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*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



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# WHICH LEGAL PROTECTION FOR MIGRANTS IN SUB-SAHARAN AFRICA?

*Cristiano d'Orsi\**

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*Migration, one of the most natural actions undertaken by human beings in the history of the world, is becoming a veritable plight in Africa. This article critically discusses the different levels of legal protection that a migrant would benefit from in the continent. The conditional is used because the protection guaranteed to a migrant in Africa is still far from allowing her or him to reach a satisfying standard of living. Therefore, the article will particularly focus on the many lacunae that afflict the legal protection of migrants in the continent, lacunae that we can observe either from an international, continental, regional or national point of view. Migrants are too often still considered as unwelcome in their countries of destination. Finally, it is clear that an agreement between the different international actors – states, regional organizations, non-governmental organizations and international organizations – is necessary to exist irrespective of a strictly legal perspective.*

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## *I Introduction*

Controlling migratory flows is a top priority for many governments. It is not challenging to define a "migrant" and the concept of "migration" in accord with the common meaning generally

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attributed to these terms. It is sufficient to look up their definition in a well known dictionary.<sup>1</sup> Migrants are so numerous throughout the world that the United Nations (UN) has specially dedicated a day to them on the 18th of December of every year.<sup>2</sup> Migration can no longer be considered the "Cinderella" of population studies, as it was in the late 1960s,<sup>3</sup> although, contrary to the common thought, the concept of "migration" does not cover all types of geographical mobility of individuals and groups.<sup>4</sup>

However, trying to find a legal definition of "migrant" becomes somewhat more difficult because, as noted by Voker Türk:<sup>5</sup>

A uniform legal definition of the term "migrant" does not exist at the international level. The 1990 UN Convention on the Protection of the rights of All Migrant Workers and Members of their Families defines the term "migrant worker".

In the same way, "stranded migrants" lack a generally accepted definition. In practice, migrants become legally stranded:<sup>6</sup>

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1 See, for instance, the Shorter Oxford English Dictionary defines migration as "the action or an act of moving from one place to another." See: *Oxford English Dictionary* (Clarendon Press, Oxford, 1993) at 1771. Oucho categorised migration as follows:

... conventionally, international migration is classified into four types: permanent migration (emigration, immigration or both); labour migration; refugee movements; illegal/undocumented migration. Each type occurs sporadically and irregularly and overlaps other types, thus precipitating situations which are difficult to track let alone isolated neatly.

See JO Oucho "International migration and sustainable human development in Eastern and Southern Africa" (1995) 33 *International Migration* 31 at 32. Koser categorised migration as "voluntary" and "forced", with the latter category usually describing "refugees, although ... the term refugee has a very specific meaning, and does not include all forced migrants." Khalid Koser *International Migration: a Very Short Introduction* (Oxford University Press, Oxford, 2007) at 16–17.

2 Proclamation of 18 December as International Migrants Day GA Res 55/93, A/RES/55/93 (2000). Paragraph 2 of the resolution reads:

[The UNGA] invites Member States, as well as intergovernmental and non-governmental organizations, to observe International Migrants Day, through, *inter alia*, the dissemination of information on the human rights and fundamental freedoms of migrants, the sharing of experience and the design of actions to ensure their protection.

3 RM Prothero "Migration in Tropical Africa" in JC Caldwell and C Okonjo (eds) *The Population of Tropical Africa* (Longman, London, 1968) at 250.

4 Han van Dijk, Dick Foeken and Kiky van Til "Population mobility in Africa: an overview" in Mirjam de Brujin, Rijk Van Dijk and Dick Foeken (eds) *Mobile Africa: Changing Patterns of Movement in Africa and Beyond* (Brill, Leiden/Boston/Koln, 2001) 2 at 9.

5 Voker Türk "Freedom from fear: refugees, the broader forced displacement context and the underlying international protection regime" in Vincent Chetail (eds) *Globalization, Migration and Human Rights: International Law under Review* (vol II, Etablissement Emile Bruylant, Bruxelles, 2007) 475 at 483 note 16.

... where they are caught between removal from the state in which they are physically present, inability to return to their state of nationality or former residence, and refusal by any other state to grant entry. They may also be stranded where there are practical or humanitarian reasons which prevent them from returning home. Many of those who become stranded ... entered a country illegally, assisted by smugglers or transported at the hands of traffickers.

Irregular migration and the smuggling of persons have been identified as:<sup>7</sup>

... one of the greatest challenges to the ability of states to effectively manage migration. It also represents the greatest challenge to IOM's core principle that humane and orderly migration benefits migrants and society, as well as to IOM's primary objective to reduce the incidence of irregular migration, in line with relevant recommendations of the 1994 Cairo International Conference on Population and Development."

On the definition of irregular migration, Koser explained that: "Irregular is itself a complex and diverse concept that requires careful clarification ... [I]t is important to recognize that there are lots of ways that a migrant can become irregular."<sup>8</sup>

In this regard, Slinckx argued that:<sup>9</sup>

... irregular migrants are referred to under a variety of names, and this sometimes makes it unclear whether persons thus included can be considered as migrant workers ... Using the broad definition of migrant worker (article 2 of the ICRMW) would avoid this confusion and clarify their status and rights.

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6 Stefanie Grant "The legal protection of stranded migrants" in R Cholewinski, R Perruchoud and E Macdonald (eds) *International Migration Law: Developing Paradigms and Key Challenges*, (TMC Asser Press, the Hague, 2007) 29 at 30–31.

7 UN High Commissioner for Refugees "Global Consultations on International Protection/Third Track: Refugee Protection and Migration Control: Perspectives from UNHCR and IOM" EC/GC/01/11 (2001) at [8].

8 Koser, above n 1, at 55.

9 Isabella Slinckx "Migrants' rights in UN human rights conventions" in Paul De Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 122 at 147. Among the situations described as irregular migration the UN Secretary-General includes:

- (a) Situations of smuggling and trafficking of persons, in many cases involving particularly vulnerable persons such as women and children ...
- (c) Abuse by public officials, including extortion, violation of the right to personal integrity and violation of the right to life;
- (d) Violations of or restrictions to the right to freedom of movement and security, in particular when migrants are held in administrative detention where the conditions of detention are inadequate ...
- (f) Various forms of abuse of economic, social and cultural rights committed by private individuals or companies ...

See United Nations General Assembly *Note by the Secretary-General: Human Rights of Migrants A/61/324* (2006) at [49].

The smuggling of migrants is defined by the UN as:<sup>10</sup>

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

In Sub-Saharan Africa (SSA) the difficulty of finding a legal definition of "migrant" is often coupled with the evidence that, historically, much of the movement of migrants in the continent has been undocumented and, when economic conditions in these receiving countries were favourable, fundamentally ignored.<sup>11</sup>

The history of SSA is one of migration.<sup>12</sup> Migration was generally used by Africans to guarantee the survival of their families or to pursue economic mobility to supplement declining domestic resources.<sup>13</sup> If we consider the four macro-regions taken into account by the UN (Eastern Africa, Middle Africa, Southern Africa and Western Africa), migration in SSA in 2010 involved an estimated number of 17,253,113 individuals, while in 1990 estimated migration was 13,694,080. In thirty years, the presence of migrants within the borders of countries like Ghana have more than doubled while in others, like Nigeria, the number of migrants has almost tripled.<sup>14</sup> In SSA various forms of population movements have been recorded from early times in response to economic, political, and security situations as well as demographic pressures. The evolution of SSA countries has given rise to a variety of forms of migration in the area; if historically migration waves were mainly formed by farmers, pastoralists and, more generally, nomadic people, today it is the migration of skilled individuals – sometimes creating labour shortages in specific sectors in the

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10 *United Nations Convention against Transnational Organized Crime* GA Res 55/25, A/RES/55/25 (2001) and art 3(a) of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime annexed to the resolution.

11 Jonathan Martens "Moving freely on the African continent: the experiences of ECOWAS and SADC with free movement protocols" in R Cholewinski, R Perruchoud and E Macdonald (eds) *International Migration Law: Developing Paradigms and Key Challenges* (TMC Asser Press, the Hague, 2007) 349 at 351, where the author continued: "But as these economic hubs suffered post-independence setbacks ... governments of migrant receiving states often responded to public sentiment by attempting to protect their labour markets from non-citizens."

12 John K Akokpari "The state, refugees and migration in SSA" (1998) 36 *International Migration* 211 at 212.

13 Aderanti Adepoju "Trends in international migration in and from Africa" in Douglas S Massey and J Edward Taylor (eds) *International Migration: Prospects and Policies in a Global Market* (Oxford University Press, Oxford/New York, 2004) 59 at 65.

14 Data available at "United Nations: Development" (2011) <<http://esa.un.org>>. In the example provided, Ghana had an estimated number of 716,527 migrants in 1990 that increased to 1,851,814 individuals in 2010. In 1990 Nigeria gave hospitality to 447,411 migrants which became 1,127,668 in 2010.

migrants' countries of origin (like the healthcare sector in Ghana and South Africa).<sup>15</sup> Female migration as has also increased in response to dramatic economic circumstances.<sup>16</sup>

Needless to say, migration patterns across SSA have been deeply altered by the arrival of European colonial powers and their attempts to organise the labour of African populations to serve their interests. Colonial policies forced people to engage in the cash economy by undertaking wage labour on coloniser estates and farms. Although this represented a major expansion of labour migration, the practice was already established. For example, areas which had been supplying porters for the convoys crossing the region through the 19th century provided the most of the labourers in the German plantations of East Africa.<sup>17</sup> There has also been a high level of migration from rural areas to the emerging urban centres, like Nairobi. In effect, in the colonial period, the British allowed labour migrants to move freely between Kenya, Tanzania and Uganda and this was continued with their independence through the establishment of the East African Community (EAC), organization that collapsed in 1977 but revived in 1999 and still in function.<sup>18</sup>

In several regions of SSA, like in West Africa, in the 1950s and 1960s we saw the beginning of intra-regional mobility generally characterised by a mainly north-south, inland-coast movement from Sahel West Africa (Chad, Niger, Burkina Faso) to the plantations, mines and cities of coastal West Africa, including: Banjul, Lagos and Douala, to mention a few.<sup>19</sup> Labour has also constituted the main reason that encouraged migration in Southern Africa, in the second half of the 19th century and in the first half of the 20th, although the migration system in that region at that time has been often described as a means to exploit the African labour to serve the interests of capitalism, particularly as developed under apartheid.<sup>20</sup> But, since 1990, the context of migration in Southern Africa has been transformed in consequence of the political events occurring in the region – the end of the apartheid and the end of the wars in Angola, Mozambique and Namibia. The attitudes to migration among the countries of the region have then become progressively more negative with

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15 Oliver Bakewell and Hein de Haas "African migrations: continuities, discontinuities and recent transformations" in Patrick Chabal, Ulf Engel and Leo de Haan (eds) *African Alternatives* (Brill, Leiden, 2007) 95 at 111.

16 Adepoju, above n 13, at 68: "A significant share of these women are autonomous migrants who move independently to fulfil their own economic needs; they are not simply joining a husband or other family member."

17 J Iliffe *Africans: the History of a Continent* (Cambridge University Press, Cambridge, 1995) at 207.

18 Treaty for the Establishment of the East African Community (30 November 1999, entered into force on 7 July 2000), art 7.1(c), clearly provides for a free movement of persons between the countries belonging to this Community.

19 John A Arthur "International labour migration patterns in West Africa" (1991) 34 *African Studies Review* 65 at 65–87.

20 Bakewell and de Haas, above n 15, at 107.

increasing controls on immigration and restrictions on migrants' rights. Rather than reducing migration, the result has been a major increase in the number of undocumented migrants. In particular, South Africa has become a focus for migration both from within the region and the rest of the continent.<sup>21</sup>

It is therefore clear that contemporary migration in SSA, which involves millions of individuals,<sup>22</sup> can be better understood within the context of the historical, economic and political evolution of local societies with emigration dynamics that need to be examined in the framework of current economic crises, political events which are in permanent progress as well as ecological disasters.<sup>23</sup> The practice of temporary migration is also common in SSA, mostly in the form of a seasonal one and linked to the rural exigencies of populations.<sup>24</sup>

In contrast to popular perception, however, we need to begin this article by affirming that there has not been a recent increase in intra-African migrations. West Africa is the sole region where the migrant population in relation to the total population has been augmenting over the past few decades.<sup>25</sup>

This article discusses the various legal regimes that apply to migrants in SSA. It begins with an analysis of the International Convention on the Protection of the Rights of All Migrants Workers and Members of Their Families 1990 (ICMRW), the major binding instrument protecting migrants. Given the difficulties involved in ratifying this instrument, the article will further consider measures adopted by the UN General Assembly (UNGA) with the goal of strengthening the international protection of migrants in SSA as elsewhere in the world. After an examination of the essential interrelation between the concept of "migration" and that of "development", the article analyses the way in which the protection of migrants is dealt with at, respectively, the continental, sub-regional and national levels, with a special reference to South Africa, eponymic of the domestic legal protection carried out in SSA. The entire analysis undertaken in this article will finally show how long the road still is to a real, effective protection of migrants in SSA.

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21 Jonathan Crush "Migration in Southern Africa" (Policy Analysis and Research Programme of the Global Commission on International Migration, Geneva, 2005) at 12.

22 Bakewell and de Haas, above n 15, at 95, note:

The UN Population Division uses census data to estimate the number of international migrants, but across Africa such census data is often of poor quality or lacks any migration questions. As a result, 19 of the 1956 countries in Africa have either no data or just one census providing any information on migrant stock from the 1950s.

23 Aderanti Adepoju "Preliminary analysis of emigration dynamics in SSA" (1994) 32 *International Migrations* 197 at 197–198.

24 Van Dijk, Foeken and Van Til, above n 4, at 12.

25 Bakewell and de Haas, above n 15, at 111.

As discussed in the following paragraphs, different examples can be provided to show the lack of will by both national and international actors – the latter influenced by the former – in protecting the rights of migrants. For instance, the poor status of ratification of the ICMRW is a first, critical symptom of the lack of consideration that migrants benefit from in this vast area of the world. The fact that the UNGA does not illustrate the "concrete measures", mentioned in its resolutions, to be adopted to safeguard the human rights of migrants constitutes another vivid example of the real situation. Still, the fact that North African countries often let SSA migrants heading to Europe live in precarious conditions represents a sign of the distance which separates the theoretical and the practical protection of migrants in the continent.

In sum, through this work, we would call on states and international organisations to adopt a less inconsistent and less contradictory attitude on the protection of migrants – a category of persons simply ineradicable until the world acts to rein in the very deep socio-economic inequalities between the different regions.

## *II The ICMRW is Still the Main Binding Instrument Protecting Migrants*

Migrants are not, as yet, a recognised group with consistency and status equivalent to that of refugees. In important areas there are no guidelines or rules to regulate inter-state cooperation in migration. There is also no universal structure or body through which the movement and rights of migrants is managed in a joint way.<sup>26</sup> In addition, United Nations High Commissioner for Refugees' (UNHCR) mandate does not normally extend to migrants without a valid claim to international protection, but who have nevertheless become vulnerable to human rights abuses in the course of their journey.<sup>27</sup>

Article 2.1 of the ICMRW – whose adoption has been considered as essential to advancing the pre-eminence of the rule of law and extension of democratic commitment in the framework of expanding international migration<sup>28</sup> – defines a "migrant worker" as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state of which he or she is not a national".<sup>29</sup> Nevertheless, it must be noted that to this day only 13 countries from SSA have ratified

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26 Erika Feller "Are Refugees Migrants? A Dangerous Confusion" (SID lecture series "Migration and Development: Challenges for a World on the Move", Amsterdam, 27 January 2004) at 2.

27 UN High Commissioner for Refugees "UNHCR, Refugee Protection and International Migration" (17 January 2007) at [12].

28 Patrick A Taran "The need for a rights-based approach to migration in the age of globalization" in Paul De Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 150 at 166. Taran served from 1998 to 2002 as Coordinator of the Global Campaign for Ratification of the Convention on Rights of Migrants.

29 Richard Perruchod and Katarina Tömölova (eds) *Compendium of International Migration Law Instruments* (TMC Asser Press, the Hague, 2007) at 232.

the ICMRW while 13 countries have signed it. However, there is not a perfect match between the countries that have signed and the countries that have ratified the convention,<sup>30</sup> with Nigeria representing the last African country to have ratified the ICMRW on 27 July 2009 and Cameroon the last African country to sign on 15 December 2009. Only Uganda, that ratified the Convention in 1995, has made a reservation to the convention, specifically to art 18.

The poor status of ratification suggests that many countries in the continent do not consider themselves bound to this definition, although there is still a hope for further ratifications coming particularly from West Africa,<sup>31</sup> where most of countries which have already ratified the ICMRW originate.<sup>32</sup> Moreover, the slow progress in the ratification of the ICMRW could reflect, above all, resistance to recognition of application of human rights standards to migrants, particularly the right of non-discrimination (including racism and xenophobia).<sup>33</sup> An absent application of rights would

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30 Among the 13 countries that have signed the Convention, only Burkina Faso, Ghana and Lesotho have successively ratified it.

31 Graziano Battistella "Migration and human rights: the uneasy but essential relationship" in Paul De Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 47 at 65.

32 Burkina Faso, Cape Verde, Ghana, Guinea, Mali, Mauritania, Nigeria and Senegal have already ratified the ICMRW. On the reason behind the limited ratification to date, Slinckx, above n 9, at 149, noted:

[An] argument is put forward by some states as a reason for not ratifying the ICMRW, according to which migrants' rights would be sufficiently covered by other treaties, and ratification of the 1990 Convention would not bring any added value. By the same token, other treaties' provisions represent the only protection available in the ... countries that have not ratified the Convention. Both protections seem more complementary than contradictory, as using the other conventions to strive for better protection is currently the best tool with which to monitor and implement respect of the human rights of migrant workers.

33 In this regard, Fitzpatrick argues:

The non-discrimination norm plays a central role in defining the human rights of migrants ... Non-discrimination is also notable for being included in the United Nations Charter [arts 1.3 and 55c] and, at least as it applies to race, the norm is *jus cogens*.

Joan Fitzpatrick, "The human rights of migrants", in T Alexander Aleinikoff and V Vincent Chetail (eds) *Migration and International Legal Norms* (TMC Asser Press, the Hague, 2003) 169 at 171. But, at 172 the author noted:

However, human rights law does not forbid all distinctions between nationals and migrants. International rules concerning discrimination against migrants are nuanced, and require careful delineation. ... In general, differential treatment is permissible where the distinction is made pursuant to a legitimate aim, the distinction has an objective justification, and reasonable proportionality exists between the means employed and the aims sought to be realized.

As the UN Secretary General also confirmed:

... the cornerstone of integration [of migrants] is *equal treatment and the prohibition of discrimination of any sort, as well as effective protection against racism, ethnocentrism and*

contribute to guaranteeing that migrant labour remains cheap, obedient, temporary and easily removable when not required.<sup>34</sup>

However, the ICRMW remains the most comprehensive international treaty in the field of migration and human rights<sup>35</sup> as it applies to the whole migration continuum, such as the recruitment process and the rights of migrants once they have been admitted,<sup>36</sup> although granting rights to migrants does not yet seem to be seen as a priority by the international community, especially since the non-economic aspect of migration remains a neglected dimension of globalisation.<sup>37</sup> The ICRMW expands on human rights only partly covered by other treaties. Article 1 also provides for broader grounds for discrimination than those initially listed in the 1948 Universal Declaration of Human Rights (UDHR)<sup>38</sup> or those elaborated upon in subsequent

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*xenophobia* ... Migrants do best in socially and politically supportive environments that allow them to adapt at their own pace.

See, United Nations General Assembly *Report of the Secretary General: International Migration and Development A/60/871* (2006) at [67] (emphasis added).

34 Taran, above n 28, at 151.

35 As the Secretary General of the UN, above n 33, at [283], noted in 2006, there are six other international treaties dealing with the protection of migrants:

(a) the International Covenant on Economic, Social and Cultural Rights; (b) the International Covenant on Civil and Political Rights; (c) the International Convention on the Elimination of All Forms of Racial Discrimination; (d) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (e) the Convention on the Elimination of All Forms of Discrimination against Women; and (f) the Convention on the Rights of the Child. All States are bound, through ratification, by at least one of the seven core human rights treaties. These instruments therefore provide the basis for the protection of everyone, citizens and non-citizens, in a State's territory. The human rights enshrined in these documents apply to everyone, not by virtue of citizenship but because they are linked to our common humanity." United Nations General Assembly.

36 Paul De Guchteneire and Antoine Pécoud "Introduction: the UN Convention on migrant workers' rights" in Paul De Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 1 at 8.

37 Ibid, at 2.

38 The Universal Declaration on Human Rights (UDHR) is a non-binding legal instrument. However, Aleinikoff pointed out:

Customary legal norms at the international level may also be of direct relevance to migrants. The right of citizens to leave and return to their countries of origin, for example, is referred to in the ... UDHR but is generally recognized as a binding norm as a matter of customary international law.

T Alexander Aleinikoff "International Legal Norms on Migration: Substance without Architecture" in R Cholewinski, R Perruchoud and E Macdonald (eds) *International Migration Law: Developing Paradigms and Key Challenges*, (TMC Asser Press, the Hague, 2007) 467 at 473.

conventions. Among others, it includes "conviction", "nationality", "age", "economic position" and "marital status".<sup>39</sup> In addition, the ICRMW also covers categories of migrant workers excluded from other international conventions, such as frontier workers and self-employed workers.<sup>40</sup>

This Convention recognises that undocumented migrants face more difficult conditions than legal migrants. The 27 articles in Parts II and III of the ICRMW list the rights of all migrant workers – basically a repetition of the civil, political, economical, social and cultural rights contained in the two Pacts of 1966. Part IV, containing 20 articles, lists additional rights for legal migrants, including the right to move freely within the state of employment,<sup>41</sup> to have access to educational institutions,<sup>42</sup> and a number of other rights providing for equality of treatment with nationals.<sup>43</sup>

In addition, migrant workers have been clearly considered to be one of the vulnerable groups by the various human rights treaty monitoring bodies.<sup>44</sup> This has been considered as a part of the development and extension of the protection mandate of the UN, with migrant status being added to more conventional grounds of discrimination such as race, religion, political or other opinion, and social origin.<sup>45</sup> But, in practice, in SSA there is still a lot to do in the field of the protection of migrants, considering that in many countries it has been for instance noted the lack of training for

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39 In detail, ICRMW, art 1 reads:

1) The present Convention is applicable, except as otherwise provided hereafter, to all migrant workers and members of their families without distinction of any kind such as sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status. 2) The present Convention shall apply during the entire migration process of migrant workers and members of their families, which comprises preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence.

40 Ibid, art 2.2(a) defines "frontier workers" as follows:

(a) The term "frontier worker" refers to a migrant worker who retains his or her habitual residence in a neighboring State to which he or she normally returns every day or at least once a week." Article 2.2(h) defines "self-employed workers" as follows: "(h) The term "self-employed worker" refers to a migrant worker who is engaged in a remunerated activity otherwise than under a contract of employment and who earns his or her living through this activity normally working alone or together with members of his or her family, and to any other migrant worker recognized as self-employed by applicable legislation of the State of employment or bilateral or multilateral agreements.

41 ICRMW, art 39.1.

42 ICRMW, art 43.1(a).

43 Virginia Leary "Labour migration" in T Alexander Aleinikoff and V Vincent Chetail (eds) *Migration and International Legal Norms* (TMC Asser Press, the Hague, 2003) 227 at 235.

44 For a list of these treaties, see above n 35.

45 Slinckx, above n 9, at 128.

officials working in the area of migration and the lack of information of the implementation of the rights of migrants.<sup>46</sup> The value of the ICRMW can also be measured by the protection it can offer on issues that are not adequately taken into account in other treaties. The protection it provides could mainly be helpful for undocumented migrants who constitute one of the most exposed categories and who are more expected to be victims of intolerance in access to rights guaranteed on the other core conventions, where irregular migrants' matters concentrate on detention, expulsion and ill-treatment, as well as on social aspects including access to education, housing and protection in employment.<sup>47</sup>

Finally, in light of this analysis, five aspects of the ICRMW deserve major emphasis. First, the convention is not widely ratified and a remarkable disproportion of ratifications exists between sending states and receiving states – the former being more interested in ratifying the Convention. Second, this instrument is unique in unambiguously treating nationality as a prohibited basis of distinction.<sup>48</sup> Parity is guaranteed particularly in work-related issues such as hours of work and remuneration, but parity is also encouraged in larger areas such as access to employment, trade union freedoms, and cultural rights. Third, migrant workers consist of several distinct groups with changing human rights issues, from multinational executives to legally admitted unskilled and skilled workers in a variety of occupations, to irregular migrants who occupy the lowest position on the employment scale. Fourth, the rights of irregular migrants are particularly controversial, as are issues of family unity.<sup>49</sup> Fifth, this Convention, at the same time as providing for the rights of migrants, promotes measures to combat illegal migration.<sup>50</sup>

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46 Ibid, at 141, where the author specifically analysed the situation in Mali.

47 Slinckx, above n 9, at 146.

48 ICRMW, art 7 reads:

States Parties undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, color, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

49 Fitzpatrick, above n 33, at 176.

50 ICRMW, Part VI: "Promotion of sound, equitable, humane and lawful conditions in connection with international migration of workers and members of their families." In particular, art 68.1 reads: "States Parties, including States of transit, shall collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation." As Cholewinski notes:

Part VI of the ICRMW is particularly important because it addresses the need for consultation and cooperation among all states parties to ensure that international labour migration takes place in sound, equitable, humane and lawful conditions. Consequently, it includes state obligations to collaborate with a view to preventing and eliminating irregular migration, including the imposition of

### *III The Efforts of the UNGA in Giving a Proper Framework to the Issue of Migration*

The African reluctance towards the ICRMW – the most salient obstacle to wider ratification remaining a lack of political will by states to extend basic human and labour rights protection to foreign workers<sup>51</sup> – has inspired calls for other approaches to the protection of migrants, as illustrated by the emergence of non-binding declarations.<sup>52</sup> It is for this reason, it is important to underline that a few years after the ICRMW entered into force, the UNHCR also started providing a definition for "migrant" where an economic aspect is relevant:<sup>53</sup>

A migrant is a person who, for reasons other than those contained in the definition [of refugee], voluntarily leaves his country in order to take up residence elsewhere. He may be moved by the desire for change or adventure, or by family or other reasons of a personal nature. If he is moved exclusively by economic considerations, he is an economic migrant and not a refugee. The distinction between an economic migrant and a refugee is, however, sometimes blurred in the same way as the distinction between economic and political measures in an applicant's country of origin is not always clear.

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sanctions on those who exploit irregular migrants, such as traffickers, smugglers and employers. This part, therefore, dispels the myth that the ICRMW somehow promotes irregular migration. On the contrary, it sees the implementation of the provisions relating to the protection of all migrant workers, including irregular migrants, as a means to the elimination of this phenomenon.

Ryszard Cholewinski "The rights of migrant workers" in R Cholewinski, R Perruchoud and E Macdonald (eds) *International Migration Law: Developing Paradigms and Key Challenges*, (TMC Asser Press, the Hague, 2007) 255 at 259.

51 On this purpose, see Taran, above n 28, at 164.

52 De Guchteneire and Pécoud, above n 36, at 40.

53 UN High Commissioner for Refugees *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* HCR/IP/4/Eng/REV 1 (1992), at [62] and [63]. In this regard, the UNHCR also observed that it:

... has become clear that politicians, the public and the media in many parts of the world are unable ... to appreciate that distinction [between refugee and non-refugee], especially in situations where considerable numbers of migrants who manifestly have no need for international protection submit applications for refugee status, remain in the asylum system for extended periods of time and remain in the country after their application has been rejected.

UN High Commissioner for Refugees *UNHCR, Refugee Protection and International Migration* (2007), at [8]. However, at [20]:

... an economic migrant may, for example, become a refugee "*sur place*", when there is an armed conflict or violent change of regime in that person's country of origin, or when the government or other actors in that country begin to inflict human rights violations on the community of which that migrant is a member.

In this framework, the UNHCR became an active contributor to the work of the Global Commission on International Migration that, among its mandate objectives, analyses gaps in approaches to migration and studies inter-linkages with other areas, considering the extreme difficulty sometimes arises when distinguishing a genuine migrant from a refugee.<sup>54</sup>

The UNGA has also dealt with the question of migration several times, often linked with the broad theme of development, and the protection of the human rights of migrants, with states as targets. The recent resolution on the subject urges states to promote and protect successfully the human rights and fundamental freedoms of all migrants, regardless of their migration status, insisting on cooperation at international, regional<sup>55</sup> or bilateral level, recognising the roles and responsibilities of countries of origin, transit and destination "in promoting and protecting the human rights of all migrants, and avoiding approaches that might aggravate their vulnerability."<sup>56</sup> In effect, discussion of any aspect of migration should always bear in mind the degree of migrants'

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54 This objective of the Commission has been expressed as follows:

The Commission will analyze the various approaches adopted by stakeholders when dealing with international migration, in particular governments. In doing so, it will also consider different regional migration perspectives. It will furthermore address the relationship between international migration and such areas as economic development, labour supply and demand, demography, remittances, trade, poverty alleviation, integration and citizenship, social support systems, gender, human rights, public health, transnational organized crime, and overall human, national and international security.

Global Commission on International Migration *Global Commission on International Migration, The Mandate* (2003).

55 On the importance of regional cooperation, Battistella, above n 31, at 67, noted:

[Recently] Governments have scaled down their goals and have begun discussion at lower level [compared to ICRMW conventional level], in so-called regional processes. It is difficult to assess the impact of such processes, which at least keep alive the idea of multilateral approach to migration. But they should not be considered as an alternative to ratifying the [ICRMW].

56 United Nations General Assembly *Protection of migrants* GA Res 63/184, A/RES/63/184 (2008) at [1]. Insisting on the concept of cooperation, para 6 of the Resolution similarly requests:

... all States, international organizations and relevant stakeholders to take into account in their policies and initiatives on migration issues the global character of the migratory phenomenon and to give due consideration to international, regional and bilateral cooperation in this field, including by undertaking dialogues on migration that include countries of origin, destination and transit, as well as civil society, including migrants, with a view to addressing, in a comprehensive manner, inter alia, its causes and consequences and the challenge of undocumented or irregular migration, granting priority to the protection of the human rights of migrants.

vulnerability, illustrated by the extent to which, in many countries, migrants and other non-nationals in administrative or immigration detention have only limited rights.<sup>57</sup>

The UNGA normally makes explicit the acts that can help to protect the human rights of migrants. For instance, through the adoption of "concrete measures" to prevent the violation of their human rights while in transit, to treat them respectfully and in accordance with the law, and to prosecute, in conformity with applicable law, any act of violation of the human rights of migrants such as arbitrary detention, torture and violations of the right to life, including extrajudicial executions.<sup>58</sup> The problem is that nowhere in the resolution do we have clear examples of the above-mentioned "concrete measures" but, on the contrary, the resolution highlights the right of migrants to return to their country of citizenship, recalling that states must ensure that their returning nationals are appropriately received.<sup>59</sup> This latter kind of situation, if taken for granted in the "First World", is not always presumed in SSA, where migration is sometimes favoured by the country of origin to alleviate the burden of too many nationals needing the care of the local government.<sup>60</sup> On the other hand, however, Resolution A/RES/63/184 welcomes immigration programs which permit migrants to integrate completely into the host countries encouraging a tolerant and respectful environment.<sup>61</sup> That was certainly not the case, for instance, in South Africa in the late 1990s where migrants from neighbouring countries that enjoyed few rights and legal protection during the apartheid era, have not seen significant changes to their situation after the abolition of the apartheid

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57 United Nations General Assembly, *Note by the Secretary-General: Human Rights of Migrants*, 11 September 2006, A/61/324 at [28]. The paragraph continues:

In numerous countries, migrants ... can be held, sometimes for prolonged periods, in administrative detention without the state being obliged to present reasonable evidence that the person might escape or not comply with expulsion orders ... This limitation of their right to liberty is considered as normal and routine, not as a measure of last resort, and is rarely the subject of debate. The result is that, in a number of countries, migrants in immigration detention may have more limited rights than persons facing criminal charges.

58 *Protection of migrants* GA Res 63/184, A/RES/63/184 (2008) at [11]. Consequently, at [12] of the Resolution the UNGA:

... recalls that the Universal Declaration of Human Rights recognizes that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him or her.

59 *Ibid.*, at [15].

60 Mozambique, for instance, experienced high net out-migration in the late 1980s caused by long standing patterns of labor migration, especially to the gold mines in South Africa. This migration has been encouraged by the Mozambican authorities who, at the end of the civil war that lasted until 1990, did not have sufficient resources to take care of the entire population. For this example, see among others: Karen Jacobsen "Migration within Africa: the view from South Africa" (2007) 31 *Fletcher F World Aff* 203 at 206.

61 *Protection of migrants* GA Res 63/184, A/RES/63/184 (2008) at [20].

regime.<sup>62</sup> Moreover, in those years there has been a major assault on "illegal migration". Hundreds of thousands of migrants from neighbouring countries were rounded up in anti-crime sweeps, railroaded into the Lindela holding centre and deported, some after many months.<sup>63</sup> In South Africa, the constant abuse of migrants' rights after 1994 can be attributed to three main causes: the consolidation of a prevailing anti-immigration discourse within the state and civil society that described migrants as a menace to the rights of recently enfranchised citizens; the appointment of a non-African National Congress activist to the Ministry of Immigration<sup>64</sup> and the approach taken by him and his advisors on migration control rather than migrant rights; and the failure of the new

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62 Human Rights Watch noted in 1998 that:

South Africa has become increasingly xenophobic in recent years, with a large percentage of South Africans perceiving foreigners – especially, almost exclusively black foreigners – as a direct threat to their future economic well-being and as responsible for the troubling rise in violent crime in South Africa.

Quoted in Jonathan Crush "The Dark Side of Democracy: Migration, Xenophobia and Human Rights in South Africa" (2000) 38 *International Migration* 103 at 106. See also: Jonathan Crush, Vincent Williams and Peggy Nicholson "Migrants' rights after apartheid: South African responses to the ICRMW", in Paul De Guchteneire, Antoine Pécoud and Ryszard Cholewinski (eds) *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press, Cambridge, 2009) 247 at 247–248. The authors note:

South Africa has a long history of abusing migrants' rights. The migrant labour system to the South African mines, for example, was once described as the "most enduring and far-flung oscillating migrant labour system in history [which] laid the foundations of a particularly ruthless system of racial discrimination." ... While major progress was made after 1994 in protecting the rights of workers in general through new labour legislation and enforcement of the Bill of Rights, none of these developments was directed at migrants' rights *per se*. Indeed, popular and official attitudes to foreign migrants became increasingly negative and even xenophobic. Government policy was therefore inimical to the whole concept of special rights for foreign migrants.

63 About this practice of deportation see, for instance, Jonathan Klaaren and Jaya Ramji "Inside Illegality: Migration Policy in South Africa and Apartheid" (2001) 48 *Africa Today* 35.

64 The immigration portfolio was held by Inkatha Freedom Party leader, M Buthelezi. For an opinion on Buthelezi's policy see Loren Landau, "The laws of the (in)hospitality: black Africans in South Africa" (2004) University of Witwatersrand, Forced Migration Studies Programme, Working Paper no 7 at 7–8:

The first interaction many immigrants have in South Africa is with the Department of Home Affairs, the department responsible determining migrants' immigration status and assigning identity documents to both citizens and foreigners. One of the most corrupt departments during the *apartheid* period, administrative incompetence and irregularities flourished between 1994 and 2004 under Home Affairs Minister Mangosuthu Buthelezi. While South Africans regularly (and justifiably) express frustration with the department, the immigrant-related activities taking place under its auspices go beyond mere administrative incompetence with spin-off practices that provide fertile ground for networks of corruption and extortion.

government to articulate an unequivocal migration policy and to change the apartheid immigration legislation.<sup>65</sup>

#### *IV The Essential Relationship Between Migration and Development*

As mentioned above, another important issue taken into consideration by the UNGA in its resolutions concerning migration is the constant reference made to the concept of "development".<sup>66</sup> However, this should not be considered as an obstacle to protection of migrants. On the contrary, the migration-protection-development relationship needs to be articulated<sup>67</sup> to facilitate strengthening promotion and action by countries of origin with countries of destination to endorse the rights protections that allows migrants to gain their earnings and live and work in respectable conditions.<sup>68</sup> As development processes influence migration, in the same way migration has an important impact on development patterns. Emigration is considered to relieve some of the problems facing migrant-sending countries by easing labour market pressures, contributing to social change and, more generally, improving quality of life at home. In contrast, emigration can also slow down the rapidity of development as the most ambitious persons are the ones who most probably emigrate, the loss of skilled workers hampering economic growth, and inflation constituting an important issue in communities impacted by remittances.<sup>69</sup>

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65 Crush, Williams and Nicholson, above n 62, at 258. As noted correctly by Crisp concerning the social consequences of mass migration in South Africa:

In South Africa ... the social and human costs of the migrant labour system established under the *apartheid* regime are still painfully apparent. The family life and social fabric of many communities in Southern Africa has been disrupted by international migration. Indeed, one of the cruellest consequences of international migration in this part of the world is the HIV/AIDS pandemic, which has been fuelled by the separation of men from their family.

Jeff Crisp "Globalization, poverty and mobility: an introduction to the developmental dimensions of international migration" UNHCR New Issues in Refugee Research, Working Paper no 164 at 8.

66 For recent examples, see, for instance, *International migration and development* GA Res 61/208, A/RES/61/208 (2006); *International migration and development* GA Res 60/227, A/RES/60/227 (2005); *International migration and development* GA Res 59/241, A/RES/59/241 (2004); *International migration and development* GA Res 58/208, A/RES/58/208 (2003); *International migration and development* GA Res 56/203, A/RES/56/203 (2001); *International migration and development* GA Res 54/212, A/RES/54/212 (1999).

67 United Nations General Assembly, above n 57, at [32], reads as follows:

... the growth of interest in the economic and developmental aspects of migration must be linked to greater protection of migrants' rights and to a genuine effort to eliminate situations that render them vulnerable to abuse and a litany of human rights violations [T]he protection of the rights of migrants makes economic sense and ... true protection would only serve to maximize development.

68 Taran, above n 28, at 162–163.

69 RT Appleyard "Migration and development: a critical relationship" (1992) 1 *Asian and Pacific Migration Journal* (1992) 1 at 3.

It has been recognised that international migration, development and human rights are intrinsically interconnected. Respect for the fundamental rights and freedoms of all migrants are considered crucial for obtaining the full benefits of international migration.<sup>70</sup> This linkage, however, is somehow controversial, as economists often tend to frame the discussion within the dilemma of "numbers versus rights". This dilemma entails that if states' policies guarantee wide-ranging rights, the number of migrants that can be accepted in a country will inevitably be small, and in contrast, if the intention is to guarantee a large number of migrants entering, protection has to be kept at a lower level.<sup>71</sup> However, it is important that others do not regard protection and development as negatively interrelated, as seen in the UN Secretary General's report:<sup>72</sup>

When there is a legitimate need for workers, providing a legal avenue for their employment and ensuring that their labour rights are protected produces the best results for all.

A "right to development" seems to directly derive from several provisions of the 1966 International Covenant of Economic, Social and Cultural Rights (ICESCR), specifically its arts 2.1, 11, 22 and 23.<sup>73</sup> These provisions of the ICESCR create an international obligation on developed

70 *Summary of the High-level Dialogue on International Migration and Development A/61/515* (2006) at [10].

71 Battistella, above n 31 at 67.

72 *Report of the Secretary General: International Migration and Development A/60/871* (2006) at [262]. In contrast, see UN General Assembly, above n 57, at [49]:

... existing demand for migrant labour, its insufficient acknowledgment by Governments and their consequent failure to provide legal avenues for migration are among the root causes of irregular migration, which is often a factor contributing to human rights violations and situations of abuse suffered by migrants.

73 Article 2.1 of the ICESCR calls upon state parties:

... to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means ...

Article 11.1 requires that state parties:

... recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

Thereafter, it calls upon states to "take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent". Article 11.2 provides that state parties "recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed ...". Article 22 authorises the United Nations Economic and Social Council (ECOSOC) to draw the attention of the other UN bodies to the "advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant". Finally, art 23 commits state parties "to international action for the achievement of the rights recognized in the present Covenant".

countries to cooperate and grant assistance to developing countries to help to realise their right to development. The obligation to cooperate in realising the right to development may be conceptualised as containing a negative and a positive duty. It would appear to be a negative duty to state parties not to impede the development of underdeveloped states.<sup>74</sup> In this regard the Declaration on the Right to Development (DRD), adopted by the UNGA in 1986, is important. From a perspective of migration, the DRD conceives the right to development as both an individual and collective right.<sup>75</sup> Migration therefore would encourage the development objectives of integration between migrants and receiving countries through the promotion of manpower mobility

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74 BS Chimni "Development and migration" in T Alexander Aleinikoff and Vincent Chetail (eds) *Migration and International Legal Norms* (TMC Asser Press, the Hague, 2003) 255 at 257. The author noted that in its General Comment No 3, the Committee on Economic, Social and Cultural Rights (CESCR) "has gone further and stated that international cooperation for development, and thus the realization of economic, social, and cultural rights, is an obligation placed upon states" (emphasis added).

75 *Declaration on the Right of Development A/RES/41/128* (1986) (DRD). Article 1.1 of the DRD reads as follows:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

Article 2.1 further emphasises that: "The human person is the central subject of development and should be the active participant and beneficiary of the right to development." Concerning the realisation of the right to development, article 3 of the DRD states:

(1) States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development ... (3) States have the duty to co-operate with each other in ensuring development and eliminating obstacles to development. States should realize their rights and fulfill their duties in such a manner as to promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States, as well as to encourage the observance and realization of human rights.

Article 4 goes further and reads:

(1) States have the duty to take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development. (2) Sustained action is required to promote more rapid development of developing countries. As a complement to the efforts of developing countries, effective international co-operation is essential in providing these countries with appropriate means and facilities to foster their comprehensive development.

Finally, art 10 reads:

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.

and various components associated with it, including capital, technical transfers, and technology.<sup>76</sup> Also, within the framework of the relationship between migration and development, the UNHCR has once again stressed the dangers of blurring the line separating refugees from migrants who have moved from one country or continent to another for economic or social reasons.<sup>77</sup>

However, according to recent surveys, it seems that very few SSA countries have anything positive to say about migration, while for countries like Nigeria, migration has hardly figured as a policy concern and until recently no connection was made between international migration and development. In Ethiopia, controlled migration that occurs as part of the state policy of planned resettlement from lowlands to highlands has been considered as beneficial, whereas spontaneous migrations, instead, causes natural resource degradation.<sup>78</sup>

Migrants who cross borders from one poor country to another similarly poor country in transit to a possible third, better, destination, end up becoming a burden for the temporary host country, instead of representing a resource for it. In this case, which is not infrequent, it is clear that the "right to development" becomes a very weak argument to sustain.

### *V Protection of Migrants in SSA at the Continental level: Many Positive Words Spent...*

In SSA there have been many attempts to regulate the phenomenon of migration, either continentally or on a regional scale, and in the different countries through the adoption of national legislation.

From a continental scale, in SSA there is no comprehensive binding instrument protecting migrants as happens, for instance, with refugees through the 1969 African Union (AU) Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>79</sup> Nevertheless, in different

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76 Oucho, above n 1 at 43. At 48 the author noted: "... at the heart of immigration will be two politico-economic considerations: the free movement of labour, with the option of securing citizenship, which regional cooperation could sanction; and fixing immigration quotas ...".

77 UN High Commissioner for Refugees "Forced Migration and Development (Global Forum on Migration and Development, Brussels, 9–11 July 2007)" (2007) UNHCR < <http://www.unhcr.org> > at 1.

78 Results of a survey conducted in 2003 by the Sussex Centre for Migration Research cited in: Oliver Bakewell "Keeping them in their place: the ambivalent relationship between development and migration in Africa" (2008) 29 *Third World Quarterly* 1341 at 1348.

79 African Union *Convention Governing The Specific Aspects Of Refugee Problems in Africa* (1969). For a general analysis of this convention see, for instance: P Weis "The Convention of the Organisation of the African Unity governing the specific aspects of refugee problems in Africa" (1970) 3 *Revue des Droits de l'homme* 449; AM Rifaat "Refugees and the right of asylum: an African perspective" (1984) 40 *Revue Egyptienne de droit international* 71; W Hövell tot Westerflieer "Africa and refugees: the OAU Refugee Convention in theory and practice" (1989) 7 *Netherlands Quarterly of Human Rights* 172; G Okoth-Obbo "Thirty years on: a legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugees Problems in Africa" (2001) 20 *Refugee Survey Quarterly* 79; BT Mukirya-Nyanduga "Refugee

instances, the AU has focused its attention on the issue of migrants through declarations and also resolutions that have stressed the importance of the protection of migrants' human rights as well as the important connection between migration and development. For instance, in 2007, the African Commission on Human and Peoples' Rights (ACHPR) addressed a series of recommendations to state parties of the ACHPR mainly focusing on the respect of human rights of all migrants, urging the state parties to the African Charter to ensure that the issue of migration be included in their periodic reports<sup>80</sup> as well as providing the Special Rapporteur on migrant issues with resources, in order to facilitate the discharge of his mandate.<sup>81</sup> The Special Rapporteur has existed since 2004 even if, at that time, he was only in charge of considering refugees, asylum seekers and internally displaced persons.<sup>82</sup> His mandate was extended to cover migrants' issues in 2006.<sup>83</sup> In terms of the measures decided upon in 2004, the Special Rapporteur should: "seek, receive, examine and act upon" information on the situation of migrants; "assist" the states members of the AU to develop policies, regulations and laws for an effective protection of migrants; "cooperate and engage" in dialogue with states and national and international human rights institutions; "develop and recommend" strategies to protect the rights of migrants and follow up on his recommendations. For this purpose, the former Special Rapporteur BT Nyanduga,<sup>84</sup> in his 2009 report, focused on several serious situations of discrimination towards migrants, especially in South Africa where, although commending the decision by the government to regularise the stay of Zimbabweans migrants in the country,<sup>85</sup> he was: "concerned that ... other issues such as the safety and security of migrants is not

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protection under the 1969 OAU Convention governing specific aspects of refugee problems in Africa" (2004) 47 *German Yearbook of International Law* 85; NS Okogbule "The legal dimension of refugee problem in Africa" (2004) 10 *East African Journal of Peace and Human Rights* 176.

80 Periodic reports are presented under art 62 of the African Charter, which reads:

Each state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.

81 African Union *Resolution on Migration and Human Rights* ACHPR/Res 114 (XXXXII) (2007).

82 African Union *Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons In Africa* ACHPR/Res 72 (XXXVI) (2004).

83 African Union *Resolution on Migration and Human Rights* ACHPR/Res 114 (XXXXII) (2007).

84 Through African Union *Resolution on the Appointment of the Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa* ACHPR/Res 160 (XLVI) (2009), the ACHPR appointed Mohamed Fayek as Special Rapporteur "for a period of two years, effective 25 November 2009".

85 This campaign of "amnesties" started in the late 1990s and involved mainly three categories of migrants. See Robert Mattes and others "South African attitudes to immigrants and immigration" in DA McDonald, (ed) *On Borders: Perspectives on International Migration in Southern Africa* (St Martin's Press, New York, 2000) 196 at 202:

[The first concerned] contract miners who had worked for at least 10 years in a South Africa mine. The second was for any SADC citizen who had been living in South Africa, and/or had a South

yet guaranteed". Compensation for the victims of the xenophobic attacks, 60 of whom lost their lives while thousands of migrants' lost property worth millions of dollars, has not been addressed."<sup>86</sup> Attacks against both refugees and migrants still continued in early 2010.<sup>87</sup> In 2008 the ACHPR adopted a resolution in which it condemned the attacks and violence perpetrated against migrants in various townships in South Africa, calling on the South African government to prosecute those responsible for the attacks, and at the same time adopting further measures to guarantee the protection of foreign migrants in that country.<sup>88</sup>

In addition, speaking more generally about the plight of migration in the entire continent, the Special Rapporteur urged African states to:<sup>89</sup>

adopt policies which provide gainful employment opportunities to African Youth, that means allocating more resources to economic development and employment; criminalize human trafficking;[<sup>90</sup>] adopt

African partner/child, and/or had been working in South Africa for a period of five straight five years, and had no criminal records. A third amnesty for Mozambican refugees still living in South Africa was due to begin in July 1999.

86 Africa Union "Report of the Commissioner Bahame Tom Nyanduga, Special Rapporteur on refugees, asylum seekers, IDPS and migrants in Africa for the period November 2008-May 2009" (2009) at 2. The same Zimbabweans have been victims of severe controls at the borders in previous decades. See Lovemore Zinyama "Who, what, when and why: Cross-border movement from Zimbabwe to South Africa" in DA McDonald (ed) *On Borders: Perspectives on International Migration in Southern Africa* (St Martin's Press, New York, 2000) 71 at 75:

In order to counter the inflow of foreigners [from Zimbabwe], the South African government has been urged to impose stringent controls on their entry into the country, particularly the less-educated and unskilled, and only selectively allow entry to those with skills and capital for investment in the country ... But it remains unclear how true these fears are that Zimbabweans ... are queuing to enter South Africa in large numbers and causing considerable harm to that country's prosperity and security.

87 See, for example, "UNHCR and South African police coordinate to protect refugees" UNHCR (2010) <[www.unhcr.org](http://www.unhcr.org)>. The article states:

What began as a protest by disgruntled commuters against a decision to reduce the number of trains to Pretoria's Phomolong Informal Section because of attacks on Metrorail property, quickly evolved into a march against the lack of promised housing, with police engaged in running battles with hundreds of stone-throwing demonstrators. It also was a test of UNHCR's efforts to enhance coordination with police in South Africa to protect the refugees and asylum-seekers who sometimes become the targets of protests against the lack of services.

88 African Union *Resolution on the Situation of Migrants in South Africa* ACHPR/Res 131 (XXXXIII) (2008).

89 Africa Union "Report of the Commissioner Bahame Tom Nyanduga, Special Rapporteur on refugees, asylum seekers, IDPS and migrants in Africa for the period November 2008-May 2009" (2009) at 4.

90 "The identification of victims of trafficking, especially at borders, in transit or in a mixed migration context, [remains] as a major challenge." See UN High Commissioner for Refugees *10-Point Plan Expert Round Table No. 2: "Different People, Different Needs" (Tunis, Tunisia, 6-8 July 2009) Summary Report* (2009) at [2.3]. The trafficking of human beings is defined by the UN as follows:

measures for mutual assistance in addressing migration issues; provide diplomatic protection to African migrants [in Africa]; ratify the ICRMW.

At the continental level, states have tried to find a common position on migration and development, convening an important meeting in 2006 where it was reaffirmed that migration and development are inextricably linked notwithstanding a view that the issue needed to be dealt with differently and separately according to the "preoccupations and priorities" of Africa's partners. More importantly, it was also reaffirmed that "migration is a source of cultural and social enrichment for the host countries", having an economic impact on employment and growth. Consequently, migration has an influence on the "demand of commodities and, therefore, on labour."<sup>91</sup> In addition, the Executive Council of the Ministers of the AU (Council):<sup>92</sup>

recommended that Member States promote free movement of persons, strengthen cooperation with regard to migration-related issues,<sup>[93]</sup> and create conditions conducive to the participation of migrants in the development of their countries of origin.

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... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

See *United Nations Convention against Transnational Organized Crime* GA Res 55/25, A/RES/55/25 (2001), art 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime annexed to the resolution.

91 African Union "Elements for an African common position on migration and development" (2006) at [8] and [9].

92 Ibid, at [14]. At [21] the meeting called:

... for the need to strengthen international cooperation with a view to a just and equitable globalization and partnership for greater support of the international community to the efforts being exerted by Africa to achieve sustainable development by placing emphasis on employment promotion, poverty reduction, regional integration and better participation in the globalization process.

And at [30]:

The preparation of a common African position on the issue of migration is likely to facilitate harmonization of national and regional policies on migration within the African economic communities which are the pillars of African integration.

See also, *Note by the Secretary-General: Human Rights of Migrants* A/61/324 (2006) at [49] and [59].

93 See also, *Summary of the High-level Dialogue on International Migration and Development* A/61/515 (2006) at [18] which states:

Most participants considered that national strategies to address the impact of international migration on development should be complemented by strengthened bilateral, regional and multilateral

Within this framework, the Council should also enable states to elaborate "rules and regulations governing migration based on a number of commonly shared elements".<sup>94</sup> The "Plan of Action for a Common African Policy on Migration and Development", included in the second part of the report of the mentioned Meeting of Experts, provided for several recommendations to be adopted within the framework of the protection of migrants in the continent. They included:<sup>95</sup>

[to] encourage the conclusion of bilateral agreements to manage illegal migrations;<sup>[96]</sup> establish appropriate mechanisms bringing together national focal points in charge of migration, information exchange that may enrich the development of a common vision based on partnership, solidarity and friendship principles; encourage a large harmonization of migration policies between African countries so as to facilitate more orderly migration for the service of development of African countries and regions and guaranteeing the rights of migrants; lay down bilateral and regional legal instruments, especially within the framework of Regional Economic Communities, to ensure a better organization of the movement of persons; promote the adhesion of states to regional and international instruments protecting migrants ... establish specific concertation frameworks and common instruments of intervention at regional and continental levels for the management of migrations.

The Meeting of Experts was created through a decision of the Council of the AU of the same year 2006<sup>97</sup> in which the Council, among others, deplored the "inhuman and degrading treatment often meted out to African migrants residing in Africa" and emphasised the need to implement "as a matter of urgency development plans in Africa in order to promote indigenous development."<sup>98</sup>

But the reality is often different. Migrants are treated in a questionable manner, especially if they are compelled to live for long periods in several transit countries, before heading to Europe. The time spent in the transit country may differ depending on several conditions: the effective

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cooperation. They considered that such cooperation was needed to promote legal, safe and orderly migration, reduce irregular migration and improve the chances of reaping the full benefits of international migration.

94 African Union, above n 91, at [17].

95 African Union *Plan of Action for a Common African Policy on Migration and Development* (2006) at [4].

96 On this purpose, it has been written: "There are a few examples of such agreements between African states but their duration was generally short and they covered only a small number of the migration flows." van Dijk, Foeken and van Til, above n 4, at 13.

97 African Union *Decision on Migration and Development EXCL/Dec 264(VIII)* (2006) at [13].

98 *Ibid*, at [10] and [6].

ability of smugglers to organise the transport of migrants,<sup>99</sup> the extent of the control measures set up by the authorities of the transit area to put an end to this stay, and the migrant's capacity to develop resources and to create contacts.<sup>100</sup> Often these migrants have a very difficult time in the transit countries. For instance, the authorities in Morocco and Libya have commonly harassed and expelled this category of migrants, sending them to desert border posts where they usually face hunger and even death.<sup>101</sup> In 2009, Libya even signed and ratified a Treaty of Friendship, Partnership and Cooperation with Italy, whose art 19 commits the parties to collaborating to prevent illegal immigration in the countries of origin of the migratory flows through bilateral and regional initiatives. This article, however, raised strong human rights concerns about the fate of the immigrants from SSA turned back and left in the desert.<sup>102</sup> Critics often argue that the implementation of bilateral agreements between European countries and transit countries from the Maghreb areas ignores the rights of the migrants, most of them originating from the Sub-Saharan regions.<sup>103</sup>

### *VI Attempts of Protection Within the Framework of the Major Sub-regional African Organisations*

On a sub-regional scale, one of the most important attempts to regulate migration has been through the adoption of the Economic Community of West African States (ECOWAS)<sup>104</sup> Revised Treaty 1993<sup>105</sup> that sought:<sup>106</sup>

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99 Collyer notes:

[In these cases] smugglers are frequently other migrants, with some experience of particular border crossing making the most of the opportunity to make a little money themselves to fund their onward journey.

Michael Collyer "States of insecurity: consequences of Saharan transit migration" (2003) Centre on Migration, Policy and Society, University of Oxford, Working Paper no 31 at 18.

100 Sylvie Bredeloup "Sahara transit: times, spaces, people" (2010) Wiley Online Library <<http://onlinelibrary.wiley.com>> at 4.

101 Aderanti Adepoju, Femke Van Noorloos and Annelies Zoomers "Europe's migration agreements with migrant-sending countries in the global south: a critical review" (2010) 48 *International Migration* 42 at 48.

102 Natalino Ronzitti "The Treaty on Friendship, Partnership and Cooperation between Italy and Libya: new prospects for cooperation in the Mediterranean?" (2009) 1 *Bulletin of Italian Politics* 125 at 130. Article 19 of the Treaty is entitled: "Collaborazione nella lotta al terrorismo, alla criminalità organizzata, al traffico di stupefacenti, all'immigrazione clandestina".

103 Adepoju, Van Noorloos and Zommers, above n 101, at 49.

104 At present, ECOWAS is constituted by 15 members: Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali Niger, Nigeria, Senegal, Sierra Leone and Togo.

105 Economic Community of West African States (ECOWAS) Revised Treaty 1993.

106 *Ibid*, art 3.1 ("Aims and Objectives").

... to promote cooperation and integration, leading to the establishment of an economic union in West Africa in order to raise the living standards of its peoples, and to maintain and enhance economic stability, foster relations among Member States and contribute to the progress and development of the African Continent.

The ECOWAS Revised Treaty also identifies as an objective the abolition of any obstacles to the free movement of persons between member states;<sup>107</sup> with art 59 harmonising the status of the citizens of the community and guaranteeing them the right of entry, residence and establishment in the other countries.<sup>108</sup> This Revised Treaty – the original dates back to 1975 – comes after some other important innovations in the community such as, the introduction of the ECOWAS travel certificate in 1985 that was intended to exempt its holders from completing immigration and emigration forms when travelling between ECOWAS member states. This measure was followed by the adoption of the ECOWAS passport at the Heads of State and Government Summit in May 2000. The ECOWAS passport was to serve as a symbol of unity, progressively replacing national passports. Supplementary protocols concerning the rights of residence and establishment were proposed in 1986 and 1990 but only the former has been ratified by the members of the ECOWAS community. With the exclusive visa-free regional scheme in Africa, ECOWAS remains a major achievement in pursuit of the objective of free movement of individuals but this unquestionable success may belie the fact that the implementation of the first ECOWAS Treaty has proved a momentous challenge.<sup>109</sup> In addition, reality does not always match the objectives stated on paper. For instance, why in the late 1990s were expulsions of citizens from other members of ECOWAS so common in countries like Benin or Côte d'Ivoire?<sup>110</sup> Within the framework of the initiatives

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107 Ibid, art 3.2(d)(iii) ("Aims and Objectives").

108 Ibid, art 59 ("Immigration") reads:

(1) Citizens of the community shall have the right of entry, residence and establishment and Member States undertake to recognise these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto. (2) Member States undertake to adopt all appropriate measures to ensure that Community citizens enjoy fully the rights referred to in paragraph 1 of this Article. (3) Member States undertake to adopt, at national level, all measures necessary for the effective implementation of the provisions of this Article.

109 Martens, above n 11, at 354. For an analysis on migration in the framework of ECOWAS see also Aderanti Adepoju "Perspectives on international migration and national development in Sub-Saharan Africa" in Aderanti Adepoju Ton van Naerssen and Annelies Zoomers (eds) *International Migration and National Development in Sub-Saharan Africa* (Brill Publishers, Leiden, 2007) 21 at 28.

110 Aderanti Adepoju "Fostering free movement of persons in West Africa: achievements, constraints, and prospects for intraregional migration" (2002) 40 *International Migration* 3 at 12. The author also pointed out:

Most countries of the sub-region have enacted or retained a series of laws, which in effect restrict "foreigners", including nationals of community states, from participating in certain kinds of economic activities. The expulsion of aliens from some member states also negates the *raison d'être* for

undertaken in West Africa the recent Regional Conference on Refugee Protection and International Migration held in Dakar in November 2008 can also be mentioned. This conference re-affirmed that the right to visa-free entry constituted an important part of the implementation of the 1986 ECOWAS Protocol. In addition, the particular challenge of finding appropriate solutions for migrants from non-ECOWAS countries to whom the ECOWAS entitlements do not apply, was noted. Often, they have few possibilities to regularise their status, thus contributing to their vulnerability. For instance, the local integration opportunity made available by the Malian authorities and civil society to Congolese mandate refugees who had been expelled from Algeria was mentioned as a good practice in this respect. In addition, the emphasis was placed on the enhancement of the legal migration underlining that nothing that increased labour migration opportunities<sup>111</sup> could assist in diminishing irregular migration. To achieve this objective, it was recommended that ECOWAS institutions should develop, among others, mechanisms to facilitate the recognition of diplomas and qualifications of labour migrants in all ECOWAS member states.<sup>112</sup> An important step accomplished by the states in this geographical area towards a better treatment of migrants has undoubtedly been the adoption, in January 2008, of the Common Approach of Member States to Migration at Ouagadougou (Burkina Faso), symbolising a willingness to start a dialogue of equals with North Africa and even Europe. This approach has set as its priority optimising intra-regional legal migration through an active policy of regional development and consistency of migration policies. New aspects were included or confirmed, such as the respect for the rights of migrants, taking into account the gender dimension.<sup>113</sup>

Another example of sub-regional organisation that has tried to ease the life of migrants is the Southern Africa Development Community (SADC).<sup>114</sup> In its 1992 original Declaration and Treaty, the SADC had as one of its objectives:<sup>115</sup>

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establishing such communities. Expulsions and deportations are common policy measures directed at illegal migrants before and after the formation of sub-regional economic unions.

111 See also, United Nations General Assembly *Summary of the High-level Dialogue on International Migration and Development A/61/515* (2006) at [15] which states: "Participants [at the Dialogue] remarked that labour migration was crucial for the world economy. In some countries, the labour market was highly dependent on foreign workers."

112 UN High Commissioner for Refugees *Regional Conference on Refugee Protection and International Migration in West Africa (Dakar, Senegal, 13-14 November 2008). Summary Report* (2009) <www.unhcr.org> at 14, 17 and 18.

113 UN High Commissioner for Refugees *West Africa as a Migration and Protection Area*(2008) <www.unhcr.org> at 22.

114 At present the South African Development Community (SADC) is constituted by fifteen members: Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

[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<sup>[116]</sup> of the Region generally, among Member States.

However, within the framework of this paper, more important is the Draft Protocol on the Facilitation of the Movement of Persons adopted in Gaborone (Botswana) in 2005. Its overall objective, specified in art 2, is "to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties".<sup>117</sup> To do this, much importance is given to the national laws and their capacity to promote the objectives of the Protocol.<sup>118</sup> An important part of this Draft Protocol is dedicated to the expulsion of aliens of another SADC state, a measure that, according to art 22,<sup>119</sup> is used for a limited number of particular reasons, counter-balanced by the provisions contained in both arts 23<sup>120</sup> and 24,<sup>121</sup> protecting against the indiscriminate expulsion of nationals of other SADC

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115 The Declaration and Treaty establishing the Southern African Development Community 1994, art 5.1(a) ("Objectives").

116 But see, for instance, Regulation on the Legal Regime of Foreigners 1994 (Angola), art 1 which is, in principle, is applied to all the immigrants without distinction if they come from other SADC states or not.

117 The specific objectives of the Draft Protocol on the Facilitation of the Movement of Persons 2005 in relation to every citizen are however enunciated in art 3 and have the goal to facilitate:

(a) entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned; (b) permanent and temporary residence in the territory of another State Party; and (c) establishment of oneself and working in the territory of another State Party.

118 For the analysis of the national legislation. *Ibid*, art 7 ("Harmonization of National Laws") reads:

Every State Party shall ensure that all relevant national laws, statutory rules and regulations are in harmony with and promotive of the objectives of this Protocol. To this end, SADC shall, from time to time, produce model laws for the consideration by Member States.

119 *Ibid*, art 22 ("Reasons for Expulsion") reads:

No person who is a citizen of a State Party, or any member of the family of such person, who has been permitted residence or establishment in the territory of another State Party, may be expelled from the host State except where: (a) reasons of national security, public order or public health of the host State so dictate; (b) an important essential condition of the issue or validity of such person's residence or establishment permit has ceased to exist or cannot be fulfilled or complied with any longer; (c) a citizen of another State Party acts in conflict with the purposes for which such permit was issued or contravenes or fails to comply with any such conditions subject to which it was issued; or (d) the person refuses to comply with a lawful order of an appropriate public health authority issued for the protection of public health in circumstances where the consequences of such refusal have been explained.

120 *Ibid*, art 23 ("Protection Against Expulsion of Individuals") reads:

(1) An order for the expulsion of a citizen of a State Party or any member of the family of such citizen from the territory of another State Party shall only be valid if the reasons thereof comply with this Protocol and are in accordance with the laws and regulations of the host State. (2) The diplomatic

countries, and by art 25 that contains a series of guarantees for the non-national that should be expelled.<sup>122</sup>

ECOWAS and SADC are two of Africa's most promising sub-regional economic schemes. However, in spite of achieving significant levels of economic integration and recognising the importance of free movement of individuals to the integration effort in their respective treaties, both sub-regional organisations have found the implementation of this goal difficult, sometimes too challenging for the practical reality faced daily.<sup>123</sup> Nevertheless, it is generally understood that, at least on paper, efforts made by the SADC have been less robust when compared to measures adopted by ECOWAS, the latter being an older and better established institution.<sup>124</sup>

### *VII Substantial Homogeneity of the Domestic Legislation on Migrants in SSA*

To ensure that the challenges posed by the issue of migration to SSA countries are effectively addressed, it would be necessary to establish a common strategy that associates countries of origin, transit and destination, in order to find balanced solutions that take into consideration the interests of all countries concerned. Subject to treaty obligations and those deriving from customary international law, a state has the sovereign right to decide who enters and who stays in its territory

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or consular authorities of the State Party of which the affected person is a citizen shall be informed by the host State of the decision to expel the affected person and such person shall be afforded an opportunity to consult with the said diplomatic or consular authorities.

121 Ibid, art 24 ("Protection against Indiscriminate Expulsion") reads:

(1) Any person who has acquired residence or establishment in the territory of a State Party shall not be subjected to collective or group indiscriminate expulsion. (2) For the avoidance of doubt, each case of expulsion from the territory of a State Party shall be considered and determined on its own merits.

122 Ibid, art 25 ("Principles Governing Expulsion") reads:

Each State Party shall ensure that its laws, regulations or administrative mechanisms for the expulsion of non-citizens shall, in relation to citizens of another State Party, except where the provisions of Article 22(a) apply, incorporate the following principles: (a) the giving of adequate notice of expulsion; (b) the affording to the affected persons of the opportunity to have recourse to the appropriate domestic courts or tribunals of the host State; (c) the suspension of any order of expulsion upon the notice of an appeal; (d) the giving of reasonable time to affected persons to enable them to settle their personal affairs including the management and disposal of their business or professional practices; (e) the expulsion of any person may not affect the residence or establishment permit of any independent member of that person's family; or (f) where expulsion results in the repatriation of the affected person, the costs or other expenses involved in the expulsion may be shared between the State Party ordering the expulsion and the receiving State Party, as may be agreed.

123 Martens, above n 11, at 360.

124 Aleinikoff, above n 38, at 468.

and under what conditions. In addition, states have the obligation to uphold the fundamental rights of all human beings.<sup>125</sup> The first concern of the SSA countries is, therefore, to adopt domestic legislation which has the main purpose of distinguishing between individuals who can legally enter and work in the country and those who cannot. The conditions of stay established by states include both the rights granted to migrants beyond those that are universally recognised and the obligations that migrants must fulfil while they remain in a country other than their own, with a particular emphasis placed on the meaning of "prohibited immigrants"<sup>126</sup> and their conditions once they find themselves in the host country. In the various sub-Saharan countries, the category of "prohibited immigrants" includes: "any idiot or epileptic, or any person who is insane or mentally deficient, or any person who is deaf and dumb, or deaf and blind [...]";<sup>127</sup> "prostitutes or homosexuals";<sup>128</sup> "any person who, from information received *from any source*, is deemed by the Minister [of Home Affairs] to be an undesirable visitor to Zimbabwe" (emphasis added);<sup>129</sup> "a person who is dealing in dangerous drugs";<sup>130</sup> and "any person who fosters or visibly spreads ideas about any kind of discrimination."<sup>131</sup> In addition, albeit rather paradoxical, is a provision of the Angolan immigration legislation which points out that "foreign citizens who without justification outstay their visa shall be subject to a daily fine, in Kwanzas, equivalent to one hundred and fifty United States Dollars", an

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125 See generally, Act on the Legal Regime of Foreign Citizens 2007 (Angola), art 3, which reads:

Foreign citizens residing or present in the Republic of Angola enjoy the same rights and guarantees, and are subject to the same duties, as Angolan citizens, *except for* political rights and other rights and duties that are clearly reserved by law for Angolan citizens.

126 On this latter point, see, for instance: Immigration Act 1966 (Botswana), ss 7–14; Immigration Act 1967 (Kenya), s 3; Immigration Act 1964 (Malawi), ss 4–20; Immigration Control Act 1993 (Namibia), ss 11, 16, and 39–52; The Immigration Act 1964 (Swaziland), ss 9–16; Immigration Act 1995 (Tanzania) ss 10–14; Immigration and Deportation Act 1967 (Zambia), ss 22–26; Immigration Act 1979 (Zimbabwe), ss 14, 17, 18 and 34.

127 Immigration Act 1964 (Malawi), s 4.1(d). See also: Immigration Act 1966 (Botswana), s 7(b); Immigration Control Act 1993 (Namibia), s 39.2(d), although here has been used the less straight expression "mentally ill or physically affected person"; Immigration Act 1963 (Nigeria), s 18.1(b); Immigration Act 1995 (Tanzania), s 10(b); Immigration Act 1979 (Zimbabwe), ss 14.1(c)(i) and 14.1(c)(ii).

128 Immigration Act 1979 (Zimbabwe), s 14.1(f)(i). Section 14.1(f)(ii) adds: "[any person who] lives or has lived on, or knowingly receives or has received, any part of the earnings of prostitution or homosexuality." See also: Immigration Act 1966 (Botswana), s 7(d); Immigration Act 1967 (Kenya), s 3(e) – only related to prostitutes; Immigration Act 1963 (Nigeria), s 18.1(g) – Nigerian law adds also a "brothel keeper" as a category of prohibited immigrant; Immigration Act 1995 (Tanzania), s 10(e); Immigration and Deportation Act 1967 (Zambia), s 22, class B.

129 Immigration Act 1979 (Zimbabwe), s 14.1(g). See also: Immigration Act 1966 (Botswana), s 7(f); Immigration Act 1967 (Kenya), s 3(f); Immigration Act 1963 (Nigeria), s 18.1(d); The Immigration Act 1964 (Swaziland), s 9.1(g).

130 Immigration Act 1995 (Tanzania), s 10(j).

131 Law N° 17/99 of 16/8/1999 on Immigration and Emigration 1999 (Rwanda), art 13.3.

amount clearly too high to be paid by any African migrant, and without specifying if this measure is retroactive.<sup>132</sup> To emphasise the direction in which the policy on migration of many SSA countries is going, it is notable that practically all the domestic legislation contains detailed measures on detention and/or deportation of illegal migrants, where arrests can be made "without warrant", sometimes only for "a reasonable period ... not exceeding fourteen days, as may be required for the purpose of making enquiries as to such person's identity or antecedents"<sup>133</sup> but often detention is longer than that, such as Guinea, where it can last up to one year,<sup>134</sup> or in Cameroon, where detention for illegal stay can last up to two years.<sup>135</sup>

"Detention",<sup>136</sup> or more vaguely, "custody",<sup>137</sup> is also very often provided for immigrants waiting to be deported.

In most countries, migrants enter under temporary categories that do not grant rights equal to those of citizens. Temporary migrant workers, for instance, are often constrained to specific jobs or employers and may not be allowed to be accompanied or joined by their immediate relatives,<sup>138</sup>

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132 Act on the Legal Regime of Foreign Citizens 2007 (Angola), art 101.1. Article 110.3 is quite harsh, providing for that: "failure to pay fines voluntarily, within the time limit established, shall cause an offence report to be drawn up and forwarded to the court".

133 Immigration Act 1964 (Malawi), s 10.1(c); The Immigration Act 1964 (Swaziland), s 12.1. But, for instance, in Rwanda the period of detention can be up to three months. Law N 17/99 of 16/8/1999 on Immigration and Emigration 1999 (Rwanda), art 20.

134 Loi L/9194/019/CTRN portant sur les conditions d'entrée et de séjour des étrangers en République de Guinée 1994 (Guinea), s 73.

135 Loi n 1997/012 du 10 janvier 1997, Fixant les conditions d'entrée, de séjour et de sortie des étrangers au Cameroun 1997, s 40.1.

136 Immigration Act 1966 (Botswana), s 14.1. See also: Immigration Act 1967 (Kenya), s 8.2(b); Passports and Immigration Act, 2003 (Sudan), s 30.1, but s 30.2 provides that the immigrant can also "reside in a specified place and report daily ... to the local police station till the date of his deportation"; Immigration Act 1964 (Swaziland), s 16.

137 Immigration Act 1995 (Tanzania), s 14.4. See also, Immigration and Deportation Act 1967 (Zambia), s 26.4(a).

138 United Nations General Assembly *Report of the Secretary General: International Migration and Development A/60/871* (2006) at [255]–[256]. Paragraph 257 adds:

States that focus on admitting temporary migrants face a dilemma. Their reluctance to grant long-term residence rights to large numbers of foreigners implies setting conditions of stay and work that reduce the chances for the economic and social integration of migrants, thus increasing the social costs resulting from the marginalization that ensues. Furthermore, those conditions may expose migrants to abuse, which may be in violation of the international obligations of states.

See also [133]–[141]. In detail, [139] stated:

In Africa, South Africa has long had a temporary worker programme to provide labour for the mining sector. In 2000, 131,000 foreigners worked in the mines accounting for 57% of the workforce in that

although some legislation is less strict on this point.<sup>139</sup> Generally speaking, the countries of Southern Africa appear to have been historically the most concerned by irregular migration and have applied systems of sanctions to employers of migrants in an irregular situation. In Zimbabwe, a system of sanctions was imposed in 1976 and in Botswana the same was done in 1981.<sup>140</sup>

Several practices increase the vulnerability of migrants and should be avoided or outlawed. In some countries, employers keep the passports and travel documents of migrant workers, thus effectively depriving them of the liberty to travel at will.<sup>141</sup> Other practices include segregating migrants from the host society, preventing them from organising or joining trade unions<sup>142</sup> on the same basis as citizens, or providing no credible mechanism for redress of grievances. These practices put migrants at an increased risk of exploitation. Moreover, it is not infrequent for migrant workers to be discriminated against when being hired in order to safeguard the national labour force. For example, in Eritrea, a work permit will be issued to a foreign applicant only after having ascertained that:<sup>143</sup>

- (a) an Eritrean citizen with the necessary skills to meet the requirement of the proposed employment is not available and that (b) programmes will be undertaken to train Eritrean citizens in the skills required.

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sector, a higher proportion than in 1990 (47%). Other countries in the continent that have relied on foreign workers include Cote d'Ivoire, Gabon and the Libyan Arab Jamahiriya.

139 See, for instance, Immigration Act 1964 (Malawi), s 24.2 which allows a temporary migrant to be accompanied "by his wife and any of his children under the age of eighteen years." See also, Immigration Control Act 1993 (Namibia), s 27.5 and Immigration Act 1964 (Swaziland), s 22.6.

140 Richard Plender *International Migration Law (Revised Second Edition)* (AW Sijthoff, Leiden, 1988) at 323–324.

141 But see, for instance, Act on the Legal Regime of Foreign Citizens 2007 (Angola), art 5.1, which states: "Foreign citizens shall enjoy the right of free movement and of choice of residence, except for the limitations provided by law and those imposed for reasons of public safety."

142 But see, for instance, Act on the Legal Regime of Foreign Citizens 2007 (Angola), art 8.1, which states: "Resident foreign workers may freely join Angolan trade unions or professional associations on the same terms as Angolan workers in accordance with applicable laws."

143 See Regulations to Issue Work Permit to Non-Nationals 2003 (Eritrea), art 5.1. Article 10 of the same document, with a very vague formula, permits a revocation of a work permit to a migrant "where it is ascertained that there are *other serious faults* that justify revocation of the work permit" (emphasis added). See also, Immigration Control Act 1993 (Namibia), s 27.2(b), which states:

The Board shall not authorize the issue on an employment permit unless the applicant satisfies the board that: b) the employment, business, profession or occupation concerned is not or is not likely to be any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia.

Or, as it happens in other situations and as mentioned above, migrant holders of a work permit can only carry on the professional work for which the permit is issued and which qualifies the worker exclusively to work in the service of the employer who applied for it.<sup>144</sup>

By contrast, if migrants are in an irregular situation they are even more vulnerable to exploitation because they generally cannot avail themselves of the protection of authorities. Hence, employers are more likely to take advantage of them, paying them low wages or making them work long hours, sometimes under dangerous conditions. They also represent unfair competition for citizens, with the result that every worker loses: irregular migrants because they are prone to exploitation and regular migrants and citizens because they are effectively barred from the jobs the irregular migrants perform more cheaply. Although SSA governments usually do not condone these practices, they find it difficult to ensure that employers abide by labour laws. Imposing severe sanctions on employers who employ migrants in an irregular situation is a common approach to control employment of irregular migrants, but its effectiveness depends on strict enforcement that is not easy to achieve.<sup>145</sup>

The Experts Meeting held in 2006 suggested several actions as necessary to alleviate the plight of migration in the continent, among others: adopting a policy on clandestine migration, strengthening the mechanisms to fight against trafficking of human beings, strengthening national educational institutions and adapting them to the needs of African countries, and working towards the elaboration and implementation of national employment policies for foreigners, immigration and movement of foreigners serving the interests of African migrants and states.<sup>146</sup>

In addition, it is strongly recommended that permanent immigrants in countries of settlement be eventually naturalised so that, by becoming citizens, migrants can acquire the full spectrum of rights. Much legislation in SSA provides for the possibility of aliens being naturalised. This includes legislation in Ethiopia,<sup>147</sup> Gabon,<sup>148</sup> Mali,<sup>149</sup> and Tanzania.<sup>150</sup>

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144 Act on the Legal Regime of Foreign Citizens 2007 (Angola), art 51. See also, Immigration Act 1964 (Malawi), s 25.1.

145 United Nations General Assembly *Report of the Secretary General: International Migration and Development A/60/871* (2006) at [259]–[262].

146 African Union, above n 93, at [7]–[8].

147 Proclamation on Ethiopian Nationality 2003 (Ethiopia), arts 4–11.

148 Code de la nationalité, Loi n 37 1998 (Gabon), arts 30–32.

149 Code of Malian Nationality 1962 (Mali), arts 28–32.

150 Tanzania Citizenship Act 1995 (Tanzania), arts 8–12.

### VIII *South Africa's Legislation and its Strict Approach in Dealing with Migrants*

To take a typical example of SSA legislation, the Immigration Act 2002 of South Africa contains some important core purposes differing little from the Aliens Control Act 1991: control of the movement of persons and prevention of "illegal migration".<sup>151</sup> The first part of the 2002 Act sets out several core objectives: to facilitate the legal movement of persons to and from, and their sojourn in, South Africa; to reduce the administrative and bureaucratic requirements associated with the processing and issuing of permits; to prevent and reduce illegal migration; to promote and facilitate cooperation between various organs of government in the implementation of immigration law.<sup>152</sup> However, the 2002 Act differed from the 1991 Alien Control Act in two respects: by making reference to the need of encouraging skilled persons and investors to migrate to South Africa,<sup>153</sup> and by identifying xenophobia as a serious problem that needed to be addressed, although it did not explain how.<sup>154</sup> Nevertheless, the bulk of the 2002 Act focused on migration control, seeking to engage not only other government departments but also public and private institutions in the enforcement of migration law.<sup>155</sup> The 2002 Act made allowance for "the shifting of resources" away from administration and bureaucracy to enforcement and control. The Act also made it a legal requirement for various government departments and private institutions to become involved in the implementation and enforcement of immigration law.<sup>156</sup>

The most recent Immigration Amendment Act 2004 is not significantly different from the 2002 Act, at least concerning the kind of permits that can be issued to a migrant. Nevertheless, s 18.1 of the 2002 Act allows the issuance of a "relative's permit" to a foreigner who is a member of the immediate family of a "resident". However, s 20.1 of the 2004 Amendment Act is stricter in that it only allows the issue of a "relative's permit" to a foreigner who is a member of the immediate family of a "*permanent resident*" (emphasis added). Even stricter is s 21.3 of the 2004 Amendment Act which, in issuing a work permit, provides for the following specification, completely absent in the 2002 Act:

Provided that a general work permit shall remain valid for a period not longer than six months in respect of a holder whose employment contract has been terminated until that holder has exhausted all applicable rights of recourse: provided further that the period may be extended for further periods of three months at

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151 Crush, Williams and Nicholson, above n 62, at 261–262.

152 Immigration Act 2002 (South Africa), s 2 ("Objectives and functions of immigration control").

153 Ibid, s 2.1(j)(i)(aa)–2.1(j)(i)(dd).

154 Ibid, ss 2.1(e) and 2.2(e).

155 Ibid, ss 32–36.

156 Ibid, ss 32–36.

a time on submission of proof to the satisfaction of the Director-General (of the Department of Home Affairs) that, due to circumstances beyond the control of the holder, the recourse procedure have not been finalized.

Major strictures are also present in s 24 of the most 2004 Amendment Act dealing with "asylum transit permits", generically dealt with under "asylum" in s 23 of the 2002 Act. Through the 2004 Amendment Act, South African authorities grant only a 14-day "asylum transit permit" to an asylum seeker (s 24.1) also pointing out in s 24.2, a subsection without any equivalent in the 2002 law, that:

Despite anything contained in any other law, when the permit contemplated in subsection 1) expires before the holder reports in person to a Refugee Reception Officer at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 ... the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act.

Compared with s 23 of the 2002 Act, the change of attitude towards a much stricter approach of the South African authorities is patent.<sup>157</sup> If necessary, this can be further confirmed by the introduction in 2004 of a new category of "prohibited persons": "anyone found in possession of a fraudulent residence permit, passport or identification document", a clause again not found in the 2002 Act.<sup>158</sup> Finally, compared to the same section of the 2002 Act, the 2004 statute provides the specification that any person who assists an immigrant to evade a correct process of identification by local authorities shall be guilty of an offence.<sup>159</sup>

### *IX Conclusion*

International migration today is fundamentally linked to the development of both sending and receiving countries. Migration is an ideal means of encouraging co-development, that is, the coordinated improvement of social and economic conditions at both origin and destination. Migration plays a positive role by providing the workers to assure the labour demand in advanced economies and in dynamic developing economies while at the same time reducing unemployment in countries of origin and generating savings and "know-how" for the benefit of the latter.<sup>160</sup>

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157 Immigration Act 2002 (South Africa), s 23 ("Asylum") more simply reads: "The Department (of Home Affairs) may issue an asylum permit to an asylum seeker subject to the Refugee Act, 1998 ... on any prescribed terms and conditions."

158 Immigration Amendment Act 2004 (South Africa), s 30.1(f).

159 Ibid, s 41.2.

160 United Nations General Assembly *Report of the Secretary General: International Migration and Development A/60/871* (2006) at [109]. See also, [50]-[54]. In particular, [54] reads:

Mounting evidence indicates that international migration is usually positive both for countries of origin and destination. Its potential benefits are larger than the potential gains from freer international trade, particularly for developing countries.

However, racism and discrimination are also frequent features of migrants' everyday experiences in SSA and this contributes to exacerbating their already fragile position. Although, to a certain extent, this is an issue of tensions between people of different ethno-cultural backgrounds, it is also the product of a general climate of socioeconomic reluctance and ambiguity towards the changes affecting many societies. As a consequence of this situation, migrants' poor living and working conditions seldom inspire solidarity from nationals who rather express scepticism towards their presence and, disregarding their economic, social and cultural contributions, provide scapegoat them for problems which have a little to do with migration.<sup>161</sup>

Unfortunately, the situation in SSA, as elsewhere in the world, suggests that there can be no monolithic approach to migration management. Above all, even when we are not in presence of legal lacunae, a weak practice in the real defence of migrants' rights is evident. A suggested idea would be that states put on the table their particular interests to see if reciprocally advantageous agreements are possible.<sup>162</sup> For instance, a sending country might bargain for enforcement of labour standards for its citizens working in another state and that host state might consent to such enforcement if the sending state assists in combating visa fraud or undocumented migration.<sup>163</sup> It is, however, true that in most African contexts migrants do not carry identity documents with them in this manner, thus making it complicated to establish their nationality since various African tribes can live on both sides of a frontier.<sup>164</sup>

Legal norms and principles relating to African migration are both broad in scope and many in number but they do not form a coherent regime. As such, the national level remains the most realistic path to the guarantee of the rights of migrants in SSA. This article leans towards this solution because it is the most effective protection, guaranteed in the framework of the national law

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161 De Guchteneire and Pécoud, above n 36, at 3.

162 Philip L Martin, Susan F Martin and Patrick Weil *Managing Migration: The Promise of Cooperation* (Lexington Books, Lanham, 2006) at 46.

163 Aleinikoff, above n 38, at 477. See also, the proposal of Adepaju, above n 101, at 45:

Bilateral and multilateral agreements between countries sending and receiving migrants should address the issue of depleting Sub-Saharan Africa of its scarce-skilled manpower resources. It is important that the residential laws of rich countries be made flexible, to give skilled professionals from the South the opportunity of relocating without losing their residence rights in those countries.

164 See, Adepaju "The politics of international migration in post-colonial Africa" in Robin Cohen (ed) *The Cambridge Survey of World Migration* (Cambridge University Press, Cambridge, 1995) 166 at 167. The author stated:

Where ethnic groups live on both sides of national borders ... the people regard movements within their cultural realm as part of their normal life routine, but without travel documents they are seen as illegal "international migrants", especially since their respective governments attained political independence. Such movements remain largely undocumented, for many such tribal people resent or ignore the boundaries they regard as a foreign imposition.

considered as "an inductive science based upon a kaleidoscopic variation of facts",<sup>165</sup> is more realistic and beneficial. It is more realistic because, as we have seen, in the end it is the host state which finally decides who to admit on its territory and under which conditions. It is more beneficial because on one hand, countries in the same area will tend to follow the example provided by the bordering states and also because of the claims of the migrants present on their territory, who will draw motivation from what is happening nearby. On the other hand, more effective national legislations could encourage greater respect for the international provisions on the same issue, provisions considered as a sort of "natural continuation" of what is applied nationally. In this way, countries that are still reluctant to implement a national protection regime for migrants could be "convinced" by the example provided by the other countries as well as by the international norms to act accordingly. It is therefore suggested that, in this particular context, "induction of the law" – meaning to conceive an international legal regime starting from the national norm – could bring better results than its "deduction".

International migration in its various forms should probably be factored into the human resource base in protocols of regional integration or economic cooperation more closely shared by African countries along with public and private actors.<sup>166</sup> For instance, often, increasing protection is perceived as losing competitiveness in the international labour market. It is the sad experience of countries of origin that they seldom agree on common conditions for migrants from destination countries. For instance, until the number of migrants willing to accept inferior conditions remains larger than the demand for workers, it will be difficult to bring governments and employers to the ICRMW table.<sup>167</sup> Nevertheless, to the extent that migration is a central arena for expression of values in law, policy and practice, advancing a rights-based framework for the protection of migrants and the regulation of migration, I strongly believe that such an approach is necessary.<sup>168</sup>

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<sup>165</sup> Judge Rodenbec, quoted in James M Kerr "The law as a true induction" (1920) 54 Am L Rev 265 at 265.

<sup>166</sup> Oucho, above n 1, at 44–45.

<sup>167</sup> Battistella, above n 31, at 67.

<sup>168</sup> Taran, above n 28, at 166.