nations Human Rights Committee, General Comment 15/17 on the Position of Aliens under the Covenant (UN GAORA, Supp. No.40. A/41/40/annex VI, Para 1).
[192] General Comment No 31 [80] on the Nature of the General Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13 (2004).
[193] Articles 14, 15 and 26 of the General Comment No 31 [80] on the Nature of the General Obligation Imposed on State Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).
[194] See articles 6, 7 and 8 of the ICCPR.
[195] Article 9.
[196] Article 17.
[197] Articles 18, 19, 21 and 22.

allowed to marry and to start a family.[198] Limitations are allowed only in respect of political rights and freedom of movement (for irregular migrants).[199] The ICCPR is important in the area of migrants' rights because its enumerated grounds for non-discrimination are more comprehensive than those of the UDHR and the ICESR.[200] Furthermore, the rights protected therein are those that are most likely to be affected by migration control measures.[201]

Generally, provisions prohibiting discrimination in the ICCPR and in other universal human rights instruments are central to the protection of all migrants, including those in countries which do not subscribe to any of the migrant workers' instruments. First, as already remarked, these instruments are widely ratified compared to the ILO Conventions and the ICMW.[202] Second, the prohibition on discrimination is included in the UN Charter, to which all UN members subscribe.[203] Third, the prohibition on discrimination has, on different occasions, been qualified as one of the fundamental principles of international law. In the most recent declaration to this effect, the Inter-American Court of Human Rights held:

> [T]he fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens.*[204]

[198] Article 23.
[199] Articles 12(1) and 25.
[200] Fitzpatrick, J 'The Human Rights of Migrants' in Aleinikoff TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 167–184 at 172–173.
The earlier version of this work is available at www.baliprocess.net/files/ConferenceDocumentation/the%20Human%20Rights%20of%20Migrants_%202002.pdf (accessed on 24 May 2012).
[201] Ibid.
[202] As of September 2011, the ICCPR had 167 ratifications, and the ICESR had 160 ratifications, while CEDAW and CERD had 187 and 174 ratifications, respectively. See the ratification status at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (accessed on 10 September 2011).
[203] Following the admission of Southern Sudan as the newest member on 14 July 2011, there are now 193 UN member states. The list of members is available at http://www.un.org/en/members/ (accessed on 6 September 2011).
[204] Inter-American Court of Human Rights *Advisory Opinion* OC-18/03, para 173(4). Previously, the International Court of Justice, in the *Barcelona Traction* case, qualified the obligation of states arising out of racial discrimination as one of the obligations qualifying as obligations *erga omnes* (the obligations of a state towards the international community as a whole). See *Barcelona Traction, Light and Power Co. Ltd. (Belgium v Spain)* 1970 ICJ 3 at 32. For a detailed discussion of *jus cogens* and *erga omnes* obligations and their relevance to human rights, see Meron, T 'On a Hierarchy of International Human Rights' (1986) 8(1) *American Journal of International Law* 1–23.

2.9 Institutional guarantees

Migration is a significantly complex issue that cuts across the work of many UN agencies and institutions. While some of these are specifically intended to deal with migration, others address migration issues only when implementing their specific programmes and projects. In the UN human rights system, the role of protecting migrants falls under two bodies: the Committee on the Rights of Migrant Workers[205] and the Special Rapporteur on the Human Rights of Migrants.

The Committee monitors the implementation of the ICMW by state parties. It started its work in 2004 and has so far conducted 15 sessions. It has received and considered reports from a number of countries, including Mali, Bolivia, Syria, Ecuador and Algeria. During its 13th session in December 2010 the Committee issued its first General Comment on Domestic Migrant Workers. The Committee certainly presents a good opportunity to enhance the protection of migrant workers. However, the Committee does not have absolute jurisdiction over individual complaints. According to article 77, the Committee can receive individual complaints only from individual residents (migrant workers) in countries which have made a declaration to that effect. So far, only three countries (Guatemala, Mexico and Turkey) have made such a declaration. The implication is that, migrants from member states cannot, on their individual capacity, petition to the Committee for remedy unless they are residents of Guatemala, Mexico and Turkey.

The UN mandate of the Special Rapporteur on the Human Rights of Migrants was created in 1999.[206] The Special Rapporteur has several promotional and protective mandates, including the mandate to examine ways and means of overcoming the obstacles to the effective protection of the human rights of migrants; to request and receive information on the violations of the human rights of migrants and their families; to formulate appropriate recommendations to prevent and remedy violations of the human rights of migrants; and to promote the effective application of existing international migration norms and standards. Unlike the Committee on Migrant Workers, the mandate of the Special Rapporteur covers all countries, even those which have not ratified the ICMW.

[205] The Committee on the Rights of Migrant Workers is established in Part VII of the ICMW.
[206] The mandate was created by the Commission on Human Rights through Resolution 1999/44.

The Special Rapporteur also receives information from any source, including migrant workers. Communications which are received by the Special Rapporteur on his mandate are sent to the relevant states for clarification of the issues raised.[207] The information may concern individual cases of alleged violations of migrants' human rights, or general cases of human rights violations in a specific country.[208] The Special Rapporteur has paid official visits to a number of countries: the United States of America, the United Kingdom, Senegal, Mexico, Spain, Morocco, Italy, the Philippines, Canada, Ecuador, Burkina Faso, Peru, Iran, Indonesia, South Korea, Guatemala, and Romania.[209] During these visits the Special Rapporteur had the opportunity to assess the general situation of migrants and to discuss the protection of migrants with the respective authorities. In his annual reports to the Human Rights Council, the Special Rapporteur has raised several protection issues that are of concern to migrant workers.[210]

2.10 Implications for Tanzania

The discussion in chapters 1 and 2 would be incomplete without an adequate discussion of the relationship between the Tanzanian legal system and the various international treaties. As noted before, the adequacy or otherwise of the law pertaining to the protection of migrant workers in Tanzania must be measured against the international norms. It is therefore important at the outset to outline how these two relate and, most importantly, what impact, if any, the norms discussed above have on the Tanzanian legal system.

The answer to this question can be found in the Vienna Convention on the Law of Treaties, 1969 and in the Constitution of the United Republic of Tanzania, 1977. According to the Vienna Convention, an international treaty is binding only on states which have expressed

[207] See Addendum No 1 of the Report submitted by the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, to the 14th Session of the UN Human Rights Council on 25 May 2010, for samples of communications sent to Governments and replies received (A/HRC/14/30/Add.1), available at http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/135/92/PDF/G1013592.pdf?OpenElement (accessed on 12 June 2011)

[208] See the details at http://www2.org/english/issues/migration/rapporteur/index.htm (accessed on 12 June 2011).

[209] Reports of the Special Rapporteur on the Human Rights of Migrants are available at http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx (accessed on 12 June 2011).

[210] Issues which have consistently appeared in the annual reports include (i) the growing demands of migrant workers and the reluctance of receiving countries in acknowledging these demands; (ii) the role of migrant workers as conduits for development and prosperity in countries of origin, transit and destination; (iii) the continued abuse and exploitation of irregular migrants in the migration process; (iv) the detrimental impacts of security and control-oriented migration policies in the protection of human rights, and their inability to combat clandestine migration, the smuggling of migrants and human trafficking. See the Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante, submitted to the Human Rights Council on 21 March 2011, available at http://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/AnnualReports.aspx (accessed on 27 August 2011). All previous reports are also available on this website.

consent to be bound by it, through ratification or accession (if a state was not party to the negotiations or to the conclusion of the treaty) or signature (in cases where ratification or accession is not required).[211] Once ratified, treaties become binding, and the ratifying states acquire an obligation not only to implement the provisions of the treaty in good faith (*pacta sunt servanda*)[212] but also to refrain from acts that defeat the purpose of the treaty. In Tanzania, the requirement for ratification appears in article 63(3)(e) of the Constitution. The mandate for ratification vests in Parliament.[213] Only those treaties which are duly ratified in accordance with article 63(3)(e) are binding on Tanzania.

As noted above, Tanzania has not ratified any of the three major Conventions on labour migration. Therefore, Tanzania is not legally obliged to implement the provisions of these Conventions. However, it is submitted that the fact that Tanzania has not ratified any of these Conventions cannot under any circumstances be used as an excuse for violating the rights of migrants or according them inferior treatment. Also, it does preclude the use of principles contained in these instruments in assessing the rights of migrant workers. As a member of the UN and the ILO Tanzania has an obligation to uphold the values of these organisations, which include the promotion of universal human rights and decent working conditions for all workers irrespective of their nationality and migration status. Also, Tanzania has ratified a number of UN and ILO instruments which, as noted before, apply to all human beings and workers without exception. This means that Tanzania, as a signatory to these instruments, is obliged to implement all the obligations arising therein, in good faith, and to refrain from acts which are likely to defeat the aim of these instruments.

The implementation and application of international treaties in the Tanzanian court system is also significant. This subject has attracted considerable scholarly attention.[214] Although the

[211] See articles 13, 14 and 15 of the Vienna Convention on the Law of Treaties, 1969.
[212] Article 26.
[213] Article 26.
[214] Kabudi, PJ 'The Judiciary and Human Rights In Tanzania: Domestic Application of International Human Rights Norms' (1991) 24(3) *Verfassung und Recht in Uberse* 277; Peter, CM 'Incorporation of International Conventions in Tanzania' 1997 *International Law Review* 172–173; Mwalusanya, L 'The Bill of Rights and the Protection of Human Rights: Tanzania Court's Experience' in Bisimba, K and Peter, CM (eds) *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries (Legal and Human Rights Ce*ntre, Dar es Salaam, 2005) 624–645; Kamanga, K *International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice* Paper presented at the Judges' Course on Constitutionalism and Human Rights, Continuing Legal Education for Judges, Faculty of Law, University of Dar es Salaam, Tanzania, 21 September – 1 October 1998, at 4. This paper has been published in Binchy, W and Finnegan, C *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (Clarus

Constitution does not explicitly state how the courts should treat international law, scholars agree that Tanzania has a *dualist* legal system, which means that international treaties do not automatically acquire the force of law upon ratification.[215] Thus, for international treaties to be applied in courts, they must be received into national legal system by way of domestication, that is, incorporated through an Act of Parliament to make them part of the national laws.[216] This inference is drawn from article 63(3)(d) of the Constitution, which vests Parliament with the power to domesticate international treaties.[217] A number of international instruments ratified by Tanzania have accordingly been incorporated. Of relevance to this study are: the International Convention Relating to the Status of Refugees, 1951 and the Convention Governing Specific Aspects of Refugee Problems in Africa, 1969,[218] the Treaty for the Establishment of the East African Community, 1999, [219] the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, 2000,[220] and various aspects of international labour law as contained in the ILO instruments.[221] Also, the Constitution of Tanzania has domesticated several provisions of the UDHR, the ICCPR and the ICESC through the Bill of Rights as incorporated in Part III.[222]

It is also important to look at how the judiciary treats the provisions of international treaties, particularly those which have been ratified but not domesticated, because there are some instruments which Tanzania has ratified, but they are yet to be incorporated into the national legal system. One of these is the Protocol on Establishment of the Common Market in East Africa, 2009, which is relevant to the protection of migrant workers from the EAC.

Generally, the judiciary has over the years adopted a liberal approach towards the application of international instruments, by citing as authority those instruments which have been duly

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Press, Dublin, 2006) 53–70; and Murungu, BC 'The Place of International Law in Human Rights Litigation in Tanzania' in Killander, M (ed) *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, Pretoria, 2010) 57–69.

[215] Ibid.

[216] This is because the dualists treat international law and domestic law as two autonomous systems existing independently of one another, unlike the monists, who consider the two to be part of one and the same legal order. See Kamanga op cit 3.

[217] The procedure for ratification and incorporation are discussed in detail in Kamanga op cit 6–9, and Murungu op cit 59–60.

[218] Incorporated through the Refugees Act 9 of 1998.

[219] Incorporated through the Treaty for the Establishment of the East African Community Act 4 of 2001.

[220] Incorporated through the Anti-Trafficking in Persons Act 6 of 2008.

[221]Incorporated through the Employment and Labour Relations Act 6 of 2004 which, as will be shown in chapters 5 and 6, incorporate several provisions of the ILO instruments.

[222] See articles 12–30 of the Constitution of the Republic of Tanzania.

ratified by Tanzania, to confirm the existence of a certain right or to invalidate provisions which are inconsistent with these instruments. Of particular importance are the following cases: *Kukutia Ole Pumbun and Another v Attorney General and Another;*[223] *Republic v Mbushuu @ Dominic Mnyaroje and Kalai Sangula;*[224] *Attorney-General v Lohay Akonaay and Joseph Lohay*;[225] *John Mwombeki Byombalirwa v Regional Commissioner Kagera and Another*;[226] *Paschal Makombanya Rufutu v The Director of Public Prosecutions*;[227] *Director of Public Prosecutions v Daudi Pete*;[228] *Chiku Lidah v Adamu Omari*;[229] *Christopher Mtikila and 3 Others v The Republic*;[230] *Transport Equipment Ltd. and Reginald John Nolan v Devram P. Valambia*;[231] *Baraza la Wanawake Tanzania (BAWATA) v Registrar of Societies;*[232] *Legal and Human Rights Centre (LHRC), Lawyers' Environment Action Team (LEAT) and National Organisation for Legal Assistance v the Attorney-General*,[233] and *Christopher Mtikila and Others v The Attorney General.* Human rights instruments such as the UDHR, the ICCPR and the African Charter of Human and Peoples' Rights have featured prominently in these cases. In some of these cases, the judiciary sought inspiration from instruments to which Tanzania is not a party, such as the European Charter on Human Rights, 1950, and the American Convention on Human Rights, 1969.[234] In essence, it is possible for individuals, including migrant workers, to seek redress in court if the provisions of an instrument ratified by Tanzania are not adhered to, even if the said instrument is not domesticated, as is the case with the EAC Common Market Protocol.

2.11 Conclusion

From the foregoing discussion it is clear that there has been significant progress in establishing international legal standards on labour migration. Thus there is now a fairly detailed set of legal rules within the UN human rights system and the ILO to guide state policy and practice. On the part of the ILO, which has pioneered the development of

[223] [1993] TLR 159.
[224] High Court at Dodoma, Criminal Sessions Case No 44 of 1991, reported in [1994] TLR 146.
[225] [1995] TLR 80.
[226] [1986] TLR 73.
[227] High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No 3 of 1990 (unreported).
[228] [1993] TLR 22.
[229] High Court of Tanzania at Singida, Civil Appeal No 34 of 1991 (unreported).
[230] High Court of Tanzania at Dodoma, Criminal Appeal No 90 of 1990 (unreported).
[231] Court of Appeal of Tanzania at Dar es Salaam, Civil Application No 19 of 1993 (unreported).
[232] High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No 27 of 1997.
[233] High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No 77 of 2005 (unreported).
[234] *Paschal Makombanya Rufutu* (supra) and *Mbushuu @ Dominic Mnyaroje* (supra).

international instruments for the governance of labour migration, there exist a total of four instruments, two in the form of legally binding Conventions and two in the form of Recommendations. These instruments, together with the ICMW, constitute what Wickramasekara calls 'a comprehensive charter of the migrant rights'.[235] They prescribe standards in respect of recruitment procedures, access and mobility in the labour market, conditions of employment, trade union rights, social security, and a series of other economic, social, civil and cultural rights. Together they 'provide a legal basis for national policy and practice on migrant workers, and serve as tools to encourage states to establish or improve national legislation in harmony with international standards.'[236] Regrettably, as noted above, these instruments have not been ratified to the same extent as other ILO and UN instruments. For instance, Tanzania has not ratified any of these instruments. The low ratification notwithstanding, these instruments hold a special place in international labour migration because their provisions constitute a basis on which state policies and legislation should be modelled. Therefore, they provide a yardstick against which the protection standards in individual counties should be measured. In addition, the general human rights instruments under the UN, together with the ILO instruments of general application, provide broad protection, supplementing the standards set under the international labour migration instruments. If these general human rights instruments are adhered to, they are imperative to the protection of migrant workers, particularly in states that have not ratified the labour migration instruments.

The most striking thing, however, is the fact that, while these developments are taking place, literature indicates that the exploitation and abuse of migrant workers in the globalized economy continues unabated. Scholars have observed that while there has been a greater integration of global markets for the movement of goods, services and capital across borders, the cross-border movement of people and labour remains much more restricted, regulated by a complex web of immigration laws and policies that uphold the principle of state sovereignty. States' policies and perceptions on migration have changed immensely. Restrictive policies on and hostility towards migration are increasingly being adopted and practised in developed and developing countries, thus limiting the entry and freedom of

[235] Wickramasekara, P 'Globalization, International Labour Migration and Rights of Migrant Workers' (ILO, Geneva, 2006) 14, available at http://www.ilo.org/public/english/protection/migrant/download/pws_new_paper.pdf (accessed on 12 June 2011).
[236] Ibid.

migrants. Some have even described the international mobility and migration of persons as the 'missing link' or 'unfinished business' of globalization.[237] The ILO reveals that, despite the positive experiences of some migrant workers, a significant number face undue hardship and abuse in the form of low wages, poor working conditions, the virtual absence of social protection, the denial of freedom of association and workers' rights, discrimination, xenophobia, and social exclusion.[238]

[237] Ibid.
[238] ILO *A Fair Deal for Migrant Workers in the Global Economy* Report VI, International Labour Conference, 92nd Session in Geneva, 2004.

Chapter 3: Regional and sub-regional standards on migrant workers: The AU, the EAC and the SADC regimes

3.1 Introduction

This chapter considers the development of policy and legal frameworks on labour migration and the protection of migrant workers in Africa and its sub-regions, particularly the East African Community (EAC) and the Southern African Development Community (SADC). The chapter starts by outlining the state of labour migration in the region, so as to provide an understanding of region-wide issues which also have a significant influence on migration patterns in the sub-regions. The chapter proceeds to examine the legal and policy framework within the African Union (AU), and then discusses the developments in the EAC and SADC, as Tanzania is a member of both regional bodies.

We observe that in both regional bodies there has been an acknowledgement of the role of labour migration in fostering economic development, coupled with a growing awareness of the human rights protection needs of migrant workers. However, the continent is yet to develop a comprehensive legal framework in this area. The provisions of the African Charter on Human and People's Rights, which incorporates some guarantees for migrants, have been largely ignored. However, the developments in the regional economic groupings are far reaching, particularly in the EAC, where comprehensive instruments on labour mobility across the sub-region have been adopted. Finally, we observe that most African countries do not offer adequate protection to migrant workers. Poor ratification of international human rights instruments on migrant workers, the non-incorporation of international norms, discrimination, xenophobia, the widespread expulsion of migrants and restrictive admission policies are all obstacles which need to be eliminated in most African states.

Although the regional and sub-regional legal instruments can be broadly categorized as international legal instruments, it is deemed necessary for the purpose of this study to examine them separately from the international framework, because of the changing patterns of migration. First, as will be explained below, Africa has become an important player in the migration discourse, being a source and a recipient of international migrants and also a hub for predominantly intra-regional labour migration. Second, the instruments developed at regional and sub-regional level are likely to be more relevant to the member countries. This is because the member states tend to share the unique economic and social characteristics that

are relevant to labour migration and which significantly influence the formulation of labour migration policies. For instance, poverty, unemployment, and the informalization of labour markets, which have significantly influenced labour migration, are common to most countries in the sub-region and on the continent as a whole. The peculiar needs arising from these and other related issues are likely to be overlooked by the international instruments which, by their very nature, tend to be general.[1] For example, in 1969, the Organization for African Unity (OAU) had to adopt a Convention on Refugees to address refugee issues peculiar to Africa which were not addressed in the UN Convention Relating to the Status of Refugees.[2] Regional and sub-regional instruments, therefore, deserve a fair examination in their own right.

The third reason relates to the comparative advantage of regional and sub-regional instruments as regards enforcement. It has been argued that, because of geographical proximity, which ultimately results in socio-economic, environmental and security interdependence, member states feel more obliged to enforce the obligations arising from regional and sub-regional instruments.[3] Also, at the regional or sub-regional level there is often a strong sense of unity: countries feel that they are all in the same boat even though they are not necessarily 'pulling together'. They therefore feel obliged to 'put aside national egoisms and devise new forms of cooperation'.[4] If this assertion is true, it can safely be argued that developments at regional and sub-regional level are best placed to offer viable tools for managing migration and fostering the protection of migrant workers, particularly if they are well designed and enforced.[5] As Von Koppenfels concludes, 'based on a sense of regional cooperation, regional processes serve to increase the sense of being "in the same boat", and help to create a willingness to act cooperatively in the realm of migration ....'[6] It is from this understanding that the developments in the AU, the EAC and SADC are discussed, also taking into account that Tanzania has not ratified any of the three international Conventions on migrant workers.

[1] Von Koppenfels, AK 'Informal but Effective: Regional Consultative Process as a Tool in Managing Migration' (2001) 39(6) *International Migration* 61–84 at 66.
[2] Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.
[3] Mugwanya, GW *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational Publishers, New York, 2003) 34. Also see 33–35 and 51–53 for more details on the comparative advantage of regional instruments in the area of human rights.
[4] Von Koppenfels op cit 69.
[5] Ibid 66.
[6] Ibid 74.

3.2. The state of labour migration in Africa

Africa is known to be a region of intensive migration driven by a number of factors, including rapid population growth, poor economic performance, political instability, poverty, and environmental deterioration.[7] The number of international migrants in Africa is currently estimated to be 19 million.[8] In 2002, the ILO estimated that the number of labour migrants in Africa constituted one-fifth of the global total and that, by 2025, one in ten Africans will live and work outside their countries.[9] Recently, the World Bank estimated that 'about 30.6 million African people (3 per cent of Africa's population) were living in countries other than the one in which they were born.'[10] This is understandable when one considers the multiple factors which shape the migration trends and patterns in the region.[11]

In the current labour migration landscape Africa serves as an important source of migrants and a strategic destination for migrants from within the region and beyond. The most recent statistics indicate that the majority of African immigrants have moved to more affluent economies on the continent, while relatively few have moved to countries in the global North.[12] In 2010, for example, 64 per cent of the sub-Saharan migration was intra-regional and employment-related, directed mainly towards countries such as Burkina Faso, Kenya and South Africa.[13] In contrast, migrants from sub-Saharan Africa constitute only 4 per cent of all migrants living in OECD countries.[14] In West Africa, intra-regional migration constitutes about 70 per cent of total migration, whilst in North Africa about 90 per cent of migrants travel out of the continent. [15]

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[7] Adepoju, A 'Regional Migration and Intra-Regional Migration in Sub-Saharan Africa: Challenges and Prospects' (2001) 39(6) *International Migration* 43–57 at 45.

[8] United Nations Department of Economic and Social Affairs (UNDESA) *Trends in International Migrant Stock: The 2008 Revision* (UNDESA, Population Division, New York, 2009), available at http://www.un.org/esa/population/publications/migration/ UN_MigStock_2008.pdf (accessed on 2 June 2011). Also see IOM *World Migration Report* (IOM, Geneva, 2010) 127.

[9] ILO *Summary Report and Conclusions* (ILO Tripartite Forum on Labour Migration in Southern Africa, Pretoria, 26–29 November 2002), available at http://ilo-mirror.library.cornell.edu/public/english/dialogue/ actrav/genact/socprot/migrant/291102cl.htm (accessed on 24 May 2012).

[10] See Radha, D et al *Leveraging Migration for Africa*: *Remittances, Skills, and Investments* (World Bank, Washington DC, 2011) 15. Africa's population in 2011 was 1,046 million population, second only to Asia, which had a population of 4,207 million. See United Nations *World Population Prospects: The 2010 Revision Highlights and Advance Tables* (United Nations, New York, 2011) 2, available at http://esa.un.org/unpd/wpp/Documentation/pdf/WPP2010_Highlights.pdf (accessed on 24 May 2012).

[11] See Adepoju, A 'Regional Organizations and Intra-Regional Migration in Sub-Saharan Africa: Challenges and Prospects' (2001) 39(6) *International Migration* 43–59 at 45-47.

[12] Radha op cit 2.

[13] International Organization for Migration *World Migration Report 2011: Communicating Effectively about Migration* (IOM, Geneva, 2011) 62.

[14] Ibid.

[15] Ibid.

The increased migratory movements have not been free of consequences to the region and to the individuals involved. Brain drain and waste, human trafficking and the smuggling of migrants, and transformed gender roles (with more women migrating on their own) have emerged as the major features of migration on the continent.[16] Human trafficking and smuggling, arbitrary expulsions and xenophobia in destination countries have led to serious violations of human rights and, in some cases, have claimed a number of innocent lives.[17] Nonetheless, migration has now become an important survival strategy and one of the major drivers in achieving regional development goals. All these factors point to the need for a comprehensive regional policy.

3.3 Labour migration standards in the African Union

Labour migration policies in independent Africa have failed to offer meaningful and reliable protection to migrant workers. While Africa has successfully legislated on human rights, thus becoming the third region to adopt a human rights instrument, and the first to promulgate multilateral treaties on refugees and internally displaced persons, it is yet to adopt a binding instrument on migrant workers.[18] This is unlike the European Union, which has a well-established legislative mechanism, in addition to a rich jurisprudence, both in the European Court of Justice and the European Court of Human Rights.[19] The Organization of American States (OAS) also has a well-established jurisprudence in this area.[20]

[16] Adepoju, A 'Issues and Trends in International Migration in Sub-Saharan Africa' (2000) 52(165) *International Social Science Journal* 383–394 at 384–388.

[17] For examples on the specific human rights violations experienced by migrant workers see Atsenuwa, A and Adepoju, A *Rights of African Migrants and Deportees* Network of Migration Research on Africa Report (2010) 18–28, available at http://www.jsf-jwb-migrants.org/documents%20-%20all/phaseI_studies/jsfjwb1-Nigeria-eng-1210.pdf (accessed on 12 April 2012). Also see Adepoju, A *The Challenge of Labour Migration Flows between West Africa and the Maghreb* International Migration Papers No 84E (ILO, Geneva, 2006), available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp84.pdf (accessed on 24 May 2012). Also see Crush, J 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2000) 38(6) *International Migration* 103–133 at 114–117.

[18] In 1981 the OAU adopted the African Charter on Human and Peoples' Rights (the Banjul Charter), which included all three generations of human rights. This was preceded by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which was adopted in 1969 to address specific refugee problems relevant to Africa which were not addressed in the UN Convention on the Status of Refugees. The most recent development is the adoption of the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) in October 2009.

[19] The European Convention on the Legal Status of Migrant Workers, which specifically addresses the protection concerns of EU nationals, was promulgated in 1977. In addition, the EU has issued directives in respect of non-EU migrants. These include the EU Council Directive 2003/109/EC Concerning the Status of Third Country Nationals who are Long Term Residents and the EU Council Directive 2009/50/EC on the Conditions of Entry and Residence for the Purpose of Highly Qualified Employment.

[20] Recently, the Inter-American Court of Human Rights provided a groundbreaking opinion on the rights of irregular migrants. See Inter-American Court of Human Rights*Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03

It has been widely documented that the facilitative intra-regional migration policies which flourished in colonial Africa were abandoned immediately after independence.[21] In what has been defined as an eagerness to reserve available employment opportunities and raise the standard of living of their citizens, the newly independent governments, with the assistance of the departing colonial powers, immediately promulgated citizenship laws.[22] The distinction between citizens and non-citizens or aliens became clear.[23] Consequently, the presence of non-nationals in newly independent states became not only a major political and economic problem in individual states, but a cause of tension in the relations of these states.

The reorientation of migration legislation and the administrative machinery which accompanied these developments quickly replaced the facilitative intra-regional migration policies. Africans were now required to produce a standard document in order to enter another African country. Admission could be denied if the applicant failed to satisfy the authorities that he or she was economically capable of supporting himself or herself without burdening the public exchequer, or if he or she was suspected of being a threat to national security.[24] Those who were already in the territory of other African countries were either deemed to be a threat to national security or to the economic growth and hence were expelled or deported, with little human rights guarantees and in the absence of any formalities.[25] Certainly, in this environment, the priority was not to provide any form of protection to this 'unwanted' group, but to limit their admission or remove them all together from the territories.

OAS has a Special Rapporteur on the Rights of Migrant Workers.

[21] See Howard-Hassmann, RE *Human Rights in Commonwealth Africa* (Rowman and Littlefield, New Jersey, 1986) 100. Also see Gould, WTS 'International Migration in Tropical Africa: A Bibliographical Review' (1974) 8(3) *International Migration Review* 347–365 at 356.

[22] Adepoju, A 'Illegals and Expulsion in Africa: The Nigerian Experience' (1984) 18(3) *International Migration Review* 426–436 at 430**.** Also see Howard-Hassmann op cit 99–106.

[23] For example, the Kenya Citizenship Act, 1963 (Cap. 170), the Uganda Citizenship Act, 1962, the Tanganyika Citizenship Ordinance 56 of 1961, the Citizenship of Zimbabwe Act 23 of 1984, the Malawi Citizenship Act, 1966, the Ghana Nationality and Citizenship Act 1 of 1957. Other examples include the Employment of Visitors Act (1968) and the Immigration Act (1966) in Botswana, and the Immigration Act (1963) in Nigeria.

[24] Other grounds, such as disease, past criminal records, prostitution and immorality also make one ineligible for admission. See Klaaren, J and Rutinwa, B *Towards the Harmonization of Immigration and Refugee Law in SADC* MIDSA Report No. 1 (Institute of Democracy in South Africa, Cape Town, 2004) 55–56.

[25] Howard-Hassmann *Human Rights in Commonwealth Africa* op cit 99–106. Also see Adepoju (1984) op cit 430. Also see the next section.

3.3.1 The African Charter on Human and Peoples' Rights (ACHPR), 1981

In 1981 the Organization for African Unity (OAU) replicated the developments in Europe and America by adopting the African Charter on Human and Peoples' Rights (also commonly referred to as the 'Banjul Charter') which was to serve as the regional human rights instrument.[26] The Charter contains a number of rights which are found in the major international and regional human rights instruments, such as the UDHR, the ICCPR, the ICESCR and the two sister instruments in Europe and America.[27] Known for its peculiarity in terms of coverage and innovativeness,[28] the ACHPR demonstrates its adherence to the general principles of international human rights law while also taking into account some African customs and principles which have been recognized and accepted as binding legal rules.[29]

The ACHPR was adopted at a time when the human rights of non-nationals were being violated, and thus it tried to incorporate the protection needs of this group. First, article 2 of the ACHPR incorporated a general prohibition on discrimination, similar to the corresponding provisions in the UDHR and other regional human rights instruments. It provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.' The omission of nationality from the prohibited grounds for discrimination was certainly not accidental. Nonetheless, the jurisprudence of the African Commission on Human and Peoples' Rights (the African Commission) has authoritatively established that discrimination against non-nationals is contrary to the spirit of the ACHPR.

[26] The African Charter on Human and Peoples' Rights was unanimously adopted by members of the OAU in 1981. It came into force in 1986, after attaining the necessary ratifications.

[27] See the European Convention on Human Rights, 1950, and the American Convention on Human Rights, 1969.

[28] The Charter brings together civil, political and economic, social and cultural rights and incorporates a new set of rights, commonly referred to as group rights, solidarity or collective rights, which adds a third generation of human rights to Karel Vesak's categorization of human rights. It also incorporates certain duties (articles 27, 28 and 29) which an individual owes to his or her family, the community, the state and other legally recognized communities and the international community. Collective/group or solidarity rights are enshrined in articles 19 to 24, and include the right to self determination, the right to development, the right to peace, the right to clean environment and the right to free dispose of wealth and natural resources. For a detailed discussion of group rights, see Umozurike, UO *African Charter of Human and Peoples' Rights* (Kluwer Law International, The Hague, 1997) 51–62; D'Sa, RM 'Human and Peoples' Rights: Distinctive Features of the African Charter' (1985) 29(1) *Journal of African Law* 72–81 at 77; Mugwanya op cit 212–288; Wa Mutua, M 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339–380; Murray, R *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, Oregon, 2000) 39–41 and 67–87.

[29] See D'Sa op cit 73. Also see Mugwanya op cit 190.

In *Union Interafricaine des Droits de l'Homme and Others v Angola*, the Commission made the following observation:

> 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 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 Parties to ensure that persons living on their territory, *be they their nationals or non nationals, enjoy the rights guaranteed in the Charter*.[30] [Emphasis added].

Even more specifically, in *Institute for Human Rights and Development in Africa v Republic of Angola,* the Commission held that all the 'rights under the African Charter, with the exception of the right to vote and to stand for election, which are undoubtedly reserved for citizens of the particular state, are to be enjoyed by all persons, citizens and non-national residents alike, without any discrimination.'[31] Accordingly, any 'denial of ... rights to individuals on account of their nationality ... violates Article 2.'[32] The frequent use of words such as 'every individual' in most of the provisions of the ACHPR, and the general provision on the right to equality under article 3, certainly support this jurisprudence.[33]

Article 2 has been widely incorporated in national constitutions.[34] A quick examination of the respective provisions in some national constitutions reveals varying lists of prohibited grounds for exclusion. The grounds range from the common grounds, such as colour, ethnicity, religion, social origin, age and sex, to more innovative grounds, such as tribe

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[30] *Union Inter Africaine des Droits de l'Homme, Federation Internationale des Ligues des Droits de l'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de l'Homme au Sénégal and Association Malienne des Droits de l'Homme au Angola* Communication No 159/96 (reported in AHRLR as *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997)).

[31] *Institute for Human Rights and Development in Africa v Republic of Angola* Communication 292/2004 (reported in the AHRLR as *Institute for Human Rights and Development in Africa v Angola* (2008) AHRLR 43 (ACHPR 2008)) para 80. Article 13(1), which guarantees political participation for citizens provides that '[e]very citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.'

[32] *Organisation Mondiale Contre la Torture and Association Internationale des Juristes Démocrates, International Commission of Jurists, Union Interafricaine des Droits de l'Homme v Rwanda* Communications 27/89, 49/91 and 99/93 (reported in the AHRLR as *Organisation Mondiale Contre la Torture and Others v Rwanda* (2000) AHRLR 282 (ACHPR 1996)), para 22.

[33] The term 'every individual' is used in articles, 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16 and 17. In article 4 the term 'every human being' and in article 8 the term 'no one' have been used as corresponding terms.

[34] See, for example, article 13 of the Constitution of the United Republic of Tanzania, 1977; article 2 of the Constitution of the Republic of Uganda, 1995; section 9 of the Constitution of the Republic of South Africa, 1996; article 27 of the Constitution of Kenya, 2010; and article 11 of the Constitution of the Republic of Rwanda, 2003.

(Uganda and Rwanda), language (South Africa, Rwanda and Kenya), sexual orientation (South Africa), marital status (South Africa and Kenya), disability (South Africa, Rwanda, Uganda and Kenya) and dress (Kenya).[35]

Second, article 12 of the ACHPR incorporates a comprehensive set of protection measures for non-nationals.[36] These include freedom of movement and residence within the borders of states, which undoubtedly will apply to migrants if they abide by the law. The right to emigrate (the right to leave one's own country) and the right to seek and to enjoy asylum are also asserted.[37] Articles 12(4) and (5) prohibit arbitrary expulsion and mass expulsion. These two provisions are very important for the protection of migrant workers, because of the pervasiveness of mass expulsions and the subsequent violations of the human rights of non-nationals.

Commentators[38] argue that these provisions were intended to mitigate and finally eliminate the incidents of mass expulsion which had preoccupied African politics prior to the adoption of the ACHPR.[39] However, with the prevalence of mass expulsions on the continent, these provisions are 'paper tigers' rather than valuable protective tools, and have failed to halt mass expulsions. In fact, mass expulsions and human rights violations against migrants have multiplied. A few years after the adoption of the ACHPR grave incidents of mass expulsion were reported in Liberia (1983), and in Nigeria, where more than a million migrants from Ghana, Niger and other West African countries were expelled in 1983, and tens of thousands

[35] Ibid.
[36] Olaniyan, K 'Civil and Political Rights in the African Charter: Articles 8–14' in Evance, M and Murray, R (eds) *The African Charter of Human and Peoples' Rights: The System in Practice, 1986-2006* 2 ed (Cambridge University Press, Cambridge, 2008) 213–243 at 231.
[37] Article 12(1) and (3) of the ACHPR.
[38] Mugwanya op cit 200.
[39] Incidents of mass expulsion of migrants in Africa have been extensively covered in the literature although the actual figures of individuals affected by expulsion in each incident vary. In West Africa, Ivory Coast expelled thousands of Togolese and Benonise in the late 1950s and also in the mid-1960s. At the same time Senegal expelled thousands of Guineans. Thousands of Nigerians were expelled from Cameroon and Sierra Leone, while Ghanaian fishermen were being expelled from Guinea and Ivory Coast around the same time. In 1969, Ghana expelled tens of thousands of foreigners, mainly Nigerians, Nigerien and Voltaics. In Central Africa, Zambia expelled approximately 150,000 nationals of Zimbabwe, Botswana, Zaire, Tanzania and Somalia in 1971. In East Africa, the dramatic expulsion of residents of Asian origin (citizens and non-citizens) from Uganda in 1972, which preoccupied regional politics, was followed by a series of expulsions in 1979 and early 1980. The later incidents were sparked by the collapse of the East Africa Community in 1977. For a detailed list of these incidents see Adepoju (1984) op cit; Afolayani, A 'Immigration and Expulsion of ECOWAS Aliens in Nigeria' (1988) 22(1) *International Migration Review* 4–27; Adepoju (2001) op cit 53; Adepoju (2006) op cit 6; Adepoju, A et al *Promoting Integration through Mobility: Free Movement and the ECOWAS Protocol* New Issues in Refugee Research Papers Series No 150 (United Nations High Commissioner for Refugees, Geneva, 2007) 14, available at http://www.unhcr.org/476650ae2.html (accessed on 24 May 2012).

of other immigrants were expelled in 1985.[40] In the 1990s, several cases were reported, including the expulsion of non-nationals from Gabon (1990), the deportation of tens of thousands Mauritanians from Senegal (1990), the expulsion of West African migrants from Zambia and Angola (1992 and 1996, respectively), the expulsion of Chadians and other non-national workers from Nigeria (mid-1990s), reciprocal expulsions by Eritrea and Ethiopia in the wake of the conflict between the two countries (1998 to 2000),[41] and expulsion of Rwandans from Tanzania (between 1997 and 1998).[42] A number of cases were also reported throughout the first decade of the 21st century. These include *Operação Brilhante* in Angola (2004), when thousands of artisan miners, mainly from the Democratic Republic of Congo (DRC) and West Africa, were deported.[43] In 2005, Guinea was accused of the massive violation of human rights and the expulsion of refugees from Sierra Leone.[44] Also, between 2006 and 2007, the government of Tanzania reportedly expelled thousands of Burundians and Rwandans.[45] In 2009 and 2010 there were reciprocal expulsions, or what the media has called 'tit-for-tat expulsions', between Angola and the DRC.[46]

Against this background, it is not surprising that the African Commission on Human and Peoples Rights has on several occasions had to determine the violation or otherwise of article 12. Accordingly, the Commission has been able to develop a fairly rich jurisprudence on the obligations of states with regard to the expulsion of non-citizens. In determining the legality of the expulsion by Zambia in *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia*, the Commission unanimously held that 'mass expulsion presented a special threat to

[40] Ibid.
[41] Ibid. Also see Ankumah, EA *The African Commission on Human and People's Rights: Practice and Procedures* (Martinus Nijhoff Publishers/Kluwer Law International, The Hague, 1996) 140.
[42] See Human Rights Watch, Tanzania *In the Name of Security: Forced Round-Ups of Refugees in Tanzania* 1999 available at http://www.hrw.org/legacy/reports/1999/tanzania/ (accessed on 28 May 2012).
[43] See Africa Files 'Diamond Industry Annual Review: Republic of Angola 2005', available at www.africafiles.org (accessed on 24 May 2012).
[44] Ibid.
[45] See Nyamukeba, N and Ndayisaba, H 'Expulsion of Burundian Refugees from Tanzania: Experiences with the Use of the IASC Guidelines on Mental Health and Psychosocial Support in Emergency Settings' (2008) 6(3–4) *Intervention* 304–306 at 304. Also see Human Rights Watch 'Tanzania: Expulsion Vulnerable Put People at Risk' 7 May 2007, available at http://www.hrw.org/news/2007/05/08/tanzania-expulsions-put-vulnerable-people-risk (accessed on 28 May 2012).
[46] In 2009, 18,000 Congolese were expelled from Angola. The DRC reciprocated by expelling thousands of Angolan nationals from its territory. Later in October 2010, significant numbers of Congolese were violently expelled from Angola. A significant number of women, men and children were sexually violated in the last incident. See 'ANGOLA-DRC: Expulsions mark rising tensions over resources' 28 October 2010 (IRIN) available at http://www.irinnews.org/report.aspx?reportid=90906 (accessed on 23 May 2012). Also see Davies, C 'Reciprocal-violence-mass-expulsions-between-Angola-and-the-DRC' (The Human Rights Brief, Centre for Humanitarian Law, 17 February 2011), available at http://hrbrief.org/2011/02/reciprocal-violence-mass-expulsions-between-angola-and-the-drc/ (accessed on 24 May 2012).

human rights'.[47] Hence, it should not be carried out without due regard to the procedural requirements outlined in article 7. This means that a state that wishes to expel or deport non-nationals should, before executing the expulsion order, accord those who are likely to be affected an opportunity to have their matter determined by a court of competent jurisdiction. In other words, the sovereign right of the state to expel non-nationals should not be regarded as absolute. In *Union Interafricaine des Droits de l'Homme and Others v Angola* the Commission concluded by cautioning that:

> While [it] does not wish to call into question, nor is it calling into question the right of any state to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide. It is, however, of the view that it *is unacceptable to deport individuals without allowing them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the Charter and international law.*[48] [Emphasis added].

The Commission has also had an opportunity to comment on the precarious situation of migrant workers in the region's poorly performing economies. Thus, while acknowledging the economic difficulties in most African countries, in *Union Interafricaine des Droits de l'Homme and Others v Angola*, the Commission cautioned that the radical measures against non-nationals which are normally adopted by governments in an attempt to protect their nationals and their economies 'should not be taken to the detriment of the enjoyment of human rights'.[49]

Generally, the Commission has demonstrated a proactive role in protecting migrants against human right violations. Regrettably, however, compliance by states is very poor. In fact, non-compliance has been identified as a general feature of the Africa human rights system.[50] The quasi-judicial nature of the Commission, the status of its decisions, its 'legitimacy deficit' and a lack of political will among African leaders have all adversely affected compliance

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[47] *Rencontre Africaine pour la Defense des Droits de l'Homme v Zambia* Communication 17/92 (reported in AHRLR as *Rencontre Africaine pour la De´fense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996)).

[48] *Union Interafricaine des Droits de I'Homme, Fédération Internationale des Ligues des Droits de I'Homme, Rencontre Africaine des Droits de l'Homme, Organisation Nationale des Droits de I'Homme au Sénégal and Association Malienne des Droits de I'Homme v Angola* Communication 159/96 (reported in the AHRLR as *Union Interafricaine des Droits de l'Homme and Others v Angola* (2000) AHRLR 18 (ACHPR 1997)) para 20.

[49] Para 16.

[50] Viljoen, F and Louw, L 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights 1994-2004' (2007) 101(1) *American Journal of International Law* 1–34 at 12.

with and enforcement of the Commission's decisions.[51] Second, the ACHPR does not provide for the alternative remedy of compensation.[52] Hence, victims of mass expulsions, which are normally accompanied by subsequent violations of rights, such as the right to property, the right to work, the right to education, or cases of sexual violence, as was recently reported in Angola, are left without remedy. As Mutua remarks, 'the Commission's findings are too remote if not virtually meaningless' for many of these victims.[53]

Given these shortcomings, the establishment of the African Court of Human Rights (currently, the African Court of Human and Peoples' Rights) presents an opportunity for some improvements. However, this institution also has its own limitations. For example, access to the court by individuals and non-governmental organizations (NGOs) is subject to specific declarations by states and to the discretion of the court.[54]

3.3.2 Whither the African regional labour migration regime?

Since the 1990s there has been a renewed interest in labour migration issues on the continent, particularly in relation to the economic impact of migration. The place of emigration on the region's development agenda has been specifically acknowledged, particularly with regard to skills transfer, trade and remittances. Currently, remittances, which appear to be the major driver behind this diversification, are said to be the second largest source of funding next to foreign direct investment (FDI).[55] It has been reported that, even amidst the global economic crisis, remittance flows to African countries and to other regions have largely remained flexible compared with other sources of foreign capital.[56] In 2010 African countries received a total of US$40 billion (excluding remittances from migrants within Africa) from its global migrants, with Nigeria, Sudan, Kenya, Senegal, South Africa, Uganda, Lesotho, Ethiopia,

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[51] Ibid.
[52] See articles 52 and 58 of the ACHPR.
[53] Mtua, W 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21(1) *Human Rights Quarterly* 342–363 at 355. Also see Udombana, NS 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2002) 28(3) *Brook Journal of International Law* 812–870 at 822.
[53] Articles 5(3) and 34(6) of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998. Also see article 30(f) of the Protocol on the Statute of the African Court of Justice and Human Rights, 2008. Also see Mtua op cit 350.
[54] Articles 5(3) and 34(6) of the Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998. Also see article 30(f) of the Protocol on the Statute of the African Court of Justice and Human Rights, 2008. Also see Mtua op cit 350.
[55] Radha et al 47.
[56] World Bank *Migration and Remittance World Book 2011* (World Bank, Washington DC, 2011) 17. Also see Radha et al op cit 48.

Mali, and Togo emerging as the top remittance recipients in sub-Saharan Africa.[57] In some African countries, remittances are said to exceed FDI, portfolio equity, and debt flows, and in some cases are equal in size to foreign aid.[58]

Theoretically, labour migration has been acknowledged as a means of achieving the continent's development goals and has thus become a development and policy issue. Accordingly, the AU has devised several measures to maximize the potential of migration. For example, the AU has extended its official recognition of Africans in the diaspora by encouraging them to participate fully in the region's development initiatives.[59] Symbolically, the AU has recognized the diaspora as 'an important and separate but related constituency outside the established regions of Africa.'[60] The participation of the diaspora in the region's programmes has increased as a result. At national level, more than ten AU countries have established specific ministries or institutions which serve as diaspora coordination units.[61] Moreover, Ghana and Ethiopia have enacted laws to grant permanent residence rights to their former citizens in the diaspora.[62] Tanzania is contemplating doing the same. So far, the government has established a Diaspora Department which is hosted by the Ministry of Foreign Affairs and International Cooperation. In Zanzibar, a diaspora unit has been established in the President's Office. The major role of these institutions is to engage with Tanzanians in the diaspora and to create an 'enabling environment that would allow them to better contribute to development as a way of giving back to their country.'[63]

[57] World Bank op cit 34.
[58] Radha et al op cit 48–51.
[59] See article 3(q) of the Protocol on Amendments to the Constitutive Act of the African Union, 2003.
[60] Adisa, J *The African Diaspora Initiative* Paper presented to the Annual Diaspora Consultations with Formations and Communities in North America, New York, 1–22 October 2010.
[61] This includes Rwanda, Nigeria, Mali, Sierra Leone, Ethiopia and Senegal. See Adepoju, A *The Future of Migration Policies in Africa* Background Papers for the World Migration Report (International Organization for Migration, Geneva, 2010) 9, available at http://publications.iom.int/bookstore/free/WMR2010_migration_policies_in_africa.pdf (accessed on 24 May 2012).
[62] Ghana passed a law in 2002 (the Dual Citizenship Act 91 of 2002) to allow Ghanaians who have lost Ghanaian citizenship by acquiring citizenship in foreign countries to reapply for Ghanaian citizenship. Also, the Immigration Act 73 of 2000 provides for a right of return and an indefinite stay for members of the broader African diaspora. In Ethiopia, the government, through Proclamation No 270/2002, issues special identity cards to foreign nationals of Ethiopian origin, which entitle the holder to certain rights and benefits not enjoyed by other foreigners, for example, visa-free entry, residence, employment, the right to own immovable property in Ethiopia, and the right to access public services. See Manby, B *Citizenship Law in Africa: A Comparative Study* (Open Society Foundation, New York, 2010) 76–77.
[63] See the address by Hon Bernard K. Membe (MP), Minister for Foreign Affairs and International Co-operation at the Tanzania Diaspora London 2 Conference, held at the Sattavis Patidar Centre, Wembley Park, London on 26 March 2010.

With the support of the World Bank, the European Commission, the African Development Bank and the International Organization for Migration, the AU is currently set to establish the African Institute for Remittance, whose major role will be to build the capacity of the AU and its members with regard to remittances so as to maximize the role of remittances in development and poverty reduction.[64]

The AU has also forged a formal partnership with the EU, one of the main recipients of African emigrants. This partnership is called the Africa-EU Migration, Mobility and Employment Partnership,[65] and indicates the importance of managing migration in a comprehensive, holistic and balanced manner, and in a spirit of shared responsibility and cooperation.[66] The protection of migrants' human rights features prominently in the Joint Africa-EU Declaration on Migration and its two subsequent plans of action.[67] The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children illustrates the commitment to protect the most marginalized sections of migrants, namely, women and children.[68]

In intra-regional relations, states have also increasingly recognized the role of labour migration in the regional integration process and in fostering the socio-economic development of individual states and the region as a whole. This has been registered in various documents and policy statements within the machinery of the OAU, and later the AU. Most remarkable, perhaps, is the Treaty establishing the African Economic Community (the AEC Treaty or the Abuja Treaty, as it is popularly known) 1991. Members of the AEC pledged through article 43 to 'adopt, individually, at bilateral or regional levels, the necessary measures, in order to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment by their nationals within

[64] More information on the institute is available at http://www.au.int/pages/remittance/about (accessed on 24 May 2012).
[65] The Africa-EU Migration, Mobility and Employment Partnership was officially launched during the 2nd Africa-EU Summit in December 2007 in Lisbon, Portugal.
[66] See para 25 of the Preamble to the Joint Africa-EU Declaration on Migration and Development, 2006.
[67] See the First Action Plan (2008–2010) for the Implementation of the Africa-EU Strategic Partnership, and the Second Action Plan (Joint Africa-EU Strategy Action Plan 2011-2013). Both documents are available at the website of the partnership at http://www.africa-eu (accessed on 24 May 2012).
[68] The Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children was adopted by the Ministerial Conference on Migration and Development, Tripoli, 22–23 November 2006. The text is available at http://www.africa-eu-partnership.org/sites/default/files/OUAGADOUGOU.pdf (accessed on 24 May 2012).

the Community.'[69] To concretize this, members pledged to conclude a Protocol on the Free Movement of Persons, Right of Residence and Right of Establishment.[70] Further pledges exist in the area of human resources development, planning and utilization. Members once again undertook to 'adopt employment policies that shall allow the free movement of persons within the Community by strengthening and establishing labour exchanges aimed at facilitating the employment of available skilled manpower of one Member State in other Member States where there are shortages of skilled manpower'.[71]

Regrettably, the protocol envisaged in the Abuja Treaty, which would serve as a regional labour migration framework, is yet to be adopted. Instead, several policy documents have been adopted. Of these, the AU Council of Ministers Decision[72] and the AU Executive Council Decision[73] deserve special attention. The former facilitated the adoption in 2006 of the AU Migration Policy Framework, while the latter facilitated the adoption of the AU Common Position on Migration.[74] The need for facilitating labour mobility and the corresponding need for the effective protection of migrants' human rights have been considerably highlighted in these two documents. For example, the AU Common Position on Migration notes that 'ensuring the effective protection of economic, social and cultural rights of migrants, including the right to development, is a fundamental component of comprehensive and balanced migration management systems.'[75]

More importantly, the AU Migration Policy Framework goes a step further by incorporating the core principles on labour migration, as stipulated in ILO Conventions No 97 and No 143 and the ICMW.[76] Specifically, the policy encourages AU members to incorporate the provisions of these instruments in their national legislation and 'to create transparent (open) and accountable labour recruitment and admissions systems based on clear legislative categories and harmonizing immigration policies with labour laws.'[77] Moreover, members are

[69] Article 43(1).
[70] Article 43(2).
[71] Article 71(2)(e).
[72] CM/Dec 614 (LXXIV) was adopted during the 74th Ordinary Session in Lusaka, Zambia in July 2001.
[73] EX.CL/Dec 264 (VIII) was adopted during the Executive Council's Meeting in Khartoum, Sudan in January 2006.
[74] The two documents were adopted by Resolutions EX.CL/276 (IX) and EX.CL/277 (IX), respectively, during the 9th Ordinary Session of the AU Executive Council held in Banjul, the Gambia on 25-29 June 2006.
[75] See the AU Common Position on Migration (EX.CL/276 (IX)) para 3.7.
[76] See the Migration Policy Framework for Africa (EX.CL/276 (IX)) 7–11.
[77] Ibid.

urged to take measures to promote equality between migrants and nationals in respect of access to employment, working conditions, remuneration, education, geographical mobility, and access to social security and social protection, and to facilitate the right of migrant workers to join trade unions and to form community organizations.[78]

The incorporation of the protection concerns of the most marginalized sections of migrants, such as women, children and the elderly, makes these documents more relevant and responsive to the African migration context. With respect to women, states are reminded that:

> Migrant women's 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 migrant trafficking is heavily implicated. It is therefore important to give particular attention to safeguarding the rights (labour, human rights, *inter alia*) of migrant women in the context of migration management.[79]

To mitigate the gendered impact of migration, states are encouraged to strengthen responses to the particular needs of migrant women, to integrate gender perspectives into national and regional migration management policies and strategies, to effectively counter migrant trafficking and smuggling, to ensure adequate protection for women and children who are victims of trafficking and sexual slavery, and to raise awareness about the gendered dimensions of migration.[80] These documents represent a remarkable policy reorientation to address migration and the challenges that still need to be addressed. States are encouraged to establish regular, transparent and comprehensive labour migration policies, legislation and structures at the national and regional levels so as to maximize the benefits of labour migration for states of origin and destination while also protecting the rights of migrant workers.[81]

While the keen interest demonstrated in addressing labour migration issues is commendable, much still needs to be done to achieve significant protection for migrant workers and

[78] Ibid.
[79] See para 3.8 of the African Common Position on Migration and Development (EX.CL/277 (IX)) and para 6.5 of the Migration Policy Framework for Arica (EX.CL/276 (IX)).
[80] See para 6.5 of the Migration Policy Framework for Africa.
[81] Paragraph 1 of the Policy Framework provides detailed guidelines for a legislative and institutional framework to facilitate labour migration. Paragraph 4 challenges states to reinforce national policies and legal frameworks by ratifying and incorporating key international human rights instruments, namely, ILO Convention No 97 and the ICMW, 1991. Also see the recommendations for action in para 5 of the African Common Position on Migration and Development.

members of their families. First, the Migration Policy Framework and the Common Position on Migration do not impose any legal obligations on AU members. They constitute a set of law known as 'soft law', which is not legally enforceable. Therefore, the protection framework discussed in the above paragraphs will remain rhetoric and merely aspirational until it is finally translated into a binding document. Although it may sound too optimistic to suggest that African countries will soon establish a binding instrument on intra-regional labour migration, it cannot be overemphasized that this issue is too important to be ignored or postponed for long.

Given the rapidly growing intra-regional labour migration, most African states are now involved in the migration discourse as sending, transit, or receiving countries, while some play more than one role. In most states, the restrictive regimes adopted soon after independence have been sustained or even intensified to safeguard the internal labour market against the intrusion of foreigners. In some countries these restrictions are complemented by 'xenophobia fanned by media and politicians hastily blaming migrants' for social and economic upheavals, as was recently the case in South Africa and Cote d'Ivoire.[82] Indeed, the adoption of a regional framework is necessary to regulate state practices and to protect migrant workers from the overbearing discretionary powers of many African states, which have so far remained ambivalent and unenthusiastic about modifying their restrictive labour migration laws.

3.4 Developments in the African regional economic integration communities (RECs)

Recently Africa has witnessed a proliferation of multilateral treaties establishing regional economic integration blocs. In sub-Saharan Africa, the most prominent ones are the Economic Community for West African States (ECOWAS), the Community of States of Central Africa (CAEC), the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC) and the East African Community (EAC). Most groupings follow 'the traditional concept based on geographical proximity and contiguity of countries and political cooperation.'[83]

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[82] Adepoju, A 'Leading Issues in International Migration in Sub-Saharan Africa' in Cross, C *Views on Migration in Sub-Saharan Africa: Proceedings of an African Migration Alliance* (HSRC Press, Cape Town, 2006) 25–47 at 39.

[83] United Nations Economic Commission for Africa (UNECA) *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* Research Policy Report (Addis Ababa, 2006) 1.

In each of these blocs the role of labour migration in achieving the envisaged economic integration between countries has been widely acknowledged. This is manifested through the founding instruments of these RECs, which usually include provisions on facilitation of intra-regional migration. In the EAC, for instance, article 104 contains an unequivocal pledge by member states to harmonize their labour policies, legislation and programmes so as to facilitate intra-regional migration and the exchange of skills.[84] Within ECOWAS, members have correspondingly vowed to eliminate obstacles to the free movement of persons and to ensure that their citizens have the right of entry, residence and establishment in other member states.[85] An analogous pledge is also registered in article 164 of the COMESA Treaty,[86] whereby members 'agree to adopt, individually, at bilateral or regional levels the necessary measures in order to achieve progressively the free movement of persons, labour and services and to ensure the enjoyment of the right of establishment and residence by their citizens within the Common Market.'

Different levels of implementation have been achieved. In some blocs distinctive legal frameworks to reinforce these pledges have been adopted. ECOWAS passed the Protocol on the Free Movement of Persons, Residence and Establishment in 1979,[87] followed by COMESA in 1998 (Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence). SADC adopted a Protocol on the Facilitation of Movement of Persons in 2005. In the EAC, labour mobility is extensively covered by the EAC Common Market Protocol, 2009 and its subsequent regulations.

Migrant workers' protection concerns feature quite well in some of these instruments**.** For instance, the ECOWAS Protocol on the Free Movement of Persons and the Right to

[84] See the Treaty for the Establishment of the East African Community, 1999.
[85] See articles 3(3)(d)(iii), 55 (1)(ii) and 59 of the Treaty Establishing the Economic Community of the West African States (Revised) 1991.
[86] Treaty Establishing the Common Market for Eastern and Southern Africa, 1992.
[87] ECOWAS has also passed a number of subsequent instruments in this area. These include Protocol A/P3/5/82 relating to the Definition of Community Citizenship; Supplementary Protocol A/SP1/7/85 on the Code of Conduct for the Implementation of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (1985); Supplementary Protocol A/SP1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (1986); Supplementary Protocol A/SP1/6/89 amending and complementing the provisions of article 7 of the Protocol on Free Movement, Right of Residence and Establishment (1989); and Supplementary Protocol A/SP2/5/90 on the implementation of the third phase (Right of Establishment) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment (1990). In 2006, ECOWAS adopted a Common Approach to Migration which, among other things, aims to enhance the implementation of the Protocol, to combat human trafficking, to promote migrants' human rights and to recognize the gendered dimensions of migration.

Residence and Establishment, 1979 incorporates a set of provisions relevant to migrant workers' rights, in addition to rights of entry, admission, residence and establishment, which were to be progressively realized within 15 years. In the EAC, the developments, although infant when compared to the ECOWAS developments, are far reaching.

3.5 The East African Community (EAC)

3.5.1 The EAC Treaty and the Common Market Protocol

The East African Community, of which Tanzania is a founding member, recognizes the role of labour migration in achieving the envisaged economic integration among countries of the sub-region. It is noteworthy to recall that, even before the official revival of the EAC in 1999, there was significant mobility of persons across the region. Some of these movements were remnants of the great mobility which had existed before and during the defunct East African Cooperation. Writing in the early 1960s, Nye observes that there was no restriction on the movement of labour in East Africa. He notes that 10 per cent of workers in Tanganyika during that time were from the neighbouring countries in the region.[88] These movements continued throughout the EAC. In 2005, it was observed that Tanzania was one of the major recipient countries of Kenyan emigrants, hosting about 13.3 per cent of all Kenyan emigrants, second only to the UK, which hosted 14.5 per cent of the same.[89] Unfortunately, because of there being little academic interest in this area, the actual level of labour integration during the defunct EAC and migratory patterns after its collapse are insufficiently documented.[90]

Given this background, it was clearly not accidental that members incorporated, in article 104 of the EAC Treaty, an unequivocal pledge to strengthen economic integration through the free movement of persons, and rights of residence and establishment across the region.

[88] Nye Jr, JS 'East African Economic Integration' (1963) 1(4) *Journal of Modern African Studies* 475–502 at 494.

[89] Black, R et al *Migration and Pro-Poor Policy in East Africa* Working Paper Series No C7, Sussex Centre for Migration Research (2007), available at www.migrationdrc.org/publications/working_papers/WP-C7.pdf (accessed on 24 May 2012).

[90] Mazrui recalls that there was substantive intra-regional migration in East Africa in the 1960s and 1970s. For instance, when Uganda adopted its policy on the 'Ugandanization' of the unskilled positions in the labour market in 1970, there were about 80,000 non-Ugandans in the labour market, most of whom were from within East Africa (about 20,000 of these were Luo Kenyans). See Mazrui, AA 'Casualities of an Underdeveloped Class Structure: The Expulsion of Luo Workers and Asian Bourgeoisie from Uganda' in Shack WA (ed) *Strangers in African Societies* (University of California Press, California, 1979) 261–278 at 262.

Members further pledged to adopt a specific protocol to operationalize their vision in this area.[91]

Members recently established a concrete framework firming up their commitment in article 104. The Protocol on the Establishment of the East Africa Common Market (Common Market Protocol) constitutes a comprehensive set of standards and regulations to assist members in maximizing the skills available in the region while at the same time protecting the rights of workers and members of their families. The Common Market Protocol was officially opened for signature in November 2009, and came into force on 1 July 2010 after being ratified by all member states.[92] Three of the eight substantive parts of the Common Market Protocol address issues pertinent to labour mobility, namely, the free movement of persons and labour (part D),[93] rights of establishment and residence (part E),[94] and freedom of services (part F).[95] For each of these parts, there is an accompanying set of regulations, which provide detailed operational guidelines for the respective provisions.[96]

3.5.2 Entry, stay and exit

While the commitment to enhance the free movement of persons, and workers in particular, is clearly articulated, it was certainly not the intention of member states to surrender their sovereign rights on matters of admission of non-citizens. The EAC Treaty and the Common Market Protocol and its accompanying Regulations do not purport to eliminate entirely the internationally recognized borders between member states, nor do they create an absolute right for EAC citizens to commute across frontiers of the member states. States in the EAC reserve the right to exclude nationals from partner states on grounds of 'national security, public security of public health.'[97]

[91] See article 104(2) of the Treaty for the Establishment of the East African Community, 1999 (as amended on 14 December 2006 and 20 August 2007).
[92] Burundi, which was the last member to ratify, deposited its ratification on 29 April 2010, paving the way for full implementation in 2011.
[93] See articles 7–12 of the Protocol on the Establishment of the East African Common Market, 2009.
[94] Articles 13–15.
[95] Articles 16–23.
[96] The Common Market Protocol is accompanied by four sets of regulations which are incorporated into the Protocol by way of Annexes: the East African Community Common Market (Free Movement of Persons) Regulations (Annex I); the East African Community Common Market (Free Movement of Workers) Regulations (Annex II); the East African Community Common Market (Right of Establishment) Regulations (Annex III); and the East African Community Common Market (Right of Residence) Regulations (Annex 1V).
[97] See article 7(5) of the Common Market Protocol.

Furthermore, there are certain minimum standards which an individual seeking to exercise his or her freedom of movement has to satisfy before he or she can be admitted into the respective country. This entails total compliance with conventional migration standards, such as the use of designated entry and exist points, the possession of valid standard travel documents, and the declaration of all information as required by the authorities.[98] Failure to observe any of these may, ultimately, lead to exclusion. The EAC passport and machine readable national identification cards[99] are legally recognized as travel documents for the purpose of entry in another member state. The envisaged use of national identity cards for admission purposes is commendable because it demonstrates an appreciation of the fact that not every person in the EAC holds a passport or is capable of obtaining one. It also presents the opportunity for an effective national identification system in the region by exerting pressure on countries such as Uganda and Tanzania, which initially did not have national identification systems in place, to adopt such systems.[100]

With regard to workers, the free movement of labour bestows on migrant workers seven core entitlements: (i) the right to apply for employment and to accept offers of employment in member states; (ii) occupational mobility within the host country's labour market; (iii) the right to enter into employment contracts; (iv) the right of residence in the host state; (v) organizational rights; (vi) social security rights; and (vii) the right to be accompanied by family members.[101] For self-employed migrants, this entails the freedom to take up and to pursue economic activity, the freedom to set up and manage an economic undertaking, freedom of residence, social security rights, and the freedom to be accompanied by family members.[102]

One must however be mindful of the fact that these entitlements are not absolute, and several restrictions apply. First, the freedom of movement of workers does not apply to employment

[98] See article 9 of the Protocol. Also see Annex I, regulation 5, Annex 2, regulation 5 and Annex III, regulation 4.
[99] Article 8 of the Protocol obliges members to establish a common standard national identification system through which nationals shall be issued with standard national identification documents.
[100] In Tanzania the idea of introducing national identity cards, which was first discussed in 1968 at an Interstate Intelligence Gathering involving participants from Tanzania, Kenya, Uganda and Zambia, was revived in 2007. In 2008 GN No 122 of 1 August 2008 established the National Identification Authority (NIDA). NIDA launched the registration and identification exercise on 26 November 2011. It is expected that national identification cards for the first group (civil servants) will be issued this year. In Uganda, the first national identification card was issued to President Yoweri Museveni on 12 May 2011, marking the official launch of the process.
[101] See article 10(2), (3) and (5) of the Common Market Protocol.
[102] Article 13 of the Common Market Protocol

in the public service (government ministries, departments and agencies) unless otherwise specifically permitted by the host state.[103] Second, as previously indicated, a migrant worker or self-employed person may legitimately be denied access to and full enjoyment of these rights on grounds of public policy, national security and public health.[104] Third, admission into the territory of another state does not automatically create the right to take up employment or to undertake any economic activity without acquiring further authorization. An obligation is imposed on non-national workers and self-employed persons from member states to seek and to obtain legal authorization in the form of work and residence permits.[105] The procedures for authorization are systematically detailed in the regulations.[106] Moreover, migrants are expected to strictly observe the conditions endorsed in their permit; the failure to do so may lead to their expulsion.[107] The acquisition of new authorization is mandatory if a migrant worker changes jobs, or if a self-employed person changes his or her economic activity.[108]

3.5.3 Non-discrimination and equality of treatment

In reinforcing the full realization of the rights which ensue within the common market, the law requires that a member state should not discriminate against the national of another state because of their nationality. Through the principle of non-discrimination and equality of treatment, which seems to be at the heart of the common market, members undertake to 'observe the principles of non discrimination of nationals of partner states on the ground of nationality.'[109] Secondly, they undertake to accord them treatment not less favourable than the treatment accorded to third parties.'[110] Accordingly, states (and their agents) should refrain from all acts which are likely to discriminate against EAC citizens. They should instead strive to achieve equality of treatment between their nationals and citizens of EAC

[103] Article 10(10). Public service is defined as service in government ministries, government departments and government agencies providing services to the public in a partner state.
[104] Article 10(11).
[105] The EAC has devised two kinds of permits, namely, temporary permits (referred to in the regulation as a 'special pass' or simply a 'pass') and long-term permits (work and residence permits). The former is a cost-free permit of 90 days or six months granted to workers whose contracts of employment in the host country do not exceed 90 days. It is also granted to long-term employees and self-employed persons pending the formalities for obtaining a long-term permit. The special pass, once issued, ordains its holder the right to remain and to work or to engage in an economic activity within the specified period. See Annex II, regulation 5(4) and regulation 6(1)–(3). Also see Annex III, regulation 5(3).
[106] See Annex II regulation 6, Annex III regulation 6 and Annex IV regulation 6. A discussion of these regulations is not possible due to space constraints.
[107] See Annex II, regulation 8(1), and Annex IV, regulation 11(b).
[108] See Annex II, regulation 6(11), (12) and (13).
[109] See article 3(2)(a) of the Common Market Protocol.
[110] Article 3(2)(b).

member states in all matters related to entry, free movement within the territory, stay and exist from the territory.[111] For migrant workers, the right to equality of treatment extends to all matters related to access to employment, terms and conditions of work, occupational health and safety, contributions to social security scheme, access to vocational training, organizational rights, access to dispute resolution and any other right accruing to a worker under the national labour regulatory framework.[112]

3.5.4 Protection against arbitrary removal

The protection of non-citizens against removal has become central to international relations, because it is a potential 'threat to states' co-existence' and may be 'a prelude to war'.[113] As already noted in chapter 2, states as sovereign entities are bestowed with a sovereign right to determine who enters and remains in their territories. They can legitimately deny access to their territories or remove those who have already entered.[114] This power is 'neither absolute nor unqualified'.[115] States desirous of exercising this right are under an obligation not to expose the subjects of removal to violations of their human rights.[116] In fact, it has been conclusively observed that:

> expelling states are formally obliged to balance their own interests against those of the individual liable to be affected by taking into account the acquired rights, and legitimate expectations and aiming to achieve a reasonable relationship of proportionality between the end (protection of recognized interests) and the means (potential severance of the individual from home and livelihood).[117]

As already described in chapter 2 and in the preceding sections of this chapter, the protection of non-citizens against arbitrary removal and expulsion, as one of the cardinal norms of international law, is widely covered by international and regional instruments. Surprisingly, the EAC, which experienced several incidents of arbitrary expulsions in the 1970s and 1980s following the collapse of its predecessor, has not taken this issue seriously. The grounds for

[111] Article 7.
[112] See Annex II, regulation 13.
[113] Vandova, V 'Protection of Non-Citizens against Removal under International Human Rights Law' in Edwards, A and Ferstman, C (eds) *Human Security and Non Citizens: Law, Policy and International Affairs* (Cambridge University Press, Cambridge, 2010) 495–531 at 497.
[114] See chapter 2, section 3.1 and notes 1 and 2 of this chapter.
[115] Vandova op cit.
[116] Ibid.
[117] Henckaerts, J *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers, The Hague, 1995) 24.

the removal of non-citizens in the new EAC framework are excessively wide, yet there are no adequate safeguards for migrants, particularly when the removal is based on abstract grounds such as public policy, public security and public health.[118] This threatens the future of labour migration in the region because, as the European Parliament and the Council of the European Union rightly observe in a comparative context:

> Expulsion of Union citizens and their family members on grounds of public policy or public security is a measure that can seriously harm persons who, having availed themselves of the rights and freedoms conferred on them by the Treaty, have become genuinely integrated into the host Member State. The scope for such measures should therefore be limited in accordance with the principle of proportionality to take account of the degree of integration of the persons concerned, the length of their residence in the host Member State, their age, state of health, family and economic situation and the links with their country of origin.[119]

This observation should be replicated and applied in the EAC, particularly now when the regime is still in its infancy.

Second, the requirement of due process of law before the removal takes place, which has been endorsed as an important norm in international law, is not included in the EAC framework. The only legally guaranteed remedy for workers is to be availed *reasonable* time to allow them to leave the country before the removal takes place.[120] The relevant regulation reads:

> Where the competent authority expels a worker or a self employed person, the competent authority shall give the worker or self employed person and his or her spouse, child or dependant, *reasonable* time to leave the territory of the host Partner State. [Emphasis added].[121]

The use of an abstract term ('reasonable') in regulation 10(1) in Annex II and in the corresponding regulation in Annex IV implies unlimited discretion on the part of the

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[118] Expulsion may also follow a breach of the conditions upon which the work permit or residence permit was granted, failure to regularize migration status, or failure to leave the territory after the cancellation of a work or residence permit. See article 7(5) of the Common Market Protocol. Also see Annex IV, regulation 10(a).

[119] See para 23 of the Preamble and article 28(1) of Directive 2004/58/EC of the European Parliament and of the Council of 29 April 2004 on the right of Union citizens and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC.

[120] Annex IV, regulation 11(2) and Annex II, regulation 10(1).

[121] Annex IV, regulation 11(2),

expelling state in determining the time. It is unclear whether the *reasonable* time in these two provisions has to be reasonable enough, as is the case in ECOWAS, to allow the expellee 'to collect any salaries or other allowances due to him from his employer, settle any contractual commitments and, when required ... for reasons of personal security ... to obtain authorization to go to a country other than his country of origin.'[122] Does *reasonable* time mean that the affected migrant should have enough time to appeal or seek any judicial recourse? A plain reading of the text does not seem to suggest this. In any case, the ability of migrants to approach the competent courts to determine the validity or otherwise of their removal is seriously limited.

Strange still, protection against removal in the EAC proceeds from an assumption that the removal of non-citizens (expulsion and deportation) shall only occur in individual cases, as opposed to collective or mass expulsion. This is disingenuous as the social, political and economic realities in the region suggest otherwise. Regional integration in the EAC and the free movement of labour in particular is increasingly dependent on the political climate, which is already fragile. High unemployment rates in member states and the negative views among political figures and the public on the net gains of labour migration, are all likely to influence the future of labour market integration.

The frameworks in the ECOWAS and SADC instruments would have been quite useful in this area had they been sufficiently consulted. The regulatory frameworks in these two regional economic communities incorporate distinctive safeguards against mass expulsion, wider in scope than the corresponding provisions in the ACHPR. For instance, the relevant provision in ECOWAS asserts that 'migrant workers and members of their families may not be affected by collective or *en masse* expulsion orders.'[123] Despite the low compliance demonstrated by member states, migrants in ECOWAS are in fact better protected, when compared to their counterparts in the EAC. With the extension of the jurisdiction of the ECOWAS Court of Justice in 2005, to allow it to entertain complaints from individuals, and to adjudicate on matters of violations of human rights by member states, migrant workers can

[122] Article 14(5) of the Supplementary Protocol A/Sp/.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.
[123] See article 13 of the Supplementary Protocol A/Sp/.1/7/86 on the Second Phase (Right of Residence) of the Protocol on Free Movement of Persons, the Right of Residence and Establishment.

now legitimately challenge their expulsion before this court.[124] The corresponding provision in the SADC framework, which is much more elaborate, is discussed in section 3.6 of this chapter.

3.5.5 Protection of social security rights

Studies on national social security in East Africa reveal serious limitations in the current social security regimes with regard to structure, coverage and performance.[125] A problem which is specifically relevant to migrants is the absence of the portability and exportability of social security rights and benefits across different schemes at national level, and also across the member states.[126] This has a direct impact on the intra-regional mobility of workers, because moving to another country will imply a loss of benefits and rights acquired.[127] These deficiencies prompted members' interest in harmonising their national social security regimes so as to secure protection for workers who exercise their freedom of mobility.[128] Regrettably, the plan to adopt a set of regulations in this area parallel with the Common Market Protocol in 2009 did not materialize, and was left to be finalized by the Council of Ministers.[129] With the support of the ILO Addis Ababa Office-Migrant Social Security Project (MIGSEC) the Council has organized several consultation meetings with social security experts. The draft Annex/Directive was finalized and presented for consideration by the meeting of the Multisectoral Council on the EAC Common Market in February 2011. Sadly, members could not reach consensus on certain operational principles, and the draft was returned to the Secretariat for further study and consultations.

The 22nd Council of Ministers meeting held in April 2011 directed the Secretariat to hire a consultant (by 30 June 2011) to consolidate national actuarial studies on social security institutions. The report of the consultant is expected to address, among other things, 'the financial and economic implications on the co-ordination of social security benefits, taking

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[124] See Supplementary Protocol A/SP.1/01/05 amending the Preamble and articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and article 4(1) of the said Protocol.

[125] Dau, RK 'Trends in Social Security in East Africa: Tanzania, Kenya and Uganda' (2003) 56(3–4) *International Social Security Review* 25–27. Also see Barya, J *Social Security and Social Protection in the East African Community* (Fountain Publishers, Kampala, 2011) and Mchomvu, AST et al 'Social Security Systems in Tanzania' (2002) 17(2) *Journal of Social Development in Africa* 11–27.

[126] Ackson, T *Social Security Law and Policy Reform in Tanzania with Reflections on the South African Experience* (unpublished PhD thesis, University of Cape Town, 2007) 199 and 211.

[127] Sabates-Wheeler, R and Koettl, J 'Social Protection for Migrants: The Challenges of Delivery in the Context of Changing Migration Flows' (2010) 63(3-4) *International Social Security Review* 115–144 at 118.

[128] See article 12(2) of the Common Market Protocol.

[129] Article 10(4).

into account the current systems, laws and policies in the partner states.'[130] The roadmap to the actuarial study and its validation process, which was adopted at the Technical Meeting of Social Security Experts in June 2011, indicates that the final report was to be ready in December 2011, and would be presented to the Council for consideration in April 2012.[131] It is therefore not too optimistic to believe that the EAC will soon have a social protection policy that will inform practice in member states.

The ongoing process stands to benefit from international standards and comparative best practices at regional and national level. Indeed, much can be learnt from the EU. The EU has an extensive regime which extends social security entitlements to EU nationals and, currently, to nationals of countries outside the EU (the third-countries) who have resided in the EU for more than five years.[132] To overcome the prevailing socio-economic barriers, the forthcoming instrument should go beyond extending coverage to non-nationals. It must envision social security as a human right, worth of being promoted and protected by member states. It should similarly be flexible and reflective of the social and economic realities in the region. For example, it should strive to include workers in the informal sector, who are currently excluded from coverage. It must also strive to include the most marginalized groups, such as irregular migrants, female migrants and children.

3.5.6 Mutual recognition of academic and professional academic qualifications

The mutual recognition of academic qualifications is extremely important in attaining a successfully integrated labour market. Even in the EU, where a high level of labour market integration has been achieved, the recognition of an individual's qualifications and competencies has been, and remains, a major obstacle to total intra-EU mobility.[133] In the

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[130] See the Report of the Technical Meeting of Social Security Experts to discuss the way forward on the co-ordination of social security benefits within the EAC Common Market/Develop terms of reference for the consolidation of a regional actuarial study (Arusha, Tanzania, 15–17 June 2011) 3.

[131] Ibid 24–25.

[132] Social security rights for EU citizens are regulated by Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, while social security benefits for non-EU citizens fall under EU Directive 109/2003. See Holzmann, R et al *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* Social Protection Discussion Papers No 0519 (World Bank, Washington, DC, 2005) 11, available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0519.pdf (accessed on 24 May 2012).

[133] Peixoto, J 'Migration and Policies in the European Union: Highly Skilled Mobility, Free Movement of Labour and Recognition of Diplomas' (2001) 39(1) *International Migration* 33–61 at 35–36. Also see Shah, S and Long, M *Global Labour Mobility and Mutual Recognition of Skills and Qualifications: European Union*

EAC, this issue is equally sensitive. The national qualification systems, education and training of the EAC members are different, and in some cases are regularly subjected to changes. Differences also exist with regard to the medium of instruction.[134] Therefore, there has been an undertaking to achieve mutual recognition of academic and professional qualifications. In a broader context, members envisage the harmonization of curricula, examinations and accreditation of educational and training institutions, which would lead to the progressive elimination of skills barriers.[135]

Regulations or directives in this area are yet to be finalized. However, there are two developments worth mentioning. The first is the Inter-University Council for East Africa (IUCEA),[136] whose mandate includes 'maintain[ing] high and comparable academic standards in higher education regionally and internationally, with special emphasis on the promotion of quality assurance (QA), quality management, and maintenance of comparable international academic standards in the East African universities.'[137] Ongoing sectoral-based mutual recognition arrangements constitute the second development. For instance, the Institute of Accountants in the EAC recently signed a mutual recognition agreement that will allow certified public accountants to work in any of the five partner states without being subjected to further examinations.[138] There is also an ongoing process in the legal fraternity to allow cross-border legal practice.

Harmonization of academic and professional academic qualifications is an area that deserves serious and timely consideration because, even at national level, issues of academic and profession qualifications remain contentious. At present, the education sector of the EAC

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and Australia/New Zealand Perspectives Working Paper No. 56 (ACER Centre for the Economics of Education and Training, Monash University, 2004) 8, available at http://www.education.monash.edu.au/centres/ceet/docs/workingpapers/WP56oct04shah.pdf (accessed on 24 May 2011).

[134] In Uganda and Kenya, English is the exclusive medium of instruction in schools. In Tanzania, Kiswahili is the medium of instruction at elementary school level, while English is used in secondary and tertiary institutions. French still dominates as the medium of instruction in Burundi. Rwanda recently passed a decision to introduce English as the medium of instruction in all schools.

[135] See article 11 of the Common Market Protocol.

[136] The IUCEA, whose establishment is traced from the pre-independence era, has been incorporated into the EAC structure as one of the six institutions of the EAC. More information on the IUCEA is provided on its website at http://www.iucea.org/ (accessed on 24 May 2012).

[137] See http://www.iucea.org/index.php?option=com_content&view=article&id=106&Itemid=66 (accessed on 24 May 2012)

[138] See *East African Business Week* 19 September 2011. Also reported by David Ssempijja A Nantambi 'East African Accountants to Harmonise Qualifications' *The New Vision* (Ugandan daily newspaper), 26 September 2011, available at http://allafrica.com/stories/201109180060.html (accessed on 24 May 2012).

member states is trying to adjust to increased student numbers and the proliferation of learning institutions, each offering different kinds of diplomas and certificates. These developments, triggered by excessive demands for higher education and the commodification of education, if not checked, are likely to compromise the quality of education in the region.[139] The absence of comprehensive national accreditation and quality assurance systems to respond to these changes has created serious problems in the education sector.

3.5.7 Rights of family members

The EAC acknowledges the importance of family unity by extending the right of freedom of movement, residence and establishment to family members.[140] A worker who intends to move to another member state for specific employment or to be self-employed has the right to bring his or her spouse, child/ren or dependant/s.[141] After being admitted to the host country, the spouse or the dependant, as the case may be, can proceed to take up employment if he or she meets the qualifications and upon obtaining the prerequisite authorization.[142] The conditions applicable to EAC workers in respect of the acquisition of employment permits, access to employment and working conditions apply equally to spouses and dependants, except where the respective family member is not a citizen of the partner state, in which case, the general laws of the host state shall apply.[143]

Although the EAC labour migration regime purports to uphold the protection of family unity, strict implementation of provisions on family unity may elicit different results. As it will be discussed in section 3.7 of this chapter, the EAC regime is biased towards skilled migrants. Therefore, the requirement that conditions applicable to EAC workers in respect of the acquisition of work permits and access to employment should apply equally to family members is more likely to prejudice the medium- and low-skilled family members. Without the prerequisite skills they will not be able to access the labour market in their host countries.

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[139] See http://www.iucea.org/index.php?option=com_content&view=article&id=106&Itemid=66 (accessed on 3 March 2012).
[140] See article 10(5) of the Common Market Protocol, Annex II, regulation 4 and Annex III, regulation 4(2).
[141] The term 'spouse' is defined in article 1 as 'a husband or a wife of a worker or a self employed person, in a legally recognized marriage in accordance with the national laws of a Partner State, who is a citizen'. A 'dependant' is defined as 'a son or daughter of a worker or a self employed person who has attained the age of eighteen years, the mother, the father, a sister or a brother of a worker or a self employed person who is wholly dependent on the worker or self employed person, who is a citizen'. See article 10 of the Common Market Protocol. Also see Annex IV, regulation 7(2) and regulation 8(1).
[142] See article 10(5)(b) of the Common Market Protocol, and Annex II, regulation 9(1).
[143] Annex II, regulation 9(2).

Worse still, the EAC regime divides family members into two categories, namely, family members who are citizens of the EAC member states and non-EAC family members. Those in the latter group have fewer entitlements than their counterparts. According to regulation 9 of Annex II, a family member in the latter category will not be able to enjoy favourable treatment with regard to access to employment. In other words, where a family member in this group applies for employment, he or she will be treated in the same way as applicants from countries other than the EAC member states (third countries), meaning that the laws applicable to migrants from third countries shall apply. Regardless of its justification, this approach directly discriminates against EAC workers who are married to migrants from third countries. With this distinction in place, workers in this group will have no incentive to take up employment opportunities in other EAC member states because of the disadvantages that their spouses or family members may be subjected to due to their nationality.

Moreover, the Protocol and its Annexes are concerned only with issues related to entry, exit and access to employment. They do not address issues which are crucial in facilitating the integration of family members in their host state. For instance, both are silent on non-employment-related entitlements, such as access to public services. This creates the impression that admission to the territory automatically confers on dependants unimpeded access to public schools, health facilities and other social services, which may not be the case. For example, at present, students from EAC countries who are studying in public universities in Tanzania are required to pay international fees.[144] To avoid any uncertainties, the Protocol and its Annexes ought to clearly list, as does the ICMW, the social entitlements to which family members are entitled after admission.

3.5.8 Gradualism and its implication on free movement of workers and full realization of rights

EAC members have adopted a progressive approach towards implementing the provisions on the free movement of labour. Through the schedule on the free movement of workers which is attached to Annex II members have set their priorities, depending on the actual needs in

[144] At the University of Dar es Salaam this ranges from US$2,100 to US$3,500 per academic year for undergraduate courses. Tanzanian students pay between 1,000,000 and 1,500,000 Tanzanian shillings, the equivalent of US$620 and US$930 respectively. See the undergraduate fees structure at http://www.udsm.ac.tz/undergraduate/fees.php (accessed on 24 May 2012).

their respective labour markets.[145] In Tanzania, for example, implementation was to start with the education sector and other strategic areas such as engineering (civil engineering, mining engineering and geomorphology) and the health sector (nurses and midwives).[146] Nonetheless, the implementation dates given by states in this schedule raise a fundamental question with regard to political will. Implementation dates are provided for only a very few categories of workers, creating the impression that the members do not intend to achieve total free movement of workers in the near future. Even the schedule on the liberalization of services, which seems to be relatively liberal, makes several cross-references to the schedule on the free movement of workers.[147] In addition, although the Protocol became operational in July 2010, there have not been substantive movements of people. Apart from Rwanda, which pursues a liberal labour migration policy, the countries have continued to cling to their old restrictive policies. Against this background, it is not too pessimistic to suggest that full integration may take longer than expected.

While such a gradual approach may assist in preparing the national labour markets to adjust to full integration, it may also create room for differential treatment at sectoral level. For example, while teachers from Kenya and Uganda are free to access the market in Tanzania and to enjoy the rights arising from the Protocol, teachers from Tanzania have limited prospects for accessing the Kenyan and Ugandan labour markets, because neither of these countries has provided an implementation date for this category of workers. If this state of affairs continues, it is likely to destabilize sectoral relations, and may also seriously hamper the full realization of rights in the respective sectors.

However, this gradualism notwithstanding, the treaty obligations of members to accord meaningful protection to EAC migrant workers remain intact. States like Tanzania, whose labour migration regime is far behind the developments in the EAC, will need to review their respective policies and legislation to align them with the provisions of the Protocol. Alternatively, they will have to adopt a separate law to incorporate the Protocol into the

[145] At the adoption of the Protocol, members adopted two comprehensive schedules for implementation, one for the free movement of workers (contained in Annex II) and another one for the liberalization of services (the East Africa Common Market Schedule of Commitments on Progressive Liberalization of Services, Annex V), which is also relevant to intra-regional labour mobility.

[146] A schedule for the implementation of the provisions on the movement of workers is provided in regulation 15 of Annex II.

[147] See the Schedule of Commitments on the Progressive Liberalization of Services, Annex V, to the East African Community Common Market Protocol.

domestic legal framework. Either way, the Protocol presents an excellent opportunity for member states to align their laws with the international norms on labour migration. Rwanda has already incorporated the EAC framework into her domestic law.[148]

3.6 The Southern African Development Community (SADC)

Intra- regional labour migration in southern Africa has been more widely studied than labour migration in the EAC.[149] There is abundant empirical evidence on regulated and unregulated intra-regional mobility, 'which have linked the regional economies together.'[150] Unfortunately, the labour migration regime in SADC is far less developed than those of the EAC and ECOWAS. In fact, as Kalula, Okoye and Fenwick remark, SADC 'has no clear migration policy'.[151] This view is shared by Kornegay, who observes that, although SADC has achieved far-reaching progress in terms of regional development, peace and security, issues related to intra-regional mobility and regional citizenship have not been addressed.[152] The free movement of persons across the borders, as an important economic driver, continues to be balanced against the political and economic interests of individual states'[153] which are competing and sometimes conflicting.[154]

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[148] See Law No 04/2011 of 21 March 2011 on Immigration and Emigration in Rwanda. Also see Ministerial Order No 02/01 of 31 May 2011 Establishing Regulations and Procedures Implementing Immigration and Emigration Law, and Ministerial Order No 03/01 of 31 May 2011 Determining the Fees Charged on Travel Documents, Residence Permits, Visas and Other Services Delivered by the Directorate General of Immigration and Emigration.

[149] Intra-regional migration in Southern Africa has been widely studied, with the emphasis on South Africa as a hub for migrants from other countries. See, for example, Kok, P et al (eds) *Migration in South and Southern Africa* (HSRC Press, Cape Town, 2006); McDonald, DA *On Borders: Perspectives on International Migration in southern Afric*a (Sothern African Migration Project, Ontario, 2000); Whitman, J (ed) *Migrants, Citizens and the State in Southern Africa* (Macmillan Press, London, 2000); McDonald DA et al 'Guess Who's Coming to Dinner: Migration from Lesotho, Mozambique and Zimbabwe to South Africa' (2000) 34(3) *International Migration Review* 813–841; Oucho, JO and Crush, J 'Contra Free Movement: South Africa and the SADC Migration Protocols' (2001) 48(3) *Africa Today* 139–158; Bloch, A 'Emigration from Zimbabwe: Migrant Perspectives' (2006) 40(1) *Social Policy and Administration* 67–87; Lucas, REB 'Emigration to South Africa's Mines' (1987) 77(3) *American Economic Review* 313–30; and Aregbeshola, RA 'The Impact of Intra-Continental Migration in Africa: Interrogating the Economic Dynamics of African Migrants in South Africa' (2010) 40(1) *African Insight* 62–77.

[150] Matlosa, K 'Human Movements, Common Regional Citizenship and Identity in Southern Africa: Prospects for Deeper Integration between Lesotho and South Africa' (2006) 19(3) *Policy: Issues and Actors* 2.

[151] See Kalula, E et al *Labour Law Reform that Supports Decent Work: The Case of Southern Africa* Issue Paper No 28 (ILO Sub-Regional Office for Southern Africa, Harare, 2008) 1. The Treaty establishing SADC only encourages members to 'develop policies aimed at the 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'. See article 5(2).

[152] Kornegay, F *Pan-African Citizenship and Identity Formation in Southern Africa: An Overview of Problems, Prospects and Possibilities* (Centre for Policy Studies, Johannesburg, 2006) 5, available at http://www.cps.org.za/cps%20pdf/RR107.pdf (accessed on 24 May 2012).

[153] Williams, V **'**In Pursuit of Regional Citizenship and Identity: **T**he Free Movement of Persons in the Southern African Development Community' (2006) 19(2) *Policy: Issues and Actors* **3.**

[154] Oucho and Crush op cit 140.

On account of these differences, the formulation of an instrument on intra-regional migration took longer than expected.[155] The Protocol on the Facilitation of the Movement of Persons which was adopted after ten years of negotiation is less promising. It is severely limited in terms of scope and standards of protection, when compared to its sister instruments in the EAC, ECOWAS and COMESA. The Protocol is a 'diluted version' of the initial draft, which was unceremoniously dropped following pressure exerted by South Africa, Botswana and Namibia.[156] The initial document, whose approach towards the achievement of free movement of persons was modelled on the ECOWAS model, envisioned the unrestricted flow of labour across the region within ten years of progressive implementation.[157] However, the current Protocol, as the name seems to suggest, is confined to facilitation rather than securing unhampered freedom of movement. This is demonstrated by article 2, which facilitates 90 days' visa-free entry, residence and self-establishment in member states.[158] Placing the administration of this Protocol under the SADC organ responsible for defence and security has also been interpreted as an indication of the region's security-centred approach to migration.[159]

To achieve the Protocol's facilitation role, article 14 lists a set of conditions to guide states on the implementation of the 90 days' visa-free entry. The Protocol provides that, to qualify for a visa-free entry, the visit should not exceed 90 days per year, subject to extension, and the visitor must possess a valid travel document. In addition, the visitor must prove that he or she has the means to support himself or herself for the duration of the visit, and the entry should be sought only at an official port of entry. The provisions on residence and self-establishment are more limited. Apart from describing the meaning of each of these terms, they restate the sovereign right of every state to determine the grant of residence permits or permission for

[155] The process to adopt an instrument to eliminate obstacles to the free movement of labour on human mobility was initiated in 1992. In 1995, a Draft Protocol on the Free Movement of Persons in the Southern African Development Community was presented for Consideration. The draft was later replaced by a South African sponsored Draft Protocol on the Facilitation of Movement of Persons, which was finally adopted in 2005 as a regional framework. Oucho and Crush op cit 143.

[156] These three countries represent the giant economies and are believed to be the major hub for migrants in the sub-region. In 2008, South Africa had approximately 1,106,000 immigrants; Namibia was home to 143,000 while Botwana had a total of 80,000 immigrants. As of 2010, South Africa had 1,863,000 immigrants, while Namibia and Botswana had approximately 139,000 and 115,000 immigrants respectively. See IOM *World Migration Report 2008: Managing Migration in an Interconnected Word* (IOM, Geneva 2008) 114. Also see IOM *World Migration Report 2010: The Future of Migration; Building Capacities for Change* (IOM, Geneva, 2010) 138.

[157] Oucho and Crush op cit 152–153.

[158] See article 3 of the SADC Protocol on the Facilitation of Movement of Persons. Also see articles 14–19.

[159] Matlosa op cit 16.

establishment, as the case may be. Hence, persons wishing to exercise any of these rights should not expect preferential treatment. Instead, they need to comply with the legal and procedural requirements of their prospective host country as do migrants from countries outside SADC.

These deficiencies notwithstanding, the Protocol contains a comprehensive safeguard against the expulsion of migrants. The relevant provisions incorporate the cardinal principles applicable to the expulsion of non-citizens worldwide.[160] Article 23 contains a general prohibition against the expulsion of a citizen of a state party except where there are valid reasons for expulsion. The valid reasons include national security, public order or public health considerations, the validity or otherwise of residence permits, and failure to abide by the conditions upon which a permit was granted. Article 24 obligates members to refrain from the indiscriminate expulsion of collectives or groups.

With regard to procedural guarantees, the Protocol requires that an expulsion order should be communicated to the diplomatic or consular authorities of the state party of which the affected person is a citizen before it is executed.[161] A positive obligation is imposed on the host state to afford the migrant an opportunity to consult with his or her respective diplomatic or consular authorities.'[162] There is no reference to the expellee's migration status, hence the protection can justifiably be extended to irregular migrants. Furthermore, in article 25, the cardinal procedural guarantees, as confirmed by international statutes and judicial pronouncements, are listed. Accordingly, nationals of a SADC member state should not be expelled from another SADC unless they were notified of such expulsion. Similarly, they should be accorded recourse to the appropriate judicial or quasi-judicial bodies. In any case, if expulsion is to take place, the expellee should be allowed a reasonable time to attend to his or her personal affairs and to enable him or her to 'settle their personal affairs including the management and disposal of their business or professional practices.'[163] Finally, article 25(e) of the Protocol notes that 'the expulsion of any person may not affect the residence or establishment permit of any independent member of that person's family'.

[160] See articles 20 to 25 of the SADC Protocol on the Facilitation of the Movement of Persons.
[161] Article 23(2).
[162] Article 23(2).
[163] Article 26(d).

Another promising SADC development is social protection. In 2003, before the conclusion of the Protocol on the Facilitation of Movement, SADC members adopted a Charter on the Fundamental Social Rights (Social Charter).[164] This instrument is relevant to migrant workers in three ways. First, it is committed to the universality and indivisibility of human rights as enshrined in international and regional human rights instruments.[165] Second, its cross-references to the ILO Conventions are directly applicable to migrant workers,[166] and, finally, most of its provisions adopt a holistic approach. For example, article 10 of the Charter provides that every 'SADC Member State shall create an enabling environment such that *every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.*' [Emphasis added].

The Social Charter has been complemented by the SADC Code on Social Security, 2007,[167] which provides guidelines to assist members in implementing their social security obligations arising from the Social Charter. The SADC Code on Social Security incorporates the social security concerns of migrants and foreign workers alongside the concerns of other marginalized groups of society, such as refugees, children, women, and persons with disabilities. The Code urges members to outlaw the inequitable treatment of migrants who are lawfully employed in their territories and outlines six principles which should be incorporated in national and in bilateral and multilateral arrangements to facilitate the full realization of social security rights and benefits by migrants.[168] With respect to irregular migrants, the Code provides that they *'should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country*.'[169] The latter provision is, however, most likely to be met by resistance from states, particularly because of its financial implications and the prevailing hostility towards irregular migrants.

It remains to be seen whether or not the provisions of the SADC Charter and the Social Security Code will be implemented, given the fact that both are policy documents providing

[164] Charter on Fundamental Social Rights in the South African Development Community, 2003.
[165] See article 3 of the Charter on the Fundamental Social Rights, 2003.
[166] Article 4.
[167] Code on Social Security in the South African Development Community, 2007.
[168] Paragraph 17. The principles relate to access by migrant workers to the social security schemes of the host country; equality of treatment between migrant workers and national workers; aggregation of insurance periods; maintenance of acquired rights and benefits; exportability of benefits; identification of the applicable law; and extension of social security coverage to self-employed migrant workers.
[169] Paragraph 17(3). Emphasis added.

guidelines, without imposing any legal obligations on the states. Nevertheless, these two documents will assist the sub-region to 'create a regime ..... which ensures minimum levels of social protection on the basis of equality, regardless of, amongst others, citizenship.'[170] The judiciary in South Africa has already set a precedent which may serve as a starting point for extending social protection for migrants in SADC, albeit only for those of regular status and with permanent residence status. In *Khosa and Another v Minister for Social Development and Others; Mahlaule and Others v Minister for Social Development and Others*[171] the Constitutional Court held that social protection should be extended to migrants with permanent residence status.

Alongside the multilateral arrangements described above, there also exist bilateral labour migration treaties, mainly between South Africa and other members of SADC, namely, Botswana, Lesotho, Mozambique, Swaziland, Zimbabwe and Malawi. Most of these were concluded in the 1960s and 1970s.[172] With the developments currently taking place, some of these have become defunct. As a result, new agreements to amend or to replace them have been adopted. These include agreements between South Africa and Mozambique (2006); Zambia and Malawi (2003); South Africa and Zambia (2002); and South Africa and Zimbabwe.[173] These treaties cover a range of issues, including recruitment procedures, employment contracts, remittances and deferred pay, taxation, and unemployment insurance.[174] Parallel to these are agreements on the facilitation of movement of persons, an example being the agreement between South Africa and Lesotho, and the reciprocal visa waiver between South Africa and Mozambique, between Swaziland and Mozambique, and

[170] Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908 (World Bank, Washington, DC, 2009) 81, available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf (accessed on 24 May 2012).
[171] *Khosa and Another v Minister for Social Development and Others; Mahlaule and Others v Minister for Social Development and Others* 2004 (6) BCLR 569 (CC).
[172] Crush, J *Covert Operations: Clandestine Migration Temporary Work and Immigration Policy in South Africa* Migration Policy Series No 1 (SAMP, 1997) 10–11.
[173] These treaties have been discussed in detail in Olivier op cit at 70–74. Also see Crush ibid 10–11; Crush, J and Williams, V *Labour Migration Trends and Policies in Southern Africa* (SAMP Policy Brief No 23, 2010) 54–58; and Government of the Republic of South Africa 'Labour Migration in South Africa, Towards a Fairer Deal for Migrants in the South African Economy' (2007) *Labour Market Survey* 27–29.
[174] Ibid.

between Angola and Namibia.[175] South Africa has also unilaterally waived visa requirements for Zimbabwean migrants (2009) and Tanzanians (2010).[176]

It has been observed that, because labour mobility is unlikely to be achieved in the near future, these bilateral arrangements may save as important protection tools for migrant workers if they are standardized to incorporate the protection needs of this group.[177] The potential of bilateral treaties as effective protection tools also lies in their sectoral specificity and comparatively simple implementation.[178] Nevertheless, a multiplicity of bilateral treaties may lead to the fragmentation of labour migration management,[179] which may negatively affect the protection of migrant workers.

3.7 The future prospects of migrant workers' protection in SADC and the EAC

The preceding sections of this chapter reveal substantive developments in labour migration and the protection of migrant workers, albeit with certain limitations, in both the EAC and SADC. This section focuses on the challenges which are common to both regions.

The first challenge is the poor ratification of migrant workers' instruments. In SADC, the ICMW has been ratified by only two countries (Lesotho and the Seychelles). ILO Convention No 97 has been ratified by Madagascar, Malawi, Mauritius, Tanzania (Zanzibar), and Zambia. None of the SADC countries has ratified Convention No 143. In the EAC, only Rwanda and Uganda subscribe to the ICMW. Kenya and Uganda are members of Convention No 143 while Convention No 97 has been ratified only by Tanzania (Zanzibar). With regard to sub-regional instruments, the record in the EAC is rather impressive when compared to that of SADC. As previously indicated, ratification of the EAC Common Market Protocol took less than a year. Nonetheless, the level of incorporation of these norms into national legal frameworks is critically low: only Rwanda has domesticated the EAC framework.[180] Hopefully, this will inspire other members to align their laws and policies with the regional framework.

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[175] Ibid.
[176] Migrants from Zimbabwe and Tanzania who intend to enter South Africa for a period not exceeding 90 days do not have to obtain a visa.
[177] Clarke, M et al *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* Development and Labour Monograph 2/99 (Institute of Development and Labour Law, Cape Town, 1999) 34.
[178] Crush and Williams op cit 57–58.
[179] Ibid.
[180] The new immigration laws in Rwanda incorporate the EAC law on labour migration.

Overlapping membership of different regional integration groupings, referred to as the 'spaghetti bowl' feature of African regional integration, is also an obstacle.[181] It has been documented that 'on average, 95% of the members of one regional economic community belong to another.'[182] For example, Tanzania, one of the founding members of the EAC, also belongs to SADC, while Kenya, Uganda, Rwanda and Burundi are also members of COMESA. As already indicated, in all these groupings there are ongoing initiatives on freedom of movement and the free movement of workers in particular. The means to achieve these ends vary considerably, and this 'dissipates energies and resources in activities that could be effectively managed under one organization.'[183]

Multiple loyalties arising from this overlapping membership are likely to affect the outcomes. The harmonization of policies and legislation is unlikely to be achieved in the current situation. Multiple memberships also provide an exit strategy for members 'who are impatient to reap the benefits of regional integration, or who are faced with difficult decisions.'[184] The ongoing Tripartite Free Trade Area (T-FTA) negotiations between the EAC, SADC and COMESA with regard to the liberalization of trade between these regions presents an opportunity which, if properly seized, can finally eliminate these hurdles through the coordination and harmonization of regional integration programmes.[185] As the United Nations Economic Commission for Africa (UNECA) observes, coordination is extremely important to regional economic communities achieving their goals and to '[moving] efficiently ... towards continental integration.'[186] Thus, the T-FTA initiative is regarded as:

> a decisive step to achieve the African vision of establishing the African Economic Community envisioned in the Lagos Plan of Action and the Final Act of Lagos of 1980, Abuja Treaty of 1991 as well as the resolution of the African Union Summit held in Banjul the Gambia in 2006 that directed the African Union Commission and the Regional Economic Communities (RECs) to harmonize and coordinate policies

[181] See United Nations Economic Commission for Africa (UNECA) *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* Research Policy Report (Addis Ababa, 2006) 50.
[182] Ibid 51.
[183] Goldstein, A and Ndung'u, NS *Regional Integration Experiences in the Eastern African Region* OECD Development Centre Working Paper No 171 (2001) 30.
[184] Ibid.
[185] This initiative started in 2004 with the establishment of the joint COMESA-SADC Task Force. See http://www.eac.int/index.php?option=com_content&view=article&id=474&Itemid=68 (accessed on 12 October 2011). The negotiation for a T-FTA between these three RECs if finalized will liberalize trade between the countries constituting these organizations whose membership in total is 26 countries.
[186] UNECA op cit 55.

> and programmes of RECs as important strategies for rationalization; and to put in place mechanisms to facilitate the process of harmonization and coordination within and among the RECs.[187]

The coordination and harmonization of labour and migration policies likely to result from this process may, if well designed, broaden the base for the free movement of labour across the continent. It is also likely to promote the exchange of skills and to enhance the rationalization of policy and legal framework and thereby spare the fiscal and non-fiscal resources which would otherwise be wasted.

The third challenge is the failure to integrate the gender perspectives of labour migration. The growing consciousness of the gendered aspects of migration in the AU is not replicated in SADC and the EAC. Although there is abundant scientific evidence (particularly in SADC) that women represent a sizeable share of migrants,[188] the legal and policy frameworks in these two regions are silent on the protection needs of this marginalized group. Even in SADC, where far-reaching developments with regard to the mainstreaming of gender in regional programmes and activities have been achieved, the protection needs of female migrants were not included in the Protocol on the Facilitation of the Free Movement of Persons, nor do they feature in the recently adopted SADC Protocol on Gender and Development.[189] This reinforces the notion that only men are involved in migration in the sub-region, a notion which is erroneous.[190] Migration in the region is 'deeply gendered', and women are migrants in their own right, as well as being partners of migrant male spouses.[191] Therefore, countries in both regions need to revisit their neutral position in this area, taking into account the negative impacts of migration on this group. It cannot be overemphasized

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[187] See the Communiqué of the Second COMESA-EAC-SADC Tripartite Summit, held at the Sandton Convention Centre, Johannesburg, South Africa on 12 June 2012, para 1(iv).

[188] On horticulture farms in the southern Free State for example, Basotho women account for about 60 per cent of the workers. See Johnson, D 'Who Needs Immigrant Farm Workers? A South African Case Study' (2007) 7(4) *Journal of African Agrarian Change* 494–525 at 512–516. For a further analysis of the place and role of women in the migration discourse in southern Africa see Lefko-Everett, K and Crush, J *Voices from the Margins: Migrant Women's Experiences in Southern Africa* Migration Policy Series No 46 (SAMP, 2007); Dodson, B *Women on the Move: Gender and Cross-Border Migration to South Africa* Migration Policy Series No 9 (SAMP, 1998).

[189] SADC has a well-developed gender mainstreaming programme implemented through the Gender Unity which is responsible for coordinating gender mainstreaming. In 1997 SADC adopted a Declaration on Gender and Development, which was followed by the SADC Protocol on Gender and Development.

[190] Oucho, J 'Cross-Border Migration and Regional Initiatives in Managing Migration in Southern Africa' in Pieter Kok et al (ed) *Migration in South and Southern Africa: Dynamics and Determinants* (HSRC Press, Cape Town, 2006) 47–70 at 55.

[191] See Crush, J et al *Migration in Southern Africa* (Global Commission on International Migration, 2005) 14–15, available at http://www.gcim.org/attachements/RS7.pdf (accessed on 24 May 2012).

that this area requires urgent attention because the negative aspects of migration affect the lives of female migrants most severely.[192]

Fourth, the regimes (in particular the EAC regime) are completely biased in favour of skilled and professional migrant workers, reflecting the general trend in the global market. The migration of semi-skilled and unskilled workers is completely ignored. A general reading of the EAC Common Market Protocol gives the impression that all categories of workers are covered. However, after a close examination of the Schedule for the Implementation of the Free Movement of Workers, which is attached to Annex II, one is left with no doubt that it is not intended for semi-skilled and unskilled workers. It has been noted that the exclusion of this group was intended to address the fear that the Common Market would lead to 'large scale migration that will threaten individual labour markets.'[193] This is a misconception, because there is more evidence to the contrary. It cannot be overemphasized that this is likely to fuel irregular migration because it ignores the demand for these workers in the labour market.[194] Studies on the small-scale fishermen-migrants across Tanzania, Kenya and Mozambique,[195] and the seasonal migrant workers (mainly from Uganda) in Kagera region in Tanzania[196] present a few examples of many unskilled and semi-skilled migrants who are compelled to work outside the legal framework.

Even more striking, the EAC regime does not cover irregular migrant workers, which is a serious omission. As already indicated in the preceding paragraph, the EAC framework is likely to increase the rate of irregular employment and residence because it favours professionals. Cases of irregular migration have been reported even after the entry into force of the Common Market Protocol. For instance, the immigration authority in Uganda recently rounded up irregular immigrants in Kampala. Thirty-eight of the 420 irregular immigrants

[192] Olivier (2009) op cit 20. Also see Klaaren and Rutinwa op cit 74.
[193] Kanyangoga, JB *Integrating Migration with Development in EAC: Policy Challenges and Recommendations* Research Papers (CUTS International, Geneva, 2010) 16, available at http://www.cuts-grc.org/pdf/BIEAC-RP10-Integrating_Migration_with_Development_in_EAC.pdf (accessed on 24 May 2012).
[194] See section 2.4.4 in chapter 2 of this study.
[195] Crona, B and Rosendo, S 'Outside the Law? Analysing Policy Gaps in Addressing Fishers in East Africa' (2011) 35 *Marine Policy* 393–388.
[196] Rutinwa, B *Addressing Irregular Settlement in North Western Tanzania: A Legal and Protection Perspective* Working Paper (International Migration Management Project, 2010) 8.

arrested in this operation were Kenyan.[197] The EAC members must reconsider the adoption of standard guidelines to deal with this group.

Whilst these challenges are enormous, it is maintained that the AU, the EAC and SADC regimes have the ability to enhance the protection of migrant workers in the individual countries. Most African countries have not ratified ILO Conventions No 97 and No 143 and the ICMW. Moreover, it can be argued that the instruments developed within the AU, the EAC and SADC are likely to address protection issues in participating countries more exhaustively because these instruments speak to the needs of individual countries in Africa.

3.8 Conclusion

In the changing political and economic landscape, Africa has increasingly become both an important source of migrants and a home to thousands of migrants, mostly from within the continent. Given this context, an in-depth study to unveil the developments which have thus far occurred in facilitating intra-continental mobility and in advancing the protection of migrant workers was deemed to be important. From the foregoing discussion it is clear that the protection of migrant workers in Africa is significantly limited, particularly when one compares the statutory and jurisprudential developments in other regions. There is currently no legal regime on labour migration, although the continent has been proactive in addressing the protection concerns of other groups of migrants, notably refugees and internally displaced persons.

However, this is not to suggest that the continent has not done anything in this area. The ACHPR tried, with its limited capacity, to address a number of issues relevant to migrant workers' protection. The African Commission has also been proactive in advancing the protection of this group through its quasi-judicial mandate, although non-compliance on the part of states has been unfortunate. The discussion also revealed some renewed interest in migration issues and commended the ongoing policy reorientations in the AU for their potential in fostering the protection of migrant workers, particularly if they are transformed into legal binding instruments.

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[197] See Sarah Tumwebaze 'Uganda: Immigration Tightens Noose on Irregular Immigrants' *The Monitor* 3 September 2011, available at http://allafrica.com/stories/201109040061.html (accessed on 24 May 2012). Other EAC members were reported as supporting the operation. See Sarah Tumwebeze 'East Africa: Regional Countries Support Crack Down on Aliens' *The Monitor* 11 September 2011, available at http://allafrica.com/stories/201109110041.html (accessed on 24 May 2012).

On the other hand, regional integration groupings have proved to be more active in facilitating the movement of workers so as to facilitate skills transfer. ECOWAS, COMESA, SADC and the EAC have all adopted instruments which not only aim to facilitate the movement of persons across borders, but also successfully incorporate human rights guarantees so as to ensure that migration takes place in a humane environment. An examination of the EAC and the SADC labour migration regimes reveals that the degrees of protection in these blocs vary both in terms of scope, standards of protection and the level of implementation. For example, the EAC regime is broader and contains a comprehensive set of standards, although some of its provisions, particularly those which relate to family reunification and expulsion, are somehow at odds with internationally established standards. The SADC regime is relatively weak compared to the EAC regime, although it contains greater protection against arbitrary expulsion.

Whilst the initiatives within the RECs are commendable, the situation of migrant workers in Africa remains alarming. Even in sub-regions where liberal labour migration policies exist, the position of migrant workers has remained rather precarious. In ECOWAS, for example, a labour migration regime with well-entrenched human rights guarantees was adopted in the 1970s but, until recently, migrant workers were subjected to arbitrary expulsion and severe human rights violations.[198] The situation in other regions is similarly poor. Within SADC, notwithstanding scientific studies to the contrary,[199] 'migrants are viewed as carriers of disease, takers of jobs and perpetrators of crime'.[200] Generally, 'in-migration' is regarded as 'a threat than an opportunity' worth of being treasured.[201] The xenophobic attacks on African

[198] See Adepoju (1984) op cit. Also Agyei, J and Clottey, E *Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Some Convergence, Divergence and Prospects for Sub Regional Integration* (International Migration Institute, Oxford University, Oxford 2007), available at www.imi.ox.ac.uk/pdfs/CLOTTEY%20and%20AGYEI.pdf *(accessed on 24 May 2012). Also see Onwuka, RI* 'The ECOWAS Protocol on the Free Movement of Persons: A Threat to Nigerian Security?' (1982) 81(323) *African Affairs* 193–206.

[199] A good example is a study conducted recently in South Africa which establishes that migrants in South Africa are in fact job creators. Most of them are entrepreneurs, mostly engaged in retail such as 'selling curios, retailing ethnic clothes and foods, motor-car repairs/panel beating, operation of hairdressing salons, restaurants, nightclubs, cafes, music shops, several import-export businesses which employ South Africans.' See Kalitanyi V and Visser, K 'African Immigrants in South Africa: Job Takers or Job Creators?' (2010) 13(4) *South African Journal of Economic and Management Sciences* 376–390 at 379.

[200] Crush, Williams and Peberdy op cit 9. For the situation in South Africa, see Maharaja, B *Immigration to Post-Apartheid South Africa* Global Migration Perspectives No 1 (Global Commission for Migration, 2004). Also see Crush, J and Williams, V *International Migration and Development: Dynamics and Challenges In South and Southern Africa* (United Nations Population Division, New York, 2005) 15.

[201] Crush, Williams and Peberdy op cit 9.

immigrants in South Africa and the recent reciprocal expulsions between Angola and the DRC all attest to the precarious position of migrant workers and their vulnerability to human rights violations by both the state and individuals.

The greatest challenge in most African countries is transforming these commitments into reality by incorporating the standards into domestic regimes. Immigration policies in African countries largely focus on control and deportation, as opposed to freedom of movement, regional integration and proper respect for human rights.[202] Most countries are said to retain 'protectionist' and anti-migration laws, some of which were inherited from the colonial era.[203] In the EAC, for example, with the exception of Rwanda, which on March 2011 adopted a comprehensive labour migration policy and legislation incorporating the principles in the EAC framework, regulatory frameworks of member states are profoundly concerned with the protection of the domestic labour market. It is now for the judiciary to protect this marginalized population. However, this requires a progressive and independent judiciary. The Constitutional Court of South Africa has already set a precedent in *Larbi-Odam and Others v Member of the Executive Council of Education (North-West Province) and Another*[204] and in *Khosa and Another v Minister for Social Development and Others; Mahlaule and Others v Minister for Social Development and Others*.[205] In the first case the court confirmed the rights of non-South Africans (with permanent resident status) to be protected against unfair discrimination, while in the second case it confirmed that migrants with permanent residence status are entitled to social protection.

Having sketched the existing norms and the challenges faced in achieving a better world for migrant workers and their families in the international, regional and sub-regional context, in the following chapters we examine the protection of migrant workers' rights in Tanzania. In so doing we will examine the situation of migrants and the extent to which these international, regional and sub-regional norms are reflected in domestic policy, legislation

[202] Ibid. Also see Matlosa, K 'Human Movements, Common Regional Citizenship and Identity in Southern Africa: Prospects for Deeper Integration between Lesotho and South Africa' (2006) 19(3) *Policy: Issues and Actors* 7.
[203] Williams, V 'In Pursuit of Regional Citizenship and Identity: The Free Movement of Persons in the Southern African Development Community' (2006) 19(2) *Policy: Issues and Actors* 6.
[204] 1998 (1) SA 745 (CC).
[205] 2004 (6) BCLR 569 (CC).

and practices. As Judge Holmes once remarked, '[l]egal obligations that exist but cannot be enforced are seen as ghosts in the law but are elusive to the grasp.'[206]

[206] *The Western Maid* 257 US 419 (1922) at 433.

Chapter 4: The growth of international labour migration and the labour migration regime in Tanzania

4.1 Introduction

Migration in search of employment and other economic opportunities is by no means a new phenomenon in Tanzania. For most people, migration was part of tribal life. The long-distance trade between the Yao, the Nyamwezi and other tribes of present-day Tanzania, and their counterparts in the neighbouring countries has been extensively documented.[1] The disruption of these movements during colonial conquest and the new forms of labour migration which emerged thereafter are also similarly documented.[2] However, the nature, magnitude and patterns of labour migration are no longer the same. They have increasingly become more dynamic and extremely complex, keeping up with the socio-economic developments taking place in the region and the world. Policies on labour migration have also been significantly modified to accommodate these developments. This chapter describes these developments so as to provide insight into the issues which have informed and influenced labour migration regulatory frameworks and the protection of migrant workers in particular.

The chapter starts with a brief reflection on labour migration in colonial Tanganyika. The chapter then examines issues and developments in the post-independence era, and finally discusses the current labour migration regime. The discussion in this chapter is largely centred on the emergence of international labour migration (long-distance migration), its underlining trends and patterns, and the ensuing regulatory frameworks, taking into account the political, social and economic environment. The contemporary labour migration regime and, in particular, its approach to the rights of migrant workers is, by and large, a product of history and social and economic developments. It is therefore important to examine these issues before venturing into specific protection issues.

[1] See, for example, Alpers, EA 'Trade, State and the Society among the Yao in the Nineteenth Century' (1969) 10(3) *Journal of African History* 405–420; Rockel, SJ 'A Nation of Porters: The Nyamwezi and Labour Market in Nineteenth Century-Tanzania' (2000) 41(2) *Journal of African History* 173–195; and Gilbert, E 'Coastal East Africa and the Western Indian Ocean Long Distance Trade, Empire, Migration and Nation Unity 1750-1970' 2002) 30(1) *The History Teacher* 34.

[2] See, for example, Sherrif, AMH 'Tanzania Societies at the Time of Partition' in Kaniki, MHY *Tanzania under Colonial Rule* (Longman Group, London, 1979) 11–50; Illife, J *The Modern History of Tanganyika* (Cambridge University Press, Cambridge, 1979); Alpers, E *Ivory and Slaves in East Central Africa* (University of California Press, Berkeley and Los Angeles, 1975).

4.2. Labour migration in colonial Tanganyika

4.2.1 German East Africa

International labour migration was introduced for the first time by the Germans, who were the first colonial power in Tanganyika. The sustainability of plantations introduced by Germans in the 1880s, and which rapidly grew in number, was heavily dependent upon migrants drawn from different parts of Africa and from as far as Asia.[3] The recruitment of these migrants was paramount in addressing the critical shortage of labour which was caused by what is described in the literature as the unwillingness on the part of the inhabitants of villages near the plantations to work on the plantations. The majority of inhabitants preferred working on their small farms, which provided them with enough food for subsistence, rather than working on the plantations for very low wages.[4] Thus, even when they were compelled to work on the plantations, they fiercely resisted. In some cases the men deserted their villages, leaving behind women and children to work on the plantations.[5] As a result, the use of Asian indentured labourers was officially sanctioned as an alternative to sustain the plantations. By 1892, the German East Africa Corporation (known in Germany as Deustche OstAfrica Gazelleschoft (DOAG)), which had emerged as the most notable administrator of estates in Tanganyika, had contracted 462 Chinese and Javanese indentured labourers to work on the plantations.[6] This marked the beginning of foreign labour migration in the country. The employers preferred these workers because, due to their circumstances, they could not desert the plantations as easily as the natives could. Also, they were seen as more obedient and hence received higher wages than their African counterparts.[7]

The recruitment of Indians and Javanese continued until the early 1900s, when it was politically and legally curtailed. The curtailment followed the decision of the Indian authorities to amend the Indian Emigration Act, 1883, the effect of which was to prohibit the exportation of unskilled Indians abroad.[8] With these restrictions, the recruitment of indentured labourers became more difficult and more expensive, and there were drastic changes to the composition of the Indian labour force in Tanganyika and the labour

[3] Sunseri, T *VILIMANI: Labour Migration and Rural Change in Early Colonial Tanzania* (Heinemann, Portsmouth, 2002) 53.
[4] Patel, L *History and Growth of Labour in East Africa: A Historical Perspective* Paper presented at the University Social Science Council Conference, University College, Nairobi, (8–12 December 1969) 4.
[5] Sunseri op cit 54.
[6] Ibid 55.
[7] Ibid.
[8] See the Indian Emigration Act 21 of 1883 and the Indian Emigration (Amendment) Act 10 of 1902. These laws were not applicable in Tanganyika.

recruitment policies.[9] Long-distance labour migration from within German East Africa, then comprising Tanganyika, Rwanda and Burundi, became an important source of labour.[10]

The Germans introduced a free labour migration policy, allowing people to migrate to any place within the colony, to address the high demand for labour brought about by the construction of the central railway in 1908.[11] The opening of this railway, a few years later, transformed the country's labour migration patterns, leaving only a few areas untouched.[12] It also paved the way for the integration of Tanganyika into what later came to be known as the 'migration network' in southern and eastern Africa.[13] Consequently, Tanganyika became a country of immigration and emigration, with its inhabitants migrating as far as South Africa.[14]

4.2.2 British Colonial Tanganyika

The demise of German East Africa did not end the era of labour migration in the region. The sisal plantations which the British inherited from Germans, and which Sabea refers to as the 'colonial institution par excellence',[15] were similarly exceedingly dependent on long-distance labour migrants drawn from the then Belgian Mandated Territories of Rwanda and Burundi. These migrants were transported by railway or road to the sisal plantations in Tanga and the Eastern Province.[16] Others worked for the Haya rich peasants while some of them travelled on foot to mines in the West Province.[17] Most left their homes to avoid the high taxes imposed by the Belgian authorities and the dues they had to pay to feudal lords.[18]

[9] Similar effects were also felt in other territories whose production heavily relied on indentured labourers. A typical example is Uganda which, by 1899, had indentured about 13,000 'coolies' to take part in the construction of the Ugandan railway. They formed the majority of the labour force. Many of these labourers came from the Gujarati-speaking areas of Kathiawad and Cutch on the north-western coast of India. About 90 per cent of them repatriated back to India after the construction. See Morris, S 'Indians in East Africa: A Study of a Plural Society' (1956) 7(3) *British Journal of Sociology* 195–211 at 115.
[10] Illiffe, J 'Wage Labour and Urbanization' in MHY Kaniki (ed) *Tanzania Under Colonial Rule* (Longman Group, London, 1980) 276-306 at 289.
[11] Ibid.
[12] Ibid 284.
[13] Ibid.
[14] Ibid.
[15] Sabea, H 'The Limits of Law in Mandated Territories, Becoming Manamba and the Struggle of Sisal Plantation Workers in Tanganyika' (2009) 68(1) *African Studies* 131–165 at 135.
[16] Shivji, IG *State and the Working Class in Tanzania* (James Currey, London, 1986) 44.
[17] Ibid 18.
[18] Ibid.

In the south, Portuguese East Africa (Mozambique) served as an important source of labour. Significant numbers of Makonde from the northern provinces of Niassa and Cabo Delegado spontaneously crossed through Ruvuma, and walked hundreds of miles to the plantations in Morogoro and Tanga.[19] Most of these movements were the result of arbitrary and endemic colonial violence.[20] At first, those participating in these movements preferred working in the Southern Province, making it easy for them to return home after a period of six months or less. However, as time passed, they started to move to Tanga and other sisal-growing areas, where they were recruited as contract workers. Within a short time Makonde labourers became a large part of the labour force on sisal plantations. In 1942, it was reported that 6,348 out of a total number of 12,901 labourers in the Southern Province were from Portuguese East Africa.[21] There were also the Makua, Yao, and Nyasa from Malawi (then known as Nyasaland) who similarly joined the labour force in Tanganyika to evade colonial violence and abuse.[22] Proximity, cultural affinities and deeply entrenched social and economic interactions between these migrants and the people of Tanganyika also acted as pull factors.[23] Statistics in 1958 suggested that of the 55,000 foreign African employees in Tanganyika, 30,000 came from territories in the south, 19,000 from the Congo, Rwanda and Burundi, and 5,000 from Kenya.[24]

Alongside the African immigrants, there were also significant numbers of Europeans and Asians, mainly in the civil service. As a result of racial divisions, Europeans occupied the senior positions in government while Asians were mainly hired to fill the clerical and middle ranks. At independence, Asians accounted for 8,365 workers (48.8 per cent of the civil servants) while Europeans constituted 4,309 workers (25.1 per cent of civil servants).[25] Africans accounted for only 26.1 per cent of the civil service at independence.[26]

[19] Alpers, EA 'To Seek a Better Life: The Implication of Migration from Mozambique to Tanganyika for Class Formation and Political Behavior' (1984) 18(2) *Canadian Journal of African Studies* 367–388 at 369.
[20] Ibid.
[21] Ibid 374.
[22] Ibid 370–371.
[23] Ibid.
[24] Egero, B *Colonization and Migration: A Summary of Border-Crossing Movements in Tanzania before 1967* (Scandinavian Institute of African Studies, Uppsala, 1979) 31.
[25] Yambesi, GD *Human Resource Planning and Development in The Public Service: The Case of Tanzania* Paper presented at the CAPAM Regional Conference on 'Governance Excellence: Managing Human Potential' held in Arusha, Tanzania (2–5 March 2009) 6.
[26] The number of Africans remained insignificant although Governor Byatt had, in as early as 1922, indicated a desire to replace the Indian clerical personnel with Africans. Ibid. Also see Shivji op cit 44.

It is also noteworthy that, in addition to attracting migrants from across the sub-region, Tanganyika was also a country of emigration. According to the literature, there were spontaneous emigrations of Tanganyikans to neighbouring Kenya and Uganda and to countries in the south, notably North and South Rhodesia (Zambia and Zimbabwe, respectively) and South Africa.[27] For instance, it is reported that the number of Tanganyikan emigrants on the Rhodesian and South African gold mines steadily increased to about 21,000 in 1954. In addition, some 8,000 Tanganyika emigrants worked in Uganda at about the same time.[28]

4.2.3 Evolution of the labour migration regime

A facilitative labour migration regime prevailed throughout colonial Tanganyika. There were absolutely no restrictions on the movements of Africans or the so-called 'natives'. They could move freely across territorial boundaries without any restrictions. In fact, some of them were forced to move to provide cheap labour for the colonial economy.[29] On the other hand, employment and labour relations were inefficiently regulated or totally unregulated.

The latter can best be described by the *laissez-faire* recruitment practices that prevailed in Germany Tanganyika before the promulgation of the first labour laws in 1909. Until then, there were no standardized employment procedures. 'Wild recruitment' practices characterized by abuse and exploitation of the natives prevailed, with employers freely competing for labour in the colony without any government intervention.[30] The Decree Concerning the Legal Position of Native Workers, 1909 and the Decree on Expositions of the Labour, 1909[31] aimed to regulate the recruitment process.[32] These laws standardized labour contracts to a term of six months (or 180 working days) to nine months in a year, after which workers had to go back to their home villages. Those willing to continue working were

[27] Ibid 16.
[28] A different report on the same year estimated that over one-third of the male populations of Biharamulo and Ngara districts in north-western Tanganyika had left their homes to work on the coffee farms in Uganda. Ibid 17.
[29] Rutinwa, B *Addressing Irregular Settlement in North Western Tanzania: A Legal and Protection Perspective* Working Paper (International Migration Management Project, 2010) 8.
[30] Sunseri, T 'Labour Migration and the Hegemony of South African Historiography' (1996) 95 *African Affairs* 581–598 at 589.
[31] 'Decree Concerning the Legal Position of Native Workers' 27 Feb 1909 and 'Expositions of the Labour Decree' 23 March 1909, *Landesgesetzgcbung des deutschostafrikanischcn Schutzgebietes* (Dar es Salaam/Tanga, 1911). The ordinance was amended in 1913 by 'Verordnung betreffend die Anwerbung von Eingeborenen in Deutsch-Ostafrika' *Amtlicher Anzeiger filr Deuisch-Ostafiika* 14:12, 1 March 1913.
[32] Sunseri (2002) op cit 139.

allowed a renewal term of one month or another 180 days.[33] The statutes also imposed conditions on the recruitment process, requiring recruiters to obtain permits from the local authority. Authorization could be denied if the recruiter had a record of abusive recruitment practices.[34]

These statutes remained in force until 1923, when the British enacted the Master and Servant Ordinance.[35] Like its predecessors, the Ordinance did not restrict the recruitment of native labourers from other territories. A native, defined under section 2 of the Ordinance as a member of an African race and includ[ing] a Swahili or Somali, could move freely across districts and territories. Recruitment continued to be closely supervised by the government. Recruiters, called 'labour agents' in the Ordinance, and their sub-agents could engage in recruitment only if they were duly authorized by the authorities in charge of the districts or sub-districts where recruiting took place.[36]

The Ordinance required all long-distance migrant labourers to sign written contracts stipulating their particulars, their place of work, the nature and duration of their work, their remuneration and the mode of payment.[37] Contracts which were to be performed outside the territory, called 'foreign contracts of service' in the Ordinance, required further approval and attestation by the administrative officer in charge of the district.[38] An attestation by a magistrate or district officer was also required if a servant in a foreign contract of service was illiterate.[39] The contract period was limited to two years.[40] The provision of accommodation, food, travel expenses, and medical services was the responsibility of the master.[41] Unsurprisingly, sections relating to the imposition of penal sanctions for the breach of labour contracts, absenteeism and desertion, as previously enshrined under the German laws, were retained in the Ordinance.[42]

[33] Sunseri (1996) op cit 590.
[34] Ibid.
[35] Master and Native Servant Ordinance, Cap 32 of 1923.
[36] Sections 25 and 26.
[37] Section 6.
[38] Section 5.
[39] Section 4.
[40] Section 11.
[41] Sections 16–22.
[42] Sabea op cit 141.

The Ordinance was amended several times to suit the prevailing environment. For example, in 1926, an amendment was passed to regulate voluntary labourers who were previously not covered by the Ordinance. At this time, voluntary labour, popularly known as *Kipande*, which allowed labourers the freedom to move across districts and territorial borders, the freedom to choose employers and the flexibility to move from one employer to another, had become increasingly popular. This is because, unlike contractual labour, it did not tie workers to a single employer. Consequently, larger numbers of native labourers from the Belgian Territories of Rwanda, Burundi, and the Congo, Northern Rhodesia, Nyasaland and Portuguese East Africa moved voluntarily into Tanganyika in pursuit of wage-earning employment. The amendment was therefore sought to regulate these workers and to control absenteeism and desertion.[43] Servants could be absent from work for a maximum period of six successive days without incurring any legal consequences. If a servant was absent for a longer period, he needed a reasonable excuse or the consent of the employer, otherwise he risked penal sanction.[44] Another amendment was passed in 1942 to regulate contracts still further.[45]

The above description creates the impression that, notwithstanding the limitations, the Ordinance commendably laid down minimum standards for the protection of migrant workers in Tanganyika. Regrettably, however, its provisions were inadequately enforced. Shivji observes that they were 'honoured more in the breach than the observance'.[46] Serious breaches occurred in respect of the care of servants. For instance, the food and shelter provided to workers *en route* and at the workplace were woefully inadequate.[47] These failings are attributed to the inability of staff to inspect and apprehend the culprits, the reluctance of labour officers to prosecute the apprehended culprits, and lenience on the part of the judiciary.[48]

4.3 Labour migration in the post-independence era

At independence, the new Tanganyika government did not immediately abandon the facilitative labour migration policy. African immigrants who had irregularly settled in the

[43] Ibid.
[44] Master and Native Servant Ordinance, No 11 of 1926, section 4.
[45] Master and Native Servants (Written Contracts) Ordinance, No 28 of 1942.
[46] Shivji op cit 44.
[47] Ibid.
[48] Ibid.

country during the colonial period were neither expelled nor harassed. The government's approach to migration was much influenced by the pan-African ideology which regarded the territorial borders as artificial impositions of the colonial powers. Accordingly, fellow Africans were not strictly regarded as immigrants and were excluded from the application of the first post-independence immigration legislation.[49] The relevant section explicitly stated that 'this Act shall not apply (a) to any citizen of Tanganyika or (b) to *any African*' (emphasis added).[50] This exemption lasted up to 1972 when a new Act was enacted.[51] The new Act was basically intended to strengthen immigration control. the removal of such exemption was, therefore among the mechanism employed to reinforce the major objective of the Act.

Citizenship laws likewise favoured Africans, and Africans from British colonies or protectorates either became citizens automatically or by registration upon fulfilling a few conditions.[52] The rest could acquire citizenship by naturalization if they so wished. Moreover, as the government tried to Africanize the civil service, posts which were previously occupied by whites were made available to all Africans without distinction.

While this liberal atmosphere prevailed for African immigrants, there were mounting pressures from within the ruling party (Tanganyika African National Union (TANU)) and the trade unions that non-African immigrants who occupied the senior and middle positions in the civil service and other sectors should vacate these positions. This was a challenge because Tanganyika, as a victim of discriminatory colonial education policies, had a critical shortage of skilled manpower to replace the outgoing colonial officers and to staff the newly established institutions. The Africanisation Commission, whose report was published in 1962, revealed that the expanded government infrastructure required 420 graduate-level personnel or 630 personnel if the positions occupied by colonial officers were to be immediately localized.[53] Yambesi recalls that at this time Tanganyika had only 21 university graduates, of whom only 11 were indigenous Tanganyikans.[54] Although another study puts

[49] Immigration Act 41 of 1963.
[50] Section 2(1).
[51] Immigration Act 8 of 1972.
[52] Tanganyika Citizenship Ordinance 56 of 1961; also see Tanganyika Citizenship (Amendment) Ordinance 69 of 1962, section 4A. Africans originating from these countries who were born in Tanganyika, and those with long-term residence, qualified for registration.
[53] Yambesi op cit 8.
[54] Ibid 4.

the total number of university graduates in Tanganyika in 1961 at 120,[55] there was nevertheless a shortage of human resources. Hence, there was an urgent need to involve Europeans and other persons of non-African descent, such as Arabs and Asians, in the development of the newly independent Tanganyika.[56] Thus, the Africanisation report authorized the government to retain the expatriates it needed beyond their contract expiration dates and to recruit new expatriates as required.[57] In implementing this recommendation, the President made a major policy speech in 1963, asserting that 'preference [in employment] would no longer be given to Africans over other citizens of Tanganyika' and that the government should utilize all trained personnel.[58] This policy was implemented despite strong criticism from politicians and trade unions within Tanganyika and neighbouring Kenya.[59]

Meanwhile the government implemented deliberate human resources planning and human resources development, which soon produced a pool of trained local staff to fill the positions vacated following the exodus of Europeans and Asians.[60] By 1964, 68.6 per cent of high- and middle-level posts were occupied by local staff. A further notable decrease of non-citizens in the public service and parastatals was recorded in 1974 and 1978, when the localization level reached 95.4 per cent and 98.9 per cent respectively.[61] This achievement marked the beginning of a more unreceptive approach to migration. In 1966 the Government Policy on the Employment of Non-Citizens was issued by the Ministry of Economic Affairs and Development Planning. The policy stated categorically that:

> It is the government policy that the economy of Tanzania should be manned by trained and competent citizens. Entry permits (or renewal thereof) for employment in Tanzania are issued to non citizens with skills not available at present in the Tanzanian labour market only on the understanding that effective training programmes in service or otherwise are undertaken within a

[55] Mwakikagile, C *Tanzania under Mwalimu Nyerere: Reflections on an African Statesman* 2 ed (New Africa Press, Dar es Salaam, 2006) 31. This study further recalls that among the 120 graduates there were 12 doctors, two engineers and two lawyers.
[56] At independence, the total number of African employees in senior and middle positions in the public service accounted for only 26.1 per cent of the total number of employees. Asians occupied 48.8 per cent of positions, while Europeans accounted for 25.1 per cent, thus the total percentage of non-Africans in the civil services was 73.9 per cent. See Yambesi op cit 6.
[57] Yambesi op cit 8.
[58] Bienen, H 'National Security in Tanganyika after the Mutiny' (1965) 21 *Transition* 39–46 at 43.
[59] Ibid.
[60] Yambesi op cit 12.
[61] Ibid.

> specific period to produce trained citizens competent to replace them.

This policy notwithstanding, Tanzania continued to host a significant number of expatriates from Western countries, from both international organizations (most of whom run foreign aid projects) and individual countries.

Another notable effect on labour migration became evident in the mid-1980s, when the government implemented major Economic Reform Programmes (ERPs) to address the economic crisis of the late 1970s to early 1980s. Spearheaded by the International Monetary Fund (IMF) and the World Bank (WB), these reforms entailed the liberalization of trade and services, the privatization of state-owned enterprises, and the liberalization of investment policy and markets to create a favourable environment for foreign direct investment (FDI). The enormous impact of this transformation on labour policy was soon felt. The streamlining of the public services and the privatization of public-owned corporations and parastatals which followed these changes left large numbers of employees in these enterprises jobless. Many lost their jobs through retrenchment. For example, between 1993 and 1998, the government retrenched a total of 63,000 civil servants as part of its Civil Service Reform Programme.[62] To contain growing unemployment, the government promoted employment opportunities in the formal and informal sectors. In addition, employers were advised and encouraged to fully utilize the available human resources and discouraged from using foreign labour. This position was later formalized in several legislation and policy documents. We will revert to these documents later.

As a result of the deteriorating economy, Tanzania also lost a significant number of its highly trained local experts, who left for Europe, America and African countries with growing economies. For example, in 1997 alone, Tanzania lost about 700 of her most qualified citizens, who went to Canada, the USA, Germany, Denmark, the UK, the Netherlands, Norway, Sweden and Australia.[63] The number almost doubled over the next three years.[64] The education sector was the most severely affected, with the university (then the University

[62] Mkenda, BK *The Impact of Globalisation on Tanzania's Labour Market: Evidence from the Manufacturing Sector* Paper prepared for a Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania, held at the Conference Hall, ESRF (28 July 2005) 7.
[63] Moshi, HPB 'Migration in Tanzania: Patterns, Characteristics and Impact' (2010) 26(1) *Eastern Africa Social Science Research Review* 91–109.
[64] Ibid.

of Dar es Salaam and its constituency colleges) losing about 173 academics between 1980 and 1999.[65]

The post-independence developments coincided with civil strife and independence struggles in neighbouring countries, which turned the newly independent Tanganyika into a home for refugees. Hosting refugees from Rwanda, Burundi, the Democratic Republic of Congo (then Zaire), Mozambique, Angola and later from Zimbabwe and South Africa, Tanganyika soon became a major refugee-hosting country. With the prevailing 'open door policy', refugees could freely engage in different economic activities. Those with good academic qualifications were accommodated in the public service and in their professions. Some were even appointed to very senior positions in the government. For instance, Vera Chirwa, a Malawian lawyer, worked as a prosecuting state attorney in the Attorney General's Chambers and was later promoted to legal advisor to the inner cabinet.[66] Her husband, Orton Chirwa, a former minister in Kamuzu Banda's government in Malawi, worked as Deputy Commissioner in the land office. There were many more who served in different capacities. Exiled Ugandans, South African exiles, and exiles from many other countries, for example, became the backbone of the academic staff at the University of Dar es Salaam. This liberal policy lasted until the 1990s,[67] when opportunities for refugees to access the labour market were increasingly curtailed. Currently, refugees require permits to engage in wage-earning employment.[68] Access by refugees to the local labour market is more the exception than the rule.

4. 4 Recent trends in labour migration in Tanzania

The nature, direction and magnitude of labour migration are all heavily influenced by global economic and political changes, which have a direct impact on political and economic situations in individual countries. In Tanzania, this was manifested by the mid-1980s economic changes which transformed Tanzania from a socialist mode of economy to a

[65] Yambesi op cit 15.
[66] Chirwa, VM *Fearless Fighter: An Autobiography* (Zed Books, London, 2007) 80–81.
[67] Rutinwa, B 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21(1 and 2) *Refugee Survey Quarterly* 12–41; Kamanga, K 'The (Tanzania) Refugees Act of 1998: Some Legal and Policy Implications' (2005) 18(1) *Journal of Refugee Studies* 100–116; Peter, CM 'Rights and Duties of Refugees under Municipal Law: Examining a Proposed Legislation' (1997) 41 *Journal of African Law* 81–99; Morel, M 'The Lack of Refugee Burden-Sharing in Tanzania: Tragic Effects' (2009) 22(1) *Africa Focus* 107–114.
[68] Section 32 of the Refugees Act 9 of 1998 obliges refugees to obtain work permits if they intend to engage in wage-earning employment. The permits are exceptionally granted and may be revoked at any time at the discretion of the Director for Refugee Services.

market-oriented economy. The flow of capital and FDI which accompanied this transformation brought technology that required skills that were not necessarily readily available in the labour market. In addition, immigration quotas were officially adopted to encourage FDI.[69] With these transformations, labour migration became an important component of the Tanzanian labour market and the economy at large. The patterns and trends of labour migration also changed significantly, corresponding to the prevailing environment. Unlike the past, when Tanzania (then Tanganyika) used to attract large numbers of non-skilled 'native servants' to work on its sisal plantations, today Tanzania attracts skilled persons and professionals to address the skills deficit. Only a few of these workers come from neighbouring countries. The majority come from Asian countries, Europe and the USA.

4.4.1 The magnitude

The changing patterns and the complex nature of migration have led to a paucity and poor quality of migration data sources. In Tanzania, as in many other countries, migration data is limited, fragmented and unreliable. In the first place, migration statistics are collected by different institutions through a variety of sources, which fall under different departments and ministries. These include the National Bureau of Statistics, the Immigration Department, the Ministry of Labour, Youth Development and Sports, the Tanzania Investment Centre, the Ministry of Higher Education, Science and Technology, the Ministry of Foreign Affairs and International Relations, and the President's Office Public Service Management (PO-PSM).[70] The nature and accuracy of the statistics collected in these departments varies according to the work of the particular department, which dictates the types of statistics gathered in the respective departments. Therefore, a particular data source can provide only certain types of migration data. As a result of differences in coverage, definitions of variables used and timeframes of collected data, it is currently not possible to calculate the number of migrants, let alone the number of migrant workers.

Second, there is a lack of coordination between and within these departments, so that the statistics in one department or Ministry are rarely reconciled with the statistics in another department or Ministry.[71] It is, for example, astonishing to note that the statistics in the

[69] See chapter 5 for a further discussion of this issue.
[70] Shitundu, MJ *A Study on Labour Migration Statistics in East Africa* International Migration Papers No 81 (ILO, Geneva, 2006) 11 and 25.
[71] Ibid.

Department of Employment are never reconciled with those in the Department of Immigration Services although, as will be demonstrated in chapter 5, these two departments collaborate in the issuing of work permits. In addition, data collected in these institutions are limited in many things. For example, they rarely contain information on various issues which are essential in human-based data collection and in profiling labour migration in particular. For example, information about gender, occupations, skills/professions and employing sectors are barely included in the statistics.[72] Third, the available migration data is not accessible to the general public, and is mostly used internally in the respective departments. The data is not disseminated to other social partners, and cannot be accessed easily due to the bureaucracy in the respective institutions.[73] Collecting statistics on irregular migrants is particularly difficult.

Nonetheless, the statistics provided by the Department of Immigration, though not accurate, indicate an increase in the flow of labour migrants. These statistics suggest that the number of holders of work permits (Residence Permit Class B) has grown significantly over the past ten years. The highest growth rate of 68.67 per cent was recorded in 2006, when the number of permits issued increased from 2,452 in 2005 to 4,137 in 2006. The numbers of workers who fall within the broad definition of migrant workers, such as self-employed persons, migrant workers who are attached to government projects, and charitable and faith-based organisation workers, is similarly significant. Nonetheless, a significant decrease in the admission rate was experienced in 2005, when the number of permits decreased from 3,644 in 2004 to 2,452, representing a decrease of 32.71 per cent. There were also low admission rates in 2002 and 2010, when permits issued fell by 19.07 per cent and 12.42 per cent respectively.

While the actual factors behind the declining trends in 2002, 2005 and 2010 remain generally uncertain, the trends in 2005 and 2010 may partly be attributed to the general elections which were to take place in these calendar years. Recently, elections have been a catalyst for violent conflicts. In Burundi, Cambodia, Ethiopia, Guyana, Haiti, Kenya, Sri Lanka, Zimbabwe and the Ivory Coast the electoral processes have escalated into serious conflicts, destroying

[72] Mwalimu, UA 'Patterns, Policy and Legal Issues on International Labour Migration in Tanzania' Globalisation and East Africa Working Paper Series No 13 (Economic and Social Research Foundation (ESRF), Dar es Salaam, 2004) 9.
[73] Mwalimu op cit 30.

property, claiming people's lives and leaving many more homeless.[74] Therefore, a country that is about to have an election becomes an unattractive destination for migrants. The downturn in 2010 may also have been the result of the economic crisis which affected the global economy between 2008 and 2010. It was reported, for example, that sectors leading in the employment of migrant workers, such as mining, tourism, construction and industry, were negatively affected. A 10 per cent decline in the number of tourists was recorded between 2008 and 2009.[75]

Table 1: **Residence Permit Class B (work permits) granted in Tanzania: 2000-2010**[76]

Year	Permits granted	Growth rate (%)
2000	2,025	
2001	2,669	31.80
2002	2,160	-19.07
2003	3,498	61.94
2004	3,644	4.17
2005	2,452	-32.71
2006	4,136	68.67
2007	5,663	36.91
2008	6,550	15.66
2009	8,508	29.89
2010	7,451	-12.42

Source: Department of Immigration Services

Table 2: **Distribution of residence permits issued in 2009-2010**

Nature of Permit	Year	
	2009	2010
Residence Permit Class A[77]	873	772

[74] For a detailed discussion of the nexus between election processes and conflicts and how destructive this can be, see UNPD *Elections and Conflict Prevention: A Guide to Analysis, Planning and Programming*, available at http://web.undp.org/publications/Elections_and_Conflict_Prevention.pdf (accessed on 24 May 2012).

[75] Lunogelo, HB et al *Tanzania Phase 2* Overseas Development Institute, Global Financial Crisis Discussion Series, Paper 20 (2010) 7, available at http://www.odi.org.uk/resources/docs/5819.pdf (accessed on 29 May 2012).

[76] This number reflects only principal applicants. Dependants and family members are not included in the list.

Residence Permit Class B	8,505	7,451
Residence Permit Class C	3,678	3,567
Exemption Certificate	2,074	1,892

Source: Department of Immigration Services

4.4.2 The source countries

There is a remarkable shift in the origin of migrant workers. Unlike the past, when migrant workers in Tanzania were drawn mainly from neighbouring countries, the current population come from a range of nations and continents. According to the 2009 statistics, there are more than 100 countries which currently contribute to the population of migrant workers. The majority come from India and China. In 2009 these two countries accounted for 37.9 per cent and 23.9 per cent respectively of the entire population. There is also a notable correlation between the flow of FDI and the flow of labour. Countries such as South Africa, the United Kingdom and Kenya, which are among the top ten source countries for FDI in Tanzania, are also among the top ten sources of migrant workers.[78]

Table 3: Distribution of permits issued to migrant workers (principal applicants) from among the top ten source countries for 2009

Country	Total Population	Percentage
India	3224	37.88
China	2033	23.89
South Africa	629	7.39
Kenya	570	6.69
Pakistan	306	3.59
United Kingdom	280	3.29
Philippines	145	1.70
Australia	119	1.39
United States	111	1.30
Nepal	108	1.26

Source: Department of Immigration Services

[77] Residence Permit Class A is for investors, self-employed persons, and peasants; Class C is for missionaries, volunteers, researchers and students; Exemption Certificate is for migrant workers attached to government.
[78] See the further discussion in section 4.4.5 of this chapter.

There is also a significant increase of workers from the EAC and SADC, which is mainly a result of increasing intra-regional migration and labour market integration and the ever-growing demand for workers to fill the existing skills gaps in the local market. South Africa and Kenya are currently among the ten major sources of migrant workers. The number of workers from these countries and other countries in the region is set to increase, depending on the scale of the regional economic integration processes. However, as a result of inefficiencies in data collection and the predominance of irregular migration, the numbers of migrant workers from within the sub-region are inadequately captured in the official statistics. The following statistics exemplify this.

Table 4: **Distribution of work permits issued to migrant workers from the EAC in 2007 and 2009**

Country	Year		Increase
	2007	2009	(Percentage)
Kenya	415	420	1.19
Uganda	44	47	6.38
Rwanda	6	4	-33.33
Burundi	3	3	0
Total Population	464	474	2.10

Source: Department of Immigration Services

The figures in Table 4 create the impression that there is only an insignificant level of migration from within the EAC. This is rather deceptive and should be treated with great caution. The number of East Africans currently working in Tanzania is far greater than the figures shown in this table. Workers from within the EAC, notably Kenya and Uganda, constitute the majority of migrant workers in the education sector and the tourism industry. Considerable numbers are also employed in the service industry, for example, banks and the telecommunications industry.[79] Also, because of the difficulties involved in obtaining work permits (as explained in the chapter 5), workers from these countries fail to access the available legal migration options. Instead, they irregularly access the market, taking advantage of cultural and social affinities, and their ability to speak Kiswahili, a language

[79] This was revealed during the interviews conducted between October 2010 and May 2011.

spoken in almost all countries in East Africa. Through their compatriots and contemporaries already working in Tanzania, who together form strong social networks, irregular migrants easily gain access to the local market. The lack of national identification documents in Tanzania also allows for irregular cross-border movements.

4.4.3 The gender aspect

Another notable feature of migration statistics in Tanzania is that they are largely gender-blind. Gender-specific information was captured only in the 2002 to 2005 statistics. A quick review of the statistics in these three years suggests that the numbers of female migrants were extremely low, ranging from 9.8 per cent to 13.1 per cent of holders of work permits. Although there might be some developments, officers involved in processing work permits were of the view that there are only a few female labour migrants.

***Table 5*: Distribution of work permit holders by gender (2002-2005)**

Year	No of males	No of females	Total	Percentage of total who are female workers
2002	1876	284	2,160	13.1
2003	3153	345	3498	9.86
2004	3136	479	3644	13.1
2005	2129	323	2452	13.1

Source: Department of Immigration Services

4.4.4 Typologies

Depending on the nature of the study and the results sought, migrant workers currently in Tanzania can be divided into different groups. The most common approach, which is adopted in this study, divides migrant workers into two broad categories based on their legal status. The first category constitutes migrants who are legally employed or self-employed. In Tanzania, with the exception of self-employed migrants, this group exclusively comprises professionals and highly skilled individuals, that is, workers with skills that are rare or not available in the local market, or expatriates, as they are popularly known. They include workers in the private sector, workers attached to government institutions or projects,

workers affiliated to charitable, religious or faith-based organisations, self-employed migrants, and refugees who have secured permits to engage in wage-earning employment.[80]

However, with the existence of a liberal labour migration policy, albeit for certain categories of expatriates, the validity of the assumption that this group is exclusively for expatriates is seriously questionable. The group is no longer exclusively for highly qualified technical staff. It currently includes a large number of managerial and supervisory staff who would be disqualified if the provisions of the Employment Promotion Services Act, 1999 were to be rigorously applied. A 2003 study indicated that 842 of 2,307 expatriates who were granted work permits through the TIC in that year were managers and supervisors. Forty of them were engineers, 171 were finance officers, 86 were technicians and the rest (1,861) were in various other fields.[81]

The second group comprises irregular migrant workers. Although their presence is unauthorized, they are significant enough to form a recognizable group. Exclusive labour migration laws and the government's refusal to admit semi-skilled and unskilled workers have fuelled irregular and clandestine migration in Tanzania. Although the actual numbers remain uncertain, many incidents of irregular migration and disorderly settlements have been reported in Dar es Salaam and other regions. This group is further divided into several sub-groups.

The first and oldest sub-group in this category comprises colonial-era migrants and their descendants. These are mainly from Burundi, the Democratic Republic of Congo, Rwanda and Mozambique, which used to be the major suppliers of migrant workers for sisal plantations in colonial Tanganyika. At independence, a significant number of them remained and settled permanently. As a result of the fairly favourable migration policy which prevailed in the early days of independence, they did take not advantage of the citizenship laws which allowed them to regularize their status. This population is currently concentrated in the regions bordering these countries and some are in Tanga and Morogoro regions, where the sisal plantations were concentrated. This group also includes migrants who were brought by

[80] Section 32 of the (Tanzania) Refugees Act 1998 empowers the Director of Refugee Services to issue work permit for refugees after consultation with the ministry responsible for labour.

[81] See Mwalimu, UA *Patterns, Policy and Legal Issues on International Labour Migration in Tanzania* Globalisation and East Africa Working Paper Series No 13 (Economic and Social Research Foundation, Dar es Salaam, 2004) 14.

missionaries to do evangelical work. The government censuses and surveys which have been conducted from time to time to determine the numbers of these migrants suggest that there are tens of thousands of them.[82]

The second sub-group in this category are contemporary migrants from neighbouring countries, notably Kenya, Uganda and Zimbabwe. Some of these are educated individuals who hold degrees and diplomas, but they do not qualify for admission under the prevailing regime. They are mainly employed in the education sector, particularly in the privately owned English-medium early childhood, primary and post-primary schools.[83] Considerable numbers are also recruited by the tourist industry, which has increasingly become an attractive area for immigrants. In this group are also Malawians (mostly low-skilled migrants employed as domestic workers) and Congolese (mainly found in the entertainment (music) industry, saloons and tailoring industry). The vast majority of workers in this group, whose numbers also remain unknown, are concentrated in certain occupations and in well-known residential areas. The prevailing admission policies mean that these workers have no alternative to irregular migration.

The third sub-group comprises Asian immigrants, mainly from India and China, who comprise a special group because of their numbers. They normally enter the country as dependants or visitors, and engage in disguised employment relationships with their hosts. Their numbers are growing rapidly, and this has attracted the attention of the general public and the government. Some of these migrants are kept indoors and forced to work at night when other employees have left. In 2000, about 700 Asian immigrants were found to be working without the appropriate permits.[84] The government has on different occasions threatened to deport thousands of irregular Chinese migrants.[85] Also, recently, it declared its

[82] About 41,262 migrants in this group were residing in the Kagera region between 2003 and 2006, between 10,000 and 12,000 were said to residing in the Kigoma region in 2009, and close to 30,000 were residing in the Rukwa region in 2006/2007. Only a few of these are in wage-earning employment. The vast majority are peasant farmers. For the statistics see Rutinwa, B *Addressing Irregular Settlement in North Western Tanzania: A Legal and Protection Perspective* Working Paper No 1 (International Migration Management Project, Centre for the Study of Forced Migration, University of Dar es Salaam School of Law, 2010) 7.

[83] Shitundu op cit 11.

[84] See Faustine Rwambali 'Dar recalls all work permits' *The East Africa* 22 January 2001.

[85] This followed complaints that Chinese vendors had overcrowded the streets of the Karikoo Market where they work as wholesale or retail sellers of flowers, electronic goods and other merchandise, which are produced cheaply in China or locally manufactured or assembled in their residences in Dar es Salaam. See 'Wachina Wamachinga Watakiwa Kuondoka Kariakoo' (Chinese vendors ordered to vacate Kariakoo Market) *Dar Leo* 11 January 2011. Also see Efracia Massawe 'Wasio na Vibali marufuku Kariakoo' (irregular migrants banned from

intention to appoint an inter-ministerial committee to investigate and recommend a suitable policy approach.

There is also a sub-group of irregular immigrants who arrive in the country in a mixed migration context. This sub-group is mainly constituted of economic migrants and a considerable number of persons in need of international protection. Most of this group use the country to reach Mozambique, Malawi and Zambia, *en route* to South Africa and beyond. Nevertheless, these migrants need to be mentioned because some of them, for various reasons, fail to reach their desired destination, and eventually end up in the black labour market in Dar es Salaam and elsewhere in the country.[86] Their numbers are unknown, because data becomes available only on border apprehension, which does not offer any real indication of their actual numbers. The report of the Ministerial Task Force on Irregular Migration, which sheds some light on this group, reveals that their numbers are growing.[87]

The last sub-group comprises seasonal workers. Workers in this category, which is very common in countries such as the USA and South Africa, enter the receiving country in a specific season of the year to undertake temporary employment which is specifically linked to that season. In Tanzania, this form of labour migration is uncommon and there are few studies. The only study which mentions this group reports a recent influx of seasonal migrant workers on the sugar plantations and on the nickel mines in Kagera region. The plantation workers come during the harvesting season and stay for varying periods of time, without work or residence permits.[88] Their numbers are unknown due to their invisibility and irregularity.

This list, however, is not exhaustive. Irregular labour migration can take many forms. Workers in this group who have not been mentioned in the foregoing discussion include persons who overstay their tourist visas and engage in employment, students who are employed, trainees who overstay their visas, regular migrants who continue working beyond

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Kariakoo) *Tanzania Daima* 7 January 2011; Fredy Azzah and Mariam Sagafu 'Wamachinga hawajaondoka Kariakooo' (Vendors (Chinese) are yet to leave the Kariakoo) *Mwananchi Sunday* 6 February 2011.

[86] Most of these are *en route* to South Africa and other countries in Europe or America. See Johnson, B *The Phenomenon of Mixed Migration into and through Tanzania* Paper presented at the 11th Session of the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam (28 September to 9 October 2009).

[87] United Republic of Tanzania *Report on the Situation of Irregular Migration in Tanzania* (2008) 2.

[88] Rutinwa op cit 11.

their contract periods, and regular migrant workers who run away from their designated employers before the expiry of their contracts and without fulfilling the legal requirements for the acquisition of new work permits.

4.4.5 Emigration of Tanzanians to other countries

In addition to being a host country, Tanzania is also currently emerging as an important source of labour. The numbers of Tanzanians working abroad is said to be rapidly growing. There is currently no coordination of these movements and hence there are no actual statistics on this group. Nonetheless, it has been reported that, in each calendar year, a significant number of skilled and unskilled Tanzanians spontaneously emigrate to more developed economies, particularly those in North America and Western Europe, while others proceed to developing countries such as Botswana, South Africa and Swaziland.[89] In 2004, for example, it was reported that there were more than 2,500 Tanzanian professionals working in Botswana.[90] There are many issues pertaining to this group which are worth of attention, but these are beyond the scope of this work.

4.4.6 Reasons for migration

Determining the reasons for migration is complex. The driving forces 'are many and complex, and global explanations may not apply to individuals.'[91] People migrate for a variety of reasons. Some migrate for personal or professional development and a desire to travel and see the world, some migrate because of events that are beyond their control, such as civil strife, and natural disasters, such as famine, drought, earthquakes and floods, while others migrate because they want a better standard of living for themselves and their families.[92] In the age of globalization, the reasons are more complicated than ever before.

In Tanzania, the factors influencing the trends and patterns of labour migration are many, some of which have already been elucidated in previous sections. Although the driving forces may vary slightly from one group of immigrants to another, most of these factors are interrelated and overlapping. They include the traditional 'pull and push' factors, such as poverty, human deprivation, conflict, growing unemployment rates, a deteriorating social,

[89] Mwalimu op cit 18.
[90] Moshi op cit 103.
[91] ILO *Towards a Fair Deal for Migrant Workers in the Global Economy* Report VI, International Labour Conference, 92nd Session, Geneva (2004) 8.
[92] ILO *Migrant Workers' Rights: A Handbook* (ILO, Geneva, 2007) 11.

economic and political environment, globalization and ongoing regional economic integration processes.

(i) Poverty and unemployment

High levels of poverty and unemployment are possibly the major drivers for cross-border labour migration between Tanzania and her neighbours. Significant numbers of people in these countries live in abject poverty. Levels of unemployment are similarly high. Recent reports reveal that Kenya, which is currently one of the major sources of migrant workers in Tanzania, had about 2.5 million unemployed youth in 2007. Barely 125,000 persons were absorbed into the labour market.[93] Similar trends are evident in Uganda, where the level of urban unemployment stands at 12 per cent, while graduate unemployment was said to be at 17.4 per cent in 2005.[94] In these circumstances migration is clearly an important survival strategy.

(ii) Conflicts and political instability

The political and ethnic turmoil in the Great Lakes Region has greatly affected labour migration patterns. Tanzania, as the only country with relative political stability in the region, has so far remained a hub for migrants from neighbouring countries. The fact that Tanzania is close to their countries also makes Tanzania a better choice because it will be easier and cheaper to return home in the future.

(iii) Globalization

Globalization has in diverse ways affected the global patterns and trends of labour mobility across international borders. It has opened a way not only to free movement of capital and goods but also movement of labour across the national and regional boundaries. Acting as a 'pull and push factor' for international migration, globalization has widened the disparity of income between countries in the global north and those in the south.[95] The persistent poverty, growing unemployment, diminishing incomes and living standards, and increasing human insecurity in the global south have created pressures on labour migration and thereby engineering unprecedented movement of people from these countries to countries with

[93] 'Unemployment Big Challenge for Kenya's Growth - Kibaki' *The East African* 1 June 2010.
[94] Republic of Uganda *Labour Market Information Status Report for Uganda* (2006), available at http://www.afristat.org/contenu/pdf/lmis/lmis_status_ug.pdf (accessed on 24 May 2012).
[95] Castles, S 'International Migration at the Beginning of Twenty-First Century: Global Trends and Issues' (2000) 52(165) *International Social Science Journal* 269–281 at 27.

affluent economies.[96] On the other hand, the modern information and communications technology, brought about by globalization, including the internet, improved telephone communication and cheap travel costs have facilitated linkages of international labour markets making international migration easier than ever before.[97] Moreover, the flow of goods and capital towards countries including those in the global south has increased a demand for high tech skills and medium skills which has also consequently expanded the opportunities for mobility of the low- and high-skilled labour force to these countries.[98]

As noted already noted above, Tanzania became part of the global economy in the mid 1980s when she transformed her economy from a socialist economy to a market oriented economy thereby allowing the flow of capital and goods. The increase of Foreign Direct Investment (FDI) which accompanied this transition influenced the flow of workers from different countries Tanzania. There is currently a considerable correspondence between the flow of FDI and the flow of migrant workers in terms of countries of origin. South Africa, the United Kingdom and Kenya, which are among the top ten source countries for migrant workers in Tanzania, are also, according to the latest investment report, among the top ten sources of FDI. In fact, South Africa, which ranked third among the migrant workers' source countries in 2009, was from 2001 to 2005 the first major source of FDI, contributing about 34.4 per cent of FDI in 2005.[99] Another determining factor is the competitive advantage of workers from certain countries. For example, India currently ranks first among the source countries of migrant workers in Tanzania, yet it is not one of the important sources of FDI to Tanzania. The reason is that, India has successfully established a large pool of experts, particularly in the area of software and information technology (IT), but because of the mismatch between the numbers of skilled personnel produced each year and the ability of the country's economy to offer jobs, the majority of these experts are not absorbed into the local market.[100] They

[96] See Teran, PA *International Migration, Globalization and the Bill of Rights: Ensuring Protection under the Rule of Law* A presentation made to the 9th Annual Human Rights and Equality Conference 'Minority Rights and Protection: International Standards and the Bill of Rights for Northern Ireland' organized by the Northern Ireland Council for Ethnic Minorities, Belfast (12 January 2007) at 3-5 available at http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf (accessed on 24 May 2012).
[97] Castles, op cit.
[98] Wickramasekara, P *Globalization, International Labour Migration and Rights of Migrant Workers* (ILO, Geneva, 2006) 4 available http://www.ilo.org/public/english/protection/migrant/download/pws_new_paper.pdf (accessed on 4 May 2012).
[99] Tanzania Investment Centre *Tanzania Investment Report* (TIC, Dar es Salaam, 2006) 19.
[100] Khadria, B '*Skilled Labour Migration from Developing Countries: Studies on India* International Migration Papers No 49 (2002) 7, available at http://ilo.org/public/english/protection/migrant/download/imp/imp49e.pdf (accessed on 1 June 2012).

tend to emigrate to other countries, where they receive better wages than they would receive in India, but lower wages than their European or American counterparts would receive. As a result of this, workers from India are regarded to be more competitive than their counterparts from other countries. Multinational companies, therefore, consider India to be an important provider of skilled and inexpensive labour.[101]

(iv) Regional economic integration

The mobility of labour is acknowledged as an important driver for successful regional economic integration in the EAC and SADC. The labour migration regime and the level of integration attained in each bloc were discussed in chapter 3. Legal instruments to facilitate labour mobility and the modalities for implementation have been adopted.[102] In SADC, a 90 days' visa-free admission for citizens of member states is envisaged in the Protocol on the Facilitation of the Free Movement of Persons, which was adopted in 2005.[103] South Africa, the economic giant in the region, has already approved a 90 days' visa-free admission for Tanzanians, with effect from 1 November 2010.[104] Although this does not guarantee Tanzanians access to the South African labour market, it is a landmark development in facilitating cross-border movements between the two countries. It is anticipated that Tanzania, which is yet to reciprocate this waiver, will soon do so. Nonetheless, as already noted, South Africa is currently one of the major sources of migrant workers in Tanzania.

In the East African Community, there have been far-reaching developments. With the coming into force of the Protocol on the Establishment of the East African Community Common Market, which regulates the mobility of labour, goods and services, citizens of member states can now be employed and use their talents and skills in partner states more easily. Consequently, Kenyans, Ugandans, Rwandans and Burundians will be free to enter Tanzania and take up employment. Similarly, Tanzanians will be able to be employed in these countries without restrictions. The number of East African citizens working in the country will undoubtedly increase. As a start, Tanzania has agreed to the admission of university and

[101] Kapur, D et al 'India's Emerging Competitive Advantage in Services' (2001) 15(2) *Academy of Management Executive* 20–33 at 27.

[102] SADC adopted a Protocol on the Facilitation of the Free Movement of Persons in SADC on 18 August 2005, after protracted negotiations of about ten years. In the EAC, the Protocol on the Establishment of the East African Community Common Market was signed on 20 November 2009 by all five members of the East Africa Community, Kenya, Uganda, Rwanda, Tanzania and Burundi. The Protocol and its four Annexes entered into force in July 2010.

[103] Protocol on the Facilitation of the Free Movement of Persons, 2005.

[104] A similar action was approved for Zimbabwe in May 2009.

higher learning institution teachers, primary school and early childhood development teachers, mathematics and science teachers, and medical doctors, while preparing for further integration.[105] Workers in these groups will no longer be subjected to the existing stringent labour admission procedures. Those with employment contracts of 90 days or less will no longer need work permits, but rather a special pass allowing them to enter, remain and work for such specified period.[106]

The progressive implementation of this Protocol notwithstanding, its impact has already been felt. Increased numbers of Kenyans and Ugandans have been reported in regions bordering these two countries and in the large cities. The signing of the Treaty establishing the East African Community in 1999 and the subsequent coming into force of the East African Customs Union in 2005 led to a belief that there were no more barriers to cross-border movement. Tanzania, Kenya and Uganda have strong economic links dating back to the opening up of the Ugandan Railway in 1890, followed by the Customs Union between Kenya and Uganda in 1917 (Tanganyika joined the Customs Union in 1927), the East African High Commission in 1948, the East African Common Services Organisation in 1961 and finally the East African Community, which lasted from 1967 to 1977. During this period, the people of these countries established strong social and economic networks fostered by the guaranteed movement of capital, goods and services across territorial borders.[107] The free movement of labour was also an important component of the colonial economy.

4.5 The current labour migration policy, legal and institutional frameworks

The benefits of international labour migration are very dependent upon the existence of comprehensive and well-designed policies and legal frameworks. Experience suggests that appropriate policing is essential if labour migration is to function in an efficient and equitable way. Unfortunately, this reality has not been adequately embraced by the government. Instead, incoherent policies seeking to promote the admission of highly skilled workers while restricting the admission of semi-skilled and unskilled workers have become popular. This impacts negatively on the livelihood of migrant workers.

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[105] See the schedule for the free movement of workers, East African Community Common Market (Free Movement of Workers) Regulations, 2009.

[106] See the Protocol on the Establishment of the East African Community Common Market, 2009 and the East African Community Common Market (Free Movement of Workers) Regulations, 2009.

[107] For a detailed outline of the level of integration in the former East African Community, see Nye, JS 'East African Economic Integration' (1963) 1(4) *Journal of Modern African Studies* 475–502.

The existing policy and legal frameworks relevant to labour migration are scattered between different instruments, which are uncoordinated and tend to contradict each other, depending on what they seek to achieve. Rigid and restrictive on the one hand, and liberal and facilitative on the other, they seek to protect the internal labour market while also trying to address, as much as possible, the emerging skills shortage. On the restrictive side, we find the National Employment Promotion Services Act[108] and the Immigration Act[109] while on the facilitative side we find the National Investment Policy,[110] and the Tanzania Investment Act.[111] The recently adopted National Employment Policy, 2008 tries to draw a balance.

The former legislation represents a continuation of restrictive labour migration policies which tried to address the unemployment crisis that started in the mid-1980s. They seek to minimize, as far as possible, the number of non-Tanzanian workers admitted to the labour market, to ensure that employers fully utilize human resources available in the local market and hence address unemployment which, according to the latest Integrated Labour Market Survey, affects 11.7 per cent of the active population.[112]

The National Investment Promotion Policy, 1996 and the Tanzania Investment Act, 1997 were, on the other hand, promulgated to accommodate the demands brought about by the transition to a market-oriented economy. The current economy places great importance on private investment and the flow of FDI. Countries such as Tanzania, which have abundant natural resources but are significantly limited in terms of capital, have been forced to compete for foreign investment with countries with similar characteristics. The main purpose of the National Investment Promotion Policy and the Tanzania Investment Act is, therefore, to create a favourable environment for investors. They prescribe a series of wide-ranging fiscal and non-fiscal incentives for investors. In terms of non-fiscal incentives, investors are guaranteed, among other things, a blanket right to employ expatriate personnel as require for the development of their enterprises.[113] Those who qualify for a certificate of incentive (issued by the TIC) are guaranteed an initial immigration quota of up to five employees at the

[108] National Employment Promotion Services Act 9 of 1999.
[109] Immigration Act 5 of 1995.
[110] National Investment Promotion Policy, 1996.
[111] Tanzania Investment Act 26 of 1997.
[112] Integrated Labour Market Survey, 2006.
[113] National Promotion Policy, 1996, para 4.2.2(c).

start of the investment.[114] Those in the mining and petroleum industries can determine the quota themselves.[115] Depending on the availability of qualified Tanzanians, the complexities of technology involved and the nature of undertaking, investors may, after consultation with the TIC and the Ministry of Labour, be authorized to employ more expatriates to suit their actual needs.[116]

The Investment Act carefully avoids any expressions implying that expatriates in the initial immigration quota must have 'rare skills'. We find these expressions only in the provision relating to the admission of extra immigrants.[117] Undoubtedly, this is intended to allow investors flexibility in choosing the persons they need to assist them in establishing their operations. In most cases, expatriates in the first immigration quota occupy the most senior managerial and supervisory positions. The rest occupy technical positions. Initially, the National Investment Policy advocated that investors be guaranteed a 'final say on the engagement of expatriate personnel without any condition.'[118] However, the government later directed that the number of expatriates should not exceed 5 per cent of all employees, that is, there should be a ratio of 1:20. A facilitative environment to expedite the issuance of work permits to expatriates in this group has been established in the TIC, where applications are lodged, processed and forwarded to the relevant authorities. The Income Tax (Remission) Inducement Allowance Paid to Expatriate Employees Order offers tax concessions for inducement allowances paid to expatriates. The existence of this facilitative policy has increased the opportunities for regular labour migration, albeit only for certain categories of employees.

Nevertheless, this policy has been widely criticized for contradicting the government's endeavours to create employment for its youth. The private sector, which is emerging as a major employer in the country, has been criticized for taking advantage of this policy to recruit non-citizens for positions which could have been filled by Tanzanians. The National Employment Policy, 2003 attempted to address the confusion created by the incoherent labour migration policy:

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[114] Tanzania Investment Act, 1997, section 24(1).
[115] Financial Laws (Miscellaneous Amendments) Act 27 of 1997, section 25(6).
[116] Tanzania Investment Act, section 24(2). Also see section 25(7) of the Financial Laws (Miscellaneous Amendments) Act 27 of 1997.
[117] Tanzania Investment Act, section 24(2).
[118] National Investment Policy, 1996, 43.

> Vacancies for wage employment are very few. Many Tanzania graduates do not find employment especially in private industries, some institutions and parastatals. Vacancies in those institutions are made available to expatriates who have the same competence as our graduates. Such cases are also common in construction companies and various consulting firms. There is a need to utilize our own graduates and in so doing there will be close monitoring of the existing laws and guidelines on the employment of such personnel.[119]

Paragraph 3.12 of the newly adopted National Employment Policy, which fine-tunes the words of its predecessor and which represents a relatively balanced approach, is also relevant:

> The government recognizes the role of foreign workers for the use of technology and skills that are not available locally, particularly those foreign workers who will facilitate the acquisition of the required skills by local personnel, through training for skills transfer in strategic areas. However, there is a growing tendency of investors to employ foreigners in jobs that could be well performed by Tanzanians thus depriving them of the rights of employment and in many cases transfer of skills is not effectively undertaken.[120]

The first sentence of this paragraph is remarkable in that it signals a change of attitude on the part of the authorities. It marks a gradual recognition and appreciation of the role of labour migration in the growth of the economy. The Policy further outlines four measures which the government intends to pursue in attempting to rationalize the employment of migrant workers. This includes harmonizing and streamlining the work permit procedure and process. In terms of emigration, the policy envisages the establishment of a Strategic and Cross-Border Placement and Recruitment Unit to facilitate and coordinate the recruitment of Tanzanians abroad.[121] This is similarly remarkable. The only issue that is unclear is whether the policy envisaged the establishment of a completely new unit or whether the policy makers were thinking of the Tanzania Employment Services Agency (TaESA), which already deals with cross-border placements.

The establishment of a new unit will worsen the existing confusion caused by a multiplicity of regulatory institutions. There are currently multiple government institutions and departments which directly and indirectly supervise the implementation of the labour

[119] National Employment Policy, 2003, para 10.8.
[120] National Employment Policy, 2008, 25.
[121] Ibid 32.

migration policy. These include the Department of Employment (Ministry of Labour), the Department of Immigration Services (Ministry of Home Affairs), the Civil Service Department, the Tanzanian Investment Centre (TIC), the Work Permits Committee, the Tanzanian Employment Services Agency (TaESA), and the Director of Refugee Services (who issues work permits for refugees). The functions of most of these institutions and departments involve supervising the admission of migrant workers. The specific functions of these institutions are addressed in chapter 5. At this stage it suffices to note that the government has vested labour migration issues in several institutions, some of which are not operative to date.

The *non functus* Alien Immigration Board provides a typical example. This Board, which was established under the Immigration Act and whose membership constitutes senior officers in the Union Government and the Revolutionary Government of Zanzibar, was to serve as the major advisory body to the Principal Commissioner for Immigration Services (then Director of Immigration Services) on matters pertaining to the issuance of work permits and other pertinent issues. This is a Board whose efficiency in discharging its respective functions would be highly doubtful even if it were to be established, because it is composed of high profile people who would be unable to meet regularly. The constitutionality of this Board is also doubtful.

The different perceptions and approaches of these institutions in addressing labour migration and the ensuing impact have been recorded. Some maintain a modest approach, while others pursue what was termed by participants in this research as the 'most liberal' approach, which is criticized for negating government endeavours to protect the local market against the influx of non-nationals. As explained further in chapter 5, it is, for instance, in the interest of the TIC to allow investors unimpeded access to immigrant labour because this will put Tanzania in a competitive position as regards attracting FDI. On the other hand, the Department for Immigration Services is concerned with reducing the numbers of new entrants.[122] The absence of coordination between these institutions has strained their relationship and consequently diminished the opportunities for cooperation. There are signs of mistrust and a lack of confidence between these institutions.[123]

[122] See chapter 5, section 5.2.4.
[123] Ibid.

4.6 Conclusion

The foregoing discussion leads us to conclude that labour migration has been an important economic and social driver in Tanzania. Although the trends and patterns of labour migration have changed over time, reflecting economic transformation, the economic importance of labour migration has not been surpassed by these events. Unlike the past, when Tanzania used to host unskilled and low-skilled migrants from neighbouring countries, today it hosts significant numbers of migrants with different skills and professional orientations from within Africa and beyond. Similarly, significant numbers of Tanzanians, both skilled and unskilled, emigrate to different destinations. However, amidst this transformation, a mismatch of policy, legal and institutional frameworks prevails. It is clear from the foregoing discussion that the current legal, policy and institutional frameworks leave much to be desired. As demonstrated in the foregoing sections, they are fragmented and incoherent, yet they all intend to regulate the number of new entrants. The human rights concerns of the already admitted migrants have so far remained beyond the scope of the current legal, policy and institution frameworks. The effects of this fragmentation and incoherence are examined in the following chapters.

Chapter 5: Migrant workers' access to remunerated activities and their general conditions of work

5.1 Introduction

Chapter 4 concludes by noting the importance of labour migration to Tanzania's social and economic growth. The chapter argues that, despite the economic transformation that has taken place over the years, labour migration has remained significant. The chapter also notes the existence of incoherent policies that seek to limit the admission of migrant workers. Using statistics available, the chapter observes that while the restrictive policy on the employment of migrants has generally remained intact, the number of migrant workers admitted has increased with time, reflecting global migration trends.

Building on these conclusions, this chapter proceeds to examine the rules and practices pertaining to the admission of migrant workers, with particular reference to their access to the labour market. The chapter then examines the situation of migrant workers in the workplace.

With regard to the admission of migrant workers and their access to remunerated activities, it is observed that, in addition to being restrictive, the current policy encourages short-term admission with no prospects for permanent residence or naturalization. It is further observed that the government is yet to adopt viable models for assessing the demands for foreign labour. The demands are determined through a labour market test which is cumbersome and unresponsive to the immediate needs of employers. The procedure for obtaining work authorization is time-consuming, cumbersome and costly. All these issues compromise the rights of migrant workers.

The chapter further observes that migrant workers' employment-related rights are governed by the basic employment laws which apply without exception to all workers. These laws incorporate the core labour standards and provide comprehensive protection for workers, and are therefore generally compliant with international labour law. However, these laws are of general application and make no reference to the specific issues that affect migrant workers. They are thus unable to adequately protect migrant workers. Moreover, because of the disjuncture between the labour laws on the one hand, and the immigration laws on the other, migrant workers are not able to take full advantage of the protection offered by employment legislation.

5.2 Access to the labour market

5.2.1 The form of labour migration

The labour migration policy currently pursued in Tanzania envisages the admission of workers strictly on a short-term basis. Skilled migrant workers are admitted for a defined and limited period of time to address what has been described in the literature as an 'absolute shortage of labour' or a 'qualitative mismatch of labour'. These terms refer to situations where, due to socio-economic reasons, the country's education and training institutions have not produced enough people with the right qualifications for certain jobs.[124] In other words, the qualification profiles of the vacancies are not matched because there are no or few people with the appropriate qualifications, skills or experience.[125] The destination country therefore admits migrant workers on the understanding that, after a certain period of time, the services of these workers will be redundant because the locals will have acquired the necessary skills.[126]

The Immigration Act specifies that residence permits (of any class) are valid for three years, subject to renewal for any period not exceeding two years. Where renewal is preferred and authorized, the total period of the validity of the original permit and its renewals should not in any case exceed five years.[127] This policy is further confirmed in the following extract from TF1 (Tanzania Immigration Form No 1), a standard application form for a work permit:

> It is the Government's policy that the economy of Tanzania should be manned by trained and competent citizens. Residence permits (or renewal thereof) for employment in Tanzania are issued to non-citizens with skills not available at present in Tanzania labour market only on the understanding that effective training programmes in service or otherwise are undertaken with a specified period to produce trained citizens competent to replace them.

For enforcement purposes, in each calendar year, employers are required to submit to the Principal Commissioner for Immigration Services (PCIS) an annual return detailing the names of non-Tanzanian employees in that calendar year, the names of such non-citizen employees who left employment in the said calendar year, the immigration status of each employee, and any other particulars that the PCIS requires. Failure to submit constitutes an

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[124] Bohning, RW *Employing a Foreign Worker: A Manual for Policies and Procedures of Special Interest to Middle and Low Income Countries* (ILO, Geneva, 1996) 5.
[125] Ibid.
[126] Ibid.
[127] See the Immigration Act, section 18(2).

offence.[128] A further obligation is imposed upon employers to establish a specific training programme to enable local graduates to take over from the expatriates. Section 27(6) of the Employment Promotion Services Act provides that '[a]ny person who employs a foreigner shall be required to establish an effective training programme to produce local experts to undertake the duties of the foreign expert.' The training programme so established should incorporate theoretical and practical aspects, that is, it should aim to equip the local worker or trainee with the requisite skills within a two-year or three-year period so that he or she can take over the duties of the expatriate when the first three years of the work permit have passed, or, in exceptional cases, when five years have passed.

It is doubtful whether this method has been successful in fostering the intended goal. Research revealed that these restrictions co-exist with a judicious practice that enables employers to retain their employees beyond five years. If the migrant worker and the employer wish to continue with the employment relationship after five years have passed, they may apply for a new work permit, following the same procedure used for first-instance applications. These applications are regarded as fresh applications and successful applicants are granted work permits with conditions identical to those in the initial work permits. For instance, the permits so issued are eligible for renewal on conditions similar to those in the initial work permits.[129] However, because of the cumbersome procedures involved only a few migrants take advantage of this practice. More often, those who wish to stay integrate in the labour market in defiance of the law.[130]

This failure to accept the temporary nature of employment is not surprising. Evidence from other countries where temporary labour migration is preferred shows that maintaining the temporariness of labour migration is very challenging. Migrant workers resist returning to their countries, and employers are not prepared to release migrant workers, particularly where

[128] See the Immigration Regulations, 1997, regulation 35.

[129] At the end of the second round, the worker would have acquired a total of ten years' residence, which gives him or her some credit if he or she wishes to become a citizen. The Tanzanian Citizenship Act requires a person who wishes to be granted citizenship by naturalization to have resided continuously in the country for a period of 12 months preceding the date of his or her application. Prior to these months, the applicant must have attained, in addition, an aggregate period of seven years' residence in Tanzania, which must have been attained in the ten years preceding the above-mentioned months. Additional requirements, related to the applicant's knowledge of Kiswahili or the English language, his or her character, his or her past, and his or her potential contribution to the national economy, also apply. See the Citizenship Act, 1995, section 9(1), and the Second Schedule to this Act.

[130] This was revealed in personal interviews with Senior Immigration Officers at the Immigration Department Headquarters between September and October 2010.

the locals have not been able to gain the skills or where they are simply not interested in particular occupations.[131] To overcome these obstacles, a functioning enforcement mechanism needs to be established, in addition to the procedural requirements.

At present, the government is exerting more pressure on employers. The requirement for training and for the succession of duties performed by non-national workers gained a new force recently with the enactment of the new Mining Act, 2010. The Act makes the granting of mining licences subject to, among other things, the submission and implementation of a satisfactory employment and training programme for Tanzanians and a succession plan for duties performed by non-Tanzanians.[132] This is an attempt to address the increasing unhappiness with mining companies, which are said to favour migrants in their employment policies. It is yet to be seen whether and how this requirement will be successfully implemented. Given the various limitations facing the enforcement institutions, this may require a reorientation of the Employment Department and other authorities charged with the enforcement of labour migration policies.

5.2.2 How are labour market needs determined?

The fluid nature of the labour market has made the formulation and choice of an appropriate labour migration policy a very challenging task. Most often, the challenge revolves around determining the numbers of migrants to be admitted and the qualifications or skills of would-be migrants and these issues are largely dependent upon the goals of the host state.[133] In the absence of definitive universal regulations, destination countries have adopted different approaches, commensurate with their labour market demands and their absorption capacity.[134] The disparities notwithstanding, states normally use quotas or ceilings and labour market tests as the main methods to determine their needs.

Quotas or ceilings refer to the setting of numerical limits on the number of migrant workers to be admitted, which are based on different factors, such as economic forecasts, employer

[131] See Ruhs, M 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145(1–2) *International Labour Review* 7–36 at 19.
[132] See the Mining Act 14 of 2010, ss 41(1)(h), 42(1)(d), 47(b), 49(1)(f), 50(1)(c), 51(e) and 52(e).
[133] Borjas, G *Keynote Address: Canada's Immigration Policy – Reconciling Labour Market Needs and Longer-Term Goals* (Institute for Research on Public Policy, Ottawa, 25–26 May 2010).
[134] Ibid.

reports, and the unemployment rate.[135] A quota or ceiling may be set on the basis of a percentage of the total labour force, a region, the type of labour, job categories and countries of origin.[136] In Tanzania, the quota system applies to employers who are registered as investors under the investment laws, who are entitled to an automatic immigration quota of five employees when the investment commences.[137] In the mining and petroleum sectors the initial quota is quite flexible, and depends on the actual demands of each particular employer. Moreover, in addition to the initial immigration quota, employers in this group are free to recruit more migrant workers, depending on the nature of their operation or business and the complexity of the technology used in their particular enterprise, without necessarily being subjected to further tests.

The labour market test seeks to assess whether the skills required for a particular post are scarce in the labour market.[138] An employer wishing to employ a migrant is therefore required to prove to the satisfaction of the authorities that there are no similarly qualified local persons.[139] In Tanzania, for example, an employer who seeks to employ a migrant is obliged to prove to the satisfaction of the Commissioner for Labour that 'all possible efforts have been explored to obtain a local expert but to no avail.'[140] In other jurisdictions, employers are further required to prove that the employment of non-citizens will not prejudice the working conditions of local workers. For example, in South Africa, before the 2011 amendment to the Immigration Act, all employers seeking to employ workers under the general work permit category had to prove to the satisfaction of the Director General that 'despite a diligent search they are unable to employ a person in the Republic with the skills and experience equivalent to those of the applicant.' In addition, they had to prove to the satisfaction of the Director- General that 'the terms and conditions under which he or she intends to employ that foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens'.[141]

[135] Organization for Security and Cooperation in Europe (OSCE), IOM and ILO *Handbook on Establishing Effective Labour Migration Policies: Mediterranean Edition* (OSCE, IOM and ILO, Geneva, 2007) 101.
[136] Ibid 101–102. Normally, quotas or ceilings are established annually by the government after consultation with other stakeholders.
[137] Tanzanian Investment Act 26 of 1997, section 24(1).
[138] OSCE, IOM and ILO, op cit 103.
[139] Ibid.
[140] National Employment Promotion Services Act 9 of 1999, section 27(2).
[141] Immigration Act 3 of 2002, section 19(2). This section has been substituted by section 12 of the Immigration Amendment Act 13 of 2011.

While the proof required to establish the absence of qualified persons in the local labour market may differ from one country to another, employers are usually required to advertise the post for a certain period of time and to demonstrate that they have taken active steps to recruit within a specific period.[142] Employers in Tanzania are required not only to advertise the post but also to interview the shortlisted applicants in the presence of a labour officer, an approach that may appear overly ambitious. Newspaper clippings of the job advertisement, together with the minutes of the meeting of the interviewing panel bearing the certification by the labour officer, must then be submitted in support of the employer's request to be allowed to import a migrant worker.[143] Unsurprisingly, this approach has never materialized due to capacity limitations in the Department of Employment. A relatively liberal practice is preferred, whereby employers are required only to submit the newspaper clippings of the job advertisement together with the curriculum vitae of the Tanzanian alternative. A more liberal procedure is preferred for foreign companies or enterprises seeking to establish new business or investments in Tanzania. Employers in this group need only indicate, without any kind of proof, that there is a scarcity of skills in the domestic market.[144]

Whether the current model adequately addresses labour market needs is unclear, in the absence of market surveys or studies. Studies on the labour market tests elsewhere warn that labour market tests are extremely difficult to implement in practice because of the ingenuity of employers in procuring foreign workers, particularly where the employment of migrant workers is deemed to be less costly. One scholar warns that, without the right incentives and appropriate enforcement, the labour market test becomes a bureaucratic obstacle that serves neither the employers nor the local workers.[145] The current practice in Tanzania neither offers the right incentive nor does it provide for an effective enforcement mechanism. There is already unhappiness about the suitability and efficiency of the labour market test and the quota system. On the one hand, the employers see the model as bureaucratic and inefficient in addressing their immediate needs while, on the other hand, members of the public think that the current model has failed to support the government's attempts to address unemployment.

[142] OSCE, IOM and ILO op cit 103.
[143] This requirement is not prescribed in the law. It was developed within the Employment Department as an internal working memo.
[144] This was revealed in a personal interview with Mr Ernest Ndimbo, the Director of Employment in the Ministry of Labour, 4 October 2010.
[145] Ruhs op cit 19.

The major concerns of the public relate to the absence of credible mechanisms for assessing skills deficiencies in the domestic labour market and for verifying the authenticity of the certificates submitted by migrants. As already noted above, attempts to establish the method that employers would use to prove the absence of qualified local staff did not yield the desired results, due to various limitations at departmental level. Discontent also exists about the *laissez faire* approach adapted to the admission of migrant workers under the quota scheme. As the discussions in the previous paragraphs and in section 5.2.4 of this chapter reveal, migrant workers in the initial immigration quota, to which all investors registered with the TIC are entitled, are not subjected to any skills test. This absence of objectivity allows investors to employ anyone, including their family members, compatriots and friends, even if they are incompetent or do not have the necessary skills.

It is therefore submitted that reform is required to address the prevailing concerns, to foster harmonious relationships between the stakeholders and the public, and to improve productivity and competitiveness. One possibility is to relax the rules of the labour market test, particularly in areas with an acute shortage of skills. The government could consider replacing the prevailing policy, which favours certain categories of employers, with a skills deficiency-based policy. The latter approach is more likely to yield better results, particularly when the skills deficit is objectively determined after consultation with the stakeholders. The other alternative is to enhance the existing two-tier system by introducing a quota system in areas with acute shortages of skills, while retaining the labour market test in other sectors where the demand for skills is relatively low. This may help to address the shortage in these areas without necessarily damaging relationships in the market and without straining government resources too much.

This submission is premised on the fact that, since the quotas are usually negotiated periodically with various sectors and are administered and allocated with the help of organizations from different sectors, they have the potential to reduce confrontations and unnecessary clashes between employers and the authorities.[146] Likewise, when they are well designed and administered, they may address public concerns over growing numbers of migrant workers. Moreover, since they apply to all employers for a certain period of time,

[146] Abella, M *Policies and Best Practices for Management of Temporary Migration* Paper presented at the International Symposium on International Migration and Development, Turin, Italy (28–30 June 2006) 35.

they are more likely to relieve the authorities of the burden of considering individual requests submitted by employers.[147] This is not to say that the quota system is perfect. Its defects require considerable attention. For instance, the system has been criticized for its lack of flexibility and for failing to meet fluctuating labour market needs. In some cases, it has also been inefficient in matching potential migrant workers and employers.[148] In some cases, the number projected is much less than the actual number needed to maximize productivity.[149]

Because of the deficiencies of both models it is argued that a two-tier approach is comparably advantageous. In any case, should either of these two alternatives be considered, an in-depth study to inform the policy-making process is imperative. The implementation of the legal obligations arising from the EAC Common Market Protocol provides a greater opportunity for reform in this area. The sectors with acute shortages of skills have already been identified under the implementation schedule of the EAC Common Market Protocol.[150] Building on this and further labour market studies, the government will be able to identify a suitable model for reform.

5.2.3 Access to labour market information and the recruitment process

Labour market information and sound employment procedures are vital for a healthy labour market. These two are unfortunately lacking in the transnational labour market. However, the robust technological advancements taking place today are increasingly bridging the divide between migrant workers and prospective employers. Migrant workers can now access information in the print and electronic media on employment opportunities and can even contact prospective employers without necessarily going to prospective countries of employment.

As a relatively small player in the transnational labour market Tanzania is yet to develop a sound labour information system and viable recruitment procedures to suit the needs of the

[147] Ibid.
[148] The determination of quotas involves many stakeholders and a long consultative process; hence the release of annual quotas is always delayed. In South Africa, for example, the Minister for Home Affairs must determine the quotas of specific professional categories and classes of skills after consultation with the Minister of Labour and the Minister of Trade and Industry. Because of this process the annual quotas are usually released late. For example, the annual quotas for 2009 were released towards the end of May. See section 19(1) of the Immigration Act, 2002 (prior to the 2011 amendment).
[149] Abella op cit 36.
[150] See the Schedule for the implementation of the free movement of workers in Annex II to the EAC Common Market Protocol. Also see the discussion in section 3.4.7 of chapter 3 of this work.

global labour market. The Tanzanian Employment Services Agency (TaESA), which is mandated to collect and disseminate labour market information and to provide internal and cross- border placement services, is relatively new and is yet to develop the capacity to satisfy the demands of the diversified and flexible labour market, both domestic and international.[151] Its mandate in terms of labour migration is limited to assisting Tanzanians who desire to work abroad to secure employment opportunities and to protect them from abusive recruitment by approving their employment contracts.[152]

The absence of standardized recruitment procedures is further exacerbated by the shrinking role of the government as a major employer. Under the free labour market economy currently implemented in Tanzania and elsewhere, governments have lost their monopoly over the labour market to the private sector, which is growing rather rapidly. As a result of privatization and structural adjustment policies, the proportion of employees in the public sector in Tanzania has recently become negligible, accounting for approximately 3 per cent of the labour force in 2006.[153] According to the National Employment Policy, the rapidly growing private sector, comprising multiple employers, has assumed a leading role in employment creation.[154] It is almost impossible to have standardized recruitment procedures in the prevailing environment, where the demands of employers are fluid and diverse.

With regard to migrant workers, the justification for the absence of standardized recruitment procedures is further reinforced by the current labour migration policy which, as will be shown below, requires all recruitment procedures to be completed before a migrant worker moves to the country. To meet this requirement, employers have used migration networks, private recruitment agencies, and web-based recruitment to identify suitable candidates, which affect migrant workers in various ways.

A large proportion of migrant workers in Tanzania, particularly those who come from India and other countries in Asia, are recruited through the existing network of their compatriots

[151] TaESA is a government agency established by the Executive Agency Act 30 of 1997. It was established in 2001 by the Labour Exchange Centre (LEC) under the then Ministry of Labour, Youth Development and Sports. In 2003 it was promoted to an independent unit in the employment department before it was finally elevated to an agency.
[152] See http://www.taesa.go.tz/new/index.php?option=com_content&view=article&id=53&Itemid=59 (accessed on 12 April 2011).
[153] United Republic of Tanzania *The National Employment Policy* (2008) 4.
[154] United Republic of Tanzania *The National Employment Policy* (2008) 41.

and contemporaries who are already working in Tanzania. This network informs them about vacant posts, the necessary skills and the employment conditions. This method is also popular among workers from within the EAC.[155] Migrant networks, according to Massey, refer to 'sets of interpersonal ties that connect migrants, former migrants, and non migrants in origin and destination areas through ties of kinship, friendship, and shared community origin.'[156] These networks are prevalent in almost all countries, and have been identified as central players in organizing local and international migration. There is ample evidence that international migrants rely heavily on these networks to migrate and find employment.[157] This is because the costs of international migration, which are much higher than those of non-international migration, are considerably reduced by migration networks, which offer 'a form of social capital that people can draw upon to gain access to foreign employment.'[158] Through the provision of transport costs, food, shelter, and job connections, these networks lower the costs and risks of migration and hence increase the likelihood of international migration.[159]

While networks offer a relatively cheap alternative for migrants in Tanzania and elsewhere, one must be mindful of its multiple disadvantages for migrant workers, employers and the host country. First, networks offer ample opportunity to migrants to evade the law.[160] Second, they increase the possibility of irregular stays and irregular employment in destination countries. Third, networks limit market efficiency as it provides restricted types of information and resources and thereby inhibits the matching of skills. As a result, specific categories of workers, in terms of gender, race, ethnicity, country of origin, or religion, are often provided to fit particular jobs and, consequently, the labour markets become 'highly

[155] Most of the migrant workers who participated in this study have established interpersonal and organizational ties.
[156] Massey, DS et al 'Theories of International Migration: A Review (1993) 19(3) *Population and Development Review* 431–466 at 448–449.
[157] Poros, MV 'The Role of Migrant Networks in Linking Local Labour Markets: The Case of Asian Indian Migration to New York and London' (2001) 1(3) *Global Networks* 243–259 at 245.
[158] Massey op cit.
[159] Ibid. Also see Boyd, M 'Family and Personal Networks in International Migration: Recent Developments and New Agendas' (1989) 23(3) *International Migration Review* 638–670 at 641; and Ivan, L et al 'Migration Networks and Immigrant Entrepreneurship' (April 1990) V *California Immigrants in World Perspective: The Conference Papers* 2.
[160] For example, in Bahrain, migrants from Sri Lanka prefer networks because, through networks, they can avoid the health insurance policy which every Sri Lankan is obliged to have before departing to work overseas. The insurance policy covers the worker's hospitalization while working abroad and up to 60 days' medical treatment after returning to Sri Lanka. See Al-Najjar, S *Women Migrant Domestic Workers in Bahrain* (International Migration Papers No 47, ILO, Geneva 2002) 18. Available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp47e.pdf (accessed on 24 May 2012).

segmented and highly localized'.[161] Worse still, networks create serious challenges for migrant workers in respect of the enjoyment of their rights. Migrant workers who are recruited through networks are more likely to be exposed to various forms of exploitation and abuse. They risk being placed with unscrupulous employers who may subject them to inhumane working conditions and low wages, or they may be compelled to work without pay.[162] Some are forced by their hosts to work for nothing or to pay excessive amounts of money in return for the facilitation.[163]

The private recruitment industry is also gradually resurfacing, with a few recruitment agents operating locally. However, unlike colonial Tanganyika, where private recruitment agents such as the Usukuma Labour Agency and the Sisal Labour Bureau (SILABU) played a massive role in supplying labour from the labour reserves,[164] there is currently no robust network of private recruitment agents, unlike Kenya where a relatively strong network of recruitment agencies exists.[165] Only a few employers in Tanzania use international recruitment agencies. The proportion of workers recruited through private recruitment agencies, both national and international, is therefore negligible.[166]

The infancy of this industry notwithstanding, in 1999, only two years after the ILO Convention on Private Employment Agencies was promulgated,[167] the government expressed an interest in regulating this industry through Part V of the Employment Promotion Services Act. Among other things, this part lays down the procedure for establishing and registering private recruitment agents, and notes the ethical requirements for the operation of this industry.[168] Disappointingly, 12 years after their promulgation, these regulations are yet to be

[161] Poros op cit 244.
[162] One of the participants in this research, an employee in a furniture store owned by a Chinese company, revealed that his fellow workers who come from China do not receive remuneration. Each of them is given some pocket money at the end of every week, and they are promised that their salaries will be paid in full when they return to China. As a result some of them become beggars because the money they are given every week is not enough to support them.
[163] One of the principal migrants in Dar es Salaam is said to charge all fellow migrants in his network 10 per cent of their monthly salaries throughout their employment period.
[164] See, Shivji, IG *Law, State and the Working Class in Tanzania* (James Currey, London, 1986) 14.
[165] Private employers in Kenya have formed an umbrella organization, called the Kenyan Association of Private Employment Agencies (KAPEA). The organization has about 69 members and has developed a code of practice and a code of ethics, which all members must adhere to in their operations. See http://www.kapea.org/index.html (accessed on 24 May 2012).
[166] Employers in the mining sector and a few others, such as the Suflag industries in Arusha, St Constantine International School and the Nile Perch industries, use international recruitment agencies.
[167] See the ILO Convention on Private Employment Agencies, 181 of 1997.
[168] See the National Employment Promotion Services Act, 1999, sections 18–23.

put into practice. The existing recruitment agents are neither registered by the Commissioner for Labour nor are their activities monitored. They are, instead, only registered and licensed as normal business companies by the Business Registrations and Licensing Agency (BRELA) under the business laws.[169] Recently, the government expressed a renewed interest in regulating this sector, and the mandate to register and to monitor the operations of private recruitment agents has now been transferred to TaESA,[170] but this is still to be operationalized.

The efforts demonstrated by the government thus far correspond with global initiatives to regulate this rapidly growing industry.[171] In international migration, where new migration routes are opening up and migration flows are diversifying, private recruitment agents have emerged as central players, creating contacts between employers and employees.[172] This is because of their ability to connect migrant workers, who lack information about job opportunities, with employers in receiving countries, who are 'looking for efficient ways to fill vacancies with migrant workers and require information about suitable candidates'.[173] This advantage notwithstanding, the negative impacts of an unregulated private recruitment industry are considerable and widely documented. A well-functioning regulatory system is therefore needed. There is ample evidence from the literature that migrant workers who rely on private recruitment agents may be exposed to unethical and abusive recruitment procedures in the form of exorbitant fees, physical abuse, deliberate misinformation about the working and living conditions in the country of employment, trafficking and smuggling, and many other violations which are likely to occur in unregulated environments.[174] As one scholar correctly warns:

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[169] BRELA is a Government Executive Agency responsible for the registration of companies and business names. It was established in 1999 under the Government Executive Agencies Act 30 of 1997.

[170] See http://www.taesa.go.tz/new/index.php?option=com_content&view=article&id=53&Itemid=59 (accessed on 24 May 2012).

[171] Private employment agents have placed over 8 million workers worldwide and have enhanced the employability of jobseekers by keeping them in touch with the job market and through training.

[172] See ILO *Guide to Private Employment Agencies: Regulation, Monitoring and Enforcement* (ILO, Geneva, 2007) 1. Also see Martin, P 'Regulating Private Recruiters: The Core Issues' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 13–26 at 15. For statistical facts on the growth of private employment agencies across the world see ILO *Private Employment Agencies, Promotion of Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors* (ILO, Geneva, 2011) 11–16.

[173] Ibid.

[174] ILO *Private Employment Agencies, Promotion of Decent Work and Improving Labour Markets in Private Services Sectors* Issue paper for discussion at the Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private (18–19 October 2011) 9, available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_164611.pdf (accessed on 24 May 2012).

> Enforcement is the key component underpinning the regulatory framework, without which employment agents will not take the licensing rules and conditions imposed seriously. Without effective enforcement by the Ministry, unscrupulous individuals will be emboldened by the fact that they stand a very high chance of getting away with exploitative behaviour.[175]

It is therefore submitted that Tanzania should, through TaESA, expedite the enforcement of the rules in this area, since such enforcement is long overdue. The fact that the industry is still in its infancy is an added advantage in building a proper and efficient system. Lessons could be drawn from countries such as Singapore, Bahrain, the Philippines, and Sri Lanka, which have all successfully installed functioning regulatory systems.[176]

5.2.4 Procedures for obtaining work permits

Authorization is required before a migrant can take up or engage in any economic activity, either as a self-employed worker or as an employee in a certain sector.[177] The current framework provides three categories of authorization, classified as class A, B and C residence permits.[178] Class A residence permit, also referred to as the 'investors' permit', is granted to all persons who intend to engage in trade, a business, a profession, agriculture, animal husbandry, prospecting of minerals or manufacture. In other words, it is granted to self-employed migrants.[179] The class B residence permit, also known as the 'work permit', is granted to skilled or professional migrant workers, or 'expatriates' as they are commonly known, who have secured employment in Tanzania, excluding those employed in government projects. Class C permits cater for students, researchers, retired persons, volunteers, and workers who are employed by religious and charitable organizations. In this study, we deal with the second category.

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[175] Pong, NC 'Management of Foreign Workers in Singapore: Regulation of Employment Agents' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva 2006) 13–25 at 15.

[176] See Baruah, N 'The Regulation of Recruitment Agencies: Experience and Good Practices in Countries of Origin in Asia' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 37–25 at 39–43; Averia Jr, C 'Private Recruitment Agencies in the Era of Globalisation: Challenges and Responses: The Case of the Philippines' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 47–52. In February 2011 the government of Singapore passed an amendment to the Employment Agency Regulatory Framework so as to take action against unlicensed and errant employment agencies, to raise the professionalism and accountability of industry stakeholders, and to ensure provisions and processes are relevant to today's context by offering flexibility to cater to different needs in the industry. See the Employment Agencies Rules 2011 (No S 172/2011)

[177] Immigration Act, section 16(1) and (2).

[178] Immigration Act, section 18.

[179] Immigration Act, section 19.

The requirement for the authorization of workers in the second category is explicitly provided for by section 20 of the Immigration Act:

> A person, who has been offered a specified employment in Tanzania and the Director is satisfied that he possesses the qualification or skill necessary for that employment and that his employment will be of benefit to Tanzania, may, if the Director thinks fit, be granted a Class B permit ...

Further, section 16(1) of the Immigration Act provides that 'no person shall engage in paid employment under an employer resident in Tanzania except under a permit …' Somewhat more elaborately, section 26 of the National Employment Promotion Services Act, 1999, provides that 'no person shall employ any "foreigner", and no "foreigner" shall take up any employment with any employer, except under and in accordance with a work permit issued to such foreigner.' An employer who employs a foreigner and a foreigner who takes up employment in the absence of a work permit commits an offence and is liable upon conviction to a fine not less than 1 million Tanzania Shillings (US$665), or to imprisonment for a term of six months, or to both such fine and imprisonment.[180]

The impact of this provision on the rights arising out of employment relationships concluded in defiance of this law is yet to be tested in the courts. However, should the judiciary be confronted with this issue, they may seek guidance from the jurisprudence of the South African Labour Court[181] and the Inter-American Court of Human Rights.[182] These bodies have on different occasions held that the violation of immigration law has no impact on the rights arising out of the employment relationship, whose existence is independent of an employee's immigration status.

Workers must obtain work permits before taking up employment. This means that an employer should apply to the relevant authorities for a work permit, on behalf of his or her prospective employee. The permit is issued by the PCIS in collaboration with the Commissioner for Labour, because Tanzania as many other countries in the region uses an 'integrated permit system' in terms of which the 'regulation of a person's rights to enter and

[180] See the National Employment Promotion Services Act, 1999, section 26(2).
[181] *Discovery Health Ltd v CCMA and Others* (2008) 29 *ILJ* 1480 (LC).
[182] *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (requested by the United Mexican States) OC-18/03.

reside in the country is combined with the regulation of the right to work.'[183] Under this system, which is common among SADC countries, a migrant worker is issued with only one document, which serves as both a work permit and a residence permit.[184] In some countries, however, like Botswana, a migrant worker is issued with two permits, one for employment (issued by the authority responsible for labour) and a different permit for residence (issued by the institution responsible for immigration).

As a result of the integrated system, an application for a work permit goes through two institutions and hence it is a two-step procedure. The National Employment Promotion Services Act, 1999 directs that all applications for work permits should be directed to the Commissioner for Labour.[185] Work permit applications cannot be sent through embassies or consulates. Ordinarily, all applications used to go directly to the Commissioner for Labour. However, following the growing numbers of migrant workers and the rapid changes to labour migration currently taking place in the country, an alternative procedure involving the work permits committee (popularly referred to as the tripartite committee) has been developed to expedite the process and enhance efficiency.

The tripartite committee, which is chaired by the Deputy Permanent Secretary for the Ministry of Labour, comprises members from the Employment Department, the Department of Immigration Services, the Association of Tanzanian Employers (ATE), and the Trade Union Congress of Tanzania (TUCTA). The committee meets twice a month to deliberate and determine the suitability of all work permit applications, excluding applications lodged through the TIC.[186] Successful applications together with the decisions of the committee (in the form of recommendations) are forwarded to the PCIS for a final decision. Unsuccessful applicants are informed of the outcome of their applications, and those with grievances may appeal to the Minister for Labour.[187]

[183] See Klaaren, J and Rutinwa, B *Towards the Harmonization of Immigration and Refugee Law in SADC* MIDSA Report No. 1 (Institute of Democracy in South Africa, Cape Town, 2004) 60.
[184] Ibid.
[185] See section 27(1).
[186] During each session, the committee deliberates on about 300 to 400 applications which comprise first instance applications and applications for first or subsequent renewals. It was originally envisaged that the committee would meet three times a month. However, this could not be achieved because of logistical difficulties. The establishment of this committee has served a number of purposes.
[187] See the National Employment Promotion Services Act, 1999, section 27(3) and (4).

There is a parallel special procedure for migrant workers who are employed by investors. The TIC has established a one-stop centre where an investor can obtain all essential services. Investors who are registered with the TIC receive expedited service upon paying a facilitation fee, which is 10 per cent of the total application fee. Applications lodged at the TIC do not go to the tripartite committee, but are processed and transmitted through the labour desk, and go to the Commissioner for Labour for determination. All successful applications, together with the recommendation of the Commissioner are forwarded to the PCIS for final decision. Unsuccessful applicants are informed and advised accordingly .[188]

An administrative fee is charged for each application, to cover the costs of testing the legitimacy of the employer's claim and the costs of processing various documents. At the time of this research, the fee was US$620 for first-instance applications and US$300 for renewals. Towards the end of 2011, the fee was increased to US$ 1550 for both first-instance applications and renewals.[189] The law is silent on whether the employer or the employee is responsible for paying this fee. As a matter of practice, employers normally bear this cost. This complies with the position under international labour migration law which provides that migrants should be exempted from having to pay administrative fees for services provided to them in relation to admission or permission to work.[190] In some cases, however, employers require the workers to contribute to the amount paid. Both the percentage and the mode of payment are mutually agreed upon by the parties. In exceptional cases, in sectors where staff turnover is relatively high, employees are expected to pay the entire amount.[191] However, only a few manage to do so. The rest choose to work irregularly.

The procedure and the administration fee raise pertinent issues. While the procedure offers opportunities for transparency and accountability, it is cumbersome and unnecessarily lengthy. Even after the establishment of the tripartite committee the procedure has remained excessively time-consuming. It takes an average of two to three months for an ordinary work permit to be issued, while applications through the TIC, which are expected to mature within 14 days, take at least a month. In regulated sectors, it takes much longer to secure clearance from professional bodies. For instance, in the education sector it may take up to six months to

[188] Immigration Act, section 18(3).
[189] **See** Government Notice (GN) Nos 185, 186 and 189 of 1 July 2011.
[190] See article 2 of ILO Convention No 97.
[191] Migrants working as teachers in some English-medium schools said there is high turnover of workers in this sector and therefore employers do not want to incur the costs associated with work permits.

secure a teaching licence.[192] The bureaucracy consequently impairs the productivity and efficiency of the labour market because the immediate needs of employers are not being met. The delays also mean that employers might use the black labour market as an alternative to meet their immediate labour demands.

Empirical evidence from countries with correspondingly bureaucratic admission procedure attests that, such procedures fuel irregular migration. Spain presents a typical example of these countries. According to Calavita, the procedure for obtaining work permit in Spain, which to certain extent resembles that of Tanzania, is unnecessarily long and has become one of the major catalysts for irregular migration.[193] A migrant seeking work authorization in Spain is required to obtain a provisional employment contract from his/her prospective employer and present such contract to the Provincial Labour Department where they are granted provisional work permit. The provisional work permit is then submitted, together with other documents, to the department interior which is responsible for granting residence permit.[194] Although not integrated, the work permit and the residence permit are 'mutually dependent on each other thus creating a "vicious circle in which clandestine immigrants are trapped"[195]

The new administrative fee is very high and undoubtedly prohibitive for employers who would otherwise consider employing non-nationals. Employers may react in different ways to the new fee, which may be detrimental to migrant workers. For example, employers may want to shift the burden to migrant workers by requiring them to contribute to the administrative fee. Alternatively, they may require workers to pay the entire amount from their own pockets, or may advance them some form of a loan while committing them to conditions which may sometimes be unbearable. To avoid this cost the parties may opt to enter into an irregular employment relationship. This is also likely to fuel corruption, which is already prevalent in the immigration department and in other law enforcement organs.[196]

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[192] This was revealed during a personal interview with X, a human resources practitioner at an international school in Dar es Salaam.
[193] Calavita K 'Immigration, Law and Marginalization in a Global Economy: Notes from Spain (1998) 32(3) *Law and Society Review*, 529-566 at 552.
[194] Ibid
[195] Ibid.
[196] In 2010, the Department of Immigration Services was named one of the ten most corrupt institutions by the East African Bribery Index (EABI), an anti-corruption watchdog in East Africa. The media recently reported that some corrupt officers at the Immigration Regional Office in Kilimanjaro issued about 480 forged Class C residence permits and 84 Class B residence permits between January 2011 and January 2012 for a fee of

From an administrative point of view, the integrated permit system has been the cause of antagonism and frustration to the Department of Immigration Services and the Department of Employment. While the current system creates the impression that it ensures 'checks and balance' between these two institutions and thereby enhances accountability and efficiency, this is not in fact the case. It will be recalled that these institutions differ significantly in terms of their mandate, responsibilities and chain of accountability.[197] More importantly, they differ significantly in their perception of and approach to labour migration. The Department of Immigration Services tends to view labour migration through the lenses of immigration and security control, while the Department of Employment views labour migration as a labour issue. This has led to frustration and, at times, antagonism between these two institutions, each blaming the other for inefficiency and for failing to uphold government policies.[198]

The checks and balance are biased and faulty and have exacerbated the antagonism between these two institutions, by giving more power to the Department of Immigration Services. In other words, it can be argued that the Department of Employment and the Commissioner for Labour have been reduced to advisory bodies to the PCIS, which is a statutorily independent entity with a full mandate over the issuing of residence permits, and hence not legally obliged to follow the advice of its counterparts. This means that the office of the PCIS can easily disregard the recommendations from its counterparts without there being any consequences. The establishment of the tripartite committee, which brings these two institutions together in determining work permit applications, has to some extent tried to address this issue. Nonetheless, antagonism and a poor working relationship still exist and are exhibited in different ways. One aspect is the lack of coordination of work permit statistics: the statistics in the Department of Immigration Services are not shared and synchronized with those in the Department of Employment. As a result, the latter department, which is supposed to be in charge of labour migration, has no accurate statistics of migrant workers in the labour market.

US$200 each, which is less than a half of the government fee (US$500 for Class C residence permits and US$620 for Class B residence permits). See Mjema, D 'Ufisadi Watisha Uhamiaji Moshi' (Alarming Corruption at Moshi Immigration Office) *Mwananchi* (Tanzanian daily newspaper) 7 May 2012.

[197] The Employment Department is accountable to the Ministry for Labour and Employment while its counterpart is responsible to the Ministry of Home Affairs.

[198] High-ranking officials in both departments expressed serious concerns about the suitability of this procedure during the interviews conducted in Dar es Salaam between September and October 2010. Officers in the Employment Department were of the opinion that the procedure is time-consuming and drains the resources of the department because the tedious work of processing all applications is done in their department but the administration fee paid in respect of these applications goes to the Department of Immigration Services.

The only numbers they have are the numbers of applications which were approved and forwarded to the PCIS. Undoubtedly, these numbers of applications include applications that were rejected or deferred by the PCIS. These problems require urgent action to improve the working relationship of these institutions and to expedite the application procedure.

5.2.6 Recognition of academic and professional qualifications

The recognition of an individual's qualifications and competencies has been and remains one of the stumbling blocks in achieving labour market integration for migrant workers. Writing about the situation of skilled immigrants in the US labour market, Mattoo et al remark that 'everyone has a story about how they discovered that their taxi driver was an Eastern European scientist.'[199] They observe that 'today, migrants who have acquired university and professional education in their home countries, at considerable expense to themselves or the government, are ending up in jobs that make little use of their education.'[200] The two statements refer to what has been popularly described as 'brain waste'. This refers to the situation where highly skilled migrant workers migrate to forms of employment for which they are over-qualified or in which they do not require the application of their skills or qualifications.[201] One explanation for this scenario is the difficulty in achieving recognition of academic and professional qualifications (credentials) obtained abroad.

In the current migration context the recognition of credentials, which was traditionally confined to the assessment and recognition of formal academic qualifications based on the assessment of intellectual specialized knowledge and skills, such as a university degree, is more broadly interpreted to include other things, such as language proficiency, communication skills, workplace competencies and experience.[202] In many destination countries, extraordinary foreign credential recognition requirements have been developed, which technically impair the access of migrant workers to their host labour market. As a

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[199] Mattoo, A et al 'Brain Waste? Educated Immigrants in the US Labor Market' (2008) 87 *Journal of Development Economics* 255–269 at 255. The earlier version of this paper is available as World Bank Policy Research Working Paper 3581 (2005).

[200] Ibid 3.

[201] Salt, J *International Movements of the Highly Skilled* (OEDC, Paris, 1997) 5, available at http://www.oecd.org/dataoecd/24/32/2383909.pdf (accessed on 24 May 2012). Also see Mahroum, S 'Highly Skilled Globetrotters: Mapping the International Migration of Human Capital' (2000) 30(2) *R&D Management* 23–31 at 24.

[202] Hawthorne, L *Migration and Education: Quality Assurance and Mutual Recognition of Qualifications* (Summary of Expert Group Meeting) Paper presented at the Group Meeting on Migration and Education: Quality Assurance and Mutual Recognition of Qualifications, UNESCO, Paris (22-23 September 2008) available at http://unesdoc.unesco.org/images/0017/001798/179851e.pdf (accessed on 24 May 2012).

result, in developed countries the unemployment rate among the migrants has remained higher, even where migrants are more qualified than the local population. In the OECD, for example, immigrants have higher education levels than their hosts, yet their rate of unemployment is significantly higher compared to that of their hosts.[203]

This is one area in which states have tenaciously fought to retain their excessive sovereignty. Attempts to develop mutual credentials recognition mechanisms have not been very successful, even in the EU where a high level of labour market integration exists.[204] In most countries, parallel accreditation systems apply. This comprises: an ordinary accreditation, normally done by national qualification/accreditation authorities, and a specialized accreditation system for regulated fields. The latter involves registration with professional bodies in the respective field. The regulated fields vary from one country to another, as do their rules and procedures.

In Tanzania, the accreditation of foreign-obtained credentials is currently entrusted to two bodies: the Commission for Universities (TCU) and the National Council for Technical Education (NACTE).[205] The former deals with the accreditation of degrees awarded by universities and colleges, while the latter is responsible for accrediting awards obtained from other tertiary institutions which offer courses at the level of technician, semi-professional and professional leading to the award of certificates, diplomas, degrees and other certificates. Disappointingly, neither of these institutions is fully involved in the granting of work permits. Applicants for work permits are currently not required to submit their certificates to these institutions for verification. All that is needed by the work permit-granting authorities is certified copies of academic and professional qualifications, and translations from a reputable institution, such as the applicant's country's embassy or consulate if the certificates are in a language other than English. This is rather unfortunate because the authorities currently involved in the processing of work permits do not have the capacity in terms of expertise and facilities for the verification of certificates. Relatively credible accreditation applies only to professionals such as doctors, nurses, lawyers, pilots, teachers, engineers, accountants,

[203] OECD *A Profile of Immigrant Populations in the 21st Century: Data from OECD Countries* (OECD, 2008) 78, available at http://www.oecd-ilibrary.org/social-issues-migration-health/a-profile-of-immigrant-populations-in-the-21st-century_9789264040915-en (accessed on 30 November 2011).
[204] See chapter 3, section 3.4.6.
[205] The TCU was established by the Universities Act 7 of 2005. NACTE was established by the National Council for Technical Education Act, 1997.

surveyors, and other categories of workers in regulated professions. Workers in this group must, in addition, submit a registration or membership certificate, or any other clearance certification from the professional bodies of their respective professions.

5.2.7 Admission of family members

Replicating the international norms on the protection of family, article 16 of the Tanzanian Constitution imposes a positive obligation on the government to respect and to protect an individual's family and matrimonial life. In addition, legislation to foster harmonious family relationships has been promulgated. With regard to migrants, the law does not prohibit family reunion. Migrants are therefore free to be accompanied by family members at the time of admission or at any other time during their residence in the territory.[206] This is, however, subject to the fulfilment of three conditions.

The first condition relates to the eligibility of family members. According to section 25(1) of the Immigration Act, the admission of family members is reserved for the migrant's spouse and dependent children. This is rather theoretical because the nuclear family phenomenon which is embraced in this provision co-exists with the liberal conception of family under the Immigration Rules, in terms of which dependants include the spouse, child/ren or near relatives who are dependent on the applicant for maintenance.[207] Although, as a matter of principle, the provision in the principal legislation is authoritative, the latter provision, which reflects the African extended family model, is preferred in practice. This model also accommodates the EAC conception of family for the purpose of reunification, in terms of which a 'dependant' is defined to include 'a son or daughter of a worker or a self-employed person who has ... attained the age of eighteen years, the mother, the father, a sister or a brother of a worker or a self-employed person who is wholly dependent on the worker or self-employed person ....'[208]

The second condition relates to the migrant's economic capability. The law requires the host (migrant worker) to prove to the satisfaction of the authorities that he or she is economically capable of providing the dependant with adequate accommodation and to demonstrate that he

[206] See the Immigration Act, section 25. An additional application fee of US$20 per every dependant is required.
[207] See the Immigration Rules, rule 9(1)(a).
[208] See article 1 of the EAC Common Market Protocol.

or she has sufficient income for his or her own maintenance and that of the dependant.[209] The third condition relates to access to economic activities. Migrants admitted as dependants may not be employed or engage in any economic activity unless they obtain a permit to that effect; the failure to do so invalidates their residence.[210] Under the current situation, it is very difficult, or rather impossible, for dependants to access the labour market. Dependants of migrant workers risk becoming idlers if they choose to exercise their right to family unity. This has a serious impact on marital relationships and is often a cause of strife. To mitigate these effects, some dependants work illegally in different establishments in the private sector, while others work as volunteers in schools and in international and local NGOs. In some cases, dependants have formed social clubs where they associate and engage in recreational activities.[211] Even then, these activities do not fully mitigate the effects of their inability to work.

Such challenges, together with the temporariness of labour migration, serve as a disincentive for workers who would otherwise like to be accompanied by family members. This is particularly the case where family members are in school or in stable employment. The fear of destabilizing family members' careers and educational development make the decision to bring family members a very difficult one.[212]

The prevailing social environment is favourable, as there are many opportunities for social interaction and integration. Migrant workers and members of their families can easily become integrated into the local community. Their access to basic social services, such as education and health services, is similarly not restricted. Thus, migrant workers' children can enrol in public schools[213] and enjoy the services of public health institutions. However, because of the poor services offered in public institutions, the majority of migrant workers depend on

[209] See rule 9(1)(b) and (c).
[210] This is rather a matter of practice. Except for dependants of envoys, consular officers and persons in the service of the government, the law does expressly prohibit dependants from taking up employment or engaging in other economic activities. See the Immigration Act, 1995, section 15(6).
[211] For example, spouses of the UN international staff have formed a group called the United Nations Spouses Group, Tanzania (UNSG TZ).
[212] One interviewee told the researcher that it was pointless to bring his family to Tanzania for a two year period because it would ruin his wife's career, as well as disrupt the education of his two children. Even those who do not have these barriers find it difficult to relocate their families for such short periods.
[213] Currently the government pursues the universal education policy, in terms of which all children of the age of seven, irrespective of their social status, must be enrolled in school. However, migrant workers may find it difficult to enrol their children because, currently, parents are required to submit the birth certificates of their children at registration.

privately owned institutions. For example, most migrant workers' children are in private schools.[214] Similarly, migrant workers and members of their families prefer private hospitals because they offer comparably better services.[215]

5.2.8 Access to the labour market by refugees and asylum seekers

Access to the labour market by refugees is regarded as an important conduit to full realisation of their right to work. Experiences from refugees hosting countries attests that, refugees as other non-nationals are, most often, not able to full realize their right to work due to various restrictions.[216] The situation is said to be more serious in the least developed countries and countries hosting large numbers of refugees. In these countries, 'access to the labour market is either denied or extremely limited for refugees'.[217] There are many examples of such restrictions in Africa.[218] As regardes asylum seekers, access to the labour market is a myth that reality.[219]

Article 17 of the United Nations Convention relating to the Status of Refugees, 1951 to which Tanzania is a member, obliges member states to '....accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.' It should however be noted that, the enjoyment of the right to work by refugees is, according to the Michigan Guidelines on the Right to Work, dependent on the refugee's ability to fulfil the conditions required for the enjoyment of such right in the same way as the most favoured foreigners.[220] Refugees who fulfil such conditions should be accorded the treatment accorded to the most favoured non-nationals. This means that, refugees residents in countries with distinct admission policies for certain favoured nationality should be treated in the same way as nationals from those countries. The same should also apply to countries with favoured

[214] There are presently numerous private schools which offer wide-ranging international curricula to suit the needs of international students. These curricula prepare children for future reintegration in their home countries.
[215] This is also the case for relatively wealthy Tanzanian families.
[216] Hathaway J The Rights of Refugees under International Law (Cambridge University Press, 2005) 730.
[217] Ibid.
[218] Tanzania, Zambia, Mauritania impose some restrictions on refugees right to work.
[219] South Africa has distinguished itself by being an exception in this case. Following judicial intervention in the famous Watchtenuka's case, asylum seekers waiting for refugee status determination are allowed to work. See *Minister for Home Affairs v. Watchenuka* (2004) 1 All SA 21.
[220] University of Michigan Law School, 'The Michigan Guidelines on the Right to Work' (2009-210) 31 *Michigan Law Review* 293-306 at 299

policies and programmes for permanent residents.[221] According to the *travaux preparatoires*, it was deemed "legitimate and desirable' during the promulgation of the 1951 Convention, to

> "accord the most favourable treatment to refugees to engage in wage earning employment, and not only the treatment accorded to foreigners generally, because refugees by their nature was denied the support of their and could not hope for governmental intervention in their favour..."

The Michigan Guidelines asserts further that, the provision of Article 17 (1) means that refugees should, by virtue of this provision, be exempted from the conditions that are too difficult to meet. For example, regulations requiring payment of fee for one to obtain a work permit should not apply to refugees.[222]

The [Tanzania] Refugees Act prescribes a distinct admission procedure for refugees.[223] Different from other non-national workers, work authorisation for refugees falls under the mandate of the Director for Refugee Services. According to Section 32 (1) of this Act, '[t]he Directors may grant work permit to any person who qualifies for the same." The Act, nonetheless, gives wide discretion on the Director to revoke the permit. Section (32)2 asserts further that, the Director 'may revoke any work permit ..... for any good cause he deems appropriate.' The discretionary powers conferred on the Director by this provision, are undoubtedly, open to abuse and thereby infringe the refugees' right to work. One commentator has rightly observed that, the objective of this provision could be none other than keeping refugees out of the labour market while encouraging a dependence syndrome.[224]

The encampment policy current perused in Tanzania and the increased restrictive measures[225] deny refugees the ability to engage in decent work which is an essential element for self empowerment and self-reliance. In the absence of adequate opportunities for accessing the labour market, refugees are rendered destitute and may consequently resort to unauthorized

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[221] Ibid.
[222] Ibid.
[223] Act 9 of 1998.
[224] Kamanga K 'The (Tanzania) Refugees Act of 1998: Some Legal and policy Implications' (2005) 18(1) *Journal of Refugee Studies:* 100-117 at 113.
[225] The Refugees Act obliges all refugees to reside in refugee camps (termed in the Act as designated areas). They are not allowed to leave those areas without the permission of the Director of Refugee Services or the Settlement Officer. This ensures total control of their freedom of movements in the territory. Pesrson not employed in these area are not allowed entry unless they obtain a general or special permit from the Minister or Settlement Officer. Non-compliance to this requirement attracts an offence punishable by imprisonment or two hundred thousand shillings. See Section

work which may expose them to various human right abuses. The current position is unfortunate as it infringes the right of refugees to work, a right which has been described by some scholars as an important right whose restriction renders other rights meaningless.[226] It also ignores the potential contribution of refugees to the national economy. It can be recalled from chapter 4 of this study that, before the introduction of these restrictive measures conceived to respond to the mass influx of refugees from the Great Lakes in 1990s, Tanzania benefited extensively from refugees who were employed in government institutions on different capacities. As the country continue to host refugees with different skills which may be of significant benefit to the country, it is important to revise the prohibitive provisions to allow refugees to contribute positively to the country's economy while also enjoying their right to work. It cannot be overemphasized that, 'permitting refugees' access to the labour market enables them to contribute to the economy and to become self-reliant, benefiting themselves and the local population.'[227]

5.2.9 Towards coherent admission policies

The prevailing incoherence and contradictions in the admission policy and its implementing structure are a typical example of the dilemma facing immigrant countries. There is evidence that, such contradiction have, of recent, become an overriding feature of labour migration policies in emerging migrant receiving countries.[228] On attempt to balance the competing interests, the regulatory framework in these countries tend to control admissions on the one hand, and on the other purport to facilitate migration of skilled migrants and guarantee their rights, but in reality they fail to achieve any of these goals.[229] The intent/outcome discrepancies resulting from incoherent policies and institutional structures has reportedly become an eminent threat to full realisation of the potential benefits of labour migration and a key catalyst for irregular labour migration. An empirical study from Spain attests further to this assertion. According to this study, the Organic Law on the Rights and Liberties of Foreigners in Spain, 1985 whose title and preamble proclaim the intention to guarantee immigrants rights and ensure their integration in the host country while the actual content of the law 'systematically marginalized migrants and circumscribed their rights, has not been able to guarantee the rights as claimed. On the contrary, it has fuelled irregular migration. [230]

[226] Hathaway, op cit at 231.
[227] The Michigan Guidelines, para 2.
[228] Calavita, op cit, 531
[229] Ibid.
[230] Ibid.

Although there is not yet an empirical study in this area in Tanzania, in the prevailing condition it is probably fair to conclude that, the current regulatory framework and its institutional structure has not been able to achieve their main goal, that is: protecting the internal labour market against an invasion by 'unwanted' immigrants, and facilitating the transfer of skills to areas with acute shortage. Measures to achieve policy coherence should therefore be considered as a priority agenda for effective and efficient migration governance. At present, there are plans to review the labour migration policy. These plans present an opportunity to overhaul the whole system and to install an improved labour migration framework. There is therefore a pressing need at this stage to engage in in-depth labour market studies so as to provide the empirical data necessary for reform so that the envisaged reform is not only confined to producing a consistent labour migration policy or legislation. The overriding objective of the envisaged reform should be to integrate labour migration into the over-all development strategy. Progress towards policy coherence, should, as the Organisation for Economic Co-opertation and Development suggested in a different context, be seen in the context of 'a three- phase circle with each phase supported by a policy "building block."[231] The three phases referred here involves (i) setting policy objectives and priorities, (ii) policy coordination- to maximize synergies and minimize incoherence, and (iii) establishing effective systems for monitoring, analysis and reporting.[232] While these phases need not to run systematically, they have to be observed if sustained progress is to be achieved in the envisaged reform

5.3 Migrant workers' conditions of employment

Studies on the post-admission experiences of migrant workers present a mixed picture with regard to the working conditions of migrant workers. The overwhelming majority of these studies suggest that admission to the destination country's labour market does not necessarily guarantee migrant workers favourable working conditions. Both Grant[233] and Wickramasekara[234] note that a significant number of migrant workers face gross human rights

[231] Organisation for Economic co-opertation and Development, Policy Coherence for Development- Lessons Learned available at http//www.un.org/en/ecosoc/pdf/hls_finland-policy_coherence(oecd)pdf (Acessed on 28 november 2012).
[232] Ibid.
[233] Grant, S *International Migration and Human Rights* Global Commission on International Migration, Thematic Paper 5 **(**September 2005) 7.
[234] Wickramasekara, P *Globalization, International Labour Migration and Rights of Migrant Workers* International Migration Papers Series (ILO, Geneva, 2006) 9.

violations in the form of (among other things) discrimination and xenophobia, poor remuneration, poor working environment, low wages, long working hours, and job insecurity. The ILO has also made similar observations. The ILO report presented during the 92nd Session of the International Labour Conference in 2004 remarked that, while 'for many, migrating for work may be a rewarding and positive experience, ... for an unacceptably large proportion of migrants, working conditions are abusive and exploitative, and may be characterized by forced labour, low wages, poor working environment, a virtual absence of social protection, the denial of freedom of association and union rights, discrimination and xenophobia.'[235] These conditions rob workers of the potential benefits of employment in another country and impair their ability to enjoy the decent working conditions which the ILO, through its decent work agenda, seeks to achieve.[236]

Having sketched the admission policies and the procedures through which migrant workers gain access to the labour market in the first part of this chapter, the following part reviews the conditions of migrant workers after their admission. In particular, the section focuses on areas which have been cited in the literature as the most problematic areas. It is worthwhile to note that, as in many other destination countries, there are no specific labour or employment regulations for migrant workers. The general labour laws, namely, the Employment and Labour Relations Act (ELRA),[237] the Labour Institutions Act,[238] the Workers Compensation Act[239] and their respective regulations or rules[240] apply to all workers. Hence, the working conditions of migrant workers are examined in the light of these statutes.

[235] ILO *Towards a Fair Deal for Migrant Workers in the Global Economy* Report VI, International Labour Conference, 92nd Session, Geneva, 2004. The paragraph was adopted, with slight modifications, as one of the conclusions and resolutions adopted at the meeting. Also see ILO *Resolution and Conclusions Concerning a Fair Deal for Migrant Workers in a Global Economy* International Labour Conference, 92nd Session, Geneva, 2004.

[236] The decent work agenda was advocated by the ILO Director-General in his report to the International Labour Conference in 1999 where he stated that '[t]he primary goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.' See ILO *Decent Work: Report of the Director-General* International Labour Conference, 87th Session, Geneva, 1999.

[237] Act 6 of 2004.

[238] Act 7 of 2004.

[239] Act 20 of 2008.

[240] The Employment and Labour Relations (Code of Good Practice) Rules, 2007 (GN 42/2007), and the Regulation of Wages and Terms of Employment Order, 2010 (GN 172/2010).

5.3.1 Discrimination and equality of treatment

Discrimination is one of the most pervasive evils in the world of work. Workplace discrimination can be found in all work situations and in all economic sectors, regardless of whether the work takes place in the formal or the informal economy.[241] Discrimination takes many forms, and may be direct or indirect. Direct discrimination, also known as disparate treatment, refers to the situation whereby people are treated differently because of a particular trait, such as being female, or male, or being a non-national or of a different social status.[242] Bourn and Whitmore argue that the less favourable treatment is that treatment which involves the narrowing of opportunities and deprivation of choice.[243] As a general rule, the narrowing of opportunities or the differentiation must result in detrimental treatment, that is, it must have a pejorative connotation.[244]

Unlike direct discrimination, which implies prejudice towards the victim, indirect discrimination, or disparate impact, as it is sometimes called, is not necessarily the result of prejudice. It occurs when apparently neutral rules and practices, which have negative effects on a disproportionate number of members of a particular group, are implemented.[245] Thus, for example, requiring knowledge of a particular language to obtain a job, where such language competence is not an indispensible requirement, is indirect discrimination.[246] Similarly, less favourable treatment of part-time workers has been interpreted as indirect discrimination against women who, because of their social and reproductive roles, are unable to work full time.[247]

In Tanzania, equality of treatment and the prohibition of discrimination form part of the supreme law and the labour laws. The Constitution outlaws all forms of discrimination and confirms that all persons are equal.[248] The term 'discrimination' is defined as the act of

[241] ILO *Time for Equality at Work* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, International Labour Conference, 91st Session 2003, Report I(B), 18.
[242] Hunter, R *Indirect Discrimination in the Work Place* (The Federation Press, New South Wales, 1992) 3.
[243] Bourn, C and Whitmore, J *Discrimination and Equal Pay* (Sweet and Maxwell, London, 1989) 26.
[244] *Jeremiah v MoD* [1979] IRLR 436 CA (reproduced in Bourn and Whitmore op cit 26. Also see Dupper, O et al *Essential Employment Discrimination Law* (Juta and Co, Cape Town, 2004) 35.
[245] Grogan, J *Dismissal, Discrimination and Unfair Labour Practices* (Juta and Co, Cape Town, 2005) 89.
[246] ILO *Time for Equality at Work* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, International Labour Conference, 91st Session 2003, Report I(B) 20.
[247] Ibid.
[248] See articles 12 and 13.

satisfying 'the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications.'[249]

With respect to workplace discrimination, the ELRA obliges employers to outlaw any form of discrimination perpetuated through employment policies or practices and to promote equality of opportunity in employment. According to section 7(4), an employer shall not directly or indirectly discriminate against an employee on the grounds of colour, nationality, tribe or place of origin, race, national extraction, social origin, political opinion or religion, sex, gender, pregnancy, marital status or family responsibility, disability, HIV/Aids status, age, or station in life. An employer may not adopt discriminatory policies or practices with regard to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion transfer, demotion, termination of employment and disciplinary measures.[250]

Accordingly, a migrant worker may not be discriminated against or harassed because of his or her nationality except where the discrimination is aimed at implementing an affirmative action measure, or where it is an inherent requirement of the job, or where a citizen is preferred over a migrant worker. [251] The latter provision is particularly relevant to this study. It provides that 'it is not discrimination to employ citizens in accordance with the National Employment Promotion Services Act, 1999'.[252] The wording of this provision and its cross-reference to the National Employment Promotion Services Act demonstrate that it serves to reinforce the national employment policy which, as explained above, restricts admission to migrant workers with exceptional skills. This seems to imply that the application of this

[249] See article 13(5).
[250] Employment and Labour Relations Act, section 7(9)(c).
[251] Ackson, T 'Employment Standards/Minimum Conditions of Employment' in Rutinwa, B et al (eds) *Employment and Labour Relations Law in Tanzania in Tanzania: Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011) 58–93 at 62–63.
[252] Section 7(6)(c).

provision cannot be extended beyond the recruitment process. It cannot, for example, be invoked on matters related to remuneration, the working environment and other employment standards.

Nevertheless, the current approach of the Tanzanian labour laws in the area of non-discrimination is very commendable because it incorporates developments in modern international labour law, which consider the elimination of discrimination to be an important tool in fostering the decent work agenda. There is now consensus in international labour law that the elimination of discrimination and the promotion of equality of treatment in employment are both important for the freedom, dignity and well-being of the individual. The inclusion of the need to eliminate discrimination in employment and occupation among the four fundamental principles which lie at the heart of the ILO Declaration on Fundamental Principles and Rights at Work is certainly indicative of this zeal. Following this development, all members of the ILO, even those who are not parties to the Convention on Equal Remuneration (Convention No 100)[253] and the Discrimination (Employment and Occupation) Convention (Convention No 111),[254] have assumed legal obligations to eliminate discrimination and to promote equality in their labour markets.[255] Annual reports to the International Labour Conference (ILC) on the follow-up to this Declaration have all noted the specific forms of discrimination which migrant workers endure every day.[256]

5.3.2 Remuneration

The right to remuneration has received wide acknowledgement in international, regional and domestic legal frameworks, as does equality of remuneration; hence the slogan 'equal pay for equal work'. Article 23 of the Constitution of the United Republic of Tanzania states that 'every person, without discrimination of any kind, is entitled to remuneration commensurate with his work ....' Employers in both the public and private sectors have a positive duty to remunerate their workers at rates which are commensurate with the nature of the employee's work and which takes into consideration the skills and qualifications of the particular

[253] ILO Convention No 100 (Equal Remuneration Convention, 1951).
[254] ILO Convention No 111 (Discrimination (Employment and Occupation) Convention, 1958).
[255] Tanzania ratified these Conventions in 2002.
[256] ILO *Time for Equality at Work* op cit 31 and 98. Also see ILO *Equality at Work: The Continuing Challenge* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, International Labour Conference, 100th Session 2003, Report I(B) 5 and 34–40.

employee.[257] The ELRA defines remuneration in a wider context as 'the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee'.[258] The computation of remuneration and its mode of payment are also detailed in the Act.[259] It suffices to mention that, as a general rule, remuneration must not be discriminatory and must meet the constitutional test, that is, it must be commensurate with one's work. Remuneration must also not, as the matter of principle, go below the statutorily prescribed minimum wage.[260]

In international labour migration law, both the ILO Conventions and the ICMW prescribe that migrant workers should be remunerated on terms equal to national workers who perform the same work.[261] However, remuneration presents a major challenge in receiving countries across the world, exhibited through disparity in wages (between migrants and nationals, and between migrants), low wages, and the non-payment of wages or delayed payments. There are many examples and much empirical evidence on wage disparities in the USA, Europe, and Asia, and in other places where studies on the living and working conditions of migrant workers have being conducted.[262] Disparities in wages between migrants are normally based on grounds such as migration status, gender and countries of origin.[263] Migrants who participated in this study were asked to describe their experiences in this regard.[264] Surprisingly, the majority of them have had positive experiences. The limited literature available also shows that favourable remuneration conditions for migrant workers exist. In fact, it has been alleged that non-Tanzanian workers are better remunerated than local workers. One example is the mining sector, where this practice is said to be rampant. It was recently reported that a Ghanaian welder at Barrick Gold earns a monthly salary of

[257] See article 23(1).
[258] See section 4.
[259] See the Employment and Labour Relations Act, sections 26–28. Also see Ackson op cit 75–80.
[260] See the Regulation of Wages and Terms of Employment Order of 2010 (GN 172 of 2010).
[261] See article 6(1)(a) of Convention No 97, and article 25(1) of the ICMW.
[262] ILO A Rights Based Approach to Migration (ILO, Geneva, 2010) 75.
[263] In Lebanon, domestic migrant workers from the Philippines earn an average monthly salary of between US$250 and US$300 while Sri Lankans and Africans earn only US$100 to US$150. In Bahrain, female domestic workers from the Philippines and Indonesia receive a monthly salary of BD50 (US$133), Sri Lankans and Indians earn BD40 (US$106) while domestic workers from Bangladesh receive only BD35 (US$93). See Al-Najjar, S *Women Migrant Domestic Workers in Bahrain* International Migration Papers No 4 (ILO, Geneva, 2004) 21. Also see Jureidini, R 'Women Migrant Domestic Workers in Lebanon' in Esim, S and Smith, M (eds) *Gender and Migration in Arab States: The Case of Domestic Workers* (ILO Regional Office for Arab States, Beirut, 2004) 64–85 at 69 and Godfrey, M et al 'Migrant Domestic workers in Kuwait' in *Gender and Migration in Arab States: The Case of Domestic Workers* (ILO Regional Office for Arab States, Beirut, 2004) 42–63 at 52.
[264] See the questionnaire attached to this study.

11,000,000 Tshs (about US$6,570), while the average pay for a Tanzanian welder is only 800,000 Tshs (approximately US$470).[265] Also, a study conducted in 2008 in this sector reported that:

> TAMICO claims that Tanzanian mine employees (at Bulyanhulu gold mine) earn from US$200 up to a maximum of US$4,000 a month, whereas foreign workers earn between US$6,000 and US$20,000 a month. Moreover, it claims the mine pays Tanzanians less than foreigners even when they are doing the same job, and also that it is not uncommon for foreign assistants to be paid more than their Tanzanian managers.[266]

Positive experiences were also noted by medium- and low-skilled migrants who, because of the barriers of the prevailing policy, are forced into irregular employment relationships, mainly in the informal sector. In 2010, when this research was being conducted, Malawian domestic workers received an average monthly salary of 80,000 to 150,000 Tshs (approximately US$55 to US$100) whereas only a few local domestic workers received the sectoral minimum monthly salary of 65,000 Tshs (approximately US$43).[267] The Legal and Human Rights Centre (LHRC) claimed in its 2010 annual report that, in almost all regions in Tanzania, local domestic workers are paid less than US$20 per month; some receive as little as US$5.[268]

The examples given above should not, however, lead one to conclude that all migrant workers in Tanzania are generously remunerated. There are many cases of poor remuneration, particularly among irregular migrant workers. A participant in this study explained that employers often delay payments and sometimes withhold their remuneration. She sadly concluded that 'some of my friends, because of delayed or non-payment of wages, returned to their home countries without having been fully remunerated and they have no

[265] This case was reported by Dr Hamis Kigwangala, a member of parliament for the Nzega constituency during the parliamentary session in June 2011. See Parliament of Tanzania, Hansard (Fourth Session of the Meeting, Session 41 of 5 August 2011) 50, 55 and 58. Also see 'Barrick undermines Tanzania workers' *The African* 1 August 2011.

[266] Curtis, M and Lissu, T *A Golden Opportunity? How Tanzania is Failing to Benefit from Gold Mining* (Christian Council of Tanzania (CCT), Dar es Salaam, 2008) 39–40.

[267] See Part A of the second schedule to the Regulation of Wages and Terms of Employment Order of 2010 (GN 172 of 2010)

[268] Legal and Human Rights Centre *Human Rights Report, 2010* (Legal and Human Rights Centre, Dar es Salaam, 2010) 150. The underpayment of domestic workers is permitted by the Regulation of Wages and Terms of Employment which, in para 4, allows for a 68 per cent deduction from the wages of live-in domestic workers.

prospects of collecting their wage.'[269] Such cases are also said to be common among workers from China, whose employers hold them out to be family members or visiting friends, yet they are made to work at odd hours in hazardous environments. In extreme cases, some employers report their workers to the authorities to have them deported, thus avoiding their contractual obligations.

The wage disparities cited in the above cases raise serious concerns, which may negatively affect working relationships and productivity. While it is not the intention of this work to substantiate any of the claims made, it is important to highlight a few issues. Labour law does not completely outlaw wage disparities. Nevertheless, the disparities should be proportional and objective. International labour law demands that wage disparities, if any, must be based on the objective appraisal of jobs.[270] Similarly, the jurisprudence from national and international courts holds that employers may justifiably reward workers differently on the basis of qualifications, skills, and productivity,[271] provided that the differentiation is rational and objective.[272] Likewise, an employer may reward workers differently if the differentiation is based on alterations in the terms of employment arising from a collective agreement.[273]

These considerations should therefore be taken into account in establishing the fairness or otherwise of the disparities in these cases. With regard to regular migrant workers, it will be recalled that, with the exception of migrant workers in the initial immigration quota, the current labour migration policy restricts the admission of migrant workers to areas where there are shortage of skills in the labour market, that is, only workers with exceptional skills will be admitted. It can therefore be argued that remuneration for workers in this group reflects their skills and expertise. Furthermore, to be able to draw any conclusions about wage disparities, one must compare the same comparators, for example, persons doing the same

[269] Personal interview with M, a migrant worker from Kenya currently employed as a hotel attendant in Dar es Salaam, on 4 February 2011.
[270] See article 3(1) of ILO Convention No 100.
[271] *Mthembu and Others v Claude Neon Lights* (1992) 13 *ILJ* 422 (IC); *Transport and General Workers Union and Another v Bayete Security Holdings* (1999) 20 *ILJ* 1117 (LC).
[272] The European Court of Justice has held that a difference in pay can be justified only where it relates to an objective criterion which corresponds with a real business need: see *Bilka-Kaufhaus v Weber van Haus* [1986] IRLR 317.
[273] *SA Union of Journalists v South African Broadcasting Corporation* (1999) 20 *ILJ* 2840 (LAC). For a detailed discussion on this topic see Grogan, J *Workplace Law* 10 ed (Juta and Co, Cape Town, 2010) 302.

work, or persons doing work of equal value under the same employer, or different employers in the same sector or industry.[274]

The first two cases raise pertinent issues which need further verification. It is imperative to establish the justification for such huge disparities (if any) so as to address the possible consequences. An imminent danger is that such disparities may de-motivate local workers, the majority in this case, and also affect productivity. Disparities are also likely to create unnecessary tensions between workers. In the absence of intervention, this may spread beyond the workplace and lead to discrimination and xenophobia.

5.3.3 Geographical and occupational mobility

With the exception of highly skilled migrant workers, temporary work authorizations are usually subject to restrictions on freedom of movement. They usually limit migrant workers' geographical and occupational mobility by binding them to employment in certain sectors or to one employer, without any prospect for mobility within the labour market.[275] Migrant workers in temporary employment contracts are expected to return to their home countries immediately after the expiry of their employment permits. Even in cases where voluntary or involuntary loss of employment occurs before the expiry of the validity of work permits, they are not allowed to look for a new job. Their stay in the host country becomes unlawful with immediate effect and they may be removed if they do not voluntarily leave the host country within a specified period.

These restrictions are replicated in the laws in Tanzania. Holders of Class B residence permits are not allowed to change their employment, and are not free to work in a location other than the place endorsed in the work permit, without further authorization. The name of employer, the nature of the employment or assignment, and the place (district) where the said employment is to be performed are all endorsed in the permit to deter the holder from any unauthorized mobility. Unauthorized changes of employer, occupation or location invalidate the work permit and render its holder an irregular migrant. According to section 20(2)(b) of the Immigration Act, 'where any person to whom a Class B permit has been granted ... is engaged, on any terms, in any employment other than the employment specified in the

[274] Grogan *Workplace Law* 303.
[275] See Ruhs, M and Martin, P 'Numbers vs Rights: Trade-Offs and Guest Worker Programs' (2008) 42(1) *International Migration Review* 249–265 at 251.

permit, the permit shall immediately cease to be valid and the presence of that person in Tanzania shall ... be unlawful.'[276]

As a matter of practice, a migrant worker who is assigned to work in different stations without necessarily changing the employer or occupation may have up to five districts endorsed in the permit after a formal application. However, the acquisition of a new work permit is mandatory should the worker wish to change his or her employer or occupation, irrespective of whether the factors behind the desired mobility are voluntary or not.[277] The law requires the employer specified in the work permit to report the cessation of the employment relationship within a period of 30 days from the date on which the employment ceased.[278] Likewise, the employee is required, within the same timeframe, to surrender the work permit and leave the country. The procedure for the acquisition of a new work permit is cumbersome. In addition to satisfying the labour market test and paying the UDS$1,550 application fee which is required for first-instance application for work permits, applicants are required to submit a letter of good standing from the former employer (a letter of no objection), the original permit (if it was not surrendered), and a copy of the applicant's travel ticket or passport with an exit stamp to prove that the employee left the country following the termination of the former employment. A standard penalty of US$400 is charged for those who fail to prove that they left the country, and for those who willingly or inadvertently failed to leave.

It has been argued on behalf of countries which limit the geographical and occupational mobility of migrant workers that such restrictions are necessary to align immigrants to the economic needs of the host country.[279] However, it has also been argued that the arguments in favour of restrictions underplay the impact of these restrictions on individual workers and on productivity and efficiency. Restrictions of this nature severely impair migrant workers' freedom of movement in the labour market, a right which is enjoyed by workers worldwide and which is acknowledged in international norms.[280] In fact, these restrictions have been

[276] Also see section 22(4).
[277] See section 20(2)(a) of the Immigration Act.
[278] See section 20(4) of the Immigration Act.
[279] See Ruhs (2006) op cit 23.
[280] Article 6(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 provides that '[t]he States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his or her living by work which she or he freely chooses or accepts, and will take appropriate

rated as one of the primary source of migrants' vulnerability, because they limit the ability of migrant workers to escape unsatisfactory working conditions.[281] In addition, these restrictions disproportionately affect the most disadvantaged migrants, such as migrant women who, because of segmented labour migration policies, are compelled to accept employment for which they may be over-qualified.[282] For example, a female university graduate working as a household employee cannot find another job that would make more appropriate use of her skills and education if she is not free to change employers.[283]

Following on the latter school of thought, it is submitted that the current restrictions on mobility serve the interests of unscrupulous employers, who are powerful and can use the work permit as a tool for exploitation and abuse. The need to submit a letter of no objection from the former employer is too extreme, and serves only to subject migrant workers to excessive control by employers. In fact, it is an incentive for forced labour, which the ELRA strictly prohibits.[284]

Both the ILO and the UN allow some form of flexibility in this area. Under ILO Convention No 143 and the ICMW, countries of destination can legitimately restrict the geographical and occupational mobility of migrant workers for a maximum period of two years of lawful residence, after which the worker should be allowed full access to the labour market.[285] In terms of the ICMW, these restrictions may be maintained for a maximum period of five years if the host country maintains policies which give preferential treatment to nationals and workers from the most preferred nationality.[286] Restrictions are also permitted in certain categories of employment or occupations where such restrictions are deemed to be necessary for the national interest.[287]

To ensure decent working conditions for all workers, productivity and competitiveness, it is submitted that while restrictions are not completely outlawed in international migration law, Tanzania should consider revisiting her position to avoid restrictions which inadvertently

steps to safeguard this right.' Also see General Comment 18 of the Committee on Economic, Social and Cultural Rights on the Right to Work, 2005.

[281] ILO *Handbook* op cit 137.

[282] Ibid.

[283] Ibid.

[284] See section 6.

[285] See article 14(1) of ILO Convention No 143, and article 52(3)(a) of the ICMW.

[286] See article 52(3)(b) of the ICMW.

[287] See article 14(b) of ILO Convention No 143, and article 52(2)(a) of the ICMW.

sanction abusive and exploitative relationships. Policies which are capable of balancing the interests of the workers and those of employers, without necessarily undermining the alignment of migrant workers to the labour market, should be considered instead. One option is to grant portable work permits, which allow mobility within a defined job category and after a certain period of time, so as to allow employers to recover the costs spent in recruiting migrant workers.[288]

5.3.4 Employment security/security of tenure

Security of tenure is an important part of professional or working life. As Mokgoro J remarked in *Larbi Odam*, 'security of tenure permits a person to plan and build his or her family, social and professional life, in the knowledge that he or she cannot be dismissed without good cause.'[289] In an attempt to protect migrant workers' employment security, the ICMW provides that migrant workers shall enjoy the same protection as nationals of the country of employment in respect of protection against dismissal.[290] Nevertheless, for most migrant workers, security of tenure is a myth. Job insecurity is common, affecting a substantive majority of migrant workers mainly because of their *alienage*, migration status and the types of employment in which they are engaged. As Stalker observes, 'not only do migrant workers find it difficult to obtain a job, they also have trouble keeping it. They are often used as a buffer stock for reserve labour hired at times of shortage and dismissed when the employment situation deteriorates.'[291]

In some countries the law prescribes that migrants should be the first to be laid off in the event of staff reduction.[292] Even in countries where this is not a legal requirement, in times of economic crisis migrant workers are more often than not the first to lose their jobs. The recent economic crisis is proof of this fact: since 2008 tens of thousands of migrants have lost their jobs.[293] As a result, they have been compelled to relocate to other countries or to return

[288] Ruhs, M 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145(1–2) *International Labour Review* 7–36 at 19.
[289] *Larbi-Odam and Others v Member of the Executive Council of Education (North-West Province) and Another* 1998 (1) SA 745 (CC).
[290] See article 54(1)(b).
[291] See Stalker, P *The Work of Strangers: A Survey of International Labour Migration* (ILO, Geneva, 1994) 102.
[292] In Austria, for example, the law specifically provides that in the event of the reduction of staff, foreigners should be the first to lose their jobs. See ILO (2007) op cit 140.
[293] For a detailed assessment of the impact of the global crisis on migrant workers and the policy responses, see Awad, I *The Global Economic Crisis and Migrant Workers: Impact and Response* (ILO, 2009) 9, available at http://www.ilo.org/public/english/protection/migrant/download/global_crisis.pdf (accessed on 24 May 2012).

home, although, as one study observes, returning home may not have been a viable option due to job displacement which may have taken place in the migrant workers' countries of origin as a consequence of the crisis.[294]

Migrant workers also risk losing their jobs because of minor differences with employers on issues such payment of wages or working conditions, or because of sickness.[295] The general protection for all workers against the loss of employment, which is normally available in the domestic labour laws, is underplayed by immigration laws, which require migrants to leave the host country in the event of unemployment.

The ELRA provides a blanket guarantee of job security for all workers.[296] It guarantees the right of the employer and the employee over termination of employment contract but demands that, such termination of the employment relationship should be fair.[297] Should the termination of an employee's services be considered, it must be based on valid grounds[298] and must also satisfy the legal procedural requirements.[299] These two requirements are comprehensively discussed by Mtaki.[300] For the purpose of this study, it suffices to note that if the employer does not comply with any of these requirements the worker may seek redress through the Commission for Mediation and Arbitration (CMA) or the Labour Court.[301] Three remedies – reinstatement, re-engagement and payment of compensation – are available to workers who successfully challenge their termination before these bodies.[302]

This safeguard is certainly comprehensive, but it may not necessarily benefit migrant workers, particularly where immigration laws are applied rigorously. As noted above, the

[294] ILO *Time for Equality at Work* Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 100th Session (ILO, Geneva, 2011) 5 paras 13 and 14.
[295] Mei, L 'Chinese Migrant Workers in Singapore: An Analysis Based on Interviews' (2010) 1(1) *International Journal of China Studies* 194–215 at 201.
[296] See part of the Employment and Labour Relations Act.
[297] See the Employment and Labour Relations Act, section 37(1).
[298] According to the Act, the valid reasons are an employee's conduct, capacity, compatibility or an employer's operational requirements. See the Employment and Labour Relations Act, section 37(2); also see rule 8 of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN 42 of 2007.
[299] See the Employment and Labour Relations Act, sections 38, 41, 42 and 43.
[300] See Mtaki, C 'Termination of Employment' in Rutinwa et al op cit 94–150.
[301] The two institutions are established by the Labour Institutions Act 7 of 2004. For a detailed discussion of the establishment of these institutions, their mandate and their procedures, see Rutinwa, B 'Dispute Resolution' in Rutinwa et al op cit 152–190. Also see Kamala, P and Kalula, ER 'Labour Institutions' in Rutinwa et al op cit 254–282 at 254.
[302] See the Employment and Labour Relations Act, section 40.

termination of employment, whether voluntary or not, invalidates the work permit. The presence of the worker becomes unlawful.[303] This is contrary to the spirit of international labour migration law, which directs that migrant workers who have legally resided in the host country should not be regarded as illegal or irregular migrants simply because of the loss of employment, nor should their residence or work permits be withdrawn as a consequence of such loss.[304]

Furthermore, the law does give migrant workers enough time to access the remedy provided for in the ELRA. Migrant workers who voluntarily or involuntarily lose their jobs are given one month to leave the country,[305] which is not enough time for them to be able to challenge the validity or otherwise of their termination and to ensure that their termination benefits and other rights arising out of employment are settled before they are repatriated. Some employers may use this as an excuse to evade their legal obligations towards migrant workers. *Andre Venter v Tanzaniteone Mining Limited*[306] is a good example of this scenario. From the facts of this case, it is clear that the employer hurriedly purported to repatriate the applicant, a South African citizen working for the respondent, to bar him from challenging the legality of his dismissal and from accessing his termination benefits. This fact was however not raised as an issue and hence it was not considered by the court. Nevertheless, this case is one of many cases which go unreported because of time constraints or because of ignorance on the part of migrant workers as regards the protection available in the ELRA.

It is further submitted that the current position does not take account of the losses which migrant workers suffer as a result of the involuntary loss of employment. In transnational migration, migrants invest heavily in the migration process, both fiscally and non-fiscally. This investment cannot be fully recovered if the migrant worker involuntarily loses his or her employment before the expiry of his or her employment contact.

[303] See section 20(3)(a).
[304] See article 8(1) of ILO Convention No 143, and article 49(2) of the ICMW.
[305] See the Immigration Rules, 1997, rules 6 and 7.
[306] *Andre Venter v Tanzaniteone Mining Ltd* High Court of Tanzania, Labour Division at Dar es Salaam, Labour Revision No 276 of 2009 (unreported). Also see *Andre Venter v Tanzaniteone Mining Ltd* Commission for Mediation and Arbitration at Arusha, Employment Dispute No ARS/CMA/MED/283/2008.

5.3.5 Mechanisms for the enforcement of employment standards and conditions of work

The effectiveness of any regulatory framework relies heavily on the availability and efficiency of the institutions charged with enforcement. In the area of labour migration, it has been rightly observed that good laws and regulations on migrant workers are meaningless without effective labour inspection and other enforcement measures.[307] In Tanzania, the inspection role vests in the labour officers who, by virtue of section 45 of the Labour Institutions Act, 2004,[308] have the mandate to enter and inspect workplaces to ensure that employers comply with the provisions of the ELRA as regards contracts, wages, working hours and other employment conditions. There are also health and safety inspectors from the Occupational Health and Safety Authority (OSHA) who are responsible to ensure compliance with occupational health and safety regulations.[309] These two bodies are autonomous although they sometimes conduct joint inspections.

The effectiveness of these two institutions in fostering good working conditions for migrant is questionable. At present, the inspectors are few in number and are not familiar with labour migration issues. Also, interviews with labour officers and migrant workers revealed that labour inspectors often tend to combine labour law and immigration law enforcement when they visit areas known to employ migrants.[310] As a result of this, irregular migrants tend to hide to avoid being discovered,[311] and therefore inspectors have been unable to uncover the injustices and the poor working conditions which irregular migrant workers endure. Labour inspectors fail to achieve any of the two intended roles: they are unable to assess the conditions of these workers and they are unable to enforce immigration laws. For this mechanism to be effective, it is recommended that labour inspections should be conducted separately from immigration enforcement. By combining the two, labour inspectors inadvertently circumvent their primary role, which is to protect workers.[312] Given rapidly growing irregular migration, it is recommended that labour inspectors should acquaint

[307] OSCE, IOM and ILO op cit 173.
[308] Act 7 of 2004.
[309] Established under the Occupational Health and Safety Act, 2003.
[310] Personal interviews with labour officers in Dar es Salaam, Arusha and Mwanza, between October and December 2010.
[311] Personal interviews with migrant workers in Dar es Salaam (October 2010 and March and April 2011), and in Arusha and Mwanza (November and December 2010).
[312] OSCE, IOM and ILO op cit 173.

themselves with the challenges of irregular migration, so that they can intervene in cases where migrants are underpaid or subjected to poor working environments.

Experiences from other jurisdictions indicate that labour inspection, as a key instrument in the administration of labour, is considered to be the most effective tool in enforcing equality of treatment and decent work for migrant workers.[313] Thus, in sectors where inspections are regularly and efficiently conducted, the situation of migrant workers is likely to improve, at least to meet the minimum requirements for protection.[314] This, however, depends greatly on the awareness of labour inspectors about the specific vulnerabilities of migrants and, more importantly, their ability to address these issues in their inspection.

Migrant workers also need to have unimpeded access to the judicial and quasi-judicial bodies which adjudicate labour disputes if they are to enjoy the protection provided for in the ELRA. The Labour Institutions Act vests these powers in the Commission for Mediation and Arbitration (CMA) and the Labour Court. Access to these bodies is guaranteed to all workers irrespective of their nationality. Migrant workers have not really seized this opportunity, with only a few referring their grievances to these bodies. This may be due to fear of retaliation and ignorance about these mechanisms which are relatively new.

Whilst the access of migrant workers to dispute resolution mechanisms appears to be guaranteed, it is yet to be determined whether or not irregular migrants can also have actual access to these bodies. The experience in other jurisdictions indicates that irregular migrants do not usually refer their disputes for adjudication. The few who dare to seek recourse in the national judicial and administrative bodies are normally denied any remedy because of the irregularity of their residence or employment. Again, South Africa serves as an illustration. Until recently, irregular migrant workers who approached the labour dispute resolution mechanisms in South Africa were denied access to these bodies on the grounds that their matters could not be adjudicated in these bodies because they were products of employment relationships which were void *ab initio*, having been concluded in contravention of the immigration laws. The Commission for Conciliation, Mediation and Arbitration (CCMA) had on different occasions cited this reason to dismiss applications brought before it. For instance,

[313] Ibid 144.
[314] Ibid 173.

in 2004, the CCMA was asked to determine an application by a migrant worker who was dismissed by her employer because she did not have an employment permit. Dismissing the matter, the CCMA stated that it had no jurisdiction to hear the matter because the contract upon which the application was based was void *ab initio* as it violated the immigration laws.[315] Recently, however, the Labour Court, *per* Van Niekerk J, extended access to the labour dispute resolution mechanisms to irregular migrant workers.[316] This is commendable because denying irregular migrant workers any recourse to justice serves only to reinforce their vulnerability. It is submitted that the Tanzanian labour dispute resolution bodies should consider this approach when faced with a similar issue.

5.4 A case for permanent residence

As noted above, labour migration in Tanzania is strictly short term, allowing a maximum period of five years of residence. At the end of this period, a Tanzanian trainee should have acquired the necessary skills to enable him or her to take over the position occupied by the migrant worker. The temporariness of the permit and the training requirement raise some issues. First and foremost, the rationale for this approach is problematic. As noted before, migrant workers are admitted to areas where there are skills shortages. In some areas the shortage is so acute that it is unrealistic to assume that it can be eliminated within a short period of time. For instance, at present, one medical doctor attends to 10,000 people.[317] In the education sector, the shortage is so severe that in 2010 the government announced that it was planning to recruit about 31,000 mathematics and science teachers from Kenya and Uganda.[318] It is therefore unlikely that Tanzania will be self-sufficient in these areas in the near future. In trying to address this challenge, the government has identified these areas, together with other professions facing the same problems, as priority areas in the

[315] *Georgierva-Deyanova/Craighall Spar* (2004) 9 BALR 1143 (CCMA). Prior to this, several other cases were dismissed on this ground. These include *Vulda and Millies Fashions* (2003) 24 *ILJ* 462 (CCMA), where the services of a Zimbabwean sales assistant were terminated due to her failure to produce a work permit, and *Moses v Safika Holdings* (2001) 22 *ILJ* 1261 (CCMA), where an American citizen employed as an advisor in the company was dismissed for failure to provide a work permit.

[316] See *Discovery Heath*, supra. Also see Bosch, C 'Can Unauthorized Workers be Regarded as Employees for the Purpose of the Labour Relations Act? (2006) 27 *ILJ* 1342–1368; Norton, D 'In Transit: The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence (2009) 30 *ILJ* 66–82; and Le Roux, R 'The Meaning of "Worker" and the Road towards Diversification: Reflecting on *Discovery*, *SITA* and "*Kylie*"' (2009) 30 *ILJ* 49–65 at 53.

[317] Alex Bitekeye 'Tanzania: JK – Shortage of Doctors is Alarming' *The Citizen* 11 January 2012.

[318] Attlio Tagalile 'Teacher Shortage: Let's Look Beyond East Africa' *The Citizen* 17 July 2010.

implementation of commitments arising out of the EAC Common Market Protocol.[319] While this is commendable, it is further recommended that the government should consider granting permanent residence status, albeit only for migrant workers in these areas, so as to attract more migrants to take up positions.

With regard to the in-service training requirement, it will be recalled that most areas with acute skills shortages are classified professions and therefore require certain minimum qualifications which can be obtained only through training institutions. The only training which the employers can offer is in-service training, which is insufficient without the minimum academic qualifications. As a result of the acute shortage of skills in these areas, all individuals with the minimum qualifications are absorbed into the market. For example, all teachers who graduate from training institutions each year are offered employment by the government. The same is true for the health sector, where all qualifying doctors are immediately employed by government or private hospitals. It is therefore unrealistic to assume that in-service training will produce the required number of professionals to enable Tanzania to become self sufficient when in fact there are no persons to undergo such training.

Furthermore, the requirement for in-service training imposed on employers increases the costs of production. This is because, in addition to conducting in-service training for citizens, employers of migrant workers are further required to contribute to the skills and development levy.[320] By requiring employers to conduct in-service training, employers are made to pay at least twice for skills development, because they also have to pay the person employed or retained to understudy the expatriate, and have to provide him or her with working space and the necessary facilities. In other words, the employer is forced to employ two people for one position. This is costly and likely to be resisted by employers, some of whom may resort to employing irregular migrants to evade this cost. In these circumstances, it may be difficult to attain the self-sufficiency prospects in the near future. To be successful in this area it is recommended that the government should devise strategic training programmes for areas known to experience acute shortages of skills. In the meantime, permanent residence could be introduced to augment these efforts.

[319] See the schedule for the free movement of workers annexed to the East African Community Common Market (Free Movement of Workers) Regulations, 2009, 29–30.
[320] Every employer in the country contributes 6 per cent of the total gross monthly emoluments payable by the employer to all employees. See section 14 of the Vocational Education and Training Act, [Cap 344 R.E., 2006].

In addition to being beneficial to the economy, permanent residence is potentially capable of addressing most of the problems currently encountered by migrant workers, namely, costly admission procedures, the admission and rights of family members, geographical and occupational mobility, and security of employment. For instance, the exorbitant mobilization costs which employers incur from time to time are likely to be reduced if migrant workers are admitted on permanent terms. Also, permanent residence status usually entitles the holder to rights which are not necessarily available to temporary migrants. Permanent residence status may have added benefits in that it is capable of providing long-lasting solutions to the acute shortage of labour whilst also addressing the vulnerability of migrants.

5.5 Conclusion

The discussion in this chapter has centred on two main issues, namely, the access of migrant workers to remunerated activities and the conditions of these workers in workplace. In particular, we examined the policies, legislation and practices pertaining to the admission criteria, the recruitment process, procedures for obtaining work permits, the recognition of academic admission credentials, and the admission of family members. With regard to workplace conditions, the discussion centred on issues related to workplace equality and non-discrimination, remuneration, geographical and occupational mobility, employment security, and the mechanisms for the enforcement of employment conditions.

In a nutshell, it has been established that the prevailing policies, legislation and practice are oriented towards temporary migration, whereby migrants are admitted for a short period of time to fill the 'absolute shortage of labour' with the understanding that, within this period, locals will be able to acquire the skills and replace the migrants. An authorization in the form of a work permit (Class B residence permit) is obtained after a labour market test, the core aim of which is to establish that only migrant workers with scarce skills are admitted.

In the light of the available literature and the empirical evidence obtained from the field, it was argued that the prevailing position with regard to the admission of migrant workers, although viewed as acceptable in principle to guard the labour market against a massive influx of migrant workers, compromises the protection of migrant workers. The opportunities for legal migration are too limited. For those who qualify, the procedures for obtaining work permits are extremely cumbersome and costly, coupled with unnecessary delays, which together tempt employers to resort to irregular migration.

With regard to employment conditions, the protection offered by the labour laws is comprehensive and generally compliant with international labour law. However, because of the peculiarities presented by *alienage*, immigration status and employment status, migrant workers may not necessarily benefit from this protection, particularly where immigration laws are enforced rigorously. There is currently no coherence between the labour laws and the immigration laws. For example, a migrant worker who involuntarily loses his job may not be able to seek redress within the one-month grace period which the immigration law prescribes. Similarly, migrant workers in irregular employment relationships are unable to take advantage of the protection in the labour laws because their residence and employment are irregular. These and other deficiencies described in this chapter expose migrant workers to various forms of exploitation and abuse. They also lead to inefficiency and decreased productivity. For example, the tying of migrant workers to one employer, which is one of the features of the prevailing labour migration policy, may lead to forced labour and slavery. To address some of these challenges, it is recommended that the government should consider refining the laws and policies to grant migrant workers permanent residence.

The next chapter examines whether the current legal framework provides room for migrant workers to exercise their organizational rights. In addition, it examines whether the trade unions are able to address the special needs of migrant workers.

Chapter 6: Migrant workers' right to freedom of association

6.1 Introduction

The previous chapter described the rules pertaining to migrant workers' access to remunerated activities and looked at their general terms and conditions of work. This chapter focuses on the right to freedom of association. The chapter starts by noting the provisions relevant to the right to freedom of association in the core labour migration instruments and also describes the jurisprudence of different international bodies. The concept of freedom of association is introduced, and its place in international human rights law and in labour law is noted, with particular reference to its nature and scope. The chapter then locates the legal foundations and practical aspects of freedom of association in Tanzania and discusses the extent to which migrant workers in Tanzania are able to exercise this right.

The chapter proceeds from an understanding that the right to freedom of association is an essential element of migrant workers' economic and social wellbeing, as it gives them a collective voice and minimizes the bargaining gap between them and their employers, particularly when they are irregularly employed. The chapter observes that whilst the right to freedom of association is guaranteed by law, migrant workers do not participate in trade union activities. The barriers which inhibit migrant workers' participation in trade unions are noted, and wide-ranging strategies which can be employed to boost the participation of migrant workers in trade unions, enabling them to exercise their collective rights, are recommended.

6.2 Freedom of association in international labour migration norms

The right to freedom of association is particularly important to migrant workers. Representation by trade unions, and having a collective voice in the workplace, constitutes one of the most effective ways of assisting migrant workers, particularly those in precarious situations, to assert their rights and to improve their working conditions.[1] In a recent report, the ILO concluded that 'if migrant workers are able to form and to join trade unions and to assert their rights, it reduces their vulnerability to be subjected to cheap labour and inferior

[1] ILO *Towards a Fair Deal for Migrant Workers in the Global Economy* International Labour Conference, 92nd Session, Report VI (ILO, Geneva, 2004) 46 para 141.

working conditions.'[2] Moreover, the right to freedom of association has the potential to further the integration of migrant workers into their host community, because trade unions and workers' organizations provide a forum for migrant workers to interact with their host community and to participate in discussions about their role in society and their contribution to economic and social progress.[3]

Unsurprisingly, therefore, the international standards on labour migration consistently maintain that states should extend equal treatment to migrants with respect to freedom of association. For example, ILO Convention No 97 provides that:

> Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of ... membership of trade unions and enjoyment of the benefits of collective bargaining.[4]

This was a slight improvement on the defunct Migration for Employment Convention, 1939[5] which provided *inter alia*: 'Each Member ... undertakes that it will apply to foreigners treatment no less favourable than that which it applies to its own nationals with respect to ... (ii) the right to be a member of a trade union.'[6] Similarly, in Convention No 143, states are urged to pursue policies designed to promote and to guarantee equality of treatment and opportunity with regard to trade union rights. Remarkably, none of these Conventions distinguishes between regular and irregular migrant workers. This suggests that equality of treatment between nationals and migrant workers in respect of freedom of association should be upheld notwithstanding one's immigration or residential status.

Recommendation No 151 records a departure from this position. According to this Recommendation, equality of opportunity and treatment between migrants and nationals in respect of membership of trade unions, the exercise of trade union rights and eligibility for office in trade unions and in labour management relations bodies and workers' representative

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[2] ILO *International Labour Migration: A Rights Based Approach* (ILO, Geneva, 2010) 80.
[3] ILO *Freedom of Association in Practice: Lessons Learned* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 97th Session (ILO, Geneva, 2008) 58.
[4] See article 6(1)(a)(ii). Also see article 10 of Convention No 143.
[5] Migration for Employment Convention No 66 of 1939.
[6] See article 6(1)(a)(ii).

bodies apply only to migrant workers who are legally present in the host state.[7] This approach was rather unexpected. As noted in chapter 2 of this study, the adoption of this Recommendation and Convention No 143 was highly contested by both the traditional countries of immigration, whose major concern was to curb clandestine migration, and by the countries of origin, which vied for improved protection for all migrants. Some form of compromise therefore needed to be reached. However, apart from this distinction, Recommendation No 151 is more comprehensive with regard to entitlements than the previous provisions.

The distinction is also present in the International Convention on the Rights of All Migrant Workers and Members of their Families (ICMW). Unlike Recommendation No 151, the ICMW does not restrict the right of irregular migrants to engage in trade union activity; instead, it only limits to some extent the entitlements for irregular migrant workers. The remarkable distinction is that, while all migrant workers can freely join trade unions, take part in trade union activities and seek the aid and assistance of any trade union, irregular migrant workers may not, as matter of right, establish trade unions,[8] which are exclusively reserved for regular migrant workers. The two-tier protection emerging from the ICMW provisions is a departure not only from Convention No 97 and No 143 but also from other related human rights instruments which, as will be discussed later in this chapter, extend the right to freedom of association to all persons.[9]

Nevertheless, there is currently a considerable body of jurisprudence in human rights law and international labour law which confirms that all migrant workers have the right to freedom of association, irrespective of their immigration or residential status. For instance, the Inter-American Court of Human Rights[10] has observed that 'in the case of migrant workers, there are certain rights that assume a fundamental importance and yet are frequently violated, such as "the rights corresponding to *freedom of association and to organize and join a trade union, collective negotiation* ..."'[11] (emphasis added). The court went on to state that:

[7] Migrant Workers' Recommendation No 151 of 1975, para 1(2)(g).
[8] See article 26(1)(i) read together with article 40(1).
[9] Cholewinski, R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Oxford University Press, Oxford, 1996) 164.
[10] Inter-American Court of Human Rights *Legal Status and Rights of Migrant Undocumented Workers* Advisory Opinion OC-18/03.
[11] Ibid para 157.

> The safeguard of these rights for migrants has great importance based on the principle of the inalienable nature of such rights, which all workers possess, irrespective of their migratory status, and also the fundamental principle of human dignity embodied in Article 1 of the Universal Declaration, according to which '[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'[12]

As regards the applicability of these rights to irregular migrants, the court was of the opinion that:

> the migratory status of a person cannot constitute a justification to deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed. These rights are a result of the employment relationship.[13]

This advisory opinion was given in response to a request by the government of Mexico, which alleged the denial of fundamental workplace rights to irregular migrant workers in the United States of America. Although not specifically stated, the request is believed to have been triggered by the decision of the United States Supreme Court in *Hoffman Plastic Compounds,*[14] which held that irregular migrants who were wrongfully dismissed for taking part in trade union activities were not entitled to back pay.[15]

The US Supreme Court's decision in the *Hoffman case* was also brought to the attention of the ILO Committee on Freedom of Association (CFA) in Case No 2227.[16] The American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO), in collaboration with the Confederation of Mexican Workers (CTM), filed a complaint against the government of the United States alleging that, following the Supreme Court decision in *Hoffman Plastic Compounds,* millions of irregular migrant workers in the US lost their only protection with regard to freedom of association ie back pay. The court in *Hoffman* had held that irregular migrant workers were not entitled to back pay, a remedy provided for anti-union discrimination under the National Labor Relations Act, because their employment was

[12] Ibid.
[13] Ibid para 173(8).
[14] *Hoffman Plastic Compounds v National Labor Relations Board* 535 US 137 (2002).
[15] Cleveland, SH 'Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18/03' (2005) 99(2) *American Journal of International Law* 460–465 at 460.
[16] Case No 2227, Complaint presented by the American Federation of Labour and Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM); ILO Committee on Freedom of Association, Report No 332 (18 October 2002).

in violation of the Immigration Reform and Control Act of 1986. The CFA urged the government to bring its legislation into line with freedom of association principles so as to ensure effective protection for all workers against acts of anti-union discrimination.[17]

Before this case, the CFA examined a complaint in respect of Basic Act 8 of 2000 on the Rights and Freedoms of Foreigners in Spain and their Social Integration (OL 8/2000) which allegedly subjected migrant workers' trade union rights to the authorization of presence or residence in Spain.[18] The CFA held that freedom of association, as provided for in article 2 of Convention No 87, 'recognizes the right of workers, without distinction whatsoever, to establish and join organizations of their own choosing without previous authorization.' It further added that, with the exception of the armed forces and the police, all workers (including migrants) are free to join organizations of their own choosing. The CFA therefore requested the government of Spain to revise the respective law to ensure that it conformed to article 2 of Convention No 87.[19]

The CFA recently considered two other cases relating to migrant workers' right to freedom of association. In Case No 2620,[20] the CFA considered a complaint filed by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC) against the government of the Republic of Korea. The complaint alleged that the government had refused to register the Migrants' Trade Union (MTU) and carried out a targeted crackdown on the MTU, arresting its officers and subsequently deporting them, while also severely harassing the president of the MTU, Michel Catuira. Referring to its previous decisions,[21] the CFA held that:

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[17] Ibid para 613.

[18] Case No 2121 (Spain), Complaint presented by the General Union of Workers of Spain (UGT) against the Government of Spain; ILO, Committee on Freedom of Association, Report No 327 (23 March 2001).

[19] Ibid para 561.

[20] Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC); ILO, Committee on Freedom of Association, Report No 362 (November 2011). The case was submitted for the first time in 2009: see Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC); ILO, Committee on Freedom of Association, Report No 355. Also see Case No 2620, Complaint against the Government of the Republic of Korea presented by the Korean Confederation of Trade Unions (KCTU) and the International Trade Union Confederation (ITUC); ILO, Committee on Freedom of Association, Report No 358 (November 2010).

[21] See ILO *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th revised edition) (ILO, Geneva, 2006) paras 209 and 214.

> Article 2 of Convention No 87 is designed to give expression to the principle of non-discrimination in trade union matters, and the words 'without distinction whatsoever' used in this Article mean that freedom of association should be guaranteed without discrimination of any kind based on occupation, sex, colour, race, beliefs, nationality, political opinion.

Accordingly, the CFA concluded that 'the right to freedom of association includes migrants regardless of their legal status.'[22]

In Case No 2637,[23] the CFA examined a complaint against Malaysia with regard to the legal and practical barriers to migrant workers' right to freedom of association. This case was filed in 2009, alleging that the government had deliberately refused to register the organization of domestic migrant workers, and that there were legal and practical barriers which limited the ability of domestic workers, who are mainly migrants, to join trade unions. Once again, the CFA reiterated that 'the right to freedom of association includes migrant workers', and subsequently urged the government to remove the barriers and to register the association of domestic migrant workers immediately.[24] The CFA urged the government of Malaysia to take all necessary measures, including legislative measures where necessary, to ensure 'in law and in practice that domestic workers, including contract workers whether foreign or local, may all effectively enjoy the right to establish and to join any organization of their own choosing.'[25]

The foregoing discussion undoubtedly shows that human rights law and international labour law generally endorse the right of migrant workers to join trade unions and participate in their activities. However, this is not always the case in destination countries. Usually, migrants are unable to enjoy these rights due to different barriers which are embedded in statutory provisions and practices in their host countries.[26] Some host countries contain specific provisions in their statutes which prohibit migrants from joining trade unions or establishing any organizations. Others do not specifically prohibit trade union activities, but rather

[22] Ibid para 595.
[23] Case No 2637 (Malaysia), ILO, Committee on Freedom of Association, Report No 362 (November 2011). The case was previously considered in 2010. See ILO, Committee on Freedom of Association, Report No 356, paras 82 and 85.
[24] Ibid para 90.
[25] See Case No 2637 (Malaysia), ILO, Committee on Freedom of Association, Report No 353 (March 2009).
[26] ILO *Freedom of Association in Practice: Lessons Learned* op cit 58.

incorporate residence or reciprocity as a condition for joining a trade union or for being appointed to a trade union office.[27] For instance, in Lesotho and Mauritania, migrant workers can be elected to a trade union office only after five years of lawful residence. In Mauritania a migrant is further required to have worked for five years in the sector which the respective trade union represent.[28] In Kuwait, in addition to the five years' residence requirement, migrants need to obtain certificates of good conduct and moral standing in order to be admitted to trade unions as non-voting members.[29] They may not participate in the election of trade union officers and cannot be elected to trade union offices. Also, a trade union can be registered only if it includes at least 15 Kuwaiti nationals (about 15 per cent of the mandatory initial membership), despite the fact that migrant workers constitute approximately 80 per cent of the workforce in Kuwait.[30]

Practical barriers are imposed by the state, employers and also by trade unions themselves. On the part of the state, the most prevalent barriers include unnecessary delays in registration or refusal to register, and harassment and victimization.[31] The latter are also common in the workplaces. On the part of the trade unions, they are more often than not reluctant to recruit migrant workers, because of pre-occupation with the protection of the internal labour market, the need to forge a national identity and ideology, and the broader perception of immigration in society.[32] This reluctance is also associated with a lack of experience about reaching out to and organizing migrant workers and also a fear of contravening the law, particularly in the case of irregular migrants. Noting the challenges facing trade unions in this area, the International Confederation of Free Trade Unions (ICFTU) stated:

> [I]t is often extremely difficult to organize migrants into unions or organizations to defend their interests. When it is not considered illegal under national laws, organizing – especially of those without legal authorization for employment – is easily intimidated by the threat of deportation.[33]

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[27] Ibid 57.
[28] Ibid 58.
[29] See International Trade Union Confederation (ITUC) *Internationally Recognized Core Labour Standards in Kuwait* Report for the WTO General Council Review of the Trade Policies of Kuwait (2011) 2, available online at http://www.ituc-csi.org/internationally-recognised-core,10577.html (accessed on 24 May 2012)
[30] Ibid.
[31] For example, in the Republic of Korea, the Migrants' Trade Union (MTU) was denied registration and its leaders were forcibly arrested and deported.
[32] Krings, T 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) 15(1) *European Journal of Industrial Relations* 49–69 at 60.
[33] Linard, A *Migration and Globalization – the New Slaves* (ICFTU, Brussels, 1998), cited in Taran, P 'Migration and Labour Solidarity' in ILO *Migrant Workers' Labour Education* 2002/4 No 129 (ILO, Geneva,

Other barriers include the concentration of migrants in sectors where unionization is either absent or less vibrant, such as domestic work and farm work, a lack of trade union tradition in their home countries, and lack of awareness of their right to freedom of association.[34] These and many other factors have greatly limited the ability of migrant workers to exercise their right to freedom of association.

6.3 The nature and scope of freedom of association

There are mixed but interconnected perspectives on freedom of association. On the one hand, it is perceived as a liberal political right closely linked with freedom of expression and freedom of assembly, which gives every person the right to associate with persons of his or her choosing, or the corresponding right not to associate.[35] On the other hand, it is viewed as a fundamental labour right through which workers are free to form and to join trade unions of their own choosing to protect their economic interests.[36] Summarizing the relationship of these two conceptions, the ILO concludes that:

> Freedom of industrial association is but one aspect of freedom of association in general, which must itself form part of the whole range of fundamental liberties of man, all interdependent and complementary one to another, including freedom of assembly and of meeting, freedom of speech and opinion, freedom of expression and of the press, and so forth.[37]

Within human rights law circles, freedom of association has long been recognized as a basic human right, and has been incorporated in all the core human rights instruments. Thus, the Universal Declaration of Human Rights (UDHR),[38] the International Covenant on Civil and Political and Rights (ICCPR)[39] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[40] all incorporate provisions on the freedom of association.

2004) 26–34 at 26. Also see Taran, PA and Geronimi, E *Globalization, Labour and Migration: Protection is Paramount*, Perspectives on Labour NO 3e (ILO Geneva, 2003) at 6 available at http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf (accessed on 24 May 2004)

[34] ILO *Freedom of Association in Practice* op cit 57.

[35] See Madima, T 'Freedom of Association and the Concept of Compulsory Trade Union Membership' 1994 *TSAR* 545- 555 at 545&546. Also see Creighton, B 'Freedom of Association' in Blanpain, R (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 10 ed (Kluwer Law International, The Hague, 2010) 285–338 at 285.

[36] Lee, E 'Trade Union Rights: An Economic Perspective' (1998) 137(3) *International Labour Review* 313–319 at 313.

[37] ILO *Freedom of Association and Industrial Relations* Report VII, International Labour Conference, 30th Session (ILO, Geneva, 1947) 11 and 12.

[38] See articles 20 and 23(4).

[39] See article 22.

[40] See article 8.

In industrial relations, freedom of association has been designated as one of the most fundamental principles of labour law. The Preamble to the ILO Constitution and part XIII of the Versailles Treaty recognize the 'principles of the freedom of association' as needing promotion to improve working conditions and to foster social justice and lasting peace. This was later affirmed in the Declaration of Philadelphia,[41] and the ILO Declaration on Fundamental Principles and Rights at Work, which held freedom of association to be one of the four most fundamental principles and rights at work.[42] It is thus clear that freedom of association is a right at the centre of international labour law.[43] In other words, it is, as Compa observes, 'the bedrock of workers' rights under international law on which all other labour rights rest.'[44] To summarise:

> The fundamental principle of freedom of association ... is a reflection of human dignity. It guarantees the ability of workers and employers to join and act together to defend not only their economic interests but also civil liberties such as the right to life, security, integrity and personal and collective freedom. It guarantees protection against discrimination, interference and harassment.[45]

At the same time, in 1948 and 1949, the ILO adopted the most fundamental instruments on freedom of association: the Freedom of Association and Protection of the Right to Organize Convention No 87 of 1948, and the Right to Organize and Collective Bargaining Convention No 98 of 1949. These two instruments incorporate a wide-ranging set of entitlements. According to the jurisprudence of the CFA, freedom of association as developed under Conventions No 87 and No 98 includes the right of workers and employers to establish and to join unions of their own choosing; the right of employers to establish organizations without any prior authorization; the right of workers and employers to establish and join organizations of their own choosing; the right of workers' and employers' organizations to draw up their constitutions and rules; the right of organizations to elect their representatives in full freedom; the right of organizations to organize their administration; the right of

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[41] See ILO Declaration Concerning the Aims and Purposes of the International Labour Organization (Declaration of Philadelphia), 1944, article 1(b).

[42] See ILO Declaration on Fundamental Principles and Rights at Work, 1998.

[43] Alston, P 'Facing up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) *European Journal of International Law* 467–480 at 474.

[44] Compa, L *An Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* Paper No 330, Articles and Chapters, Cornell University (Human Rights Watch, 2000) 19.

[45] ILO *Organizing for Social Justice* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 92nd Session (ILO, Geneva, 2004) 1.

organizations to freely organize their activities and to formulate their programmes; the right to strike; the right of employers' and workers' organizations to establish federations and confederations and to affiliate with international organizations of employers and workers; protection against anti-union discrimination; protection against acts of interference; and the right to collective bargaining.[46]

Conventions No 87 and No 98 are complemented by other ILO instruments,[47] and their implementation is monitored by the Committee on Freedom of Association, whose decisions 'have been, and are accepted as binding in themselves and as authoritative as a source and expositions of the ILO principles.'[48] According to Creighton, these two Conventions and their associated supervisory procedures[49] have acquired a degree of acceptance among the international community that not only renders them uniquely authoritative, but also makes them amongst the most respected ILO standard-setting instruments.[50] With the adoption of the Declaration of Fundamental Freedoms and Rights at Work, these two Conventions acquired a universal character and are now binding on all members of the ILO, even those who have not ratified them.[51] This accords with the proposition that freedom of association as incorporated in these two instruments has acquired a status 'akin to the customary norms of international law'.[52]

Freedom of association as currently understood in industrial relations is very broad in its scope. It is more than an abstract right of workers to get together and associate. It

[46] See ILO *Digest of Decisions and Principles of the Freedom of Association* op cit. Also see this list in Eren, Ö *The Role of the International Labor Organization's (ILO's) 1998 Declaration on Fundamental Principles and Rights at Work in Strengthening the ILO Regime: A Study on the ILO's Committee on Freedom of Association (CFA)* Unpublished PhD Thesis, Texas Tech University (2010)147.

[47] These include the Right of Association (Agriculture) Convention, 1921 (No 11); the Right of Association (Non-Metropolitan Territories) Convention, 1947 (No 84); the Workers' Representatives Convention, 1971 (No 135); the Rural Workers' Organizations Convention, 1975 (No 141); the Labour Relations (Public Service) Convention, 1978 (No 151); and the Collective Bargaining Convention, 1981 (No 154).

[48] Rubin, N 'International Labour Law and the Law of the New South Africa' 1998 *South African Law Journal* 685–709 at 690–691.

[49] The supervisory procedure comprises the Committee on Freedom of Association (CFA), established in 1951, with nine members drawn from the government, employers' and workers' groups; the Fact-Finding and Conciliation Commission on the Freedom of Association comprising three members appointed by the Governing Body of the ILO; and the ILO Commission of Inquiry appointed on an *ad hoc* basis under article 26 of the ILO Constitution.

[50] See Creighton op cit 276.

[51] See article 2 of the Declaration on Fundamental Principles and Rights at Work.

[52] See Von Potobsky, G 'Freedom of Association: The Impact of Convention 87 and the ILO Action' (1998) 137(2) *International Labour Review* 195–221 at 196. Also see Olivier, MP and Potgieter, O 'The Right to Associate Freely and the Closed Shop' 1994 *Journal of South African Law* 289–305 at 291.

encompasses the right of workers to meaningfully associate for the purpose of collectively defending their rights in the workplace.[53] Some scholars regard this right as a 'shorthand expression for a bundle of rights and freedoms relating to membership of associations of employers and workers.'[54] Ordinarily, freedom of association as incorporated in human rights instruments and the ILO instruments encompasses three major components. The first component is the right of workers to form and join trade unions, through which workers are able to come together, draw up their constitutions and rules, choose their leaders and combine their economic resources for the common good.[55] The second component is the right of workers to join organizations of their own choosing without any interference, and subject only to the rules of the organization concerned. Workers are thus able to choose and join trade unions which they believe are best placed to defend and foster their economic interests.[56] The last component relates to the right not to join a trade union.[57] The last two components have become the subject of a contentious debate between scholars, particularly with regard to the suitability or legality of closed shop agreements, the right of trade unions to disassociate from their members, and the impact of these two components on the wellbeing of the labour movement. [58] This debate, however, is beyond the scope of this study.

The three components are complemented by two 'intrinsic corollary' components: the right to organize and bargain collectively, and the right to strike.[59] These two components are deemed necessary to assert the collective aspects of the freedom of association and to achieve one of the distinctive objectives of freedom of association, namely, balancing the unequal bargaining power between employees and employers through collective bargaining.[60] They

[53] Eren op cit.
[54] Creighton op cit.
[55] Summers, CW 'Freedom of Association and Compulsory Union Membership in Sweden and the United States' (1964) 112(5) *Pennsylvanian Law Review* 649. Also see Budeli, M *Freedom of Association and Trade Unionism in South Africa: From Democracy to the Constitutional Order* Unpublished PhD Thesis, University of Cape Town (2007) 49.
[56] Ibid. Also see the European Court of Human Rights decision in *Young, James and Webster v The United Kingdom* (1981) IJRL 408.
[57] Madima op cit 546.
[58] Albertyn, CJ 'Freedom of Association and the Morality of the Closed Shop' 1989 *ILJ* 901–1005. Also see Olivier and Potgieter op cit 289; Madima op cit 546; Landman, AA 'Statutory Inroads into a Trade Union: Unions' Right of Disassociation' (1997) 18 *ILJ* 13–25 at 13; Grogan, J *Collective Labour Law* (Juta & Co, Cape Town, 2010) 27; Gernigon, B et al *ILO Principles Concerning the Right to Strike* (1998) 137(4) *International Labour Review* 441–481; Madhuku, L 'The Right to Strike in Southern Africa' (1997) 136(4) *International Labour Review* 509-530 at 510–511; and Caraway, TL 'Freedom of Association: Battering Ram or Trojan Horse?' (2006) 13(2) *Review of International Political Economy* 210–232 at 219–220.
[59] Gernigon et al op cit 441–481 and Madhuku op cit 510&511.
[60] Olivier and Potgieter op cit 392 and 394.

provide a 'legitimate weapon' that trade unions can use to further their interests.[61] There is a consensus in the literature that, without these two complementing rights, the right to freedom of association would be reduced to nothing more than a theoretical aspiration.[62]

To conclude: the provisions on freedom of association in the human rights instruments and the ILO instruments are comprehensive. In addition, they notably and consistently reinforce the universal nature of the right to freedom of association. Article 20 of the UDHR provides that 'everyone has the right to freedom of peaceful assembly and association'. Article 23(4) of the ICCPR specifies that 'every person has the rights to form and to join trade union for the protection of his interests'.[63] In the ICESCR, states undertake to ensure the 'right of everyone to form trade unions and to join the trade union of his choice....'[64] More specifically, Convention No 87 states that 'workers and employers, *without distinction whatsoever*, shall have the right to establish and ... to join organizations of their own choosing.'[65] It cannot be overemphasized that these provisions provide the ground work for the protection of workers in precarious situations, such as migrant workers, who would otherwise be sidelined because of *alienage* and because of their immigration or residence status.

6.4 The legal foundations and practical aspects of freedom of association in Tanzania

This section examines how the norms discussed above are applied in Tanzania. Tanzania subscribes to Conventions No 87 and No 98. It ratified Convention No 98 in 1962, soon after independence, but remained reluctant to ratify Convention No 87 until 2000, when it finally ratified.[66] Also, as noted in chapter 2 of this study, Tanzania is a signatory to the ICCPR and the ICESCR, both of which incorporate the right to freedom of association. Hence, Tanzania has a positive obligation to guarantee the right to freedom of association.

Within the domestic legal framework, the freedom of association has constitutional and statutory legitimacy. Article 20 of the Constitution of the United Republic of Tanzania, 1997

[61] Swepston, L 'Freedom of Association: Development through the ILO Supervision' (1998) 137(2) *International Labour Review* 169–194 at 179.
[62] Olivier and Potgieter op cit 293.
[63] See art 22(1) of the ICCPR.
[64] See art 8(1).
[65] See art 2(1). Emphasis added.
[66] See the ratification status at http://www.ilo.org/ilolex/english/index.htm (accessed on 24 May 2012).

recognizes individuals' right to 'freely ... associate and cooperate with other persons ... and to form and join with associations or organizations' which are aimed at preserving or furthering their interests. Although this provision does not refer specifically to trade unions, as some modern constitutions do,[67] it is remarkably important to the working class throughout the country. In addition to protecting their right to form and to belong to trade unions, it gives the labour movement a constitutional right to associate among themselves and with other organizations with similar interests, within the country and beyond the national borders. Furthermore, the general approach preferred in the Constitution provides an opportunity for workers who are normally excluded from traditional labour law protection, such as workers in the informal sector, to legitimately assert their right to establish organizations or to join organizations which they regard as best equipped to protect or to further their interests.

The recently adopted Employment and Labour Relations (ELRA), which is one of the most up-to-date labour statutes in the region, takes this provision further. Replicating the developments taking place in international labour law, and within the ILO in particular, the ELRA singles out freedom of association as one of 'the most fundamental rights and protections', alongside the prohibitions on child labour and forced labour, and the principle of non-discrimination.[68] Provisions pertaining to freedom of association are crafted in a manner that demonstrates the recognition of the freedom of association, not only as one of the core labour rights, but also as an important tool in promoting good working conditions and preserving harmonious industrial relations. In other words, freedom of association is central to achieving the objectives of the Act, which include '[promoting] economic development through economic efficiency, productivity and social justice'.[69]

Section 9, which addresses the right of employees and employers to organize, provides that all employees, with the exception of magistrates, prosecutors and managerial employees have the right to establish trade unions and to participate freely in the lawful activities of their respective organizations.[70] Magistrates, prosecutors and managerial employees may form and

[67] For example, the Constitution of the Republic of South Africa, 1996 and the Constitution of the Republic of Kenya, 2010 contain elaborate provisions on the right of workers and employers to join and to form organizations and to participate in the activities of the organization. See section 23 (South Africa) and article 41 (Kenya). Also see article 29(1)(e) of the Constitution of the Republic of Uganda, 1995.
[68] See part II of the Act, sections 5–11.
[69] See the Employment and Labour Relations Act 6 of 2004, section 3(a).
[70] Section 9(1).

belong to trade unions, but they can only belong to specific categories of trade unions, namely, organizations whose membership is restricted to judicial officers, organizations for prosecutors and court officers, or organizations for senior management employees.[71] With regard to the last group, it has been argued that this restriction has a negative impact on individual workers and trade unions, threatening the solidarity and the strength of the labour movement in the country.[72] This is because the categorization of workers into two separate groups, namely senior management employees and non-management employees, reinforces divisions between employees and consequently weakens the labour movement.[73] With regard to migrant workers, it could also be argued that this categorization negatively affects their ability to exercise their right to freedom of association. We will revert to this point later.

With the exception of the limitations in respect of the three categories of workers discussed above, there is no provision in the ELRA which purports to limit the enjoyment of freedom of association to a particular group of employees. The right to join and to form trade unions therefore applies to all employees, who include 'applicants for employment'.[74] The term 'employee' has also been innovatively defined to extend labour law protection to workers who would otherwise not qualify as employees.[75] To facilitate the realization of the right to freedom of association, the ELRA sets out the procedures for the establishment of trade unions, trade union rights, the administrative and financial management of trade unions, dispute resolution, and procedures for the dissolution of trade unions. All these issues have been addressed in detail,[76] and this study will only look at a few issues which have a direct bearing on migrant workers.

First, with regard to the formation of a trade union, a minimum of 20 members is required for a trade union to qualify for registration.[77] There is no reference to nationality, residence or

[71] Section 9(2).
[72] Ackson, T 'Trade Unions, Employers' Association and Federation' in Rutinwa, B et al *The New Employment and Labour Relations Law in Tanzania: An Analysis of the Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and University of Cape Town, 2011) 191–225 at 202.
[73] Ibid.
[74] See section 9(6)(a).
[75] For instance, workers under contracts in which the individual undertakes to work individually for the other party to the contract and the other party is not necessarily a client or customer of any profession, business, or undertaking carried on by the individual. See section 3. Also see Olivier, M 'Informality, Employment Contracts, and Social Insurance Coverage: Rights-Based Perspectives in a Developing World Context' (2011) 27(4) *International Journal of Comparative Labour Law and Industrial Relations* 419–433 at 430.
[76] Ibid 199–217.
[77] Section 46(1) (d)

immigration status in the Act. This suggests that migrant workers can legitimately form and register trade unions, provided that their membership at registration is not less than 20. After registration, trade unions acquire legal personality and several other entitlements,[78] including the right to represent their members in different forums and to exercise other organizational rights, including the right to recruit members, to access employers' premises, to communicate and to hold meetings with their members, and to establish field branches.[79] In addition, a trade union can legitimately join other trade unions to establish a new union or federation,[80] amalgamate with similar organizations and form a new union,[81] or affiliate with any international workers' organization.[82]

Complying with Convention No 98, the ELRA incorporates a set of provisions to protect employees against prejudices which would otherwise limit their ability to exercise their right to freedom of association or impair their participation in trade union activities. It directs that employees should not be discriminated against for belonging to a trade union or for participating in the lawful activities of a trade union.[83] Similarly, office bearers and officials of trade unions and federations are protected from any discrimination for reasons connected with the discharge of their official responsibilities. They may not, as a matter of principle, be discriminated against for representing their respective organization or federations or for performing the lawful activities of the association.[84]

Another remarkable feature of the law pertaining to freedom of association in Tanzania is that it impliedly accommodates the analogous right not to join or to belong to trade unions alongside the right to join and to belong to trade unions. It is unlawful under the Constitution to compel any person to join any association or organization against his or her will.[85] Confirming this position, the ELRA maintains that any collective agreement that purports to compel an employee to join or to belong to a trade union is unenforceable.[86] Whereas employers and employees may legitimately conclude an 'agency shop agreement', they may

[78] Section 49(1).
[79] Section 61(1) and (2).
[80] Section 54.
[81] Section 11.
[82] See Ackson op cit 207–208.
[83] Section 10(2).
[84] Section 10(3).
[85] Article 20(4).
[86] Section 72(1).

not legitimately conclude a 'closed shop agreement'.[87] This means that, whilst all workers, including migrant workers, are free to join trade unions, they cannot, in terms of the Constitution and labour law, be compelled to belong to any organization.

Most of the provisions of the ELRA on the right of workers to join and to belong to trade unions were recently confirmed in a landmark case on freedom of association.[88] In this case, the Communication and Transport Workers' Union of Tanzania (COTWU(T)) sought the intervention of the Labour Court to enforce a clause in its constitution which prevents its members from cancelling or transferring their membership unless they give notice and obtain permission. The court declared the clause illegal as it contravenes the ELRA, which guarantees unrestricted freedom of association. The court concluded that the right of employees to join a union of their choice cannot be restricted by an employer, a union, a federation of unions or even a court.

In general, the Tanzanian law is compliant with international norms with regard to freedom of association. Nonetheless, this does not mean that workers in Tanzania are able to exercise this right free of any interference or prejudice. There are formidable barriers, notably with regard to the right to strike and, in the private sector, with regard to the rights of employees to join trade unions, to participate in trade union activities and to engage in collective bargaining.[89] The procedure for conducting a legal strike is lengthy and unnecessarily cumbersome; as a result, employees tend to wage wildcat strikes and walkouts.[90]

Not allowing workers to belong to trade unions and vengeance against trade union members and officials are more prevalent in the private sector. Recently, two employees of the Geita Gold Mining Company (GGM), a subsidiary of AngloGold Ashanti (AGA), were dismissed for allegedly participating in trade union activities in their capacities as branch chairman and branch secretary of the Tanzanian Mines and Construction Workers' Union (TAMICO). They were later reinstated after a joint intervention by AGA and the International Federation of

[87] Section 72(2). Also see Rutinwa op cit 237.
[88] *Communication and Transport Workers' Union of Tanzania [COTWU(T)] v Telecommunication Workers' Union of Tanzania (TEWUTA) and Tanzania Postal Corporation* High Court of Tanzania, Labour Division, at Dar es Salaam, Labour Dispute No 9 of 2010.
[89] ITUC *Annual Survey of Trade Union Rights Violations (Tanzania), 2011* available at http://survey.ituc-csi.org/Tanzania.html?lang=en#tabs-1 (accessed on 24 May 2012)
[90] Ibid.

Chemical, Energy, Mine and General Workers' Union (ICEM). Even then, they were served with warning letters.[91] Incidents of unfair dismissals and other forms of victimization of trade union members and leaders have also been repeatedly reported in mines owned by African Barrick Gold Plc, a subsidiary of Barrick Gold of Canada.[92] These two examples are particularly relevant to this study because the companies involved are among the leading companies in the mining sector, which is one of the major employers of migrants in the country.

These difficulties notwithstanding, workers in Tanzania have continually asserted their right to freedom of association. The labour movement, which was founded in the colonial era and which played a great role in the political liberation of Tanganyika, managed to survive, albeit with some concessions, the statutory and practical barriers imposed on trade unions by the colonial regime and later by the government of independent Tanganyika/Tanzania.[93] However, the extent of participation in trade unions remains extremely low. The Trade Union Congress of Tanzania (TUCTA), which currently acts as an umbrella body of trade unions in the country, had a total of 14 affiliated trade unions and about 600,000 affiliated members in 2010.[94]

6.5 The nature and level of migrant workers' participation in trade unions in Tanzania

From the above discussion it is clear that neither the Constitution nor the ELRA prevent migrants from joining trade unions. They do not prescribe any conditions which undermine or impair the ability of migrant workers to exercise their right to freedom of association. This

[91] Wa Simbeye, F 'Geita Mine, Union in Dispute' *Daily News* (Tanzania) 31 October 2011.

[92] ITUC *Annual Survey of Trade Union Rights Violations (Tanzania), 2011* available at http://survey.ituc-csi.org/Tanzania.html?lang=en#tabs-5 (accessed on 24 May 2012).

[93] Shivji, IG *Law, State and the Working Class in Tanzania* (James Currey, London, 1986) chapters 5, 6 and 7. Also see Ackson op cit 191–109.

[94] Trade unions affiliated to TUCTA include the Tanzanian Local Government Workers' Union (TALGWU); the Tanzanian Union of Government and Health Employees (TUGHE); the Tanzanian Mines and Construction Workers' Union (TAMICO); the Tanzanian Union of Journalists (TUJ); the Tanzanian Teachers' Union (TTU) (also known as CCW–Chama cha Walimu Tanzania); the Tanzanian Union of Industrial and Commercial Workers (TUICO); the Conservation, Hotels, Domestic and Allied Workers' Union (CHODAWU); the Researchers, Academicians and Allied Workers' Union (RAAWU); the Tanzanian Railway Workers' Union; the Tanzanian Plantation and Agriculture Workers' Union (TPAU), the Communication and Transport Workers' Union (COTWU), the Telecommunication Workers' Union of Tanzania (TEWUTA), the Dock Workers' Union of Tanzania (DOWUTA); and the Tanzanian Association of Seafarers Union (TASU). In a personal interview with the acting secretary of TUCTA, Mr Nicholas Mgaya (at the TUCTA headquarters in Dar es Salaam, 18 March 2011) it was revealed that there are a few trade unions such as the Tanzania Higher Learning Institutions Trade Union (THTU) which are not members of TUCTA.

means, therefore, that, whilst migrant workers are free to join the existing trade unions in their workplaces, they can also establish new trade unions themselves or in collaboration with the local workers. Unfortunately, this is yet to happen. The participation of migrant workers in trade unions is negligible or simply absent.[95] It appears that migrants are ignorant of the statutory regulations on freedom of association. Whereas most of them are aware of the importance of trade unions in industrial relations, they do not know whether they can legitimately exercise this right in a foreign country. From the migrants' point of view, trade unions are exclusively reserved for national workers.[96] Migrants also believe that their real or perceived involvement in trade unions will expose their employment and consequently jeopardize residential or work authorization. In other words, they believe that, one is safer if he or she keeps a low profile. Interestingly, however, a few migrants have pursued the possibility of joining trade unions, but they had to leave because they felt unwelcome.[97]

Migrant workers are also unable to organize due to the stringent conditions attached to work permits. As pointed out in chapter 5 of this study, work permits are issued for a two to three-year term, which may be extended at the discretion of the Department of Immigration Services and the Labour Department. As a result, migrant workers tend to avoid trade unions because they may not stay long enough to be able to acquaint themselves with the respective organizations or to reap the fruits of their investment. This is similarly challenging for trade unions aspiring to organize migrant workers. From the trade unions' point of view, 'organizing temporary migrants is not always an easy task since there is a high turnover of workers given that the workers are only in their host country temporarily. By the time workers are organized and integrated, they might already have to leave the country.'[98] Also, work permits tie migrant workers to one employer without any possibility of occupational mobility in the market. In this environment, it becomes extremely difficult for migrants to bargain for better terms with their employers.

[95] All migrant workers who were interviewed in this study do not subscribe to any trade union.
[96] Sixty per cent of migrant workers who participated in this study were aware of the concept of workers' associations in the workplace. Of these 35 per cent indicated that they belonged to trade unions in their home countries prior to relocating to Tanzania. Many indicated that they could not join trade unions in Tanzania because they were foreigners.
[97] In their responses, they indicated that they found that it was practically impossible for them to participate in trade unions because they were regarded as spies.
[98] Schmidt, V 'Temporary Migrant Workers: Organizing and Protection Strategies by Trade Unions' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 191–206 at 194.

Another barrier relates to the benefits flowing from trade unions. Migrant workers who come from countries with strong labour movements, such as South Africa, consider the trade unions in Tanzania as worthless because they are extremely weak in terms of bargaining power, when compared to trade unions in their countries.[99]

Some migrant workers have failed to exercise this right because they occupy seniour managerial positions in their respective workplaces and hence cannot legally belong to trade unions which represent all workers. Section 9(2)(c) of the ELRA provides that seniour management employees, defined in the Act as employees who, by virtue of their position, '[make] policy on behalf of the employer; and [are] authorized to conclude collective agreements on behalf of the employer',[100] may not belong to trade unions that represent the non-senior management employees of the employer. This is unfortunate because, in the absence of trade unions for senior management employees, which is currently the case, migrant workers in this group cannot exercise their right to freedom of association. Currently, a considerable number of migrant workers who are legally admitted are appointed to the most senior management positions or as heads of departments.[101]

With regard to irregular migrants, the main obstacle is their legal status. In the current environment, where migration is not regarded as a labour issue, but rather as a security or law and order issue, irregular migrants cannot reasonably be expected to join trade unions or to participate in trade union activities, because this would obviously lead to incarceration and deportation. Also, the nature of the work in which the majority of irregular migrant workers are involved has no strong union tradition. For example, there are significant numbers of irregular migrants in domestic work and in the tourism industry, where the level of unionization is very limited.[102]

Trade unions are less than enthusiastic about migrant workers' participation. They face the three most common dilemmas amongst trade unions in host countries: whether to resist immigration or to cooperate and try to influence the formulation of sound immigration

[99] This was revealed during the personal interviews with migrant workers.
[100] See section 10(6)(b).
[101] See section 5.3.2 in chapter 5.
[102] See, for example, the challenges in organizing domestic workers in Kapinga, S *From Enclosed Domestic Labour to Training Centers: Challenges of the Unions and the NGOs in Organizing Paid Child Domestic Workers in Tanzania* Unpublished Master's Dissertation, University of the Witwatersrand (2008) 41–47.

policies, whether to extend trade union membership to migrant workers, and whether and how to adopt special trade union policies to suit the needs of migrants.[103] None of the trade unions visited during this study had migrant workers amongst their members, although their constitutions do not subject membership to citizenship or nationality qualifications. This is the case even amongst trade unions which operate in sectors where there are considerable numbers of migrant workers, such as the Tanzania Teachers' Union (TTU) and TAMICO. Interestingly, TAMICO had received membership applications from migrant workers, but had not decided (at the time of this study) whether to admit the applicants.[104]

Trade unionists mistakenly assume that trade union rights are exclusively for Tanzanian workers, not migrants. The interviews suggest that trade union leaders are either ignorant of the constitutional and statutory regulations on membership of and participation in trade unions, or have, for unknown reasons, chosen to ignore the respective provisions.[105] There is a fear amongst trade unionists that the admission of non-Tanzanian workers to trade unions will automatically create the opportunity for 'foreigners' to participate in national politics through the back door. Articulating the perceived danger of admitting migrants to trade unions, one participant vehemently argued that:

> [B]y assuming membership of trade unions, migrant workers automatically acquire electoral rights through which they can elect trade union leaders and also be elected to trade union offices. Given that there are currently no rules prohibiting migrants from being elected to certain posts in their respective unions, it is most likely that they can be elected to the most senior posts which would automatically entitle them to participate *ex officio* in national policy-making bodies. In the education sector, for example, the senior officials of the TTU participate *ex officio* in policy-making forums at the ministry level. How on earth can a teacher from a foreign country, say Uganda or Kenya, participate in such forums?[106]

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[103] Penninx, R and Roosblaad, J *Trade Unions, Immigration and Immigrant and Ethnic Minority Workers in Western Europe 1960-1993* Unpublished paper, Institute for Migration and Ethnic Studies, University of Amsterdam (1994), quoted by Wrench, J and Virdee, **S** *Organising the Unorganised: 'Race', Poor Work and Trade Unions* Research Paper in Ethnic Relations No 21, Centre for Research, University of Warwick, Coventry (1995).

[104] Interview with an officer of TAMICO, at the TAMICO Headquarters in Dar es Salaam, 21 February 2011.

[105] Most trade union officials who participated shared the view that migrants are not statutorily eligible for trade union membership. Surprisingly, even after discussions on the law, some of them vehemently ruled out any possibility of having non-Tanzanian workers as members of their association.

[106] Interview with an officer of the Tanzanian Teachers' Union (TTU) at the TTU headquarters in Dar es Salaam, 24 February 2011.

In general, trade unions are in a dilemma. On the one hand, they see no prohibitions on the recruitment of non-Tanzanian workers to their respective unions, while, on the other hand, they are sceptical about the implications.

Furthermore, trade unions still perceive migrant workers as rivals of local workers. The current preoccupation of trade unions is to reduce the influx of migrant workers, rather than to defend their rights. As a result, the trade unions are ignorant of migrant workers' special protection needs. This is rather unfortunate, since the major role of the trade union movement around the world is to protect workers and to fight for equality and decent work for all workers.[107] It is therefore unfortunate that trade unions in Tanzania and in other countries sideline migrant workers. One of the slogans of the labour movement, which was adopted in the early 1900s by the founders of the industrial labour movement and which has become one of the most popular slogans used by trade unions around the world, is that 'an injury to one is an injury to all'.[108] By sidelining migrant workers, trade unions not only ignore this slogan, but they also ignore the fact that migrant workers, whether regular or not, are first and foremost workers.

There is ample evidence that trade unions have a special role to play in advancing not only the rights of national workers, but also those of all workers in the country, irrespective of their migration or social status.[109] They can serve as the best defenders of migrant workers' rights because, first, they have experience and solidarity, and are therefore better placed to defend migrant workers. Secondly, trade unions have a strong voice compared to migrant workers, who are not only few in number but are also not organized and are not well acquainted with industrial relations and regulations in the host country. As Budeli correctly observes in a different context, 'union representatives acting on behalf of employees are able

[107] ILO *Freedom of Association in Practice* op cit 56.

[108] It is reported that this motto was used for the first time by David Coates, one of the founders of the Industrial Workers the World (IWW) in the early 1900s.

[109] Trade unions in Spain, the United States, Russia and Malaysia have successfully reached out to migrants. Also, in the Netherlands, the Confederation of Trade Unions (FNV) opened membership to undocumented migrant workers in 2000. In the Republic of Korea, the Korean Congress of Trade Unions (KCTU) together with churches and other organizations co-sponsored the Joint Committee for Migrants in Korea. The Committee assists migrants and works to combat discrimination against irregular migrant workers in Korea. In Switzerland, the trade unions have on different occasions, in collaboration with the movements of undocumented workers (the *Sans-papier* movement), successful campaigned for migrant workers' rights and for the regularization of irregular migrants. Other trade unions have established special units or assigned full-time staff to deal with migrant workers. See ILO *In Search of Decent Work – Migrant Workers' Rights: A Manual for Trade Unionists* (ILO, Geneva, 2008) 114–119. Also see ILO *Freedom of Association in Practice* op cit 57–58.

to secure better terms and conditions of employment than individuals negotiating on their own behalf.'[110] It is therefore important that trade unions in Tanzania organize migrant workers and take a leadership role in defending their rights alongside the rights of national workers.

6.6 Opportunities for improving the protection of migrant workers' freedom of association

The prevailing isolation of migrant workers from the labour movement is a barrier to freedom of association for immigrants. It does not bode well for the developments taking place in the country's economy, and also within the sub-region, which, as noted in chapter 4, have significantly increased the numbers of migrants, both regular and irregular. The prevailing assumptions amongst trade unionists that these numbers involve only skilled migrant workers who are highly remunerated and well provided for are entirely flawed. In fact, these assumptions create feelings of betrayal and rejection on the part of low-skilled and medium-skilled workers, who move across country borders without proper documentation because they do not legally qualify for it, and hence have no one to look to for protection, except for fellow workers and the labour movement. As indicated in chapter 4, the numbers of workers in this group are likely to grow because of market forces and also because of the biased nature of the labour migration regimes across the sub-region. It is therefore important that trade unions, while repositioning themselves in the contemporary market economy, should also explore opportunities to improve the participation of migrant workers and thus address their specific protection needs, particularly the needs of those in vulnerable situations.

The inclusion of migrant workers, if well planned and generally accepted, is likely to have a profound impact on trade unions. As noted before, some migrant workers come from or have worked in countries with strong union traditions. They may transform the labour movement by importing techniques and information from their countries, thus enhancing the performance of trade unions and the labour movement in general.

[110] Budeli, M 'Understanding the Right to Freedom of Association at the Workplace: Components and Scope' 2010 *Obiter* 16–33 at 25.

There are various ways in which trade unions can improve the participation of migrant workers and make themselves relevant to migrant workers, which are outlined in the next section.

6.6.1 Raising awareness among trade union members and advocating for change

The first strategy is to educate and inform union members, especially shop stewards and officers, on the special protection needs of migrant workers and the need to organize them and defend their rights.[111] In doing so, trade unions could use the ILO Conventions which, as noted in chapter 2 of this study, have a universal character. As noted above, Tanzania is a signatory to Conventions No 87 and No 98. These two Conventions and other ILO Conventions ratified by Tanzania are instrumental in defending and advocating for the rights of migrant workers within trade unions and beyond. The ILO Declaration of Fundamental Principles and Rights at Work, and the 'Decent Work Agenda' are also excellent advocacy tools. In the prevailing situation in Tanzania, this strategy is very important, not only to win the support of members, but also to avoid antagonism. As stated elsewhere, migrants are viewed as competitors and 'takers of jobs'. Trade unions must therefore educate their members before adopting pro-migrant policies.

6.6.2 Reaching out to migrants

Outlining the challenges of organizing migrants from the eight Eastern Europe countries which joined the European Union (EU) in 2004 (also known as the A8 countries),[112] Fitzgerald and Hardy note that the recruitment and organization of migrants raise three interrelated challenges: how to locate and recruit them to trade unions, how to transform them from passive membership to self-organization and activism, and how to formulate policies to suit the migrant workers' concerns.[113] These challenges are also particularly relevant to Tanzania. As pointed out previously, the poor participation of migrant workers in trade unions is partly the result of lack of awareness about the national regulations on freedom of association and uncertainty about the benefits and the consequences flowing from participation in trade unions, particularly for irregular migrant workers. Trade unions must therefore raise awareness and persuade migrants to join trade unions, and also build trust so

[111] ILO *In Search of Decent Work – Migrant Workers' Rights* op cit 106 and 111.
[112] The countries in this group are the Czech Republic, Lithuania, Estonia, Poland, Slovakia, Slovenia, Hungary and Latvia.
[113] Fitzgerald, I and Hardy, J 'Thinking Outside the Box? Trade Union Organizing Strategies and Polish Migrant Workers in the United Kingdom' (2010) 48(1) *British Journal of Industrial Relations* 131–150 at 133.

that migrant workers, particularly those in precarious situations, can feel secure about joining unions. Once recruited to trade unions, migrant workers with leadership potential may be identified, trained and involved in leadership so as to encourage other migrants to join the unions.[114] This is likely to boost the recruitment of migrant workers, since migrants can easily reach out to their non-unionized colleagues.

6.6.3 Engaging with the government and other partners

The third strategy is to engage with the government and social partners, and to advocate and promote a rights-based migration policy. Trade unions may use the international standards and good practices to lobby for a well-planned and transparent labour migration admissions system and a human rights-based approach to immigration regulations.[115] The African Regional Organization of the International Confederation of Free Trade Unions (ICFTU-AFRO) recommends that trade unions should do the following: (i) pressurize their respective governments to ratify the ILO Conventions on migrant labour and the ICMW; (ii) engage actively with government, employers and other partners to shape immigration policies; and (iii) carry out surveys and research on the working conditions of migrant workers.[116]

As noted in chapter 2 of this study Tanzania has yet to ratify ILO Conventions No 97 and No 143 and the ICMW. Social partners must therefore lobby for ratification. Human rights non-governmental organizations (NGOs) have established a good precedent on how to lobby for ratification and incorporation of international norms. Recently, human rights NGOs successfully lobbied for the ratification of the Optional Protocol to the African Charter of Human and Peoples' Rights on the African Court of Human and Peoples' Rights, 2004 and the Optional Protocol to the African Charter on Human and Peoples' Rights on the Elimination of All Forms of Discrimination against Women, 2005.[117] In 2009, human rights NGOs led by the National Organisation for Legal Assistance (*nola*) successfully lobbied for the enactment of the Law of Child Act,[118] which incorporates the principles laid down in the

[114] ILO *In Search of Decent Work – Migrant Workers' Rights* op cit 114.
[115] Ibid 106.
[116] See ICFTU-AFRO (2004) *The Conclusions and Recommendations of the ICFTU-AFRO Regional Conference on Migrant Labour in Africa* (Nairobi, 15–17 March 2004) 7, available at http://www.gurn.info/en/topics/migration/research-and-trends-in-labour-migration/africa/conclusions-and-recommendations-of-the-icftu-afro-regional-conference-on-migrant-labour-in-africa (accessed on 24 mAY 2012).
[117] Tanzania ratified the two Conventions on 10 February 2006 and 7 May 2007 respectively.
[118] Act 21 of 2009.

International Convention on the Rights of the Child, 1989 and the African Charter on the Rights and Welfare of the Child, 1990. TUCTA may consult or partner with these organizations to lobby for ratification and for a sound labour migration policy, because, apart from their demonstrated capacity in this area, human rights NGOs have a stake in promoting and defending the rights of workers. The rights of migrant workers are first and foremost human rights and therefore fall within the sphere of human rights NGOs. In fact, some of these organizations are already working on migration issues. For instance, *nola* and the Tanzanian Women Legal Aid Clinic (WLAC) have implemented certain projects in Tanzanian refugee camps and settlements, in collaboration with the United Nations High Commission for Refugees (UNHCR) office.

With regard to engagement with the government and employers, as noted in chapter 5 of this study, a member of TUCTA sits on the tripartite committee, which also brings together the government and employers. This gives TUCTA an advantage in advancing the need for a sound labour migration policy that addresses labour market needs without compromising the rights of migrant workers.

6.6.4 Creating alliances with trade unions in other countries

Alliances, partnerships or coordination with trade unions in host countries and their counterparts in other countries, particularly those in migrants' home countries, have proved to be one of the ways in which trade unions can effectively protect migrant workers.[119] The partnership or coordination may be established at sectoral level or at national trade union level.[120] Depending on the environment, the cooperation may take place by means of informal working relationships or formal cooperation concretized by memoranda of understanding (MoUs) or binding agreements in the form of bilateral or multilateral agreements. Recently, the ILO Bureau of Workers (ACTRAV), in collaboration with the ITUC, facilitated the adoption of a model trade union agreement on migrant workers' rights to provide guidelines on issues that should be included in bilateral and multilateral trade union agreements.[121]

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[119] ILO *In Search of Decent Work – Migrant Workers' Rights* op cit 110.

[120] Beirnaert, J *Trade Unions Building Bridges to Protect Migrant Workers'* (2011) available at http://www.ihrb.org/commentary/guest/trade_unions_building_bridges_to_protect_migrant_workers.html (accessed on 24 May 2012).

[121] The model agreement was developed by the ILO Bureau of Workers (ACTRAV) in collaboration with ITUC and regional trade unions. With the support of national trade union centres in countries of origin and destination

Internationally, a number of bilateral and multilateral agreements have been signed so far. For example, in May 2009, three trade union centres in Sri Lanka[122] signed bilateral agreements with trade unions in Bahrain, Jordan and Kuwait.[123] The agreements commit the signatories to take a number of actions and to promote the rights of migrant workers from Sri Lanka. These include ensuring that legislation and collective bargaining agreements in their respective countries fully protect migrant workers, including temporary workers, and promoting the ratification of international labour migration instruments.

Also, most recently, on 7 February 2012, the Georgian Trade Unions Confederation and CGT-France signed a memorandum of cooperation, in terms of which the French union will assist its Georgian partner in protecting the rights of workers, and will share its experience and expertise in the fields of organizing, researching the labour market and other issues relevant to migrants.[124] In 2011 a Memorandum of Understanding (MoU) to protect the rights of cross-border migrant workers in the brick kiln sector was signed by Nepalese trade unions (comprising CUPPEC and CAWUN) and the Hind Khet Mazdoor Panchayat (HKMP) in Bihar State, India.[125]

In the Caribbean, trade unions in Barbados, Bermuda, Jamaica, and Trinidad and Tobago have engaged in joint activities since 2009. These include the provision of legal aid to

countries, it was finally adopted in 2008. The model agreement contains key trade union principles, proposals for joint actions and campaigns, and covers a wide range of practical suggestions for activities aimed at promoting the rights of both migrant and non-migrant workers. The text of the model agreement is available at http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@actrav/documents/publication/wcms_115036.pdf (accessed on 24 May 2012).

[122] The Ceylon Workers' Congress (CWC), the National Trade Union Federation (NTUF), the National Workers' Congress (NWC) and the Sri Lankan Nidahas Sewaka Sangamaya.

[123] The General Federation of Bahrain Trade Unions (GFBTU), the General Federation of Jordanian Trade Unions (GFJTU), and the Kuwait Trade Union Federation (KTUF). See ILO *Bilateral Trade Union Agreements on Migrant Workers Rights between Sri Lanka and Bahrain, Kuwait and Jordan* (2009) available at http://www.ilo.org/dyn/migpractice/migmain.showPractice?p_lang=en&p_practice_id=32 (accessed on 24 May 2012).

[124] Agreement signed between GTUC and CGT-France at the Pan-European Regional Council, available at http://perc.ituc-csi.org/spip.php?article717 (accessed on 24 May 2012).

[125] MoU signed between Nepalese and Indian Unions on Cross-Border Migrant Workers, see http://connect.bwint.org/?p=405 (24 May 2012).

migrant workers and outreach campaigns to organize migrant workers into trade unions.[126] In Africa, trade unions in Morocco, Mauritania, Senegal, Cape Verde and Tunisia have on different occasions concluded cooperation agreements with Italy and Spain, which are aimed at protecting African migrant workers in these two countries.[127]

These practices are worth replicating. To start with, trade unions in Tanzania could partner with trade unions in Kenya which, as indicated in chapter 4 of this work, is among the top ten countries of origin of migrant workers in Tanzania. This form of collaboration could also be extended to other countries in the EAC and SADC. The existing formal and informal relationships between trade unions in Tanzania and other countries could serve as a starting point. For instance, the Tanzania Teachers' Union currently maintains an informal relationship with similar organizations in Uganda and Kenya.[128] A considerable number of migrant workers in the education sector come from these two countries. It will therefore be easy for these organizations to strengthen their ties and develop better ways of protecting teachers against exploitation.

6.6.5 Regional and sub-regional coordination

Regional and sub-regional trade unions present an excellent opportunity for improving the conditions of migrant workers. Recognizing the challenges of migration, regional and sub-regional trade unions have increasingly asserted an active role, by building the capacity of national trade unions and by advocating for migrant workers' rights in the regional consultative processes. The African Regional Organization of the International Confederation of Free Trade Unions (ICFTU-AFRO) remarked during its Regional Conference on Migrant Labour in Nairobi in 2004 that the trade union movement at national, sub-regional and regional levels has a major stake in protecting the rights of migrant workers.[129] However, they have not seized the opportunity to protect migrant workers, thus leaving African

[126] These initiatives include the Barbados Workers' Union (BWU); the Bermuda Industrial Union (BIU); Sindikato di Empleadonan den Bibienda (SEBI) and Sentral General di Trahadonan di Korsou (SGTK) of Curacao; the Guynana Labour Union (GLU); the Bustamante Industrial Trade Union (BITU); the National Workers' Union (NWU) of Jamaica; and the Seamen and Waterfront Workers' Trade Union (SWWTU) of Trinidad and Tobago. See 'Commitment to Organize Migrant Workers in the Caribbean Renewed', at http://connect.bwint.org/?p=230 (accessed on 24 May 2012).
[127] ILO *In Search of Decent Work – Migrant Workers' Rights* op cit 110 and 111.
[128] Interview with an officer of the TTU at the TTU headquarters in Dar es Salaam, 24 February 2011.
[129] See ICFTU-AFRO (2004) op cit.

migrants at the mercy of receiving countries.[130] For that reason, the Conference adopted a plan of action which apportioned different activities to be implemented by national trade union federations, sub-regional trade union organizations, ICFTU-AFRO, ICFTU and the ILO.

In terms of this plan of action, the role of sub-regional trade unions is to (i) campaign for the implementation of protocols regarding the protection of migrant workers in their respective sub-regions; (ii) lobby for the inclusion of trade unions in the regional consultative and integration processes so as to adequately advocate for the protection needs of migrant workers; (iii) facilitate the development of sub-regional strategies for trade union engagement and action on labour migration; (iv) support the implementation of regional agreements on labour migration; (v) encourage inter-regional trade union contact, coordination and solidarity on labour migration; and (vi) disseminate and share information about the specific situations of migrant workers in different sub-regions, and information about good practices in trade union action and organizing.[131]

The responsibilities of ICFTU-AFRO are to (i) facilitate the development of regional strategies for trade union engagement and action on labour migration; (ii) develop an analysis of the economic and financial aspects of migration in Africa, with a view to identifying effective actions and responses to ensure the protection of migrants and options for decent policies; (iii) facilitate an African trade union campaign to achieve wider ratification by African governments of the two ILO Conventions on migrant workers and the ICMW; (iv) work closely with sub-regional trade union organizations and Regional Economic Communities (RECs) to support the implementation of agreements on labour migration; (v) encourage inter-regional trade union contact, coordination and solidarity on labour migration; (vi) seek periodic consultations (in collaboration with the ICFTU) with the EU and ETUC so as to closely monitor the situation of African migrant workers in the EU; and (vii) disseminate information about the specific situations of migrant workers in different sub-regions.[132]

[130] Ibid 7.
[131] Ibid.
[132] Ibid 8.

Within the sub-regional economic groups, the Southern African Trade Union Co-ordinating Council (SATUCC), acting as an umbrella body of trade unions in SADC, spearheaded the adoption of the SADC Charter of Fundamental Social Rights, 2003 which incorporates a detailed provision on the right to freedom of association and collective bargaining.[133] In the EAC, the East African Trade Unions Confederation (EATUC) was actively involved in the preparation of the EAC Common Market Protocol and its regulations, and has recently published its draft or proposal for the Social Charter in the East African Community, paragraph 15 of which contains an elaborate provision on freedom of association for workers and employers.[134] Although neither SATUCC nor EATUC have demonstrated actual involvement in promoting and defending the rights of migrant workers, they present an opportunity for affiliate members to have a unified voice in furthering the rights of migrant workers. It is therefore important for affiliate members of these federations to widen the scope of regional federation involvement and to develop new strategies which are commensurate with economic and social development in this area. The ICFTU-AFRO plan of action is an important policy document for achieving this goal. However, the success or otherwise of this strategy depends on the affiliate members being willing to change. It is submitted that, with growing intra-regional investment, particularly in SADC, trade unions have excellent reasons to partner and to act collectively with sub-regional federations.

ETUC is a good example of how regional and sub-regional trade unions can contribute to social justice for migrant workers. ETUC is involved in policy advocacy, awareness-raising and research on the situation of migrant workers. For example, it recently launched a project called 'What price the tomatoes?!', the aim of which was to raise awareness in European trade unions about the exploitative conditions suffered by irregular migrant workers and to advocate for change.[135]

The International Confederation of Arab Trade Unions (ICATU) has increasingly paid attention to improving cooperation on labour migration and migrant workers. The fundamental objective of this initiative is to guarantee the rights of migrant workers in the

[133] See article 4 of the SADC Charter of Fundamental Rights, 2003.
[134] The draft was published on 1 August 2011. It is available at http://eatuc.info/wp-content/uploads/Social-Charter-in-the-East-African-Community-draft-01Aug20111.pdf (accessed on 24 May 2012).
[135] Merlino, M and Parkin, J *First and Foremost Workers: Irregular Migration in Europe, EU Policies and the Fundamental Rights Gap* (ETUC Report, 2011) 91, available at *http://www.etuc.org/IMG/pdf/A_CES_migrants_EN_5.pdf* (accessed on 24 May 2012).

Arab countries and also to protect the rights of Arabs who migrate to foreign countries.[136] In 2007 ICATU organized a conference entitled 'The Role of Trade Unions in Protecting the Rights of Migrant Workers', which brought together ICATU-affiliated organizations from ten Arab countries.[137]

6.6.6 International coordination

The Global Union Federation (GUF), which currently has 13 members, is also an avenue for advancing the rights of migrant workers.[138] Members of GUF have demonstrated their concern about migrant workers and their preparedness to cooperate with their affiliate members in promoting the rights of migrant workers, in particular the right to freedom of association. For example, the Building and Wood Workers' Association (BWI) encourages its affiliates to increase trade union awareness about migrant workers' rights, to continue to campaign against racism and xenophobia, and to organize migrants and cross-border workers. In December 2011, its regional office in Asia, together with the regional offices of the Union Network International (UNI Global Union), Public Services International (PSI) and their affiliates in Nepal and Malaysia, jointly signed a Memorandum of Understanding on Mutual Regional Cooperation for Organising and Promoting the Rights of Migrant Workers in Malaysia.[139]

In 2000, the Union Network International (UNI), which organizes postal, tourism, electricity, telecommunications, commerce, finance, media, cleaning and security workers, launched a 'union passport scheme' to help migrant workers to retain their union rights and obtain support as they travel and work in different countries. The UNI passport allows a worker who is already a member of a union in his or her home country to be 'hosted' by a UNI-affiliated union in the destination country and to enjoy the services provided by that trade union.[140]

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[136] ILO *In Search of Decent Work – Migrant Workers' Rights* op cit 104.
[137] Ibid.
[138] Members of GUF include the International Transport Workers' Federation (ITF), the International Trade Union Confederation (ITUC), the International Textile, Garment and Leather Workers' Federation (ITGWLF), the International Union of Food, Agriculture, Hotels, Restaurants, Catering, Tobacco and Allied Workers' Association (IFU), Education International (EI), the International Federation of Chemical, Energy, Mine and General Workers' Union (ICEM), Union Network International (UNI), the Building and Wood Workers' Association (BWI), the International Federation of Journalists (IFJ), the International Metal Works Federation (IMF) and Public Service International (PSI).
[139] *Trade Unions Sign MoU to Organise Migrant Workers in Malaysia*, 2 January 2012, available at http://www.bwint.org/default.asp?Index=3877&Language=EN (accessed on 24 May 2012).
[140] Schmidt (2006) op cit 198.

ITUC, which was established in 2006 following the amalgamation of ICFTU and the World Confederation of Labour (WCL), has been actively involved in promoting and defending the rights of migrant workers. Immediately after its establishment, ITUC convened the first global consultation on trade unions and migrant workers in Brussels in December 2006. In 2010, during its second World Congress, it adopted a resolution on migrant workers which stated that '[f]reedom of association and the right to organize is a fundamental right of migrant workers and their participation in trade unions is an important path to their integration at the workplace and in society.'[141] A plan of action annexed to this resolution instructs ITUC and regional organizations to collaborate with GUF partners and affiliates to:

> Promote action by unions in countries of destination: to establish structures and service centres and engage in organising of migrant workers, including those in irregular status; ensure that legislation and collective agreements, including access to basic public services and social protection, cover migrant workers on the basis of the principle of equal treatment; provide training and information on their rights; extend legal assistance in cases of abuse and special assistance to address problems of women migrant workers; and pay particular attention to young migrant workers.[142]

In the same year, ITUC joined the Korean Confederation of Trade Unions (KCTU) to bring a complaint before the CFA against the government of the Republic of Korea on the alleged violation of migrant workers' right to freedom of association.[143] Moreover, ITUC has been active in facilitating the adoption of bilateral agreements between trade unions in countries of origin and those in host countries. Other global union federations, such as Public Services International (PSI, the global confederation of government and public service worker unions), the International Union of Food and Agricultural Workers (IUF), and the International Federation of Building and Wood Workers (IFB WW) also pay special attention to the issues of migrant workers, particularly those whose status is irregular.

6.7 Conclusion

This chapter has reflected on the legal framework for and the practices and challenges pertaining to migrant workers' right to freedom of association. The chapter notes that the

[141] Paragraph 8.
[142] ITUC Resolution on Migrant Workers, adopted at the 2nd World Conference, 21–25 June 2010, Vancouver, para 15(e), available at http://www.ituc-csi.org/IMG/pdf/2CO_11_Migrant_Workers_03-10-2.pdf (accessed on 24 May 2012).
[143] See note 20 of this chapter.

right to freedom of association and its universal application to all workers is a firmly established principle of international law. This position is confirmed in Tanzania's Constitution and labour laws. Theoretically, migrants can establish trade unions or join existing trade unions without any interference. Nevertheless, migrants are unable to exercise this right for a variety of reasons, including a fear of victimization and an assumption that only national workers can exercise collective rights. There are also barriers associated with the conditions in their work permits, specifically the limited period of residence and the fact that migrant workers are confined to a particular employer, which negatively affects their bargaining power.

The existing trade union environment offers no incentives to attract migrant workers. Faced with the dilemma of whether or not to recruit migrants, trade unions tend to avoid doing so, even where migrants have impliedly or explicitly indicated their interest in joining the union. The chapter argued that this approach is untenable given rapidly growing irregular labour migration and informalization, which are accompanied by serious protection challenges that require the intervention of trade unions. The chapter recommended some strategies that trade unions can use to promote the rights of migrant workers and to improve their participation in trade unions. The chapter concluded that unionizing migrants and defending their rights is an important task for trade unions and therefore recommends that trade unions in Tanzania should not continue to avoid migrants. Instead, they should seek to recruit them and to include their concerns on the trade unions' agenda. As the ILO correctly observes:

> Protection of all workers, in an age of international labour mobility, imposes an urgent organizational and political agenda on trade unions. Trade unions have a fundamental role to play in providing moral, political and practical leadership to defend the labour and human rights of migrant workers, in particular their rights to organize and bargain collectively.[144]

[144] ILO *Freedom of Association in Practice* op cit 61.

Chapter 7: Migrant workers' rights to social security

7.1 Introduction

One of the crucial areas of concern in international labour migration relates to migrants' social protection, in particular their access to social security and their ability to preserve social security rights as they move across borders. Migrant workers often encounter legal and physical barriers which inhibit their access to social security in host countries and thus reinforce their partial or total exclusion from the social security system. Using entrenched international law principles of nationality and territoriality, countries tend to subject the access of migrant workers to social security to nationality and residence requirements, thus reinforcing the exclusion and marginalization of non-nationals and non-residents.[1] The position of migrant workers in the social security systems of their host countries therefore warrants in-depth examination and analysis.

Building on these broad issues, this chapter examines the position of migrant workers in the Tanzanian social security system. In particular, it looks at issues pertaining to access to the social security schemes and also at the benefits provided by such schemes. The chapter starts with a brief overview of the social security system in Tanzania, so as to provide an understanding of the general issues concerning the provision of social security in the country. It then looks at the specific position of migrant workers with regard to coverage and access to benefits. The chapter observes that the position of migrant workers in respect of social security access is more or less the same as that of nationals. Those in formal employment are obliged to subscribe to existing social security schemes. However, migrant workers in the informal sector and atypical employment, which is where the majority of irregular migrants are found, have no recourse to social security. It is further observed that there are currently no provisions for cross-country portability of social security. Consequently, migrants are exposed to social security losses as they relocate to Tanzania and also as they return to their home countries. The chapter then proceeds to examine the principles underlying the protection of migrant workers' social security and finally discusses various ways in which Tanzania can improve the social protection of migrant workers.

[1] Malherbe, K 'The Co-ordination of Social Security Rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European Experience (2004) 8(1) *Law, Democracy and Development* 59–84 at 60.

7.2 The state and characteristics of the social security system in Tanzania

The state of social protection and the specific characteristics of the social security system in Tanzania warrant a brief consideration as they have a great influence on the position of migrant workers with regard to social protection. Social protection in Tanzania is provided in two ways: the informal or traditional social network, and the formal social security system. The latter category is built on the ILO's three-tier social security system.[2] The first tier comprises services such as health, primary education, food, water and other services, largely financed jointly by government revenue, development partners and non-governmental organizations, and is available to those who pass the means test.[3] The second tier is social insurance, comprising mandatory contributory schemes, which cover several contingencies outlined in international social security instruments.[4] These generally cover employees in the formal sector. The third tier comprises private insurance schemes which are complementary and voluntary arrangements.[5]

For the purpose of this study, we will examine the second tier, because the first tier is critically undeveloped and limited in many ways. At present, there is no social assistance policy. Social assistance is currently provided by different uncoordinated pilot projects which are small in scale and target specific groups, usually the most vulnerable members of community, such as the elderly, orphans and people living with HIV and AIDS. [6] The community-based conditional cash transfer pilot programme under the Tanzanian Social Action Fund (TASAF) covers only 80 villages in three districts.[7] The National Costed Plan of Action (NCPA) targets only the most vulnerable children.[8] In 2008 the government formulated the National Social Protection Framework (NSPF), 2008 to operationalize its

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[2] Ackson, T *Social Security Law and Policy Reform in Tanzania with Reflections on the South African Experience* Unpublished PhD Thesis, University of Cape Town (2007) 150.
[3] United Republic of Tanzania *The National Social Security Policy* (2003) para 2(1)(a).
[4] Ibid para 2(1)(b).
[5] Ibid para 2(1)(c). Also see Ackson op cit 6 and 7.
[6] For instance, the TASAF project targets older people (over the age of 60), orphans and vulnerable children; the Kwa Wazee programme is aimed at people over the age of 60, including those caring for children without parents, and the NCPA is for the most vulnerable children. See Shepherd, A et al *Addressing Chronic Poverty and Vulnerability through Social Assistance in Tanzania: Assessing the Options* Working Paper No 2009, Chronic Poverty Research Centre (2011) 12–14, available at http://www.chronicpoverty.org/uploads/publication_files/WP209%20Shepherd%20et%20al.pdf (accessed on 19 May 2012).
[7] The project is jointly financed by the Government of Tanzania, the World Bank and the Japan Social Development Fund.
[8] United Republic of Tanzania *The National Costed Plan of Action for Most Vulnerable Children, 2008-2010* available at http://www.pacttz.org/pdfs/Tanz_NCPA_web.pdf (accessed on 3 June 2012). There are also various pilot projects, such as the Save the Children pilot cash transfers in Lindi District.

social protection vision as spelt out in the National Strategy for Growth and Reduction of Poverty (NSGRP) I and II.[9] It is not clear if the NSPF has yet been approved.[10] The third tier is also in its infancy and only available to the most affluent households. For these reasons, at present it is only feasible to assess the second tier, which is relatively better developed and more accessible, albeit only by workers in the formal sector.

There are currently six major statute-based social security institutions under the second tier, each of them covering a specific group of employees. These are the Local Authorities' Pensions Fund (LAPF), for local authorities employees,[11] the Government Employees' Provident Fund (GEPF), for government employees,[12] the Public Service Pensions Fund (PSPF), for pensionable employees of the government,[13] the Parastatal Pensions Fund (PPF), which covers employees in government parastatals and private sector employees,[14] and the National Social Security Fund (NSSF), for non-pensionable government employees, self-employed persons and other employees in the private sector.[15] There is also a specialized medical insurance scheme, the National Health Insurance Fund (NHIF), for employees in the public sector.[16] With the exception of the NHIF, which provides only medical benefits, the schemes provide an array of short-term and long-term social security benefits. It should be noted from the outset that these schemes operate only in Tanzania mainland. Zanzibar has its own system, which is beyond the scope of this study.

The multiplicity of institutions notwithstanding, social security coverage is chronically low and vastly inadequate. There is no universal social security coverage, and the rate of coverage is as low as five per cent of the total labour force.[17] This is partly a result of the limitations inherent in the social security concept, as transplanted to national systems in Tanzania and elsewhere in Africa, which tends to favour employees in the formal sector as opposed to

[9] See United Republic of Tanzania *National Strategy for Growth and Reduction of Poverty (NSGRP) II* (2010) 92 and 97.
[10] In July 2011, when the field research was finalized, it was still to be approved. A 2012 report by the International Monetary Fund (IMF) reports that the government is contemplating to drop the NSPF because the work envisaged in this document has been integrated into the ongoing broader national social security reform program. See IMF, Staff Country Report No. 12/23 (IMF, Washington, D.C, 2012) 16.
[11] Established by the Local Authorities Fund Act 9 of 2004.
[12] Established by the Government Employees Provident Fund Ordinance, 1942 (Cap 51).
[13] Established by the Public Service Retirement Benefit Act 2 of 1999.
[14] Established by the Parastatal Pensions Act 14 of 1978.
[15] Established by the National Security Fund Act 9 of 2006.
[16] Established by the National Health Insurance Fund Act 8 of 1999.
[17] See the National Social Security Policy (2003) 14. Also see Ackson op cit 90.

informal sector workers, who at present constitute the majority of the work force.[18] Furthermore, the benefits provided by these schemes are largely inadequate and inconsistent.[19] At present, there are no provisions for in-country and cross-country portability of social security.[20] Recently, Tanzania passed a law to establish the Social Security Regulatory Authority (SSRA), an autonomous body with the mandate to regulate the operation of the social security institutions, [21] and it is anticipated that issues of fragmentation and in-country social security portability will be resolved.

In addition, the right to social security is not one of the enforceable human rights. Instead, it appears in article 11 of the Constitution, which covers the unenforceable fundamental objectives and directive principles of state policy.[22] Consequently, individuals are unable to enforce this right, unless they use other correlative provisions such as the right to life, which encompasses the right to adequate standards of living.[23] This position contrasts sharply with the position in other countries, such as South Africa, where social security is recognized as an enforceable human right. In South Africa, the entitlement to social security, including the rights of migrant workers to social security, has been widely adjudicated.[24] In *Khosa*, the Constitutional Court found that the exclusion of permanent migrants from social security amounted to unfair discrimination and extended the provision of social assistance to migrants in this group.[25] It is expected that the ongoing process of re-writing the Constitution of Tanzania will look at this issue and elevate social security to an enforceable right, thus allowing the courts to intervene where necessary.[26]

[18] Olivier, M 'Informality, Employment Contracts, and Social Insurance Coverage: Rights-Based Perspectives in a Developing World Context' (2011) 27(4) *International Journal of Comparative Labour Law and Industrial Relations* 419–433 at 423. For the actual share of the informal sector in Tanzania see *The National Employment Policy* (2008) 4.

[19] Ackson op cit 62–65.

[20] See Dau, RK 'Trends in Social Security in East Africa: Tanzania, Kenya and Uganda' (2003) 56(3–4) *International Social Security Review* 25–37 at 31.

[21] Social Security Regulatory Authority Act 8 of 2008.

[22] Constitution of the United Republic of Tanzania, 1977, part II.

[23] Article 16. Also see Ackson op cit 28.

[24] See, for example, the judgments of the Constitutional Court in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC), also reported in 2004 (6) SA 505 (CC).; *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC); and *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1033 (CC). A detailed analysis of the role of the South African judiciary in advancing social protection is provided in Olivier, M 'Constitutional Perspectives on the Enforcement of Socio-Economic Rights: Recent South African Experiences' (2002) 33(1) *Victoria University of New Zealand Law Review* 117–151.

[25] *Khosa and Others v Minister of Social Development and Others* para 74.

[26] Tanzania is in the process of rewriting the Constitution. The law to initiate the process was passed in 2011: the Constitutional Review Act 8 of 2011. The Law Constitution Review Commission has been established and is ready to start work.

7.3 Migrant workers' access to the social security system

7.3.1 Access to social security schemes: coverage

The question of access to social security by migrant workers brings into play two intertwined issues, namely, legal access and physical or actual access. Whilst both of these raise the issue of coverage, they are normally examined independently because, in practice, legal access does not necessarily guarantee physical access.[27] Thus, even where the laws and regulations of the host country do not restrict migrant workers' access to social security or where they expressly demand equality of treatment, the access of migrant workers to the host countries' social security system is often physically restricted.[28]

In Tanzania, legislation governing social security does not expressly exclude any person on the basis of nationality, residence, migration status or any other social status. Membership of social security schemes is defined sectorally. One is deemed to be eligible or ineligible for membership in a particular scheme not because of one's nationality, but rather because of the occupation and the sector in which one is employed. Moreover, membership is determined by the type of employment. In the latter case, a distinction is usually drawn between permanent and pensionable employees, on the one hand and short-term or contract employees, on the other.[29] In general, it can be argued that the principle of nationality, which normally subjects access to social security to one's nationality and thereby excludes migrants,[30] does not apply in Tanzania. This does not mean, however, that the social security system in Tanzania covers all migrant workers adequately. As the discussion below shows, there are various barriers to fully accessing this right.

Because of sectorally pre-determined membership, only the NSSF and the PPF cover migrant workers. Originally, migrant workers were covered only by the NSSF. The PPF acquired the mandate over migrants in 2001, after an amendment to its founding Act, which extended the coverage of the PPF to workers other than employees of government parastatals.[31] Following this amendment, workers in the private sector, where the majority of migrants are employed, became eligible for PPF membership. The amendment also anticipated the changes expected

[27] Sabates-Wheeler, R and Koettl, J 'Social Protection for Migrants: The Challenges of Delivery in the Context of Changing Migration Flows' (2010) 63(3–4) *International Social Security Review* 115–144 at 123.
[28] Ibid.
[29] For example, the NSSF is mandated to provide coverage to, among others, non-pensionable employees in the government service and parastatals. See the NSSF Act, section 6(3).
[30] Malherbe op cit. Also see Avato et al (2009) op cit 9.
[31] See the Parastatal Pensions (Amendment) Act 25 of 2001, section 2.

under the EAC, which was revived three years before this amendment, and therefore innovatively refined the definition of parastatals to include 'anybody corporate established by or under any written law including ... the East African Community; any corporation within the East African Community; and any other registered company.'[32] Following this amendment migrants employed by the EAC and those working in different corporations dully registered or incorporated in the EAC and in other countries became eligible for PPF membership.

Despite this progressive approach, the actual access to social security schemes is generally limited, particularly for irregular migrants. The limitation is reinforced by an uneasy interaction between immigration law and social security legislation.[33] As noted in chapter 5 and 6 only a few workers manage to migrate through legal channels due to the prevailing restrictive admission policies. The majority of semi-skilled and non-skilled workers migrate irregularly and diffuse into the informal sector. Those employed in the formal sector are, most often, in disguised employment relationships where labour law and social security law rarely apply. The current social system does not adequately carter for employees in informal sector and those in atypical employment relationships. It is built on the ILO traditional concept of social security which is inherently biased towards formal sector employees. Social security protection is based on the existence of formal employment relationship between the employer and the worker and is most often not available to informal sector workers. Such distinction is likely to have more impact on migrants because different from citizens who, in the absence of formal protection, may avail themselves to informal social protection or safety nets, the ability of migrants to access these nets may be far limited because of their alienage and migration status.

7.3.2 Access to social security benefits

The ability of migrant workers to access social security rights is largely determined by the nature of the benefit in question. For example, while migrants normally encounter difficulties in accessing benefits financed by tax, they have less difficulty in accessing benefits accruing

[32] Ibid.

[33] Sabates-Wheeler and Koettl op cit. For details on how migration policies affect the social security position of migrants, see Vonk, G 'Migration Social Security and the Law: Observation of the Impact of Migration Policies upon the Position of Migrants in Social Security Law in Europe' in Bergman, J et al (eds) *Social Security in Transition* (Kluwer Law International, The Hague, 2002) 77–92 at 78–85.

from occupational schemes and contributory social security schemes.[34] There are also differences between short-term and long-term social security benefits. The latter are normally subject to various conditions, such as the period of contributions, the period of residence in the host country, and the nature or typology of migration (temporary as opposed to permanent migrants), which exclude migrants.[35]

The PPF and the NSSF provide an array of benefits to their members. Both provide long-term benefits, such as old age pensions, invalidity benefits and survivor's benefits. The NSSF also offers short-term benefits, such as maternity benefits and medical benefits.[36] The benefits in the latter group are easily accessible and can be enjoyed by migrant workers without any difficulties. For example, migrant workers registered under the NSSF, like other members of the NSSF, become eligible for medical benefits after three months of contributions.[37] After 36 months of contributions they also qualify for maternity benefits.[38] However, the long-term benefits are subject to lengthy qualifying periods which are technically prohibitive for migrant workers. For instance, under the PPF, a member will receive an old age pension only if he or she is of retirement age (55 years) and upon meeting an aggregate of 10 years of insurance.[39] Similarly, the NSSF pays old age pensions to members who have attained pensionable age (60 years) and who have contributed to the scheme for an average of 180 months, which is the equivalent of 15 years.[40] With regard to invalidity benefits, the NSSF requires that the member must have, prior to the state of invalidity, made an aggregate contribution of 180 months.[41] The PPF prescribes a minimum of 120 monthly contributions.[42]

[34] Dupper, O 'Migrant Workers and the Right to Social Security: An International Perspective' in Becker, U and Olivier, M (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law (CICLASS), 2008) 13–52 at 50.
[35] In South Africa, for example, the mandatory old age pension is available to permanent migrants. In Australia, different social security systems apply to permanent migrant workers and short-term migrants, with temporary migrants having no immediate access to social security and public health benefits. See Sabates-Wheeler, R et al 'Social Security for Migrants: A Global Overview of Portability Arrangements' in Sabates-Wheeler, R and Feldman R (eds) *Migration and Social Protection: Claiming Social Rights Beyond Borders* (Palgrave Macmillan, Hampshire, 2011) 99.
[36] See the NSSF Act, section 21.
[37] Section 41.
[38] Section 44(a).
[39] Section 24(1) read together with sections 26(a) and 28(1).
[40] Section 23(a) and (b) read together with section 2.
[41] Section 33(1).
[42] For a detailed discussion of the benefits and their qualifying conditions see Ackson op cit 103–127.

In practice, these qualifying periods exclude migrant workers from the scope of these benefits. The effect of this exclusion is reinforced further by the temporary migration policy currently pursued. As described in chapter 5 of this study, labour migration in Tanzania is categorically temporary in nature, allowing migrants a maximum of five years' residence, which includes the three-year initial permit and a renewal for a maximum of two years.[43] As a result, the majority of migrant workers are excluded from these benefits because they cannot possibly meet the qualifying period. Although a few migrants manage to stay beyond the prescribed time limit, the majority of migrants are left without protection.

The absence of provisions for the portability of social security rights exacerbates this state of affairs. As noted above, the social security system in Tanzania does not provide for cross-country portability of social security. Therefore, migrant workers who take up employment in Tanzania are likely to incur social security losses. Similarly, Tanzanians who relocate to other countries for employment or residence purposes lose their social security rights as a result of relocation. So far, Tanzania has not concluded any bilateral social security agreements with any country. Attempts to conclude bilateral agreements with the Netherlands, Kenya, Uganda, South Africa, and the United Kingdom did not materialize.[44] The ongoing initiatives between Tanzania and other countries in the EAC and SADC to forge region-wide social security co-ordination are yet to materialize. Until these arrangements are finally concluded, migrant workers in Tanzania are left with limited social security protection. Even though they may belong to social security schemes, they cannot transfer their social security rights when they relocate to Tanzania. Also, they cannot preserve and transfer the rights acquired in Tanzanian social security schemes to their new destinations or to their home countries. The NSSF and the PPF usually pay migrants the value of their contributions plus those of their employers, with or without accrued interest, depending on the particular scheme. Withdrawal benefits were also made available to Tanzanians who relocated to take up employment in foreign countries.[45] However, the recent amendments to the social security legislation repealed section 44 of the PPF Act which provided for

[43] See section 5.2.1 of chapter 5.
[44] See Ackson op cit 124.
[45] See section 44 of Act 14 of 1978, as amended and substituted by Act 25 of 2001. The NSSF Act does not provide for benefits but in practice it provides benefits on grounds similar to those in the PPF Act. See Ackson op cit 124–125.

withdraw benefits.[46] By virtue of these amendments Tanzanians migrating to foreign countries may no longer be availed withdraw benefits.

Of particular relevance is the newly promulgated Workers' Compensation Act (WCA),[47] whose scope of coverage extends to all employees who sustain injuries, occupational diseases or death in the course of employment. The WCA, which borrows heavily from the South African Compensation for Occupational Injuries and Diseases Act (COIDA),[48] provides for the protection of workers against occupational injuries and diseases. This Act is of particular interest to this study because it applies to employees from all sectors, provided it is established that the employment relationship exists and that the injury was sustained or the death occurred in the course of employment.[49] The Act does not require the worker to have attained a certain minimum period of employment to qualify for benefits. Nonetheless, the WCA leaves open the possibility of migrant workers losing some of their benefits if they return to their countries or relocate to other countries. Section 57 of the WCA provides that, if the employee or dependant of the employee to whom the pension arising from the Act is paid is resident outside Tanzania or is outside the country for a period of six months, he or she may, if the Director of the Fund so decides, be paid a lump sum in lieu of the pension. The Act does not provide any cross-border portability arrangements, which means that returning migrants will be unable to transfer their benefits if they relocate to their home countries.

From the preceding discussion it would appear that the social security laws in Tanzania embrace the principle of territoriality, which normally limits the application of national laws to the territorial boundaries of the country in question.[50] Access to social security benefits ceases immediately if one becomes resident in a different country. This is rather detrimental to migrant workers, who are currently admitted on a temporary basis. Because of the absence of bilateral social security agreements, they cannot transfer their social security rights and benefits.

[46] Section 44 of the PPF Act was repealed recently by the Social Security Laws (Amendments)(No.2) Act, 5 of 2012 which became operational in July 2012.
[47] Act 20 of 2008.
[48] Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[49] See sections 20, 21 and 22.
[50] Wedel, J 'Social Security and Economic Integration: Freedom of Movement and the Social Protection of Migrants' 1970 *International Labour Review* 455–474 at 467.

7.4 Minimum standards for the protection of migrant workers' social security rights

The exclusion of migrants from social protection entirely defeats the objective of social security, which focuses on the need to reduce vulnerabilities, manage individuals' and communities' risks, and 'enhance the social status and rights of the marginalized' groups in society.[51] The international community, aware of the major issues surrounding the legal and physical access of migrant workers to social protection and the need to promote decent living conditions for workers in this group, has developed an extensive set of regulatory frameworks setting out the general principles and providing guidelines to states for dealing with social security issues. These principles are aimed at minimizing the negative impact on migrant workers. They also address the need for equitable distribution of responsibilities between home countries and host countries in advancing adequate social protection to migrant workers. The ILO has formulated several specific standards on migrant workers' social security rights,[52] in addition to the two existing labour migration Conventions. The ICMW also addresses this issue. Within regional and sub-regional economic groupings, social security arrangements for migrant workers have also gained considerable attention.[53]

An examination of international instruments in this area suggests that the international norms on migrants' social security rights are grounded in the traditional understanding of social security, in terms of which social security is regarded as a social protection tool to relieve an individual of contingencies. Hence, no one should be deprived of this relief, whether or not there is a change of domicile. In other words, migrant workers should not be at risk or disadvantaged simply because they are employed or are residents in countries other than their own.[54] The following principles have thus far been established:

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[51] Avato, J et al 'Social Security Regimes, Global Estimates, and Good Practices: The Status of Social Protection for International Migrants' (2010) 38(4) *World Development* 455–466 at 456.

[52] The Equality of Treatment (Accident Compensation) Convention, 1925 (No 19); the Maintenance of Migrants' Pension Rights Convention, 1935 (No 48); the Equality of Treatment (Social Security) Convention, 1962 (No 118); the Maintenance of Social Security Convention, 1982 (No 157); and the Maintenance of Social Security Rights Recommendation, 1983 (No 167).

[53] See section 7.6.3 of this chapter for details.

[54] Fischer, T *European Co-Ordination of Long-Term Care Benefits: The Individual Costs of Migration Illustrative Case Studies* International Tax Coordination SFB, Discussion Paper No 4 (undated) 2, available at http://epub.wu.ac.at/1728/1/document.pdf (accessed on 24 May 2012). Also see Holzmann, R and Koettl, J *Portability of Pension, Health, and other Social Benefits: Facts, Concepts, Issues* Social Protection Discussion Paper No 1110 (World Bank, 2011) 2.

7.4.1 Equality of treatment

The general principle guiding the provision of social security to migrant workers is that social security as a basic human right should be enjoyed by migrants just as it is enjoyed by nationals of the host country. This rule is explicitly stated in article 6(1)(b) of Convention No 197 and also restated in article 10 of Convention No 143, and article 27(1) of the ICMW. Article 27(1) of the ICMW, however, contains a proviso which has been variously interpreted. According to this provision, migrant workers and members of their families should enjoy equal treatment with migrants '*in so far as they fulfil the requirements provided for under the applicable legislation of that state and the applicable bilateral and multilateral treaties.*'[55] It has rightly been argued that, by subjecting social security rights to national legislation and bilateral and multilateral treaties, the ICMW dilutes the intended protective effect.[56] The proviso gives states a loophole to enact laws which distinguish between regular migrants and irregular migrants.[57] According to Cholewinski, the reference to national laws and to bilateral and multilateral agreements in article 27 of the ICMW, although it does not exclude the ability of states to include irregular migrants in their social security arrangements, '*makes the application of this principle to irregular migrants rather a remote prospect.*'[58]

Another remarkable feature of these instruments is that they do not subject the principle of equality of treatment to reciprocal arrangements. This means that their signatories are legally obliged to maintain equality of treatment between migrants and nationals as regards social security, irrespective of whether the migrant in question originates from a member or whether there is any reciprocal arrangement between his or her home country and the country of employment.[59]

7.4.2 Reciprocity

In social security, the principle of reciprocity is built on the understanding that costs arising from the extension of social protection to migrants are to be shared on a 'reasonably equal basis'.[60] Thus, there should not be a blanket extension of social security to all migrants; instead, social security should be extended only to workers from countries which reciprocate

[55] Emphasis added.
[56] Dupper op cit 29. Also see Cholewinski op cit 113.
[57] Dupper op cit.
[58] Cholewinski, R *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe, Strasbourg, 2005) 41. Emphasis added.
[59] Cholewinski *Migrant Workers in International Human Rights Law* op cit.
[60] Dupper op cit 34.

such acts or which have pledged to do so. The ILO technical Conventions on social security, Convention No 102[61] and Convention No 118,[62] in particular, subscribe to this approach. Although they acknowledge in theory the need for equality of treatment between migrants and nationals, they do not entirely agree with the blanket extension of social security to all migrant workers. Different from the ILO Conventions 97 and 143 and the ICMW, Conventions 102 and 118 provide conditions of reciprocity, while also limiting equality of treatment to workers from countries that are signatories to the respective Conventions.[63] The danger of this approach is that migrants originating from countries that have not signed these instruments and are not party to any bilateral social security agreements are left without any protection. This is quite detrimental, particularly at present when there is literally no reciprocity in terms of migration between countries.[64] As a result of diversification in international migration, migrant workers come from many countries, most of which are not party to any bilateral or multilateral social instruments.[65] Accordingly, it can be argued that, while the principle may serve to ensure the equitable sharing of responsibilities, its practical application is limited.[66]

7.4.3 Mandatory provision of emergency medical care

The third principle which emerges from these instruments is that migrants, irrespective of their employment and migration status, should not be denied emergency medical care. A self-explanatory provision to this effect appears in article 28 of the ICMW, which provides *inter alia* that:

> [M]igrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the states concerned. *Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment*.[67]

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[61] Social Security (Minimum Standards) Convention, 1925 (No 102).
[62] Equality of Treatment (Social Security) Convention, 1962 (No 118).
[63] See article 68 of Convention No 102, and article 3 of Convention No 118.
[64] Dupper op cit.
[65] Ibid.
[66] Dupper, O 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) 18 *Stellenbosch Law Review* 217–252 at 236.
[67] Emphasis added. In addition, the Committee on Economic, Social and Cultural Rights recently reiterated in paragraph 37 of its General Comment No 19 on the Right to Social Security, 2008 that 'all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.'

The practical application of this provision, referred to by Pieters and Schoukens as 'the bottom line with regard to access to social benefits for illegal migrant workers', is however questionable.[68] Bosniak makes an interesting observation, cautioning us about the barriers that are likely to drive away the intended beneficiaries:

> [U]pon presenting themselves [irregular migrants] for emergency medical care or upon applying for social security benefits, for instance, they would almost certainly be required to display identification, or in some other way reveal the particulars of their status, which could lead to questions and to unwanted contact with immigration officials. There is nothing in the Convention that would preclude such a result; there is no provision that provides that undocumented migrants may not be prosecuted for immigration violations based on information obtained in the course of the migrants' exercise of their rights under the Convention.[69]

Certainly, faced with such threats, irregular migrants may not be able to avail themselves of emergency medical care. Those who do so nevertheless may risk prosecution afterwards.

7.4.4 Portability of social security rights

Portability of social security rights has been defined with reference to the ability of workers to 'preserve, maintain and transfer vested social security rights or rights in the process of being vested, independent of profession, nationality and country of residence.'[70] In the absence of portability, migrant workers are likely to incur the full or partial loss of social security rights and benefits as a result of a change of domicile. This has a great effect on migrants, particularly those who are not covered by bilateral or multilateral social security agreements.[71] In fact, this will exert significant influence on one's decision to migrate to another country or to return to one's own country. [72] The international community and the ILO in particular have taken a keen interest in facilitating the portability of social security across countries. In 1935, the ILO had already adopted an instrument on the maintenance of social security, which laid down the principles of portability of social security rights and

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[68] Pieters, D and Schoukens, P *Exploratory Report on the Access to Social Protection for Illegal Labour Migrants* Council of Europe, Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 6th Meeting, Limassol (25–26 May 2004) 11, available at http://www.coe.int/t/dg3/sscssr%5CSource%5CIllLabMigrReport.PDF (accessed on 24 May 2012).

[69] Bosniak, LS 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25(4) *International Migration Review* 737–770 at 760.

[70] Holzmann, R and Koettl, J *Portability of Pension, Health, and other Social Benefits: Facts, Concepts, Issues* Social Protection Discussion Paper No 1110 (World Bank, 2011) 15. Also see Sabates-Wheeler et al (2011) 94.

[71] Dupper (2007) op cit 237.

[72] Avato et al op cit 456.

benefits.[73] This Convention was later revised and replaced by a new Convention, the Maintenance of Social Security Rights Convention, 1982,[74] accompanied by a Recommendation, which together bring about relevant social and economic transformations.[75]

The ILO visualizes the negative effects of individual states handling issues of portability unilaterally. Hence, it encourages cooperation between states in the form of bilateral and multilateral arrangements, with a view to facilitating the portability of social security through the co-ordination or harmonization of social security systems.[76] The belief of the ILO, as exhibited in these instruments, is that social security arrangements between countries, whether bilateral or multilateral, should aim to eliminate social security loss through (i) the prohibition of discrimination and ensuring equality of treatment between migrants and nationals; (ii) the determination of applicable legislation so as to avoid subjecting migrants workers to different legislation and the conflict of laws likely to result if migrants are subjected to two or more statutes; (iii) the maintenance of rights in the course of acquisition through aggregation and totalization of insurance periods in different countries;[77] and (iv) maintenance of acquired rights.[78] These measures together 'replace the territorial principle with a personal entitlement of benefits which follow the beneficiary.'[79] The ILO also calls for mutual administrative assistance and co-operation between states.[80]

In the current migration discourse, in which labour migration has become predominantly temporary and circular in nature, the portability of social security rights has become increasingly important.[81] Persons who migrate under the temporary or circular labour migration regime are unlikely to enjoy long-term social security benefits, which normally require lengthy qualifying periods, because their period of residence in the host country is normally too short or too inconsistent to meet the requirements.[82] Thus, in the absence of

[73] Maintenance of Migrants' Pension Rights Convention, 1935 (No 48).
[74] Maintenance of Social Security Rights Convention, 1982 (No 157).
[75] Maintenance of Social Security Rights Recommendation, 1983 (No 167).
[76] See article 4 of Convention No 157.
[77] Articles 6 and 7 of Convention No 157.
[78] Articles 9 and 10.
[79] Olivier, M *Acceptance of Social Security in Africa* Paper presented at the ISSA Regional Conference for Africa, Zambia, Lusaka (9–12 August 2005) 6.
[80] Article 12 of Convention No 157.
[81] Sabates-Wheeler and Koettl (2011) op cit 118.
[82] Ibid.

provisions for social security portability, they risk incurring social security losses if they change their domicile.

7.4.5 Reimbursement of contributions

To minimize social security losses for migrants in countries where there is no provision for the portability of social security, article 27(2) of the ICMW requires that:

> [W]here the applicable legislation does not allow migrant workers and the families a benefit, the state concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of treatment granted to nationals who are in similar circumstances.

This principle, which is normally applicable to social insurance (contributory schemes), is particularly relevant to countries such as Tanzania, which impose mandatory social insurance for migrant workers, yet do not unilaterally guarantee the portability of social security rights and have not entered into bilateral or multilateral social security arrangements to that effect. This provision is generally commendable in ensuring that migrant workers are not deprived of their contributions when they leave the country. However, it is argued that this approach is not commensurate with the major aim of social security, which is built on providing relief to individuals when they are destitute or unable to provide for themselves. To remedy this, it is recommended that reimbursement should be regarded as a temporary measure while the respective countries are looking for ways to allow portability. The focus should always be on providing relief to migrants when they are destitute or unable to provide for themselves due to old age, invalidity or any other contingency.

7.5 Policy options for improving social security protection for migrant workers

Scholars have identified various ways in which countries can improve the social position of migrant workers and thereby minimize their vulnerability and marginalization. These measures are grouped into three broad categories, namely, unilateral government responses, bilateral social security arrangements, and multilateral social security arrangements. The following sections looks at how these can be applied in improving the social protection of migrant workers in Tanzania.

7.5.1 Unilateral government action

There are various ways in which the government can unilaterally improve social protection for migrant workers. One of these is to adopt a human rights approach to social protection, which involves the adoption of a liberal regulatory framework to allow unimpeded access to social security schemes and to enhance the benefits available to migrant workers in these schemes.[83] This can be cemented by regarding social security as an enforceable human right, so as to allow for judicial intervention. The value of this approach can be seen in the best practice adopted in South Africa. As noted above, through judicial activism, the Constitutional Court of South Africa extended social security protection to permanent migrants.[84] Another approach is to incorporate provisions in national social security legislation which allow partial or full portability of social security.[85] The ongoing social security and constitutional reforms present an opportunity to adopt these measures to improve the position of migrant workers in Tanzania.

There have been notable unilateral attempts on the part of the PPF and the NSSF to accommodate the particular social security needs of migrant workers and also of Tanzanian residents overseas. The PPF admits migrant workers under a special scheme known as the Deposit Administration Scheme (DAS). This is a relatively new scheme designed to cover all persons who, for various reasons, do not qualify for the traditional pension scheme, such as persons who are employed when they are above the age of 45 years, migrant workers (expatriates), self-employed persons and persons with seasonal income.[86] The scheme is considerably flexible regarding the rates and modes of contributions, so as to meet the diverse needs of the members. Migrant workers who join this scheme have the opportunity to negotiate favourable terms regarding the rate of contributions and the interval for remissions. Depending on the merits of each individual case, contributions may be pegged at a

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[83] Olivier, MP and Kalula, ER 'Regional Social Security' in Olivier, MP et al (eds) *Social Security: A Legal Analysis* (LexisNexis Butterworths, Durban, 2003) 655–678 at 673.

[84] Olivier, M 'Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Agreements within a Multilateral Framework (Part One)' 2011 *SADC Law Journal* 122–148 at 141.

[85] Countries like the United Kingdom and Italy allow the unilateral portability of rights: see Sabates-Wheeler, R *Social Security for Migrants: Trends, Best Practice and Ways Forward* Working Paper No 12, International Social Security Association (Geneva, 2009) 19. Also see Holzman and Koettl (2011) 4.

[86] Personal interview with the PPF Member Care and Marketing Manager at the PPF headquarters in Dar es Salaam, 16 March 2011. Also see Magawa, M *Join PPF for a Secure Future* PPF Presentation at the Lo ndon Diaspora 3 Conference (6–7 May 2011). Additional details on DAS are available at http://www.ppftz.org/home/das_scheme.php (accessed on 24 May 2012).

percentage of earnings, or may be a fixed amount, or may be a combination of percentage of earnings and a fixed amount. Members are also free to decide whether the contributions should be paid jointly by the employee and the employer, as in the traditional scheme, or whether they should be paid by either one of them.[87] Since Tanzania is not party to any social security agreement at present, migrant workers are allowed the total withdrawal of contributions at the expiry or termination of the contract. The employee withdraws from the scheme all his savings, which include his or her own contributions and those of his or her employer, plus accrued annual interest which currently stands at 5 percent.[88]

The PPF and the NSSF have recently expressed a keen interest in extending social protection to Tanzanians overseas. The NSSF Welfare Scheme for Tanzanians in the Diaspora (WESTADI) warrants some consideration. WESTADI is a new scheme, in the form of an insurance scheme for Tanzanians who are living and working overseas. The scheme is expected to serve two purposes, namely, to provide social protection for family members who are left behind and to protect members against certain contingencies.[89] It is expected to offer out-patient and in-patient medical care for the member while in Tanzania and for up to four dependants who are left behind. The scheme is also expected to cover repatriation services, the transport of the human remains of a member back to Tanzania, a return airline ticket for one person accompanying the remains, and burial expenses for deceased members who are buried overseas. Members of this scheme, which was launched recently, are required to pay an annual premium of US$300.[90] Although the envisaged benefits are limited, this is a commendable start.

Comparative practices from the Philippines and Sri Lanka, where similar approaches are used, show that they are effective tools for protecting migrants. In the Philippines, the unilateral extension of social security operates at three levels. The first level is a voluntary pension scheme for Filipinos overseas operated by the Social Security System (SSS) and the

[87] Ibid.
[88] Ibid.
[89] Personal interview with the NSSF Director of Operations, Mr Crescentius Magori, at the NSSF headquarters in Dar es Salaam, 6 July 2011. Also see Magori, C *Welfare Scheme for Tanzanians in the Diaspora* Paper presented at the London 3 Diaspora Conference (6–7 May 2011).
[90] More information on WESTADI is available at http://www.nssf.or.tz/index.php?option=com_content&view=article&id=240&Itemid=215 (accessed on 24 May 2012).

Overseas Workers' Welfare Administration (OWWA).[91] At the second level is the overseas medical scheme operated by the Philippines Health Insurance Cooperation. Finally, there is a tax-exempt supplementary scheme called Flexi-Fund, operated by the SSS.[92] In Sri Lanka, a different approach is adopted. A mandatory social insurance scheme, providing two years' insurance cover for migrants, is maintained by the Overseas Workers Welfare Fund (OWWF), which is administered by the Sri Lankan Bureau of Foreign Employment (SLBFE).[93] Insured persons are entitled to compensation for the family in the case of death or invalidity, and for travel expenses.[94] These two examples present best practices that could be replicated by the NSSF and the PPF to enhance protection for Tanzanians overseas.

With regard to migrants working in Tanzania, it is submitted that the PPF and the NSSF should explore ways of ensuring portability of rights. The lump sum currently provided for as withdrawal benefits for migrant workers in these two schemes is unlikely to achieve the aim of social insurance, which is centred on alleviating social contingencies, in particular, those associated with old age, invalidity and death, which normally require long-term insurance. It is recommended that the NSSF and the PPF should explore opportunities for co-operation with similar institutions in other countries. The arrangement between the NSSF and the Zanzibar Social Security Fund (ZSSF) is a good example of how institutions can co-operate with similar social security institutions. In terms of this agreement, the NSSF undertakes to pay ZSSF members and beneficiaries who reside on the mainland. Similarly, the ZSSF is responsible for providing benefits to NSSF members and beneficiaries who are resident in Zanzibar.[95]

7.5.2 Bilateral social security arrangements

Bilateral social security arrangements have over the years proved to be the most effective way of addressing migrant workers' social protection concerns, by allowing them to transfer

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[91] Opiniano, MJ *International Migration as a Social Protection Mechanism in the Philippines: Issues and Implications* Paper presented at 33rd Global Conference of ICSW, Tours, France (30 June to 4 July 2008) 25.
[92] A good number of Filipinos overseas subscribe to these schemes. See 'Rights to Social Protection', 'Social Security Rights: Acquisition, Maintenance and Enforcement', 'The Philippine Social Security System Experience' available at http://www.issa.int/pdf/initiative/reports/2Philippines.pdf (accessed on 24 May 2012).
[93] Del Rosario, T *Best Practices in Social Insurance for Migrant Workers: The Case of Sri Lanka* (ILO Regional Office for Asia and the Pacific, Bangkok, 2008) 15–16.
[94] Ibid. In 2009, the government adopted a new policy to enhance the protection of migrant workers.
[95] Personal interview with the NSSF Director of Operations, Mr Crescentius Magori, at the NSSF headquarters in Dar es Salaam, 6 July 2011.

their social security rights and benefits as they move across borders.[96] So far, Tanzania has not concluded any bilateral social security agreements, although it has participated in the migration discourse over the years. However, the government has on different occasions expressed a strong commitment to forging bilateral social security cooperation. One of these occasions was the adoption of the NSSF Act in 1997, which created the possibility for such arrangements and conferred a legal mandate on the government to enter into such agreements. According to section 92(1) of this Act, 'the Government of Tanzania may enter into a reciprocal agreement with the Government of any other territory in which a Scheme similar to the Scheme has been established.'[97] Six years after the NSSF Act, the government reiterated its commitment to develop legal mechanisms 'to provide for reciprocal agreements with other countries for transfer of social security benefits across nations' in its policy priorities under the National Social Security Policy (NSSP), 2003.[98]

None of these commitments has been honoured. In the past, the government expressed an interest in entering into bilateral social security agreements with countries such as the Netherlands, Kenya, South Africa, Uganda, the United Kingdom and Zanzibar.[99] However, none of these has materialized so far, for a number of reasons. Ackson observes that there are three major problems. The first relates to the lack of universal social security coverage.[100] Since social coverage is available only to a very small section of the population – approximately 5 per cent coverage of the entire workforce – the priority at present is to extend coverage to as many citizens as possible.[101] In other words, the extension of social protection to non-nationals is viewed as not politically and economically justifiable at present. The second problem is the fact that the social security systems of Tanzania and the prospective contracting states are incompatible.[102] The third problem is the prevailing fragmentation and substantial variations in terms of coverage, operating rules, contributory rates, and the type and level of benefits available in social security institutions in Tanzania

[96] See Avato et al (2009) op cit 10.
[97] Also see subsections (2) and (3).
[98] See para 3.7.
[99] See Ackson op cit 124.
[100] Ibid.
[101] Ibid. Also see the NSSP (2003) para 3.2.
[102] Ibid 214. For details in Uganda and Kenya, see Dau op cit, and Barya, J *Social Security and Social Protection in the East African Community* (Fountain Publishers, Kampala, 2011).

and in some of the prospective cooperating states, particularly Kenya, Uganda and South Africa.[103]

A fourth problem which emerged during the interviews is uncertainty about the benefits and opportunities presented by bilateral agreements. Administrators believe that Tanzania is unlikely to benefit from these agreements because the number of Tanzanians working in the prospective collaborating countries is probably very low compared to the number of nationals from those countries who are currently employed or resident in Tanzania. Thus, there is little motivation on the part of Tanzania to enter into these arrangements.[104] Whether this observation is correct is debateable. We believe that this observation is largely based on misguided assumptions, for two major reasons. First, the migration of workers from Tanzania to these and other countries is mainly spontaneous. At present, there are no proper records or statistics of the number of Tanzanian workers in these countries, as only a few Tanzanians register in the Tanzanian embassies in the respective countries.[105] Second, most of these countries maintain restrictive admission policies, which have fuelled considerable irregular migration, and therefore the status of many Tanzanian workers may be irregular.

In view of this and in keeping with previous submissions, it is submitted that Tanzania must enter into bilateral arrangements, albeit with the few countries which currently attract considerable numbers of Tanzanians.[106] This is likely to benefit Tanzanians who migrate to these countries and also migrant workers from these countries who are employed or established in Tanzania. Furthermore, bilateral social security arrangements are also likely to create additional economic benefits for the country. Tanzania, as an underdeveloped country, is likely to benefit economically from remittances and skills acquired by her returning citizens, particularly those who were employed in highly developed countries. The absence of bilateral social security arrangements with these countries is likely to inhibit their return, because of the fear of losing social security benefits. It is submitted that the government commitment to improve remittances and skills transfers, as explicitly incorporated in the

[103] Ibid.
[104] Personal interview with the NSSF Director of Operations, Mr Crescentius Magori, 6 July 2011.
[105] For a discussion of issues relating to labour migration statistics in Tanzania, see Shitundu, MJ *A Study on Labour Migration Statistics in East Africa* International Migration Papers No 81 (ILO, Geneva, 2006) 22–23, and Mwalimu, UA *Patterns, Policy and Legal Issues on International Labour Migration in Tanzania* Globalisation and East Africa, Working Paper No 13, Economic and Social Research Foundation (2004) 18.
[106] Ackson op cit 217.

National Employment Policy,[107] is unlikely to succeed if Tanzanians abroad are not guaranteed social protection when they return.

It is also submitted, with reference to practices in countries such as South Africa, Malawi, Zambia and Lesotho, that while issues of disparity and fragmentation of social security schemes may impede bilateral social security arrangements, it is possible to achieve bilateral cooperation.[108] Nonetheless, a few issues need to be considered when entering into bilateral agreements, to minimize negative consequences and to ensure adequate protection for migrant workers. These include the incorporation of portability principles as developed in international instruments, broad coverage in terms of contingencies and benefits, and the standardization of terms and conditions to eliminate disparities between social security agreements and to minimize the administrative burdens likely to result from multiple bilateral agreements.[109] Another important aspect is the need to minimize the possibility of discrimination between migrants who are covered by bilateral agreements and those from other countries.[110]

7.5.3 Multilateral social security arrangements: The EAC and SADC

The EAC and SADC have recently developed a keen interest in developing multilateral social security arrangements in the interests of regional integration. Tanzania, as a member of these organizations, has been actively involved in the process. Developments in both organizations are in their infancy, when compared to those in other regions such as the EU and the Caribbean Community (CARICOM), which have made considerable progress in this area.[111] Chapter 3 of this study briefly reflected on the emergence of regional-wide social security arrangements in the EAC and SADC.[112] The discussion noted the progress made in these two organizations. At this point it suffices to mention that in SADC the foundation for the establishing of a region-wide social security network has already been laid down in terms of a body of soft law constituting the Charter on Fundamental Social Rights in SADC, 2003 (the SADC Social Charter) and the Code of Social Security in SADC, 2007. The actual implementation of these two instruments, which together have the potential for the further

[107] National Employment Policy (2008) 32.
[108] Ackson op cit 216.
[109] Ibid. Also see Avato et al (2009) op cit 10.
[110] Ibid.
[111] See section 7.5.3.1 of this chapter.
[112] See section 3.5.5 of chapter 3.

formulation of an effective region-wide social security system, is yet to take place.[113] As a result, migrants from within the region continue to incur social security losses as they cross the borders to take up employment in another SADC country. On the part of the EAC, the development of a new regime is still on the drawing board. An actuarial study of the social security systems in member states is being conducted to inform the ongoing process.[114]

These processes are largely driven by the developments currently taking place in the two regions, particularly the growth of intra-regional labour mobility and its increasing role in the regional integration process.[115] There is also a growing awareness of the precarious social situation of migrant workers. Available reports on the social situation of migrant workers in both regions raise serious protection concerns. The position in SADC is summarized in the following extract by Olivier and Kalula:

> [T]he social security law position of SADC citizens migrating within the SADC region is poorly regulated. It would also appear, barring a limited number of exceptions, that SADC member states are not yet linked to the network of bilateral and multilateral Conventions on co-ordination of social security. This may operate to the disadvantage of SADC citizens, both when they take up temporary or permanent employment or residence in SADC countries, as well as when they return home after working as migrants elsewhere in the region. The situation leaves migrants marginalized, owing to their exposure to the largely nationality-based social security systems of most of the SADC member states.[116]

The situation in the EAC is less well documented than that of SADC. However, the available literature suggests that the situation of migrant workers in the EAC is, by and large, similar to that existing in the SADC.[117] This is largely a by-product of the regional economic, social, and political landscape.[118] Particular problems are poverty, irregular migration, and hostility and xenophobia, which are largely responsible for the prevailing social exclusion and marginalization of migrants.

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[113] Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908 (World Bank, 2009) 78.
[114] See further details in chapter 3, section 3.4.5.
[115] Olivier (2009) 99, 105–106; Olivier and Kalula op cit 672; and Fultz, E and Pieris, B *The Social Protection of Migrant Workers in South Africa* ILO/SAMAT Policy Paper No 3, Harare (1997) 15.
[116] Olivier and Kalula op cit 669. Also see Millard, D 'Portability of Social Security Benefits: The Position of Non-Citizens in South Africa and the Southern African Development Community' in Becker and Olivier op cit 143–162 at 155. Also see Olivier *Acceptance of Social Security in Africa* International Social Security Association (ISSA) Regional Conference for Africa, Lusaka, Zambia (9–12 August 2005) 17.
[117] Dau op cit and Barya op cit.
[118] Millard op cit 144. Also see footnote 3 on this page.

There are many expectations within SADC and the EAC regarding the potential of these initiatives to address the prevailing predicament. It is expected that with sound region-wide social security arrangements, workers will be free to move across countries because they will no longer have to fear social security losses. As a result of greater intra-regional labour mobility, regional integration will ultimately grow.[119] The second and perhaps most important expectation is that the ongoing process will finally eliminate the social vulnerability and marginalization that migrant workers in these regions endure. For instance, Olivier visualizes the creation of a region-based regime in SADC which will ensure minimum levels of social protection on the basis of equality, regardless of, amongst other things, citizenship.[120] Until these new regimes are actually implemented, it is not possible to predict whether or not these expectations will be met.

At present, the major challenge facing countries in the EAC and SADC is formulating viable models of cooperation to meet these and many other expectations. Looking at the social, economic and political conditions in these two organizations, it appears that the task of formulating and implementing multilateral social security will be complex. This is due to certain social, economic and political issues which are peculiar to these two regions and which are, by and large, alien to the already existing models. The forthcoming sections briefly reflect on these issues and how they can affect the formulation and implementation of a viable region-wide social security regime and, in particular, the protection of migrant workers in member countries.

7.5.3.1 Method of cooperation

The choice of a model for region-wide social security protection has attracted considerable attention. It appears from the SADC Social Security Charter that SADC favours social security co-ordination as opposed to social security harmonization. The reasons are obvious. The latter model entails the unification of social security through the adoption of unified social security legislation or amendments and the restructuring of existing national social security legislation and institutions so as to standardize them.[121] Co-ordination, on the other

[119] Olivier (2009) op cit 80.
[120] Olivier (2009) op cit 81.
[121] Forteza, A *The Portability of Pension Rights: General Principles and the Caribbean Case* Social Protection Discussion Paper No 0825 (World Bank, 2005) 6; Frick, BJ and Flechas, ACC 'Social Security for Migrant Workers: The EU, ILO and the Treaty Based Regime' (2007) 9 *Revista Colombiana de Derecho Internacional* 45–86 at 51.

hand, entails the adoption of rules or regulations aimed at coordinating the existing national social security regulations and institutions without necessarily changing them.[122] The rules so adopted normally focus on co-ordinating the protection of migrant workers' social security through the cardinal principles of co-ordination, namely, reciprocity, equality of treatment, choice of applicable legislation, maintenance of rights in the course of acquisition, maintenance of acquired or vested social security rights, payment of social security abroad, and mutual administrative assistance between cooperating states.[123] Briefly, social security co-ordination allows states to retain their sovereignty regarding the formulation and implementation of social security schemes while also ensuring that migrants have actual access to social security in their host countries and are protected from social security losses as they move across the region.[124] It is therefore unsurprising that countries in SADC prefer social security co-ordination to harmonization.

Social security co-ordination has been implemented with great success in the EU. The current EU social security co-ordination scheme came into being in 1972, following the adoption of Council Regulation (EEC) 1408/71 and Regulation (EEC) 574/72.[125] Regulation 1408/71 established the rules for co-ordinating the existing social security schemes within the EU member states to allow for portability of social security as a person migrated from one country to another. In other words, it did not establish a unified or a universal 'European Welfare State'.[126] Instead, each EU member state maintains its social security institutions, legislation and administrative structures. Region-wide cooperation is achieved through coordination rules, namely, equality of treatment and non-discrimination, choice of applicable legislation (*lex loci laboris*), totalization and aggregation of insurance periods, full portability of acquired social security rights and benefits, and mutual administrative assistance as incorporated in Regulation 1408/71. In 2003, Council Regulation (EC) 859/2003) was passed to extend the application of this arrangement to nationals of third countries. In 2004, new regulations (Regulation (EC) No 883/2004) were adopted to enhance

[122] Ibid. Also see Sakslin, M 'The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation' (2000) 2 *European Journal of Migration and Law* 157–183 at 159.
[123] Frick and Flechas op cit.
[124] Sakslin op cit.
[125] See Roberts, S 'A Short History of Social Security Coordination' *The European Commission: 50 Years of Social Security Coordination Past – Present – Future* Report of the Conference Celebrating the 50th Anniversary of the European Coordination of Social Security, Prague (7–8 May 2009) 8–28.
[126] Malherbe op cit 60.

social security coordination in line with emerging issues and challenges. The new Regulations became operational in 2010.

Social security co-ordination has been implemented with limited success in the Caribbean.[127] In 1996, CARICOM adopted an Agreement on Social Security (CASS). Like the EU, CASS focuses on the protection of social security rights for migrants who migrate between the member states. The arrangements cover only long-term social security benefits, namely, old age pensions, invalidity benefits, disablement, death and survivors' benefits. The CARICOM agreement allows for portability of social security rights and aggregation of social security rights.[128] A recent empirical study by Forteza observes that the arrangement has had a limited impact so far, when compared to similar arrangements in the EU.[129]

Based on the experiences in these two regions, a considerable number of scholars who have written in this area consider social security co-ordination to be an appropriate model for SADC.[130] Their preference for this model seems to be grounded in the ability of states to retain their sovereignty over social security legislation which, if removed, may inhibit any chances of cooperation and ultimately defeat the intended objectives. However, most of these scholars, while supporting the co-ordination model, have also noted a few issues that are likely to impede the co-ordination of social security in SADC and therefore inhibit social protection for migrant workers. One scholar, comparing the situation in the EU and SADC, cautions that 'co-ordination does not occur overnight'.[131] The next sections highlight these issues.

7.5.3.2 Poverty and labour market conditions

The majority of people in the EAC and SADC live in abject poverty. According to the World Bank Development Indicators report, all countries in the EAC are low-income countries, with less than US$955 Gross National Income (GNI) per capita.[132] In SADC, six countries are in this group. The rest are categorized as lower middle-income and higher middle-income

[127] Hendrikx, M *Appropriate Social Security for Migrant Workers: Implementation of Agreements on Social Security* Paper presented at the International Social Security Association, Regional Conference for the Americas, Belize (28–31 May 2006) 3. Also see Forteza op cit 23.
[128] See articles 17 to 19.
[129] Forteza op cit 25.
[130] Malherbe op cit 71; Ackson op cit 223; Olivier (2009) op cit 75; Olivier and Kalula op cit 672.
[131] Malherbe op cit 74.
[132] World Bank, *The Africa Development Indicators 2011* (World Bank, Washington DC, 2011) 5.

countries.[133] Even in the latter countries, the UNDP Human Development Index report reveals that most people in SADC live below the national poverty line. In Zambia, for instance, this group constitutes 72.9 per cent of the population.[134] The labour market conditions in the EAC and SADC countries are also generally poor, characterized by high unemployment rates and diminishing formal employment. The informal sector proportion in some countries has increased to as much as 90 per cent, compared to 10 to 20 per cent of the economically active population in the formal sector.[135] Yet it is only the latter group which has access to labour law and formal social security protection. The social security system therefore covers only a very small section of the population. The majority fall within the informal social security network, which will not form part of the ongoing process. This contrasts with the EU, where the social security systems provide universal coverage.[136] This factor needs to be taken into account when formulating a regional social security policy.

7.5.3.3 Inefficiency of the social security system

Scholars have specifically noted the infancy of the social security system. The particular concern in this area is that, unlike the EU, where the social security systems are highly developed, the systems in the EAC and SADC are largely underdeveloped.[137] There are also huge disparities in the levels of development of the social security systems in the member states. For instance, in SADC, Mauritius is said to have a relatively well developed social security system compared to Malawi, where the system is under developed.[138] In addition, social security institutions in individual countries maintain notable variations in terms of coverage, benefits, operational rules, and governance structure and benefits.[139] For instance, some countries have pension schemes, other countries have provident schemes, and some countries have both.[140] These factors are likely to threaten co-ordination, particularly with

[133] The lower middle-income countries are Lesotho, Angola, Namibia and Swaziland. South Africa, Botswana, the Seychelles and Mauritius are categorized as higher middle-income.
[134] Olivier (2009) op cit 27.
[135] Fenwick, C and Kalula, E *Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives* Development and Labour Monograph Series, Occasional Paper 2/2004 (2004) 10; also published in (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193–226.
[136] Malherbe op cit 74. Also see Avato et al (2009) op cit 28.
[137] Ibid. Also see Olivier and Kalula op cit 672.
[138] Olivier and Kalula ibid 662; and Avato et al (2009) op cit 29.
[139] Malherbe op cit 75.
[140] Ibid. Also see Olivier, M 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 2 *ILJ* 2199–2212 at 2205. For the position in East Africa see Barya op cit and Dau op cit.

regard to determining material scope. The disparities are also likely to threaten the implementation of a multilateral regime, which is normally achieved through reciprocity.

It is therefore important for countries in both regions to address these disparities before the actual co-ordination takes place. The ongoing social security reform in individual countries in the EAC and SADC[141] presents a golden opportunity for member states to address this anomaly. For example, the Tanzanian parliament recently passed a law to establish a Social Security Regulatory Authority whose mandate is to coordinate and harmonize the existing social security institutions so as to remove the prevailing disparities.[142] The existing social security legislation was amended recently to enhance efficiency.[143] There are also ongoing social security reforms in Uganda.[144] At regional level, the ongoing actuarial study in the EAC is an important step in addressing these disparities.[145]

The nature of the envisaged benefits also needs to be specified. The social-economic conditions in SADC and the EAC and the prevailing social security inefficiencies demand an urgent consideration of this issue. The SADC Code is silent on this issue. However, it appears from the literature that there are two possible alternatives to address this issue. The first alternative, which has been used in other social security multilateral arrangements, is to confine coverage to long-term benefits. Given the social and economic barriers, the countries may consider identifying a few benefits to start with. Depending on the success of implementation, the coverage can be extended to other long-term benefits and, finally, if conditions allow, to short-term benefits. The second alternative is to start with a few benefits which are common to all countries. One of these benefits is workers' compensation, which is available in almost all countries.[146] For example, as previously noted in this work, the Tanzanian WCA is a replica of the South African COIDA. It is therefore reasonable easy to co-ordinate this area.

With regard to the level of the benefits, it has been suggested that the regional regime should prescribe the minimum standards for the levels of benefits, while leaving it open to each

[141] For a detailed account of the social security reforms in SADC, see Olivier (2009) op cit 45–47.
[142] The Social Security Regulatory Authority Act 8 of 2008.
[143] A Bill to amend the social security laws was presented for first reading during the parliamentary session in April 2012.
[144] Barya op cit 13 and 41–44.
[145] See chapter 3, section 3.4.5.
[146] Malherbe op cit 82; and Olivier and Kalula op cit 672.

individual state to set the maximum benefit, depending on its purchasing power.[147] This should minimize the differences and losses which may result from the different GDPs and living standards in member states. This approach should also balance the responsibilities of the individual states without necessarily imposing an extra burden on members with generous social security schemes. Thus, for instance, Tanzanians working in South Africa should have benefits equal to those of South Africans working in Tanzania. This approach is likely to avoid the antagonism that may result from an unequal sharing of responsibility or what is described in the literature as a 'prisoner's dilemma'.[148] Alternatively, it has been suggested that members consider adopting the EU approach, whereby individuals are able to claim the difference from the generous social security institution.[149]

7.5.3.4 Inefficient administrative structures

Studies have noted inefficiencies in implementing national social security laws and in implementing bilateral social security treaties.[150] The latter case refers to bilateral social agreements between South Africa and her neighbours. This is critical because the future of social security co-ordination lies in efficient administration and enforcement mechanisms. According to Fischer, good administration and enforcement is a 'fundamental *condition sine qua non*', without which there can be no prospects for social security co-ordination.[151] As a general rule, social security co-ordination does not change the institutional governance in member states. It is therefore expected that the social security institutions in the contracting member states should have the physical and fiscal capacity to implement the new regime.

Experience from other regions supports the need for efficient national social security institutions. For instance, the celebrated achievements in the EU would not have been possible without the sophisticated social security systems in the member states which spearheaded the implementation of the complex co-ordination regulations. SADC has taken

[147] Ackson op cit 225.
[148] This refers to the situation where countries have no incentive to extend social protection to migrant workers because of the absence of parallel action by other contracting members. In the absence of corresponding social protection for its workers, a country which is capable of providing maximum protection to its citizens, including those who migrate, will have no incentive to extend such protection to workers from fellow contracting states. Similarly, the countries with low income may lower their standards or withhold social protection in the expectation that other contracting countries will provide. See Fultz and Pieris op cit 14.
[149] Olivier and Kalula op cit 672.
[150] See Olivier (2009) op cit 37 and Ackson op cit 210 and 225. Also see Mpedi, LG 'Introduction' in Becker and Olivier op cit 1–12 at 9.
[151] Fischer op cit 7.

note of the prevailing inefficiencies, and has called upon members to 'endeavour to establish proper administrative and regulatory frameworks in order to ensure effective and efficient delivery of social security benefits.'[152] SADC also refers to five important structures which are instrumental in fostering co-ordination at the national level: the establishment of integrated, inter-departmental and inter-sectoral structures with adequate and sufficient budgetary support;[153] the existence of effective and independent adjudication institutions which are easily accessible, inexpensive, expeditious and have minimal legal formalities;[154] the involvement of Non-Governmental Organizations (NGOs) and Community-Based Organizations (CBOs);[155] the establishment of an autonomous national social security governance structure;[156] and an independent national compliance monitoring structure.[157]

At present, it is important for countries in the EAC and SADC to revamp the social security institutions before actual co-ordination takes place. Tanzania is already adopting this approach. The ongoing social security reforms address, among other things, issues of in-country portability of social security. Although this is unlikely to benefit migrants it is crucial in preparing the national social security institutions for cross-country co-ordination and to ultimately improve the protection of migrant workers in the future. This development is worth replicating in countries with multiple social security schemes.

7.5.3.5 Irregular migration

As noted in chapter 3 of this work, irregular migration in the EAC and SADC is on the rise.[158] While the exact numbers remain unknown, it is estimated that in 2008, there were 80,000 irregular migrants in Botswana. Also, South Africa is said to have deported over 1.5 million irregular migrants in the period between 1994 and 2010, 90 percent of whom were from Mozambique and Zimbabwe.[159] The majority of migrants in this group have no recourse to social protection due to restrictive migration polices.[160] The exclusion is further

[152] See the SADC Code of Social Security Paragraph 21(1).
[153] Paragraph 21(1)(a).
[154] Article 21(1)(b).
[155] Article 21(1)(e).
[156] Article 21(1)(f).
[157] Article 21(2).
[158] Mudungwe, P *Migration and Development in the Southern Africa Development Community Region: The Case for a Coherent Approach* (Intra-ACP Migration Facility, 2012) 49–50. Also see Crush, J and Williams, V *Labour Migration Trends and Policies in Southern Africa* SAMP Policy Brief No 23 (Southern African Migration Project, 2010) 19–20.
[159] Mudungwe op cit 49, and Crush and Williams op cit 21.
[160] Olivier (2009) op cit 17.

exacerbated by the growth of informalization in the labour market, which has pushed irregular migrants to the informal sector and atypical employment, which in many countries offer no protection.[161] Irregular migration is a product of restrictive and exclusive migration policies in member countries and within regions. Unlike the EU, the EAC and SADC do not guarantee unlimited freedom of movement. In the EAC, the free movement of labour is guaranteed only for skilled and self-employed persons, whereas in SADC there is literally no such guarantee.[162]

This issue has a direct impact on determining the personal and material scope of the regional social security regime. As noted before, multilateral social security arrangements tend to draw a distinction between social insurance and social assistance, usually excluding the latter.[163] The danger of this distinction is that, since irregular migrants are largely excluded from social insurance schemes, they will most likely be pushed to the periphery of social protection. It is important consider this factor. The SADC Code contains a distinct provision on irregular migrants, which provides that '[i]llegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country.'[164] However, the question remains: to what extent is this provision practicable in a region where countries are characterized by restrictive migration policies and hostility towards irregular migrant workers? How will the laws of the host country cater for irregular migrants if, for example, they do not apply to the informal sector where the large majority of these workers are found? Given these and the many other challenges of irregular migration, the ability of members to honour this provision is questionable.

7.5.3.6 Political will

The commitment of member states is essential to formulating and implementing suitable region-wide social security. The legal status of the EAC and SADC and the reluctance of states to discharge their treaty-based obligations further reinforce the importance of political

[161] Ibid. Also see Mudungwe op cit 49.
[162] See chapter 3, section 3.8.
[163] Vonk *De coordinatie van bestaansminimumuitkeringen in de Europese Gemeenschap* (1991) 483–4, quoted in Olivier, MP 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *ILJ* 2199–2212 at 2208–2209. Also see Malan, S and Jansen van Rensburg, L 'Social Security as a Human Right and the Exclusion of Marginalized Groups: An International Perspective' in Olivier, MP et al *The Extension of Social Security Protection in South Africa: A Legal Inquiry* (Siber Ink CC, Cape Town, 2001) 74–114 at 112.
[164] See para 17.3.

commitment in this area. Unlike the EU, which is a supra-national institution, the EAC and SADC are only economic community organizations with no supra-national mandate over their members.[165] The laws adopted in the EAC and SADC are therefore not self-reinforcing, but need ratification by the responsible national organs. In countries with dualist legal systems like Tanzania, they also require incorporation into national laws. These processes usually take a long time, particularly if member states choose to cling to their old practices. In other words, it all depends on the political will of individual states. For instance, in countries where the extension of social security to migrants is not regarded as a priority by the organs responsible for ratification and incorporation, the process may be unnecessarily delayed. Already, there are some indications of inadequate political support for the free movement of persons, which is essential to the issue at hand. The EAC Protocol on the EAC Common Market and the SADC Protocol on the Facilitation of Free Movement are good examples. The former came into force in 2010 after being ratified by all member states, yet none of the parliaments in the EAC countries, apart from Rwanda, has incorporated the Protocol in their legal systems. The latter instrument was adopted in 2005; to date it has not acquired sufficient ratifications.[166] At present, it is very difficult to predict whether or not the region-wide social security regime will face similar problems. Given the relevance of these two instruments to the current subject, it may be that social security co-ordination will suffer a similar fate.

It appears that countries are reluctant to implement region-wide migration instruments. This reinforces the importance of a region-wide compliance mechanism. The SADC Social Security Code proposes that the monitoring of compliance should be entrusted to an independent Committee of Experts, still to be established.[167] This would also involve the existing regional structures.[168] It is therefore recommended that, in addition to establishing the administrative structures proposed in the SADC Social Code, countries should allow regional quasi-judicial and judicial bodies, such as the East African Court of Justice (EACJ) and the SADC Tribunal, to intervene where necessary to monitor compliance and to provide guidelines on implementing the obligations arising from the treaties. These structures should also allow individual access by migrant workers to enable them to assert their rights to social

[165] Olivier (2009) op cit 75.
[166] See chapter 4, section 4.8.
[167] Article 21(3).
[168] Article 6(1) of the SADC Social Charter.

security. This will be an added advantage for migrants in countries like Tanzania, where the right to social security is not subject to adjudication.

Nonetheless, this will depend on the legal status of the instruments establishing the social security regime. For example, in SADC, the social security co-ordination arrangements are currently covered by instruments constituting soft law, which are technically not legally enforceable. In the EAC, it remains to be seen whether the process will establish binding instruments in the form of guidelines, like the first four annexed regulations, or whether it will follow the soft law approach of SADC. If the first alternative is preferred, migrants may be able to seek the intervention of the EACJ in determining their social security rights. This will certainly enhance compliance and ultimately enhance social protection for migrant workers in Tanzania and in other member countries.

Drawing on the experience in other regions it appears that the involvement of a region-wide compliance mechanism is imperative. Even in regions such as the EU, where the community laws are self-executing, the intervention of regional bodies has proved to be necessary. There is ample evidence that the European Court of Justice has played an important role in interpreting social security regulations and ultimately in facilitating compliance by member states.[169] In addition, the EU has two administrative bodies in this area, the Administrative Commission on Social Security for Migrant Workers[170] and the Tripartite Advisory Commission on Social Security for Migrant Workers, which together foster compliance by members.[171] Both have been instrumental in fostering the implementation of the regime. It is therefore important for countries in the EAC and SADC to utilize the existing regional bodies in their endeavours.

[169] There is evidence that the ECJ's extensive case law has greatly facilitated the implementation of coordination. The ECJ has been instrumental in expanding the base of the persons covered and the scope of contingencies and benefits provided under the EU social security framework. Social security is a widely adjudicated subject at the ECJ. Of the 5,055 cases adjudicated by the ECJ by March 2009, 509 were on social security, ie one in every ten cases. See Van Raepenbusch, S 'The Role of the European Court of Justice in the Development of Social Security Law of Persons Moving within the European Union' in Jorens, Y *Fifty Years of Social Security Coordination Past – Present – Future* Report of the Conference Celebrating the 50th Anniversary of the European Coordination of Social Security, Prague, 7–8 May 2009 (European Union, Luxembourg, 2010) 29–54 at 30. Also see Kivsti, J 'Does EU Enlargement Start a Race to the Bottom? Strategic Interaction among EU Member States in Social Policy' (2004) 14(3) *Journal of European Social Policy* 301–318 at 303–305.

[170] Established under articles 80 and 81 of Regulation 1408/71.

[171] Established under articles 82 and 83 of Regulation 1408/71.

7.5.3.7 Alternative approaches to region-wide social security co-ordination

Recently, scholars have debated the suitability of region-wide social security co-ordination for countries in the global south. These arguments are premised on the poor state of social security in these countries, particularly in the areas of coverage and service delivery.[172] Some scholars suggest that it is rather premature for these countries to dedicate their resources and attention to region-wide co-ordination while the majority of the population has no access to social protection. They also argue that social security administration structures are too undeveloped for the desired change.[173] They therefore suggest that, instead of devoting too much attention to the portability of rights, countries in the global south should consider the adoption of alternative effective policies which suit their socio-economic conditions.[174] According to Olivier, the current priorities are the 'overarching objectives of regional integration, alleviation of poverty, and the prioritization of the plight of the socially disadvantaged.'[175]

Building on these arguments, they propose wide-ranging alternative approaches which should be used to address the social security needs of migrant workers. These include:

(i) Widening the protection base by extending social security to individuals who are currently excluded, particularly those in the informal sector, where the majority of irregular migrant workers are found.[176] This may also include supporting alternative arrangements, such as informal migrant networks and migrant human rights NGOs[177] that also pay particular attention to the provision of social assistance.[178]

(ii) Ensuring the portability of those occupational benefits that are legally available to migrants, such as workers' compensation, severance payments and benefits from provident funds.[179]

[172] Sabates-Wheeler and Koettl (2011) op cit 132 and 133.
[173] Ibid 132,133 and 137.
[174] Ibid 134.
[175] Olivier (2009) op cit 106.
[176] Ibid 136–146. Also see Sabates-Wheeler and Koettl (2011) op cit 137.
[177] Sabates-Wheeler and Koettl (2011) op cit 137 and 138; Sabates-Wheeler (2009) op cit 17 and Olivier (2009) op cit 151.
[178] Olivier and Kalula op cit 673.
[179] Sabates-Wheeler (2009) op cit 16; Sabates-Wheeler and Koettl (2011) op cit 137; Malherbe op cit 82 and Olivier and Kalula op cit 672.

(iii) Improving social protection for the most vulnerable migrants, such as women migrants, children, refugees and irregular migrants.[180]

(iv) Adopting viable labour migration policies to provide more opportunities for regular migration.[181]

(v) Adopting a rights-based approach to migration based on international and regional standards and comparative best practices, and incorporating such standards and practices in national legal frameworks and institutional structures. This may also include the use of human rights standards and the Decent Work agenda as tools for extending social security protection to all migrants irrespective of their status.[182]

(vi) Improving the ratification of the ILO standards and incorporating the major principles for coordination, such as equality of treatment, maintenance of acquired rights, the aggregation of insurance periods, portability of benefits, and the provision of minimum forms of protection to irregular migrants. [183]

(vii) Integrating migration management into broad regional policies, particularly those which relate to development and poverty alleviation.[184]

(viii) Entering into bilateral social security agreements that are designed in line with a region-wide model for bilateral agreement, to eliminate complex administrative responsibilities and to create uniformity.[185]

(ix) Prioritizing national social security reforms to enable the existing structures to deal with the specific needs of migrants and to prepare them for implementing bilateral and regional-wide social security agreement.[186]

In view of the preceding discussions of the EAC and SADC, particularly the unique social, economic and political realities and their likely impact on the ongoing co-ordination processes, it is submitted that countries in both regions should also pay attention to the alternative approaches as they continue to develop the envisaged regime. In particular, it is recommended that Tanzania should consider adopting some of the alternative measures to

[180] Sabates-Wheeler and Koettl (2011) op cit 134. Also see Olivier (2009) op cit 151.
[181] Sabates-Wheeler and Koettl (2011) op cit 134 and 140. Also see Sabates-Wheeler (2009) op cit 17 and 18.
[182] Olivier (2009) op cit 146–150; Sabates-Wheeler and Koettl (2011) op cit 138; Sabates-Wheeler (2009) op cit 17, Malherbe op cit 75–78.
[183] Olivier (2009) op cit 148 and Malherbe op cit 78–80.
[184] Olivier (2009) op cit 106.
[185] Olivier (2009) op cit 152 and 153.
[186] Ibid 152.

provide immediate solutions for the most vulnerable groups, such as irregular migrants, as they wait for region-wide social security co-ordination which may take too long to occur and which may not be applicable to them. To start with, the ongoing constitutional and social security reforms should be used to broaden the base of protection and to incorporate a human rights approach to social security. This will certainly improve the situation of irregular migrants who are currently excluded from the system.

7.6 Conclusion

The discussion in this chapter was centred on the position of migrant workers in the Tanzanian social security system. In particular, the chapter considered access to the social security system and the extent to which migrants are able to enjoy the benefits available in these schemes. Migrant workers have unimpeded legal access to the formal social security scheme, but in practice, irregular migrants are not able to access the social security system due to an inherent bias in the social security system. The uneasy interaction between labour law and social security protection on the one hand, and immigration law on the other is also a problem. With regard to access to social security benefits, there are similarly no restrictions, although in practice migrant workers are unable to enjoy long-term social security benefits which are subject to lengthy qualifying periods which migrants cannot meet because of the temporary nature of migration. There are no provisions for the portability of social security, and migrant workers incur social security losses as they relocate to and from Tanzania.

It was therefore recommended that Tanzania should consider improving the social security position of migrant workers. The chapter looked at three major ways of improving social security protection for migrant workers, namely, unilateral action, bilateral responses and multilateral action (regional social arrangements). The chapter recommended that Tanzania should unilaterally improve the position of migrant workers by adopting a human rights-based approach to social security, guaranteeing access to social security to all. It should also consider empowering the existing institutions to offer the unilateral portability of social security where possible. Moreover, Tanzania should unilaterally extend social security protection to Tanzanian emigrants overseas. With regard to bilateral arrangements, the chapter recommended that Tanzania should consider concluding bilateral agreements with countries that currently host considerable numbers of Tanzanians, to improve the protection of these workers and to facilitate their return and skills transfers.

Finally, the chapter discussed the ongoing arrangements for region-wide social security coordination in the EAC and SADC. Reflecting on similar arrangements in other regions, it was argued that these arrangements have the potential to alleviate the social exclusion and marginalization of migrants, which is rampant in both regions, and to foster intra-regional integration. Nonetheless, it was observed that, given the socio-economic challenges in these two regions, such arrangement may take a long time to occur. In addition, they may not adequately benefit the most vulnerable migrants, such as irregular migrants and migrant women, who are concentrated in the informal sector. The chapter therefore recommended that Tanzania should consider alternative approaches that will offer immediate solutions to migrant workers while they wait for the region-wide processes to be finalized.

Chapter 8: Conclusion

8.1 Introduction

This thesis has addressed one of the most pressing challenges in international labour migration, namely, the protection of the rights of workers who are involved in labour migration. In particular, the study sought to address the protection of migrant workers in Tanzania. The question underlying the study was whether the laws in Tanzania adequately protect the rights of migrant workers. A contextual legal and policy analysis was undertaken to examine the national laws on labour migration and practices, with reference to international norms and comparative best practices to determine their adequacy. An empirical study was also conducted to provide evidence-based support for the arguments advanced in respect of the four key areas discussed in this study: migrant workers' access to remunerated activities, their general conditions of work, their right to freedom of association, and social security rights.

This chapter seeks to provide a summary of findings and general conclusions, and provides some recommendations for possible legislative and policy reforms.

8.2 Summary of findings and conclusions

Chapter 2 provided an in-depth account of the international legal standards for the protection of migrant workers. The chapter proceeded with a full understanding of the unresolved tensions between states' sovereign rights on the admission of non-nationals on one hand and human rights law on the other. The former recognizes the right of every sovereign state to formulate immigration policies and to regulate the admission of non-nationals, whilst the latter imposes an obligation on states to treat all migrants who have already entered their territories with dignity. The chapter examined this relationship and considered how the international community has tried to resolve this tension. The evolution of international norms on migrants and the transformations which have led to modern international protection standards were traced. The international instruments relevant to the protection of migrant workers within the ILO and the UN human rights system were then examined, as were the provisions relating to the protection of the most vulnerable groups of migrants, such as irregular migrants and women migrants. Finally, the chapter looked at the relationship between international law and municipal law so as to establish the status and the impact, if

any, of international norms on labour migration in municipal law and the Tanzanian legal system in particular.

It was observed that the UN and the ILO have made considerable strides in advancing the protection of migrants' rights. There currently exists a set of international standards which attempts to ensure that labour migration takes place in humane conditions. After a thorough examination of international instruments, it was concluded that it is now an established principle of international law that while states maintain their sovereign rights in matters of the admission of migrant workers and other non-nationals, they have an obligation to adhere to wide-ranging standards laid down in international legal instruments which regulate the manner in which states deal with migrant workers. ILO Conventions No 97 and No 143 and the ICMW are particularly important. The latter has a comprehensive scope, focusing on migrant workers and their families and also extending numerous human rights guarantees to irregular migrants. The study has maintained that, while the international legal instruments on labour migration are less developed when compared with other international instruments, they are of great significance. They 'provide a legal basis for national policy and serve as tools to encourage states to establish and improve their national legislation and to bring them in harmony with the international standards.'[1]

Regrettably, however, these instruments have not been widely ratified or implemented. As a result, large numbers of migrant workers continue to endure various forms of abuse and human rights violations, supported by the complex web of restrictive national immigration laws and policies that prevail in many countries.

Tanzania has also not ratified any of these instruments. In terms of the law of treaties, Tanzania and other non-ratifying states are not legally bound to implement the standards outlined in these instruments. For this reason, it was submitted that other international instruments ratified by Tanzania, such as the core UN human rights instruments and the ILO Conventions, particularly those relating to the four core principles and fundamental rights at work, are ultimately significant in advancing the protection of migrant workers in the

[1] Wickramasekara, P 'Globalization, International Labour Migration and Rights of Migrant Workers' (ILO, Geneva, 2006) 14. Available at http://www.ilo.org/public/english/protection/migrant/download/pws_new_paper.pdf (accessed on 4 May 2012).

country. In support of this submission, it was argued that the general approach to human rights and labour rights preferred in these instruments makes them invaluable tools for the protection of the marginalized, irrespective of nationality and migration status. Moreover, it was submitted that, in addition to the treaty obligations arising from the UN and ILO instruments duly ratified, as a member of the UN and the ILO, Tanzania has a moral obligation to uphold the values of these two organizations which, among other things, seek to reinforce universal human rights and decent working conditions for all workers irrespective of their nationality.

Chapter 3 reflected on the developments at continental/regional and sub-regional levels. The discussion in this chapter centred on the developments taking place in the AU, the EAC and SADC, and examined instruments relevant to labour migration in these organizations. The following observations and conclusions were made. First, there has never been any substantial legal protection for migrant workers in the African region, despite the fact that Africa has from time immemorial served as a migration hub. Second, there is no specific legal instrument on labour migration, despite the fact that the continent has been proactive in advocating the protection of other groups of migrants, notably refugees and internally displaced persons. Most countries in Africa continue to cling to restrictive migration policies, viewing labour migration as a threat rather than as an opportunity and thus restricting as far as possible the number of new entrants.

Nevertheless, it was observed that there have recently been some landmark developments although they are mostly still in their infancy. From the early 1990s labour migration has been acknowledged as a driver of economic development and has therefore been incorporated in regional and sub-regional development agendas. Legal and policy instruments adopted under the mandate of the AU and its Regional Economic Communities (RECs) have at different levels expressed commitment to fostering intra-regional labour mobility and to enhancing the protection of migrant workers as a way of realizing social and economic growth. On the part of the AU, provisions for the free movement of labour appear in the treaty establishing the African Economic Community, 1991, which also calls for the promulgation of a specific protocol on labour migration and the harmonization of labour laws by member states to ensure greater mobility of people.

It was also observed that there are substantial developments in the RECs, particularly in the East African Community (EAC), with the free movement of workers and rights of residence being extensively covered by the EAC Common Market Protocol, 2009. The rights of migrant workers and the means for realizing these rights appear in the regulations accompanying the Protocol. In the South African Development Community (SADC) the developments are less substantial when compared to those in the EAC: its regulatory framework does not have the comprehensive scope that its counterpart in the EAC does. In addition, it is mainly confined to facilitating the movement of persons for a short-term period, rather than ensuring greater labour mobility. Nevertheless, the SADC framework includes significant guarantees against the arbitrary expulsion of migrants, compared to those in the EAC. SADC has also made considerable progress in the area of labour laws and social security, having adopted instruments in the form of soft law which provide for the possible harmonization of labour laws and the extension of social security to migrant workers in the future.

However, it was further observed that while the developments in the AU, the EAC and SADC are notable, they leave a lot to be desired. The AU developments are relatively new and the protocol envisaged in the Abuja Treaty is yet to be adopted. Provisions relevant to the protection of migrant workers have therefore remained the subject of policy documents which do not impose any legal obligations on states. In the EAC and SADC, there are several outstanding issues that are likely to inhibit the greater mobility of labour and the protection of migrant workers in particular. These include the bias of the regime towards highly skilled migrants, which leaves low- and medium-skilled workers unprotected and vulnerable to irregular migration and human trafficking. Other issues are insufficient protection against arbitrary expulsion, the failure to integrate gender-specific protection, although there is evidence that intra-regional migration is considerably gendered, overlapping memberships of and multiple loyalties to RECs, and poor ratification and implementation of obligations arising from regional and international treaties.

These challenges notwithstanding, it was concluded that instruments developed in the AU and within the EAC and SADC are of great significance in shaping the Tanzanian labour migration regime and ultimately enhancing the protection of migrant workers, particularly workers who come from within the region or sub-region. As a result of geographical proximity and shared socio-economic realities between the participant countries, sub-regional

instruments arguably tend to speak to the actual situation in individual countries. Therefore, they are more likely to be accepted and implemented by participating countries. Also, given the poor ratification of international labour migration instruments in the EAC and SADC member states, it was argued that migrant workers from the region stand to benefit substantially if the treaty obligations arising from regional and sub-regional instruments are efficiently implemented.

The examination of international and regional norms was followed by a historical account of labour migration in Tanzania in chapter 4. The chapter sought to provide insights into the issues underlying the contemporary labour migration regime. The discussion in this chapter was therefore centred on the emergence of international labour migration, its underlying trends and patterns, and the ensuing regulatory framework. It was observed that international labour migration, or long-distance labour migration as it was then known, was introduced in the colonial era, when it flourished and became an important source of labour for the colonial economy. Laws regulating the recruitment of migrants were introduced to ensure that there were adequate supplies of labour for the plantations, whose sustainability depended greatly on this type of labour. International labour migration was thus institutionalized.

When Tanganyika gained independence in 1961, liberal migration and citizenship policies extending Tanganyikan citizenship to African immigrants, whilst also unconditionally integrating them into the labour market, were adopted as part of the pan-African policy and also as a strategy to address the appalling shortage of skills. However, these policies were short-lived and were soon abandoned in favour of restrictive policies. With the implementation of major economic reform programmes in the mid-1980s, when many jobs were lost and employment opportunities became scarce, labour migration was discouraged.

Despite the fluctuating socio-economic conditions, labour migration has remained an important part of the economy, particularly in the present era when Tanzania has become part of the global free market economy, which is built on transnational movements of capital, goods and labour. As a result of this and other factors, such as the growing integration of regional labour markets, the numbers of migrant workers in Tanzania have recently grown tremendously.

Efficient regulatory and institutional frameworks are key elements in addressing this development. Therefore, the chapter provided general insight into the existing policy, legal and institutional frameworks responsible for labour migration. With the aid of empirical data, it was established that, at present, Tanzania does not have a coherent labour migration policy or legislative framework. Therefore, labour migration issues are insufficiently addressed by different policy documents and statutes. Most of these are of a sectoral nature, and geared towards regulating the numbers of new entrants. Hence, they tend to contradict one another. The institutions are similarly self-centred and inefficient. Their major roles, which are correspondingly focused on regulating the admission of migrants, are overlapping and sometimes contradictory.

Chapter 5 dealt with two main issues: access of migrant workers to remunerated activities and their general conditions of work. In particular, the chapter examined legal provisions and practices pertaining to the form and nature of labour migration in Tanzania, admission criteria, the recruitment process, procedures for obtaining work permits, recognition of foreign-acquired academic and professional credentials, and the admission of family members. With regard to conditions in the workplace, the discussion addressed issues related to workplace equality and non-discrimination, remuneration, geographical and occupational mobility, and employment security.

The following observations and conclusions were made in this chapter. First, the policies, legislation and practices regulating the access of migrant workers to the labour market are oriented towards temporary migration. Migrants are therefore admitted for a short period of time to fill the 'absolute shortage of labour', with the understanding that they will impart knowledge and skills to citizens to equip the latter to assume their roles, to take charge of all strategic production positions, and ultimately to run the economy. Second, the avenues for legal access to the labour market by non-citizens are extremely limited: an authorization in the form of a work permit, issued only to migrants with skills deemed to be scarce in the labour market, is mandatory before one can engage in any wage-earning employment. Worse still, this permit, which in principle has to be acquired before a migrant enters the territory, can be obtained only through an extremely cumbersome, lengthy and costly procedure. Other problems faced by migrants are the inefficient labour market test to determine the scarcity of skills, unnecessary delays, and corruption. All these factors make irregular migration an attractive alternative, irrespective of its many consequences for migrant workers and the

economy. It was argued that most of these problems could be solved through the introduction of permanent residence status, at least for workers in areas suffering acute shortages of skills.

With regard to conditions of work, two major observations were made. First, migrants' terms and conditions of work tend to differ, depending on their immigration and employment status. Thus, while regular migrants are able to enjoy good employment standards and decent working conditions, irregular migrants are often exposed to poor working conditions because of their immigration and residence status.

Second, there are no specific legal provisions for the protection of migrant workers. Migrant workers are therefore subject to the blanket protection of labour laws. These laws generally comply with international labour law with regard to the protection of employment standards and the rights of all workers. They incorporate all the core labour standards and provide comprehensive protection for workers. However, like other legislation of general application, the laws fail to adequately address the particular protection issues brought about by migrant workers' *alienage* and immigration status. One example was cited: the weak position of labour laws *vis-à-vis* immigration laws. Whenever migrant workers contravene immigration control rules, the immigration laws take precedence, and the workers are deprived of the protection which they would otherwise enjoy under the employment and labour laws.

It was also submitted that the institutions that have the mandate to inspect workplaces in order to ensure their compliance with fair employment standards and workplace safety regulations have severe fiscal and physical limitations. They have therefore not been able to protect migrants.

Chapter 6 examined the provisions relating to the right to freedom of association. It was observed that, while the right of migrant workers to form and to join trade unions and to participate in trade union activities is legally guaranteed, the actual participation of migrant workers in trade unions is severely limited, for a number of reasons. Migrant workers do not know that they have a right to join and participate in trade union activities, and those who know are reluctant to join trade unions due to several reasons or cannot join because they are in managerial posts. Trade unions are reluctant to admit migrants as members. The study maintained that the protection of all workers in an age of international labour mobility imposes certain organizational and political responsibilities on trade unions. Trade unions

have a fundamental role to play in providing moral, political and practical leadership to defend the labour and human rights of migrant workers, in particular, their rights to organize and bargain collectively. This can be achieved only if trade unions are able to reach out to migrants, to organize them, and to include their specific protection needs in the unions' day-to-day agendas and programmes.

In chapter 7, a comprehensive review of social security laws was conducted with a view to examining migrant workers' access to the social security system and the extent to which migrants are able to enjoy the benefits available in these schemes. It was established that Tanzanian social security laws generally comply with international standards with regard to the access of migrant workers to social security schemes. Migrant workers have unimpeded access to the employment-based social security schemes. In fact, they are obliged to subscribe to the social security schemes which cover their respective sectors. However, due to segmentations in the social security sector, only regular migrant workers are able to join social security schemes, unlike irregular migrants who are overwhelmingly concentrated in the informal sector and atypical employment, which are currently beyond the scope of social security law.

With regards to access to social security benefits, it was established that migrant workers are more susceptible to social security losses because Tanzania is yet to become part of the bilateral and multilateral social security networks. Hence, there are no provisions for the portability of social security rights and benefits. It was argued that the current state of affairs is detrimental not only to migrant workers who come to Tanzania but also to the growing numbers of Tanzanians who are taking up employment overseas, as they may be compelled to remain in their countries of employment for fear of social security losses if they return home.

To overcome this challenge it was recommended that Tanzania should consider improving the social security position of migrant workers. It was further suggested that Tanzania should consider adopting a rights approach to social security, whereby social security will be accessible to all. Also, Tanzania should consider empowering the existing institutions to enable them to offer unilateral portability of social security where possible. Alternatively, Tanzania should consider entering into bilateral social security arrangements with countries which currently host considerable numbers of Tanzanians and those which serve as major

sources of the country's migrant population. Finally, it was argued that Tanzania should enthusiastically continue to take part in the ongoing arrangements for region-wide social security coordination in the EAC and SADC, because these have the potential to alleviate the social exclusion and marginalization of migrant workers.

8.3 General conclusion

This study has established that the Tanzanian regulatory framework and practice on labour migration is significantly inadequate. Furthermore, the existing legal and policy framework is distributed between several incoherent instruments. The supervisory institutions are similarly uncoordinated and oriented towards immigration control, rather than protecting the rights of migrant workers. At present, their major orientation is protecting the internal labour market against an invasion by 'unwanted' immigrants. None of the institutions addresses the rights of migrant workers with a view to their status as workers and as human beings. As a result, migrant workers are left with no specific protection except the general protection in the labour and employment laws, and in other general legislation, such as that addressing human rights and social security. The presumption among policy makers is possibly that migrant workers are able to enjoy the protection offered in these instruments in the same way as citizens. The study has maintained throughout that this is a misconception and a significant failure to acknowledge the fact that migrant workers and their family members constitute a special group, with specific protection needs distinct from those of nationals, and which cannot adequately be met by the general legal framework. When the Tanzanian labour migration framework is evaluated from the perspective of international labour migration law, it becomes apparent that the framework predates international and regional standards for the protection of migrant workers. In other words, it is yet to take cognizance of the changes taking place in the region and globally.

8.4 Recommendations

The findings and conclusions that emerge from this study require substantial intervention in the current system if Tanzania is to benefit fully from international labour migration. As a destination country, Tanzania needs to be fully aware of and acknowledge the fact that labour migration 'involves the cross-border movement of people who lay claim to certain rights'. Therefore, Tanzanian policies should be concerned not only with the 'number and type of noncitizens to be admitted, but also [with] the rights that noncitizens are to be granted after

admission.'[2] It cannot be overemphasized that the economic efficiency of labour migration is largely dependent on the extent to which migrants are able to realize their rights.

8.4.1 A liberal and rights-conscious labour migration framework

It is recommended that the stringent and control-oriented labour migration regime should be changed and replaced with a rights-conscious and liberal framework. The latter entails two inter-related actions: increasing the avenues for legal migration, and adopting a rights-based approach to labour migration. With regard to the first action, it was argued in chapter 5 that, by allowing the admission of highly skilled migrants alone, and by preferring stringent admission procedures, the laws inadvertently create opportunities for irregular migration and place irregular migrants on the periphery of the labour market, where they are exploited and subjected to violation and abuse. It was also submitted, with reference to intra-regional labour migration in chapter 3, that restrictive admission policies alone are unlikely to curtail irregular migration among medium- and low-skilled migrants if the social and economic factors responsible for these movements are not addressed. In keeping with this argument, chapter 5 maintained that the stringent admission policies currently pursued in Tanzania serve as an incentive to unscrupulous employers to engage irregular migrants.

To deal with this problem, it is recommended that the government should reconsider its admission policies, in order to expand the avenues for legal labour migration and to liberalize admission procedures. Whilst this approach may not in itself be a panacea for irregular migration, its role cannot be underestimated. This recommendation must not however be taken to suggest that Tanzania should be a border-free country. All that is suggested is that, while exercising its sovereign right to determine admission to the territory, the government should reconsider its immigration procedures to provide more opportunities for legal migration.

Second, it is recommended that the labour migration framework should be rights-conscious. This thesis has maintained that the protection of the rights of migrant workers is an engine for productivity. Thus, a decent working environment and the protection of human rights and labour rights are pre-conditions for fully realizing the benefits of international labour

[2] Ruhs, M and Chang, H 'The Ethics of Labor Immigration Policy' (2004) 58 *International Organization* 69–102 at 70.

migration. To achieve this, a rights-based approach is inevitable. The rights-based approach to labour migration is premised on the distinct nature of international migration. As Max Frisch once remarked in his legendary expression about the guest worker programmes, '*Man hat Arbeitskrafte gerufen und es kommen Menschen*' (translated as 'We called for labour and came human beings' or 'We called for workers but human beings arrived'),[3] meaning that labour migration 'in contrast to international trade and capital flows, involves the cross-border movement of people, who lay claim to certain rights *vis-à-vis* the host state and their fellow residents.'[4] A rights-based approach is therefore an important acknowledgment of the fact that migrants, by virtue of their essential humanity, should enjoy all human rights. If any distinction is made between migrants and nationals, it must be justified, in other words, it must be proportional and premised on a legitimate objective.[5]

Implementing a rights-based approach means that the labour migration regime should move away its focus on the number and types of migrant workers. The regime should incorporate in its approach the protection needs of migrant workers which, as maintained in this study, cannot be met by general legislation. Second, this approach means that the human rights provisions in the bill of rights as incorporated in the Constitution should be guaranteed to all migrant workers, as they are guaranteed to nationals, except for political rights, which are normally reserved for citizens. Obligations arising from the international human rights instruments which Tanzania has ratified, such as the ICESCR and the ICCPR, and those arising from the ILO instruments ratified so far should be implemented in a manner that ensures equality of treatment between nationals and non-nationals. Nevertheless, the special vulnerability of migrant workers must be taken into account to ensure that any approach is responsive to the special needs of migrant workers, particularly those whose status is irregular.

The fact that Tanzania has not ratified the ICMW and the ILO international instruments on migrant workers makes the latter approach rather inevitable, since Tanzania has ratified all

[3] Quoted in Soysal, L 'Labor to Culture: Writing Turkish Migration to Europe' (2003) 102(2) *South Atlantic Quarterly* 491–508 at 497. Also see Bauder, H *How Labour Migration Regulates Labour Markets* (Oxford University Press, Oxford, 2006) 103.
[4] Ruhs and Chang op cit.
[5] The Office of the United Nations High Commissioner for Human Rights (OUNHCHR) *Migration and Development: A Human Rights Approach* para 64, p 13, available at http://www2.ohchr.org/english/bodies/ cmw/docs/HLMigration/ MigrationDevelopmentHC'spaper.pdf (accessed on 4 May 2012).

the core UN human rights instruments and the major ILO instruments. The time has come for Tanzanian policy-makers to move away from the control-oriented approach to a more liberal approach, which views migrants as human beings endowed with rights and responsibilities. In other words, policy-makers should no longer be concerned only with the number and type of immigrants, but also with the rights of migrants who have already been admitted and who are contributing to the national economy. It cannot be overstated that the control-oriented and labour market protectionist approach exhibited in the Tanzanian labour migration regime is detrimental to migrant workers and to the economy.

8.4.2 Gender responsiveness

Chapter 2 noted the changing patterns of labour migration, and the fact that labour migration has become increasingly gendered. Chapter 4 noted that the Tanzanian labour migration framework and practices are unfortunately gender-blind. For instance, information about gender is not reflected in the statistics obtained from the Department of Immigration Services. To remedy this anomaly, it is recommended that gender-specific concerns are incorporated in labour migration policies and practices, to ensure that the specific needs of female migrant workers are addressed. This should include collecting and analyzing data about the sex of migrants.

8.4.3 Coherency and transparency

One of the most pressing challenges noted in this study is the lack of a coherent labour migration policy. The present regime comprises fragmented legislation and policy documents, which are not coordinated, vary significantly and are at times contradictory, depending on what they want to achieve. Ensuring the coherence of labour migration law and policy is therefore a pressing need. The Global Commission for International Migration noted in its final report that 'establishing a coherent approach to international migration is a first step towards migration governance.'[6] By coherence we mean that migration law and policies should not only be consistent, but should also be integrated into the over-all development strategy. Tanzania should therefore strive to align her labour migration regime with the broader strategies for the realization of human rights and with the social and economic development goals. This means that the labour migration policy and regulatory framework

[6] Global Commission for International Migration (GCIM) *Migration in an Interconnected World: New Directions for Action* Report of the Global Commission on International Migration (GCIM, 2005) 68.

should move away from being isolated guards of the internal labour market. Instead, they should be aligned with the policies regulating other aspects of the country's economy, such as those which relate to the regulation of international trade and capital flows, which, as indicated in this study, have affected the country's labour migration profile significantly. To avoid possible policy conflicts, it is important to ensure that the objectives of the labour migration policy are similar to those of the investment policy, which is not currently the case.

The labour migration framework must also be transparent, which means that the mission, vision and objectives of the labour migration regime should be clearly defined, with a view to addressing development needs. For example, the framework should clearly define the reasons for and the demand for foreign labour and the benefits of labour migration. Furthermore, it should identify the institutions responsible for labour migration and their specific roles and specify the enforcement measures such as those related to regular labour market assessment, admission procedures, the specific protection needs of migrant workers, and the procedure for enforcing migrant workers' rights. Transparency is important because it provides the public with a clear understanding of labour migration issues, including the demand for migrant workers and the economic benefits of labour migration. Furthermore, the labour migration regime should be a product of consultations with and consensus between all the major stakeholders.[7] If labour migration policies 'are not fair, transparent, openly debated and consensually grounded', as is currently the case in Tanzania, 'they are likely to generate suspicion and resentment amongst the citizens of destination countries, thereby impeding integration.'[8]

8.4.4 Social dialogue

Dialogue, consultation and cooperation between the government and other actors in the field are essential in designing and implementing a suitable labour migration policy and regulatory framework.[9] To borrow the words of Cholewinski and Taran, 'migration policy can only be credible, viable and suitable to the extent it takes into account the interests, concerns, and experiences of the most directly affected stakeholders.'[10] This means that there must be inter-ministerial consultation between ministries with migration competence and other relevant

[7] ILO *International Labour Migration: A Rights-Based Approach to Migration* (ILO, Geneva, 2010) 149.
[8] GCIM op cit 45.
[9] ILO op cit at 150 and 151.
[10] Cholewinski, R and Taran, P 'Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization' (2010) 28(4) *Refugee Survey Quarterly* 1–33 at 31.

ministries, such as the Ministry for Foreign Affairs. There must also be consultation with social partners, namely, employers and trade unions, which represent the interests of national workers and migrant workers.[11] While the state is responsible for developing policies and drafting regulations, consultations with these groups is essential because they are the first to be directly affected by such policies. Moreover, these groups are very knowledgeable, because of their experience of labour market needs, and are likely to have informed ideas about suitable policy approaches. Finally, because their interests sometimes conflict with those of the state, it is important to address these issues at the outset to ensure better compliance and harmonious relationships.[12]

The participation of the Trade Union Congress of Tanzania (TUCTA) and the Association of Tanzanian Employers (ATE) in the tripartite committee is an excellent way to engage social partners. It is recommended that this kind of consultation should also occur in the formulation of labour migration policies. Moreover, it is recommended that consultation should also be extended to civil society. Although the involvement of civil society in migration issues is currently confined to refugee issues, it is recommended that mainstream human rights organizations should be consulted in formulating labour migration policy because, as submitted in chapter 6, these organizations deal with broad human rights issues, which are also relevant to migrant workers.

8.4.5 Labour market information and statistics

Outlining the importance of data, the ILO notes that '[g]ood policy requires good data. Thus, policies should be based on the most up-to-date evidence and information about labour market needs, and migrant worker profiles, including their origin, citizenship, age and sex composition, education and skills, qualifications, labour force participation, sector of work, treatment and conditions of work, and extent of integration.'[13] Regrettably, in Tanzania, this is an area with critical limitations. This study noted two issues in this area: the paucity of data and the lack of research. Chapter 4 noted that there is an acute shortage of data. Migration statistics are collected by different institutions, which tend to use different variables, thus producing fragmented and inaccurate statistics. The data collected rarely includes the basic information required to profile labour migration, such as information about gender,

[11] Ibid.
[12] ILO op cit 151.
[13] Ibid 153.

occupation, skills, profession and sector of employment. Worse still, these statistics are not shared between or coordinated by the relevant institutions, and are never published.

It is recommended that urgent measures be taken to improve migration data. Such measures should aim to build the capacity of these institutions to enable them to collect migration statistics and to synchronize such data in line with internationally recognized data collection standards. Furthermore, it is recommended that this should be accompanied by regular labour market surveys, which are currently not conducted. There is ample evidence that migration data and surveys will enable the government to design appropriate migration policies and a regulatory framework based on evidence-based data and accurate statistics. They will also assist the government in determining an appropriate labour migration programme and admission procedures. Efficient data collection and regular labour market surveys may also facilitate flexibility of the labour migration admission policy, allowing it to respond timeously and efficiently to labour market developments, and to address the concerns of migrant workers.

8.4.6 Institutional capacity-building and coordination

A good labour migration regulatory framework must be accompanied by enforcement institutions with the requisite capacity. This study has noted two pressing challenges of the institutions responsible for labour migration. First, there are multiple players with overlapping mandates, yet they are uncoordinated and have different objectives. Second, they lack human and non-human resources. As a result, they are inefficient, while they also compete in their duties and at times blame each other for the inefficiency. It is recommended that the duties currently performed by these institutions should be harmonized. In addition, the number of players should be reduced, leaving only the core players, which are well equipped to deal with migration issues. Instead of having multiple institutions to administer the admission of migrant workers, this function should be entrusted only to the Department of Immigration Services and the Department of Employment and their internal structures, such as the tripartite committee.

Second, to enhance efficiency and accountability, it is recommended that the dual permit system, whereby work permits are issued separately from residence permits, should be adopted to replace the integrated permit system. This approach will allow the institutions above to deal efficiently with matters within their competence, without necessarily

encroaching on the duties performed by the other. The Ministry of Labour, through the Department of Employment and the Commissioner for Labour, should issue all work permits, including the exemption certificates which are currently issued by the Civil Service Department. This will give the Department of Employment and the Commissioner for Labour a full mandate and authority in respect of work permits, unlike the prevailing practice, whereby they are reduced to advisory bodies responsible for offering non-binding recommendations to the PCIS. To ensure co-ordination and coherence, it is recommended that the two procedures should be properly co-ordinated, so that the duration of the residence permit is the same as that of the work permit. Hopefully, this approach will enhance efficiency and accountability and also improve relationships between these institutions.

Furthermore, it is imperative to equip these institutions, because of the dynamic nature of labour migration and its challenges, which require not only fiscal capacities but also knowledge of the emerging issues and how to address them. The Department of Employment should be equipped to deal with labour migration in a holistic manner that ensures the protection of migrant workers. For example, labour inspectors should have the necessary skills to address the working conditions of migrant workers, particularly those who are in irregular and atypical employment. Labour inspectors should embrace their role as labour law enforcers and should prioritize their primary role of ensuring decent working conditions, rather than enforcing immigration law, which is currently the case.

8.4.7 Irregular migration

The increase in irregular migration discussed in chapter 4 requires precise measures to address the problem and to protect irregular migrants against the vulnerabilities and prejudices which accompany these movements and also against the evils of human trafficking and smuggling. As recommended above, one way of addressing this is to increase the opportunities for legal migration, and thus enable more people to migrate via legal channels. For those who are already in the labour market, it is recommended that, instead of treating irregular migration as a security, immigration control or compliance issue, irregular migration should be integrated into the broad Decent Work Agenda. This involves ensuring decent working conditions for all workers, including those in irregular and atypical forms of employment. Other possible measures include adopting a holistic approach to irregular migration by addressing its root causes and the protection needs of irregular migrants, and by holding all actors accountable, for example, imposing heavy sanctions on employers. Other

approaches might include increasing respect for human and labour rights in the workplace, strengthening the ability of labour institutions, such as labour inspectors, to deal with irregular migration, and holding employers responsible for providing decent working conditions.

8.4.8 Ratification and implementation of international and regional legal instruments

International norms are very important in ensuring that labour migration policies, and regulatory frameworks and practices comply with the rule of law. Tanzania is yet to ratify any of the three major international instruments on international labour migration. At regional level, although Tanzania has ratified the EAC Common Market Protocol, its implementation is yet to be effected. It is therefore strongly recommended that the government should prioritize the ratification and incorporation of the international labour migration instruments. These instruments are best placed to protect migrant workers because as Ruhs correctly observe:

> policy principles espoused in the ILO's Migrant Worker Conventions or the UN's International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (MWC) are based on an ethical framework of "rights based cosmopolitanism", which emphasizes the individual's rights rather than the individual's economic welfare, or the consequences for society, and accords a very high degree of "moral standing" to non-citizens.'[14]

Another justification for ratification is Tanzania's rapidly growing emigration profile. With the support of empirical data, it was noted in chapter 4 that, besides being a strategic destination for migrant workers, the effects of Structural Adjustment Programmes (SAPs) and globalization have led to Tanzania becoming a supplier of migrant workers to other countries in the region and beyond. It is undoubtedly in the interests of the government to ensure that the rights of these workers are respected and protected.

The recommended ratifications should be accompanied by the incorporation and implementation of these norms. As noted in chapter 2, Tanzania has a dualist legal system, and international instruments require domestication before they can be enforced in the courts. Ratification alone would be meaningless without incorporation of the norms into the national

[14] Ruhs, M 'Designing Viable and Ethical Labour Migration Policies' in IOM *World Migration 2005: Costs and Benefits of International Migration* (IOM, Geneva, 2005) 203–214 at 206&207.

legal system. Although, as indicated in chapter 2, the Tanzanian judiciary has thus far demonstrated a liberal approach towards the application of international instruments duly ratified by Tanzania, the domestication of these norms is essential to ensuring their effective implementation. The legendary remark by Judge Holmes that 'legal obligations that exist but cannot be enforced are seen as ghosts in the law but are elusive to the grasp'[15] cannot be overstated.

8.4.9 A case for further research

It is of considerable concern that labour migration, irrespective of its longevity and substantial economic benefits, has not attracted much academic interest. There is therefore little research-based information available to inform policy-makers. This study was an attempt to address this deficiency. Nonetheless, it does not claim to have exhaustively covered all the questions and issues. Labour migration is a broad subject, comprising wide-ranging issues and themes which cannot be covered in a single study. Further qualitative and quantitative studies need to be undertaken to substantiate the submissions made in this study. More importantly, there is an urgent need for quantitative studies on the actual demands of labour migrants, the impact of labour migration on the labour market, and the working conditions of migrants, to inform the policy-making process and the public at large. At present, there are plans to review the labour migration policy in Tanzania. Although these plans present an opportunity to overhaul the whole system and to install an improved labour migration framework, they are bound to fail unless they are informed by empirical evidence.

The ILO Multilateral Framework on Labour Migration, 2006 should also assist in these endeavours. The Framework provides non-binding guidelines to assist countries in formulating balanced and human rights-friendly labour regulatory frameworks. The ILO has also published two additional resources, namely, the *Handbook on Establishing Effective Labour Migration Policies*,[16] and *International Labour Migration: A Rights-Based Approach*.[17] Both resources aim to assist states in formulating labour migration policies that conform to global developments and which place the protection of migrant workers at the heart of national labour migration policies. However, whilst these resources are helpful,

[15] *The Western Maid* 257 US 419 (1922) at 433.
[16] OECD, IOM and ILO *Handbook on Establishing Effective Labour Migration Policies: Mediterranean Edition* (OECD, IOM and ILO, Geneva, 2007).
[17] ILO op cit.

Tanzania should avoid a ‘one size fits all approach’ by investing more in empirical research. Such research will assist in understanding the actual situations and issues which may be peculiar to Tanzania, and will therefore assist in formulating policies and regulatory frameworks which are relevant to local needs.

Bibliography

Books

Aleinikoff, TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003)

Alpers, E *Ivory and Slaves in East Central Africa* (University of California Press, Berkeley and Los Angeles, 1975)

Ankumah, EA *The African Commission on Human and People's Rights: Practice and Procedures* (Martinus Nijhoff Publishers, The Hague, 1996)

Award, I *The Global Economic Crisis and Migrant Workers: Impact and Response* 2 ed (ILO, Geneva, 2009)

Barya, J *Social Security and Social Protection in the East African Community* (Fountain Publishers, Kampala, 2011)

Bauder, H *How Labour Migration Regulates Labour Markets* (Oxford University Press, Oxford, 2006)

Becker, U and Olivier, M (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law, 2008)

Bohning, RW *Employing a Foreign Worker: A Manual for Policies and Procedures of Special Interest to Middle and Low Income Countries* (ILO, Geneva, 1996)

Bourn,CJ and Whitmore, J *Discrimination and Equal Pay* (Sweet and Maxwell, London, 1989)

Castles, S *Ethnicity and Globalization: From Migrant Workers to Transnational Citizen* (SAGE Publications, London, 2000)

Chirwa, VM *Fearless Fighter: An Autobiography* (Zed Books, London, 2007)

Cholewinski, R *Migrant Workers in International Human Rights Law: Their Protection in Countries of Employment* (Clarendon Press, Oxford, 1997)

Cholewinski, R et al (eds) *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press, The Hague, 2007)

Cholewinski, R *Irregular Migrants' Access to Minimum Social Rights* (Council of Europe, 2006)

De Guchteneire, P et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009)

Dupper, O et al (eds) *Essential Employment Discrimination Law* (Juta and Co, Cape Town, 2004)

Economic Commission for Africa (ECA) *Assessing Regional Integration in Africa II: Rationalizing Regional Economic Communities* (ECA, Addis Ababa, 2006)

Egero, B *Colonization and Migration: A Summary of Border Crossing Movements in Tanzania before 1967* (The Scandinavian Institute of African Studies, Uppsala, 1979)

Esim, S and Smith, M *Gender and Migration in Arab States: The Case of Domestic Workers* (ILO Regional Office for Arab States, Beirut, 2004)

Faist, T *The Volume and Dynamics of International Migration and Transnational Social Space* (Oxford University Press, Oxford, 2002)

Global Commission for International Migration (GCIM) *Migration in an Interconnected World: New Directions for Action* Report of the Global Commission on International Migration (GCIM, 2005)

Henckaerts, J *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers, The Hague, 1995)

Howard-Hassmann, RE *Human Rights in Commonwealth Africa* (Rowman and Littlefield, New Jersey, 1986)

Hunter, R *Indirect Discrimination in the Work Place* (The Federation Press, New South Wales, 1992)

Illife, J *The Modern History of Tanganyika* (Cambridge University Press, Cambridge, 1979)

ILO *In Search of Decent Work – Migrant Workers' rights: A Manual for Trade Unionists* (ILO, Geneva, 2008)

ILO *International Labour Migration: A Rights-Based Approach to Migration* (ILO, Geneva, 2010)

ILO *Migrant Workers' Rights: A Handbook* (ILO, Geneva, 2007)

ILO *Private Employment Agencies, Promotion of Decent Work and Improving the Functioning of Labour Markets in Private Services Sectors* (ILO, Geneva, 2011)

ILO *Social and Labour Issues Concerning Migrants in the Construction Industry* (ILO, Geneva, 1995)

International Labour Migration (IOM) *World Migration Report 2003: Managing Migration Challenges and Responses for on the Move* (IOM, Geneva, 2003)

IOM *World Migration Report 2005: Costs and Benefits of International Migration* IOM, Geneva, 2005)

IOM *World Migration Report 2008: Managing Migration in an Interconnected Word* (IOM, Geneva, 2008)

IOM *World Migration Report 2010 The Future of Migration: Building Capacities for Change* (IOM, Geneva, 2010)

IOM *World Migration Report 2011 Communicating Effectively about Migration*(IOM, Geneva, 2011)

Kelsen, H *Principles of International Law* (The Law Book Exchange, New Jersey, 2003)

Klaaren, J and Rutinwa, B *Towards the Harmonization of Immigration and Refugee Law in SADC* MIDSA Report No. 1 (Institute of Democracy in South Africa, Cape Town, 2004)

Kok, P et al (eds) *Migration in South and Southern Africa* (HSRC Press, Cape Town, 2006)

Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006)

Manby, B *Citizenship Law in Africa: A Comparative Study* (Open Society Foundation, New York, 2010)

McConville, M & Wing, HC (eds) *Research Methods for Law* (Edinburgh University Press, Edinburgh, 2007)

McDonald, DA *On Borders: Perspectives on International Migration in Southern Africa* (Sothern African Migration Project, Ontario, 2000)

Mugwanya, GW *Human Rights in Africa: Enhancing Human Rights through the African Regional Human Rights System* (Transnational Publishers, New York, 2003)

Murray, R *The African Commission on Human and Peoples' Rights and International Law* (Hart Publishing, Oregon, 2000)

Mwakikagile, C *Tanzania under Mwalimu Nyerere: Reflections on an African Statesman* 2 ed (New Africa Press, Dar es Salaam, 2006)

Organisation for Security and Cooperation in Europe (OSCE), IOM and ILO *Handbook on Establishing Effective Labour Migration Policies: Mediterranean Edition* (OECD, IOM and ILO, Geneva, 2007)

Ouguergouz, F *The African Charter on Human and Peoples' Rights: A Comprehensive Agenda for Human Rights and Sustainable Democracy in Africa* (Martinus Nijhoff Publishers, The Hague, 2003)

Papademetriou, DG and Martin, P (eds) *Unsettled Relationship: Labour, Migration and Economic Development* (Greenwood Press, West Point CT, 1999)

Radha, D et al *Leveraging Migration for Africa*: *Remittances, Skills, and Investments* (World Bank, Washington DC, 2011)

Ramirez-Machado, JM *Domestic Work, Conditions of Work and Employment: A Legal Perspective* (ILO, Geneva, 2003)

Rutinwa, B et al (eds) *Employment and Labour Relations Law in Tanzania: Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011)

Sabates-Wheeler, R and Feldman, R (eds) *Migration and Social Protection: Claiming Social Rights Beyond Borders* (Palgrave Macmillan, Hampshire, 2011)

Shivji, IG *State and the Working Class in Tanzania* (James Currey, London, 1986)

Sunseri, T *VILIMANI: Labour Migration and Rural Change in Early Colonial Tanzania* (Heinemann, Portsmouth, 2002)

Tiburcio, C *The Human Rights of Aliens under International and Comparative Law* (Kluwer Law International, The Hague, 2001)

Umozurike, UO *African Charter of Human and Peoples' Rights* (Kluwer Law International, The Hague, 1997)

Weissbrodt, D *The Human Rights of Non-Citizens* (Oxford University Press, Oxford, 2008)

Whitman, J (ed) *Migrants, Citizens and the State in Southern Africa* (Macmillan Press, London, 2000)

Journal articles and chapters in books

Ackson, T 'Employment Standards / Minimum Conditions of Employment' in Rutinwa, B et al (eds) *Employment and Labour Relations Law in Tanzania: Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011) 58–93

Ackson, T 'Trade Unions, Employers' Associations and Federations' in Rutinwa, B et al *The New Employment and Labour Relations Law in Tanzania: An Analysis of the Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and University of Cape Town, 2011) 191–225

Adepoju, A 'Illegals and Expulsion in Africa: The Nigerian Experience' (1984) 18(3) *International Migration Review* 426–436

Adepoju, A 'Issues and Trends in International Migration in Sub-Saharan Africa' (2000) 52(165) *International Social Science Journal* 383–394

Adepoju, A 'Leading Issues in International Migration in Sub-Saharan Africa' in Cross, C *Views on Migration in Sub-Saharan Africa: Proceedings of an African Migration Alliance* (HSRC Press, Cape Town, 2006) 25–47

Adepoju, A 'Regional Organisations and Intra-Regional Migration in Sub-Saharan Africa: Challenges and Prospects' (2001) 39(6) *International Migration* 43–59

Afolayani, AA 'Immigration and Expulsion of ECOWAS Aliens in Nigeria' (1988) 22(1) *International Migration Review* 4–27

Akokpari, JA 'The State, Refugees and Migration in Sub-Saharan Africa' (1998) 36(2) *International Migration* 211–234

Albertyn, CJ 'Freedom of Association and the Morality of the Closed Shop' (1989) 10 *Industrial Law Journal* 981–1005

Aleinikoff, TA 'International Legal Norms and Migration: A Report' in Aleinikoff, TA and Chetail, V (eds) *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 1–30

Al-Najjar, S 'Women Migrant Domestic Workers in Bahrain' in Esim, S and Smith, M *Gender and Migration in the Arab States: The Case of Migrant Workers* (ILO, Geneva, 2004) 24–40

Alpers, EA 'Trade, State and the Society among the Yao in the Nineteenth Century' (1969) 10(3) *Journal of African History* 405–420

Alpers, EA 'To Seek a Better Life: The Implication of Migration from Mozambique to Tanganyika for Class Formation and Political Behavior' (1984) 18(2) *Canadian Journal of African Studies* 367–388

Alston, P 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) *European Journal of International Law* 467–480

Avato, J et al 'Social Security Regimes, Global Estimates, and Good Practices: The Status of Social Protection for International Migrants' (2010) 38(4) *World Development* 455–466

Averia Jr, C 'Private Recruitment Agencies in the Era of Globalisation: Challenges and Responses: The Case of the Philippines' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 47–52.

Baldwin-Edwards, M 'Between a Rock and a Hard Place: North Africa as a Region of Emigration, Immigration and Transit Migration' (2006) 2(108) *Review of African Political Economy* 311–324

Baruah, N 'The Regulation of Recruitment Agencies: Experience and Good Practices in Countries of Origin in Asia' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 37–25

Berg, L 'At the Border and Between the Cracks: The Precarious Position of Migrant Workers under Human Rights Law' (2007) 1 *Melbourne Journal of International Law* 1–34

Bienen, H 'National Security in Tanganyika after the Mutiny' (1965) 21 *Transition* 39–46

Blainpain, R 'Comparativism in Labour Law and Industrial Relations' in Blainpain, R *Comparative Labour Law and Industrial Relations in Industrialized Market Economy* 10 ed (Kluwer Law International, The Hague, 2010) 3–24

Bloch, A 'Emigration from Zimbabwe: Migrant Perspectives' (2006) 40(1) *Social Policy and Administration* 67–87

Bohning, R 'The ILO and the New UN Convention on Migrant Workers: The Past and Future' (1991) 25(4) *International Migration Review* 698–709

Bohning, WR 'The ILO in Contemporary International Economic Migration' (1976) 10(2) *Migration Review* 147–156

Borchard, E 'The "Minimum Standard" of the Treatment of Aliens' (1940) 38(4) *Michigan Law Review* 445-461

Bosch, C 'Can Unauthorized Workers be regarded as Employees for the Purpose of the Labour Relations Act?' (2006) 27 *ILJ* 1342–1368

Bosniak, LS 'Human Rights, State Sovereignty and the Protection of Undocumented Migrants under the International Migrant Workers Convention' (1991) 25(4) *International Migration Review* 737–770

Boyd, M 'Family and Personal Networks in International Migration: Recent Developments and New Agendas' (1989) 23(3) *International Migration Review* 638–670

Brownlie, I 'The Place of the Individual in International Law' (1964) 50(3) *Virginia Law Review* 435–462

Budeli, M 'Understanding the Right to Freedom of Association at the Work Place: Components, and Scope' 2010 *Obiter*16–33

Caraway, TL 'Freedom of Association: Battering Ram or Trojan Horse?' (2006) 13(2) *Review of International Political Economy* 210–232

Castles, S 'International Migration at the Beginning of Twenty-First Century: Global Trends and Issues' (2000) 52 (165) *International Social Science Journal* 269–281

Chimni, BS 'Development and Migration' in Aleinikoff, TA and Chetail, V *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 255–270

Cholewinski, R and Taran, P 'Migration, Governance and Human Rights: Contemporary Dilemmas in the Era of Globalization' (2010) 28(4) *Refugee Survey Quarterly* 1–33

Clapham, A 'The Role of the Individual in International Law' (2010) 21(1) *European Journal of International Law* 25–30

Creighton, B 'Freedom of Association' in Blanpain, R (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 10 ed (Kluwer Law International, The Hague, 2010) 285–338

Crona, B and Rosendo, S 'Outside the Law? Analysing Policy Gaps in Addressing Fishers in East Africa' (2011) 35 *Marine Policy* 393–388

Crush, J 'The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa' (2000) 38(6) *International Migration* 103–133

Dankwa, EVO 'Working Paper on Article 2(3) of the International Covenant on Economic, Social and Cultural Rights' (1987) 9(2) *Human Rights Quarterly* 230–249

Dau, RK 'Trends in Social Security in East Africa: Tanzania, Kenya and Uganda' (2003) 56(3–4) *International Social Security Review* 25–27

De Guchteneire, P and Pécoud, A 'Introduction: The UN Convention on Migrant Workers' Rights' in De Guchteneire, P et al *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 1–48

D'Sa, RM 'Human and Peoples' Rights: Distinctive Features of the African Charter' (1985) 29(1) *Journal of African Law* 72–81

Dupper, O 'Migrant Workers and the Right to Social Security: An International Perspective' (2007) 18 *Stellenbosch Law Review* 217–252

Dupper, O 'Migrant Workers and the Right to Social Security: An International Perspective' in Becker, U and Olivier, M (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law, 2008) 13–52

Fenwick, C and Kalula, E 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193–226

Fitzgerald, I and Hardy, J ' "Thinking Outside the Box"? Trade Union Organizing Strategies and Polish Migrant Workers in the United Kingdom' (2010) 48(1) *British Journal of Industrial Relations* 131–150

Fitzpatrick, J 'The Human Rights of Migrants' in Aleinikoff, TA and Chetail, V *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 167–184

Freman, AV 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law' (1946) 46 *American Journal of International Law* 121–147

Frick, BJ and Flechas, ACC 'Social Security for Migrant Workers: The EU, ILO and the Treaty Based Regime' (2007) 9 *Revista Colombiana de Derecho Internacional* 45–86

Gaja, G 'The Position of Individuals in International Law: An ILC Perspective' (2010) 21(1) *European Journal of International Law* 11–14

Gernigon, B et al 'ILO Principles Concerning the Right to Strike' (1998) 137(4) *International Labour Review* 441–481

Gilbert, E 'Coastal East Africa and the Western Indian Ocean Long Distance Trade, Empire, Migration and Nation Unity 1750-1970' (2002) 30(1) *The History Teacher* 1–34

Godfrey, M et al 'Migrant Domestic Workers in Kuwait' in *Gender and Migration in Arab States: The Case of Domestic Workers* (ILO Regional Office for Arab States, Beirut, 2004) 42–63

Godwin-Gill, GS 'International Law and Human Rights: Trends Concerning International Migrants and Refugees' (1986) 23(3) *International Migration Review* 526–554

Goss, J and Lindquist, B 'Conceptualizing International Labour Migration: A Structuration Perspective' (1995) 29(2) *International Migration Review* 317–335

Gould, WTS 'International Migration in Tropical Africa: A Bibliographical Review' (1974) 8(3) *International Migration Review* 347–365

Government of Republic of South Africa 'Labour Migration in South Africa: Towards a Fairer Deal for Migrants in the South African Economy' *Labour Market Survey* (2007) 27–29

Hainsfurther, JS 'A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers' (2009) 24(5) *American University International Law Review* 843–895

Hansenau, M 'ILO Standards on Migrant Workers: The Fundamentals of the UN Convention and Their Genesis' (1991) 25(4) *International Migration Review* 687–697

Hune, S 'Migrant Women in the Context of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families' (1991) 25(4) *International Migration Review* 800–817

Ilahi, N and Jafarey, S 'Guestworkers, Migration, Remittances and the Extended Family: Evidence from Pakistan' (1999) 58 *Journal of Development Economics* 485–512

Iliffe, J 'Wage Labour and Urbanization' in Kaniki, MHY (ed) *Tanzania Under Colonial Rule* (Longman Group, London, 1980) 276–306

Ivan, L et al 'Migration Networks and Immigrant Entrepreneurship' (April 1990) vol V *California Immigrants in World Perspective: The Conference Papers*

Johnson, D 'Who Needs Immigrant Farm Workers? A South African Case Study' (2007) 7(4) *Journal of African Agrarian Change* 494–525

Jureidini, R 'Women Migrant Domestic Workers in Lebanon' in Esim, S and Smith, M *Gender And Migration in Arab States: The Case of Domestic Workers* (ILO Regional Office for Arab States, Beirut, 2004) 63–82

See Kalitanyi V and Visser, K 'African Immigrants in South Africa: Job Takers or Job Creators?' (2010) 13(4) *South African Journal of Economic and Management Sciences* 376–390

Kamala, P and Kalula ER 'Labour Institutions' in Rutinwa, B et al (eds) *The New Employment and Labour Relations Law in Tanzania: An Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011) 254-282

Kamanga, K 'International Human Rights Law as Reflected in Tanzania's Treaty and Court Practice' in Binchy, W and Finnegan, C *Human Rights, Constitutionalism and the Judiciary: Tanzanian and Irish Perspectives* (Clarus Press, Dublin, 2006) 53–70

Kamanga, K 'The (Tanzanian) Refugees Act of 1998: Some Legal and Policy Implications' (2005) 18(1) *Journal of Refugee Studies* 100–116

Kofman, E 'The Invisibility of Skilled Female Migrants and Gender Relations in Studies of Skilled Migration in Europe' (2006) 6 *International Journal of Population Geography* 45–59

Krings, T 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) 15(1) *European Journal of Industrial Relations* 49–69

Landman, AA 'Statutory Inroads into a Trade Union's Right of Disassociation' (1997) 18 *Industrial Law Journal* 13–25

Le Roux, R 'The Meaning of 'Worker' and the Road towards Diversification: Reflecting on *Discovery*, *SITA* and *"Kylie"*' (2009) 30 *ILJ* 49–65

Lee, E 'A Theory of Migration' (1966) 3(1) *Demography* 47–57

Lee, E 'Trade Union Rights: An Economic Perspective' (1998) 137(3) *International Labour Review* 313–319

Lonnroth, J 'The International Convention on the Rights of Migrant Workers and All Members of their Families in the Context of International Migration Policies: An Analysis of Ten Years of Negotiation' (1991) 25(4) *International Migration Review* 710–736

Louer, L 'The Political Impact of Labour in Bahrain' (2008) 20(1) *City and Society* 32–53

Lucas, REB 'Emigration to South Africa's Mines' (1987) 77(3) *American Economic Review* 313–330

MacDonald, E and Cholewinski, R 'The ICRMW and the European Union' in De Guchteneire, P et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009) 360–392

Madhuku, L 'The Right to Strike in Southern Africa' (1997) 137(4) *International Labour Review* 509–530

Madima, T 'Freedom of Association and the Concept of Compulsory Trade Union Membership' 1994 *TSAR* 545–555

Mahroum, S 'Highly Skilled Globetrotters: Mapping the International Migration of Human Capital' (2000) 30(2) *R&D Management* 23–31

Malan, S and Van Rensburg, LJ 'Social Security as a Human Right and the Exclusion of Marginalized Groups: An International Perspective' in Olivier, MP et al *The Extension of Social Security Protection in South Africa: A Legal Inquiry* (Siber Ink CC, Cape Town, 2001) 74–114

Malherbe, K 'The Co-ordination of Social Security Rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European Experience' (2004) 8(1) *Law, Democracy and Development* 59–84

Martin, DA 'The Authority and Responsibility of States' in Aleinikoff, TA and Chetail, V *Migration and International Legal Norms* (TMC Asser Press, The Hague, 2003) 31–44.

Martin, P 'Labour Migration Theory and Reality' in Papademetriou, DG and Martin, P (eds) *Unsettled Relationship: Labour, Migration and Economic Development* (Greenwood Press, West Point CT, 1999) 27–56

Matlosa, K 'Human Movements, Common Regional Citizenship and Identity in Southern Africa: Prospects for Deeper Integration between Lesotho and South Africa' (2006) 19(3) *Policy: Issues and Actors*

Mattoo, A et al 'Brain Waste? Educated Immigrants in the US Labor Market' (2008) 87 *Journal of Development Economics* 255–269

Mazrui, AA 'Casualties of an Underdeveloped Class Structure: The Expulsion of Luo Workers and Asian Bourgeoisie from Uganda' in Shack, WA (ed) *Strangers in African Societies* (University of California Press, California, 1979) 261–278

McDonald, DA et al 'Guess Who's Coming to Dinner: Migration from Lesotho, Mozambique and Zimbabwe to South Africa' (2000) 34(3) *International Migration Review* 813–841

MacDonald, E and Cholewinski, R 'The ICRMW and the European Union' in De Guchteneire P, et al, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009).

McDougal, MS 'Impact of International Law upon National Law: A Policy-Oriented Perspective' (1954) 4 *South Dakota Law Review* 25–92

McDougal, MS et al 'The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights' (1976) 70(3) *American Journal of International Law* 432–469

Mchomvu, AST et al 'Social Security Systems in Tanzania' (2002) 17(2) *Journal of Social Development in Africa* 11–27

Mei, L 'Chinese Migrant Workers in Singapore: An Analysis Based on Interviews' (2010) 1(1) *International Journal of China Studies* 194–215

Meron, T 'On a Hierarchy of International Human Rights' (1986) 8(1) *American Journal of International Law* 1–23

Midlerson, RA 'Human Rights and the Individual as Subject of International Law: A Soviet View' (1990) 1 *European Journal of International Law* 33–43

Millard, D 'Portability of Social Security Benefits: The Position of Non-Citizens in South Africa and the Southern African Development Community' in Becker, U and Olivier, M (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law, 2008) 143–162

Moshi, HPB 'Migration in Tanzania: Patterns, Characteristics and Impact' (2010) 26(1) *Eastern Africa Social Science Research Review* 91–109

Mpedi, LG 'Introduction' in Becker, U and Olivier, M (eds) *Access to Social Security for Non-Citizens and Informal Sector Workers: An International, South African and German Perspective* (Max Planck Institute for Foreign and International Social Law and Centre for International and Comparative Labour and Social Security Law, 2008) 1–12

Mtaki, C 'Termination of Employment' in Rutinwa, B et al (eds) *The New Employment and Labour Relations Law in Tanzania: An Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011) 94–150

Murungu, BC 'The Place of International Law in Human Rights Litigation in Tanzania' in Killander, M (ed) *International Law and Domestic Human Rights Litigation in Africa* (Pretoria University Law Press, Pretoria, 2010) 57–69

Mutua, M 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21(1) *Human Rights Quarterly* 342–363

Mutua, M 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties' (1995) 35 *Virginia Journal of International Law* 339–380

Nafziger, JAR 'The Migrant Workers' Convention: Its Place in Human Rights Law' (1991) 25(4) *International Migration Review* 771–779

Norton, D 'In Transit: The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence (2009) 30 *ILJ* 66–82

Nye Jr, JS 'East African Economic Integration' (1963) 1(4) *Journal of Modern African Studies* 475–502

Olaniyan, K 'Civil and Political Rights in the African Charter: Articles 8–14' in Evance, M and Murray, R (eds) *The African Charter of Human and Peoples' Rights: The System in Practice 1986–2006* (Cambridge University Press, Cambridge, 2008) 213–243

Olivier, MP 'Critical Issues in South African Social Security: The Need for Creating a Social Security Paradigm for the Excluded and the Marginalized' (1999) 20 *Industrial Law Journal* 2199–2212

Olivier, M 'Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Agreements within a Multilateral Framework (Part One)' 2011 *SADC Law Journal* 122–148

Olivier, M 'Informality, Employment Contracts, and Social Insurance Coverage: Rights-Based Perspectives in a Developing World Context' (2011) 27(4) *International Journal of Comparative Labour Law and Industrial Relations* 419–433

Olivier, MP and Kalula, ER 'Regional Social Security' in Olivier, MP et al (eds) *Social Security: A Legal Analysis* (Durban: LexisNexis Butterworths, 2003) 655–678

Olivier, MP and Potgieter, O 'The Right to Associate Freely and the Closed Shop' 1994 *Journal of South African Law* 289–305

Onwuka, RI 'The ECOWAS Protocol on the Free Movement of Persons: A Threat to Nigerian Security?' (1982) 81(323) *African Affairs* 193–206

Oucho, J 'Cross-Border Migration and Regional Initiatives in Managing Migration in Southern Africa' in Kok, P et al (ed) *Migration in South and Southern Africa: Dynamics and Determinants* (HSRC Press, Cape Town, 2006) 47–70

Oucho, JO and Crush, J 'Contra Free Movement: South Africa and the SADC Migration Protocols' (2001) 48(3) *Africa Today* 139–158

Peixoto, J 'Migration and Policies in the European Union: Highly Skilled Mobility, Free Movement of Labour and Recognition of Diplomas' (2001) 39(1) *International Migration* 33–61

Pessar, PR 'Transnational Migration: Bringing Gender In' (2003) 37(3) *International Migration Review* 812–846

Peter, CM 'Rights and Duties of Refugees under Municipal Law: Examining a Proposed New Legislation' (1997) 41 *Journal of African Law* 81–99

Piper, N 'Obstacles to, and Opportunities for, Ratification of the ICRMW in Asia' in De Guchteneire, P et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009) 171–192

Pong, NC 'Management of Foreign Workers in Singapore: Regulation of Employment Agents' in Kuptsch, C (ed) *Merchants of Labour* (ILO, Geneva, 2006) 13–25

Poros, MV 'The Role of Migrant Networks in Linking Local Labour Markets: The Case of Asian Indian migration to New York and London' (2001) 1(3) *Global Networks* 243–259

Rockel, SJ 'A Nation of Porters: The Nyamwezi and the Labour Market in Nineteenth-Century Tanzania' (2000) 41(2) *Journal of African History* 173–195

Rubin, N 'International Labour Law and the Law of the New South Africa' 1998 *South African Law Journal* 685–709

Ruhs, M 'Economic Research and Labour Immigration Policy' (2008) 24(3) *Oxford Review of Economic Policy* 403–426

Ruhs, M 'The Potential of Temporary Migration Programmes in Future International Migration Policy' (2006) 145 (1–2) *International Labour Review* 7–36

Ruhs, M 'Designing Viable World Migration Policies' in IOM *World Migration Report 2005: Costs and Benefits of International Migration* IOM, Geneva, 2005) 203–214

Ruhs, M and Chang, H-J 'The Ethics of Labor Immigration Policy' (2004) 58 *International Organization* 69–102

Ruhs, M and Martin, P 'Numbers vs Rights: Trade-Offs and Guest Worker Programs' (2008) 42(1) *International Migration Review* 249–265

Rutinwa, B 'Dispute Resolution' in Rutinwa, B et al (eds) *The New Employment and Labour Relations Law in Tanzania in Tanzania: An Analysis of Labour Legislation in Tanzania* (University of Dar es Salaam School of Law and Institute of Development and Labour Law, University of Cape Town, 2011) 151-190

Rutinwa, B 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (2002) 21(1&2) *Refugee Survey Quarterly* 12–41

Rutinwa, B 'The Tanzanian Government's Response to the Rwandan Emergency' (1999) 9(3) *Journal of Refugee Studies* 291–302

Sabates-Wheeler et al 'Social Security for Migrants: A Global Overview of Portability Arrangements' in Sabates-Wheeler, R and Feldman, R (eds) *Migration and Social Protection: Claiming Social Rights Beyond Borders* (Palgrave Macmillan, Hampshire, 2011) 99–116

Sabates-Wheeler, R and Koettl, J 'Social Protection for Migrants: The Challenges of Delivery in the Context of Changing Migration Flows' (2010) 63(3–4) *International Social Security Review* 115–144

Sabea, H 'The Limits of Law in Mandated Territories, Becoming Manamba and the Struggle of Sisal Plantation Workers in Tanganyika' (2009) 68(1) *African Studies* 131–165

Sakslin, M 'The Concept of Residence and Social Security: Reflections on Finnish, Swedish and Community Legislation' (2000) 2 *European Journal of Migration and Law* 157–183

Satterthwaite, MR 'Crossing Borders, Claiming Rights: Using Human Rights Law to Empower Women Migrant Workers' (2005) 8 *Yale Human Rights and Development Law Journal* 1–60

Schindlmayr, T 'Sovereignty, Legal Regimes and International Migration' (2004) 41(2) *International Migration* 109–123

Schmidt, V 'Temporary Migrant Workers: Organizing and Protection Strategies by Trade Unions' in Kuptsch, C *Merchants of Labour* (ILO, Geneva, 2006) 191–206

Sherrif, AMH 'Tanzania Societies at the Time of Partition' in Kaniki, MHY *Tanzania under Colonial Rule* (Longman Group, London, 1979) 11–50

Sivakumaran, S 'The Rights of Migrant Workers One Year On: Transformation for Consolidation?' (2004) 36 *Georgetown Journal of International Law* 113–154

Slinckx, I 'Migrants' Rights in UN Human Rights Conventions' in De Guchteneire, P et al (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, New York, 2009) 122–149

Soysal, L 'Labor to Culture: Writing Turkish Migration to Europe' (2003) 102(2) *South Atlantic Quarterly* 491–508

Starke, JG 'Monism and Dualism in the Theory of International Law' (1936) 66 *British Yearbook of International Law* 66–81

Summers, CW 'Freedom of Association and Compulsory Union Membership in Sweden and the United States' (1964) *Pennsylvanian Law Review* 647–696

Sunseri, T 'Labour Migration and the Hegemony of South African Historiography' (1996) 95 *African Affairs* 581–598

Swepston, L 'Freedom of Association: Development through the ILO Supervision' (1998) 137 (2) *International Labour Review* 169–194

Taran, P 'Migration and Labour Solidarity' in ILO *Migrant Workers' Labour Education* 2002/4 No 129 (ILO, Geneva, 2004) 26–34

Temu AE and Due, JM 'The Business Environment in Tanzania after Socialism: Challenges of Reforming Banks, Parastatals, Taxation and the Civil Service' (2000) 38(4) *Journal of Modern African Studies* 683–712

Touzenis, K and Cholewinski, R 'The Human Rights of Migrant Workers: Editorial Introduction' (2009) 11(1) *International Journal on Multicultural Societies* 1–18

Udombana, NS 'An African Human Rights Court and an African Union Court: A Needful Duality or a Needless Duplication?' (2002) 28(3) *Brook Journal of International Law* 812–870

Valticos, N 'Comparative Law and the International Labour Organisation' 1977 2(4)*Comparative Labour Law* 273–288

Vandova, V 'Protection of Non-Citizens against Removal under International Human Rights Law' in Edwards, A and Ferstman, C (eds) *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, Cambridge, 2010) 495–531

Vasak, K 'Human Rights: A Thirty-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights' *UNESCO Courier* 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977).

Von Koppenfels, AK 'Informal but Effective: Regional Consultative Process as a Tool in Managing Migration' (2001) 39(6) *International Migration* 61–84

Von Potobsky, G 'Freedom of Association: The Impact of Convention 87 and the ILO Action' (1998) 137(2) *International Labour Review* 195–221

Vonk, G 'Migration, Social Security and the Law: Observation of the Impact of Migration Policies upon the Position of Migrants in Social Security Law in Europe' in Bergman, J et al (eds) *Social Security in Transition* (Kluwer Law International, The Hague, 2002) 77–92

Wedel, J 'Social Security and Economic Integration: Freedom of Movement and the Social Protection of Migrants' 1970 *International Labour Review* 455–474

Weissbrodt, D 'The Protection of Non-Citizens in International Human Rights Law' in Cholewinski, R et al (eds) *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press, The Hague, 2007) 221–236

Wickramasekara, P 'Globalisation, International Labour Migration and the Rights of Migrant Workers' (2008) 29(7) *Third World Quarterly* 1247–1264

Williams, V 'In Pursuit of Regional Citizenship and Identity: The Free Movement of Persons in the Southern African Development Community' (2006) 19(2) *Policy: Issues and Actors*

Wisskirchen, A 'The Standard Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience' (2005) 115 *International Labour Review* 253–289

Reports, theses, monographs and papers

Abella, M *Policies and Best Practices for Management of Temporary Migration* Paper presented at the International Symposium on International Migration and Development, Turin, Italy (28–30 June 2006)

Ackson, T *Social Security Law and Policy Reform in Tanzania with Reflections on the South African Experience* Unpublished PhD Thesis, University of Cape Town (2007)

Adedokun, *OA The Rights of Migrant Workers and Members of their Families: Nigeria* (UNESCO, 2003) at http://unesdoc.unesco.org/images/0013/001395/139534e.pdf (accessed on 12 June 2010)

Adepoju, A *The Future of Migration Policies in Africa* Background Papers for the World Migration Report, International Organization for Migration, Geneva (2010)

Adepoju, A *The Challenge of Labour Migration Flows between West Africa and the Maghreb* International Migration Papers No 84E (ILO, Geneva, 2006) available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp84.pdf (accessed on 24 May 2012)

Adisa, J *The African Diaspora Initiative* Paper presented to the Annual Diaspora Consultations with Formations and Communities in North America, New York (1–22 October 2010)

Agyei, J and Clottey, E *Operationalizing ECOWAS Protocol on Free Movement of People among the Member States: Some Convergence, Divergence and Prospects for Sub Regional Integration*, available at www.imi.ox.ac.uk/pdfs/CLOTTEY%20and%20AGYEI.pdf (accessed on 24 May 2012)

Asylum Access Tanzania 'No Place Called Home: Report on Urban Refugees Living in Dar es Salaam, Tanzania' (Asylum Access Tanzania, Dar es Salaam, 2011) available at http://asylumaccess.org/AsylumAccess/wp-content/uploads/2011/11/No-Place-Called-Home.pdf (accessed on 24 May 2012)

Atsenuwa, A and Adepoju, A *Rights of African Migrants and Deportees* Network of Migration Research on Africa Report (2010) available at http://www.jsf-jwb-migrants.org/documents%20-%20all/phaseI_studies/jsfjwb1-Nigeria-eng-1210.pdf (accessed on 24 May 2012)

Avato, J et al *Definitions, Good Practices, and Global Estimates on the Status of Social Protection for International Migrants* Social Protection Discussion Paper No 0909 (World Bank, 2009) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0909.pdf (accessed on 23 May 2012)

Black, R et al *Migration and Pro-Poor Policy in East Africa* Working Paper Series No C7, (Sussex Centre for Migration Research, 2007) available at

www.migrationdrc.org/publications/working_papers/WP-C7.pdf (accessed on 24 May 2012)

Brahim, J *The Phenomenon of Mixed Migration into and through Tanzania* Paper presented at the 11th Session of the East African School on Refugees and Humanitarian Affairs (EASRHA), University of Dar es Salaam (28 September to 9 October 2009)

Budeli, M *Freedom of Association and Trade Unionism in South Africa: From Democracy to the Constitutional Order* Unpublished PhD Thesis, University of Cape Town (2007)

Cerna, L *Policies and Practices of Highly Skilled Migration in Times of the Economic Crisis* International Migration Papers Series No 99 (ILO, 2010) available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp99.pdf (accessed on 24 May 2012)

Cholewinski, R *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (Council of Europe, Strasbourg, 2005) available at www.mighealth.net/eu/images/e/ec/Chol.pdf (accessed on 24 May 2012)

Clarke, M et al *Labour Standards and Regional Integration in Southern Africa: Prospects for Harmonisation* Development and Labour Monograph 2/99 (Institute of Development and Labour Law, Cape Town, 1999)

Compa, LA *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* Paper No 330, Articles and Chapters, Cornell University (Human Rights Watch, New York, Washington, London and Brussels, 2000)

Crush, J and Williams, V *Making up the Numbers: Measuring Undocumented Migration in Southern Africa* SAMP Migration Policy Brief (2002) available at http://www.idasa.org/media/uploads/outputs/files/Measuring%20Illegal%20immigration%20to%20SA.pdf (accessed on 24 May 2004)

Crush, J *Covert Operations: Clandestine Migration Temporary Work and Immigration Policy in South Africa* SAMP Migration Policy Series, Issue No 1 (1997)

Crush, J and Williams, V *International Migration and Development: Dynamics and Challenges in South and Southern Africa* (United Nations Population Division, New York, 2005) available at http://www.un.org/esa/population/meetings/ittmigdev2005/P05_Crush&Williams.pdf (accessed on 24 May 2012)

Crush, J and Williams, V *Regionalizing International Migration: Lessons for SADC* SAMP Migration Policy Brief No 11 (2003) available at http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief11.pdf (accessed on 24 May 2012)

Crush, J and Williams, V *Policing Migration: Immigration Enforcement and Human Rights in South Africa* SAMP Migration Policy Brief No 14 (2004) available at

http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief14.pdf (accessed on 24 May 2012)

Crush, J and Williams, V *Labour Migration Trends and Policies in Southern Africa* SAMP Policy Brief No 23 (2010) available at http://www.queensu.ca/samp/sampresources/samppublications/policybriefs/brief23.pdf (accessed on 24 May 2012)

Crush, J et al *Migration in Southern Africa* Paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) available at http://www.gcim.org/attachements/RS7.pdf (accessed on 24 May 2012)

Curtis, M and Lissu, T *A Golden Opportunity? How Tanzania is Failing to Benefit from Gold Mining* (Christian Council of Tanzania, Dar es Salaam, 2008)

Del Rosario, T *Best Practices in Social Insurance for Migrant Workers: The Case of Sri Lanka* (ILO Regional Office for Asia and the Pacific, Bangkok, 2008)

Forteza, A *The Portability of Pension Rights: General Principles and the Caribbean Case* Social Protection Discussion Paper No 0825 (World Bank 2005) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0825.pdf (accessed on 24 May 2012)

Fultz, E and Pieris, B *The Social Protection of Migrant Workers in South Africa* ILO/SAMAT Policy Paper No 3 (Harare, 1997)

Galloti, G *The Gender Dimension of Domestic Work in Western Europe* International Migration Papers No 96 (ILO, Geneva, 2009) available at www.ilo.org/public/english/protection/migrant/.../imp/imp96.pdf (accessed on 24 May 2012)

García, AI et al *Costa Rica: Female Labour Migrants and Trafficking in Women and Children* GENPROM Working Paper No 2 (ILO, Geneva, undated) available at http://www.ilo.org/wcmsp5/groups/public/--ed_emp/documents/publication/wcms_117928.pdf (accessed on 24 May 2012)

Ghosh, B *Managing Migration: Whither the Missing Regime?* Draft Article of the Migration without Borders Series (UNESCO, 15 February 2005) available at http://unesdoc.unesco.org/images/0013/001391/139149e.pdf (accessed on 23 May 2012)

Global Commission on International Migration *Migration in an Interconnected World: New Directions for Action* Report of the Global Commission on International Migration (5 October 2005) available at http://www.unhcr.org/refworld/docid/435f81814.html (accessed on 21 May 2012)

Goldstein, A and Ndung'u, NS *Regional Integration Experience in the Eastern African Region* OECD Development Centre Working Paper No 171 (2001) available at www.oecd.org/dataoecd/18/17/1921635.pdf (accessed on 24 May 2012)

Grant, S *International Migration and Human Rights* Paper prepared for Global Commission on International Migration (2005) available at http://www.gcim.org/attachments/TP7.pdf (accessed on 12 September 2011)

Hawthorne, L *Migration and Education: Quality Assurance and Mutual Recognition of Qualifications (Summary of Expert Group Meeting)* Paper presented at the Group Meeting on Migration and Education: Quality Assurance and Mutual Recognition of Qualifications (UNESCO, Paris, 22–23 September 2008) available at http://unesdoc.unesco.org/images/0017/001798/179851e.pdf (accessed on 24 May 2012)

Hendrikx, M *Appropriate Social Security for Migrant Workers: Implementation of Agreements on Social Security* Paper presented at the International Social Security Association, Regional Conference for the Americas, Belize (28–31 May 2006) available at http://www.issa.int/pdf/belize06/2hendrikx.pdf (accessed on 24 May 2012)

Holzmann, R and Koettl, J *Portability of Pension, Health, and other Social Benefits: Facts, Concepts, Issues* Social Protection Discussion Paper No 1110 (World Bank, 2011) available at http://documents.worldbank.org/curated/en/2011/05/14416002/portability-pension-health-other-social-benefits-facts-concepts-issues (accessed on 24 May 2012)

Holzmann, R et al *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* Social Protection Discussion Paper No 0519 (World Bank, 2005) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Pensions-DP/0519.pdf (accessed on 24 May 2012)

ILO *Summary Report and Conclusions* ILO Tripartite Forum on Labour Migration in Southern Africa, Pretoria (26–29 November 2002) available at http://ilo-mirror.library.cornell.edu/public/english/dialogue/actrav/genact/socprot/migrant/291102cl.htm (accessed on 24 May 2012)

ILO *Organizing for Social Justice* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 92nd Session (2004) available at http://www.ilo.org/public/portugue/region/eurpro/lisbon/pdf/rep-i-b.pdf (accessed on 24 May 2012)

ILO *Decent Work for Domestic Workers* Report IV(1), International Conference, 99th Session (2010) available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_104700.pdf (accessed on 24 May 2012)

ILO *International Labour Migration and Development: The ILO Perspective* (ILO, Geneva, 2007) available at http://www.ilo.org/public/english/protection/migrant/download/mig_brief_development.pdf (accessed on 24 May 2012)

ILO *Equality at Work: The Continuing Challenge* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), Report of the Director-General, International Labour Conference, 100th Session (2003) available

athttp://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_154779.pdf (accessed on 24 May 2012)

ILO *Freedom of Association and Industrial Relations* Report VII, International Labour Conference, 30th Session (ILO, Geneva, 1947)

ILO *Freedom of Association in Practice: Lessons Learned* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 97th Session (ILO, Geneva, 2008) available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_096122.pdf (accessed on 24 May 2012)

ILO *Migrant Workers* Report VII(1), 59th Session, International Labour Conference, Geneva, (1974)

ILO *Private Employment Agencies, Promotion of Decent Work and Improving Labour Markets in Private Services Sectors* Issues paper for discussion at the Global Dialogue Forum on the Role of Private Employment Agencies in Promoting Decent Work and Improving the Functioning of Labour Markets in Private (18–19 October 2011) available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/meetingdocument/wcms_164611.pdf (accessed on 24 May 2012)

ILO *Report of the Tripartite Meeting of Experts on Future ILO Activities in the Field of Migration* (21–25 April 1997) available at http://actrav.itcilo.org/actrav-english/telearn/global/ilo/seura/ilomigrp.htm (accessed on 24 May 2012)

ILO *Time for Equality at Work* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 91st Session, Geneva (2003) available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221128717_en.pdf (accessed on 24 May 2012)

ILO *Towards a Fair Deal for Migrant Workers in the Global Economy* Report VI, International Labour Conference, 92nd Session, Geneva (2004) available at http://www.ilo.org/public/libdoc/ilo/2004/104B09_110_engl.pdf (accessed on 24 May 2012)

ILO *Time for Equality at Work* Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report I(B), International Labour Conference, 100th Session (ILO, Geneva, 2011) available at http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_publ_9221128717_en.pdf (accessed on 24 May 2012)

International Council of Human Rights Policy *Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence* A Report (International Council of Human Rights Policy, Geneva, 2010) available at http://www.ichrp.org/files/reports/56/122_report_en.pdf (accessed on 2 September 2011)

Iredale, R and Piper, N *Identification of the Obstacles to the Signing and Ratification of the UN Convention on the Protection of the Rights of All Migrant Workers: The Asia-Pacific Perspective* (UNESCO, Paris, 2003) available at http://unesdoc.unesco.org/images/0013/001395/139528e.pdf (accessed on 10 October 2011)

Jolly, S and Reeves, H *Gender and Migration: Overview Report* Institute of Development Studies (2005) available at www.bridge.ids.ac.uk/reports/CEP-Mig-OR.pdf (accessed on 10 October 2011)

Jureidin, Y *Women Migrant Domestic Workers in Lebanon* International Labour Migration Papers No 48 (ILO, Geneva, 2002)

Kalula, E et al *Labour Law Reform that Supports Decent Work: The Case of Southern Africa* Issue Paper No 28 (ILO Sub-Regional Office for Southern Africa, Harare, 2008)

Kanyangoga, JB *Integrating Migration with Development in EAC: Policy Challenges and Recommendations* Research Papers, CUTS International, Geneva (2010) available at http://www.cuts-geneva.org/pdf/BIEAC-RP10-Integrating_Migration_with_Development_in_EAC.pdf (accessed on 24 May 2012)

Kapinga, S *From Enclosed Domestic Labour to Training Centers: Challenges of the Unions and the NGOs in Organizing Paid Child Domestic Workers in Tanzania* Unpublished Master's Dissertation, University of Witwatersrand (2008)

Kornegay, F *Pan-African Citizenship and Identity Formation in Southern Africa: An Overview of Problems, Prospects and Possibilities* Report (Centre for Policy Studies, Johannesburg, 2006) available at http://www.cps.org.za/cps%20pdf/RR107.pdf (accessed on 24 May 2012)

Lefko-Everett, K and Crush, J *Voices from the Margins: Migrant Women's Experiences in Southern Africa* (Migration Policy Series No 46, SAMP, 2007)

Legal and Human Rights Centre *Human Rights Report, 2010* (Legal and Human Rights Centre, Dar es Salaam, 2010)

Lyon, B *New International Human Rights Standards on Unauthorized Immigrant Worker Rights: Seizing an Opportunity to Pull Governments out of the Shadows* Villanova University Legal Working Paper Series **(**2006) available at http:// law.bepress.com/villanovalwps/papers/art45 (accessed on 2 September 2011)

MacDonald, E and Cholewinski, R *The Migrant Workers' Convention in Europe: Obstacles to the Ratification of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families: EU/EEA Perspectives* (UNESCO, Paris, 2007) available at http://unesdoc.unesco.org/images/0015/001525/152537e.pdf (accessed on 10 September 2011)

Magawa, M *Join PPF for a Secure Future* PPF Presentation during the London Diaspora 3 Conference (6–7 May 2011)

Martin, S *The Legal and Normative Framework of International Migration* Global Commission on International Migration (2005) available at http://www.gcim.org/attachements/TP9.pdf (accessed on 12 June 2010)

Masabo, J *Report on the Survey of Refugee Population in Dar es Salaam* Unpublished Report (2006)

Merlino, M and Parkin, J *First and Foremost Workers: Irregular Migration in Europe, EU Policies and the Fundamental Rights Gap* ETUC Report (2011)

Mkenda, BK *The Impact of Globalization on Tanzania's Labour Market: Evidence from the Manufacturing Sector* Paper prepared for a Policy Dialogue for Accelerating Growth and Poverty Reduction in Tanzania, held at the Conference Hall, ESRF (28 July 2005)

Mudungwe, P *Migration and Development in the Southern Africa Development Community Region: The Case for a Coherent Approach* (Intra-ACP Migration Facility, 2012)

Musonda, F M *Migration Legislation in East Africa* International Migration Papers Series No 82 (ILO, Geneva, 2005) available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp82.pdf (accessed on 24 May 2004)

Mwalimu, UA *Patterns, Policy and Legal Issues on International Labour Migration in Tanzania* Globalisation and East Africa Working Paper Series No 13, Economic and Social Research Foundation, Dar es Salaam (2004)

Najjar, S *Women Migrant Domestic Workers in Bahrain* International Migration Papers No 4 (ILO, 2004)

Office of the United Nations High Commissioner for Human Rights *Migration and Development: A Human Rights Approach* available at http://www2.ohchr.org/english/bodies/cmw/docs/HLMigration/ MigrationDevelopmentHC'spaper.pdf (accessed on 4 May 2012)

Oishi, N '*Gender and Migration: An Integrative Approach*' Working Paper No 49, Centre for Comparative Immigration Studies, University of California, San Diego (2002) available at www.ccis-ucsd.org/PUBLICATIONS/wrkg49.PDF (accessed on 10 October 2011)

Olivier, M *Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)* Social Protection Discussion Paper No 0908, World Bank (2009) available at http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf (accessed on 24 May 2012)

Olivier, M *Acceptance of Social Security in Africa* Paper Presented at the ISSA Regional Conference for Africa, Zambia, Lusaka (9–12 August 2005)

Opiniano, MJ *International Migration as a Social Protection Mechanism in the Philippines: Issues and Implications* Paper presented at 33rd Global Conference of ICSW, Tours, France (30 June to 4 July 2008)

Oucho, J *The Relationship between Poverty and Migration in Southern Africa* Paper presented at SMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria (23 April 2002)

Eren, Ö *The Role of the International Labor Organization's 1998 Declaration on Fundamental Principles and Rights at Work in Strengthening the ILO Regime: A Study on the ILO's Committee on Freedom of Association (CFA)* Unpublished PhD Thesis, Texas Tech University (2010)

Patel, L *History and Growth of Labour in East Africa: A Historical Perspective* Paper presented at the University Social Science Council Conference, University College, Nairobi (8–12 December 1969)

Peberdy, S *Hurdles to Trade? South Africa's Immigration Policy and Informal Sector Cross-border Traders in the SADC* Paper presented at SAMP/LHR/HCRS Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria (23 April 2002)

Pécoud, A and De Guchteneire, P *Migration, Human Rights and the United Nations: An Investigation into the Obstacles of the UN Convention on Migrant Workers* (Global Migration Perspectives Series No 3, Global Commission on International Migration, Geneva (2004) available at http://www.gcim.org/gmp/Global%20Migration%20Perspectives%20No%203.pdf and at http://portal.unesco.org/shs/en/files/6611/10962899451GCIM.pdf/GCIM.pdf (accessed on 24 May 2012)

Pieters, D and Schoukens, P *Exploratory Report on Access to Social Protection for Illegal Labour Migrants* Council of Europe, Committee of Experts on Standard-Setting Instruments in the Field of Social Security (CS-CO), 6th Meeting, Limassol (25–26 May 2004) available at http://www.coe.int/t/dg3/sscssr%5CSource%5CIllLabMigr Report.PDF (accessed on 24 May 2012).

Piper, N *Gender and Migration* A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration (2005) available at http://www.gcim.org/attachements/TP10.pdf (accessed on 10 October 2011)

Roberts, S *A Short History of Social Security Coordination, The European Commission, 50 Years of Social Security Coordination Past – Present – Future* Report of the conference celebrating the 50th Anniversary of the European Coordination of Social Security, Prague (7–8 May 2009) (European Union, 2010)

Rutinwa, B *Addressing Irregular Settlement in North Western Tanzania: A Legal and Protection Perspective* Working Paper No 1, International Migration Management Project, Centre for the Study of Forced Migration, University of Dar es Salaam School of Law (2010)

Sabates-Wheeler, R *Social Security for Migrants: Trends, Best Practice and Ways Forward* Working Paper No 12, International Social Security Association, Geneva (2009)

Salt, J *International Movements of the Highly Skilled* (OEDC, Paris, 1997) available at http://www.oecd.org/dataoecd/24/32/2383909.pdf (accessed on 24 May 2012)

Shah, S and Long, M *Global Labour Mobility and Mutual Recognition of Skills and Qualifications: European Union and Australia/New Zealand Perspectives* Working Paper No 56, Monash University – ACER Centre for the Economics of Education and Training (2004) available at http://www.education.monash.edu.au/centres/ceet/docs/workingpapers/WP56oct04shah.pdf (accessed on 24 May 2011)

Shepherd, A et al *Addressing Chronic Poverty and Vulnerability through Social Assistance in Tanzania: Assessing the Options* Working Paper No 2009, Chronic Poverty Research Centre (2011) available at http://www.chronicpoverty.org/uploads/publication_files/WP209%20Shepherd%20et%20al.pdf (accessed on 19 May 2012)

Shitundu, MJ *A Study on Labour Migration Statistics in East Africa* International Migration Papers No 81 (ILO, Geneva, 2006) available at http://www.ilo.org/public/english/protection/migrant/download/imp/imp81.pdf (accessed on 24 May 2012)

Taran, PA *To Be or Not to Be Ruled by Law: Migration in the 21st Century and the 1990 International Convention* Paper presented at Workshop 2.5: UN Convention on the Protection of the Rights of All Migrant Workers 1990: Challenges? Eighth International Metropolis Conference, Vienna (15–18 September 2003)

Teran, PA *International Migration, Globalization and the Bill of Rights: Ensuring Protection under the Rule of Law* A presentation made to the 9th Annual Human Rights and Equality Conference 'Minority Rights and Protection: International Standards and the Bill of Rights for Northern Ireland' organized by the Northern Ireland Council for Ethnic Minorities, Belfast (12 January 2007) available at http://www.ilo.org/public/english/protection/migrant/download/pom/pom3e.pdf (accessed on 24 May 2012)

Tanzania Investment Centre *Tanzania Investment Report* (TIC, Dar es Salaam, 2006)

United Nations, Department of Economic and Social Affairs, Population Division *Trends in International Migrant Stock: The 2008 Revision* United Nations database, POP/DB/MIG/Stock/Rev.2008

Wickramasekara, P *Globalization, International Labour Migration and Rights of Migrant Workers* (ILO, Geneva, 2006) available at http://www.ilo.org/public/english/protection/migrant/download/pws_new_paper.pdf (accessed on 4 May 2012)

Wrench, J and Virdee, S *Organising the Unorganised: 'Race', Poor Work and Trade Unions* Research Paper in Ethnic Relations No 21, Centre for Research, University of

Warwick, Coventry (June 1995) available at http://www2.warwick.ac.uk/fac/soc/crer/research/publications/research_papers/rp_no.21.pdf (accessed on 12 May 2012)

Wrench, J and Modood, T *The Effectiveness of Employment Equality Policies in Relation to Immigrants and Ethnic Minorities in the UK* International Migration Papers Series No 38 (ILO, Geneva, 2000) available at http:http://www.ilo.org/public/english/protection/migrant/download/imp/imp38.pdf (accessed on 24 May 2012)

Yambesi, GD *Human Resource Planning and Development in the Public Service: The Case of Tanzania* Paper presented at the CAPAM Regional Conference on 'Governance Excellence: Managing Human Potential', Arusha, Tanzania (2–5 March 2009)

Zlotnik, H *Migrants' Rights, Forced Migration and Migration Policy in Africa* Paper prepared for Conference on African Migration in Comparative Perspective, Johannesburg, South Africa (4–7 June 2003) available at http://pum.princeton.edu/pumconference/papers/6-Zlotnik.pdf (accessed on 2 August 2012)