Free & safe movement in Southern Africa: Report to inform advocacy promoting safe and unencumbered movement of people across Southern Africa’s international borders

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Southern African synthetic report

Executive summary

Due to its relative political stability and strong economic position in the continent, Southern Africa region continues to experience a significant rise in mixed and irregular migration, labour migration and displacement due to conflict and natural disasters. As regional migration grows and diversifies, authorities face a challenging task of formulating and implementing regional, national, and local mobility governance regimes balancing migrant protection with the sovereign interests of states, their citizens and those of other non-state actors. This report presents findings of a comparative research whose aim is to identify challenges and opportunities for safe and free movement in Southern Africa. More specifically, the research aims to identify and analyse the gaps and obstacles in migration laws, polices and practice, with the aim of identifying opportunities for legislative and policy reform. This report specifically presents research findings on select Southern African countries: South Africa, Zambia, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe. Three main sources inform the findings: document and literature review (policy analysis and review of scholarly literature; qualitative individual and focus group interviews with relevant stakeholders in two sites in South Africa (Rosettenville and Komatipoort); and qualitative telephonic interviews with experts and key informants (migration scholars, practitioners, civil society organisations, labour unions, etc.) in other countries.

With a specific focus on lived-experiences of migrants and host populations, this report identifies the following obstacles to -and opportunities for- free and safe movement in the region.

Obstacles to free and safe movement in Southern Africa:

- *Lack of coherent regional migration regime*: the study finds that the region lacks a coherent regional migration regime due particularly to low rate of ratification of continental and regional legal/policy frameworks. While many multilateral and regional migration instruments exist, few countries have adopted or incorporated them into national laws. The main obstacles to the regional harmonization of migration regime include: i) security perspective and the concept of mobility as a threat to states and their citizenries; ii) negative public attitudes towards immigration and immigrants; iii) the weakness of SADC as a regional institution; iv) weak and uneven rights regimes at national level and lack of state capacity to
implement national laws; and v) competing interests and uneven capacities among multiple actors involved in the regional governance of migration and human mobility;

- **Lack of coherent national migration policies**: While all countries in the region have immigration laws/acts that govern the entry, stay, and employment of foreign nationals, most lack coherent and comprehensive migration policies that address all migration-related matters and are in line with other national laws and policies (e.g. on labour, health, education, etc.). As such, the national governance of migration is often compartmentalised with some aspects governed by different (and often contradictory) legislations and practices by different state departments/ministries or spheres of government. Recognising this as a major governance gap and a missed opportunity, many countries in the region have started formulating/drafting national migration policies with the assistance of international bodies such as IOM, UNHCR and ILO;

- **Limited freedom of movement within and from host countries**: Migrants’ restricted freedom of movement in their host countries is perhaps one of the most visible signs or examples that free and safe movement in the region is far from being a reality. Indeed, in addition to the difficulties they face when crossing international borders, immigrants (particularly poor immigrants, refugees and asylum seekers) in many Southern African countries have limited freedom of movement within and from their host countries even when they are staying in those countries legally. Within host countries, their movement is particularly restricted by fears of arbitrary arrests, detention and deportation. In many countries in the region (e.g. Botswana, Zambia, Zimbabwe), asylum seekers and refugees (with valid asylum status) are expected to stay in closed-up camps. They are required to request and obtain permissions from camp managers to leave camps. Asylum seekers, refugees and permanent residents’ freedom of movement out of their host countries is similarly restricted even for those lucky few who manage to get travel documents. Indeed, travel documents given to refugees and permanent residents by UNHCR or government departments are not universally accepted and this impacts negatively the holders’ ability to move freely for social and/or professional reasons;

- **Limited opportunities for permanent settlement**: Many long-term migrants in the region live in a ‘permanent temporality’ as there are limited opportunities to establish permanent settlement and acquire citizenships. As elsewhere, migrants’ permanent settlement and integration in the region are undermined by multiple factors including exclusionary policies
and practices by host governments and populations. These exclusionary policies and practices are a constant reminder to immigrants that they do not belong in their host societies and they not only deny them opportunities to settle but also discourage any effort in this regard. In many countries in the region, host communities are unable or unwilling to provide immigrants with the necessary bases on which to build feelings of belonging. The lack of opportunities for permanent settlement has significant negative implications particularly for the socio-economic development of host societies. Indeed, for those many immigrants whose sense of belonging is ‘being here while belonging elsewhere’, it is the chase of usufruct rights that motivates and maintains their presence and interactions with host societies. They have no interest in investing in local economy but rather contribute to resource outflows through remittances and investments in home countries. Host countries and communities do not often realize that fostering immigrants’ integration would be less costly than excluding and denying them opportunities to build a sense of belonging;

- **Weak governance and administrative capacity:** Most countries in the region have no capacity to effectively control their national borders. This means that their extensive, porous and unmanaged borders, in addition to corruption at official border posts and checkpoints, increasingly facilitate the passage of undocumented migrants. Weak state capacity to effectively control borders not only leads to corruption but also means that other non-state actors (e.g. illegal labour recruitment syndicates, smugglers and traffickers) will fill the vacuum. This often puts migrants’ security and safety at risk (e.g. deaths, rapes, robberies, etc. while crossing borders) and leads to exploitation and other human rights abuses. Weak and limited administrative capacity are also evident in member states’ inability to i) receive, screen and refer vulnerable migrants to appropriate services; and ii) enforce national laws resulting for example in large scale and unlawful and prolonged detention and deportations of migrants in violation of national laws and international norms. They also manifest in frontline service providers’ lack of capacity and or willingness to correctly interpret and implement national laws/policies- this results in immigrants being denied services and protections to which they are entitled.

- **Limited or lack of portability of social security benefits:** Most migrant workers residing and working in southern African countries other than their home countries have no access to social security benefits and rights they are entitled to when they return home. ‘Portability’ in this context refers to the migrant worker’s ability to preserve, maintain and transfer acquired
social security rights independent of nationality and country of residence. This lack or limited social security portability in the region is a result of various factors including i) the lack of national insurance schemes in many countries, ii) cumbersome administrative procedures; iii) the lack of cross border social security coordination and iv) the fact that those affected by these issues are not well enough informed and organized not only to be able to contribute to the policy debate, but also to ensure that national governments bring about the necessary policy changes;

- **Xenophobic exclusion: Communities as space of immigration control:** Xenophobia and related violent outsider exclusion are constant threats to lives and livelihoods of many immigrants in many countries in the region. Xenophobia expressions range from discriminatory attitudes and remarks to institutional or social exclusion, harassment and overt forms of interpersonal and collective violence or attacks on outsiders and/or their livelihood assets. Xenophobia and its different forms of manifestations are pervasive in Southern Africa particularly in South Africa, Namibia and Botswana. Xenophobic violence has in particular become a longstanding feature in post-Apartheid South Africa and this is significant because South Africa is the preferred destination for most migrants from the region and the rest of the continent. Xenophobic exclusion is a threat not only to the lives and livelihoods of foreign nationals but also to the regional stability and socio-economic integration due to retaliatory measures (or threat thereof) taken by citizens of other countries in the region and beyond. It is also a reminder that communities are de facto spaces of immigration control. Indeed, through xenophobic exclusion, communities and their leaders decide who lives in and has access to resources held within certain spaces often in defiance of national laws and immigration policies. This means that host communities should be counted as important actors in the governance of migration and human mobility.

- **Administrative obstacles in countries of origin:** Obstacles to free and safe movement can often be traced back to countries of origin. This is particularly true not only for refugees and asylum seekers who flee persecution from their home countries but also for poor citizens who have no easy access to passports and/or visa application processes. With the imperative to move to other countries for better socio-economic opportunities, the only choice left is to cross international borders illegally with all the risks and dangers this entails. Understanding obstacle and opportunities to free and save movement as well as migrant lived-experiences in
host countries requires also looking at conditions and administrative practices in countries of origin. Free and safe movement can only start from countries of origin.

- **Limits of migration policies and laws: Laws and policies do not guarantee protection:** The South Africa case study demonstrates that while legal/policy frameworks are important, their presence (even those deemed progressive) is not an accurate predictor of adequate immigrant protection. Indeed, without sustained political will and administrative capacity to properly interpret, implement and enforce existing legal and policy frameworks, migrants’ protection will always be compromised. The existence of protection on paper does not equal protection in reality. Migration laws and policies do not necessarily guarantee protection particularly in contexts of weak governance and limited state capacity to enforce rule of law by making sure that governance regimes at all levels correctly interpret and implement existing legal and policy frameworks.

- **The Lesotho special case:** Landlocked and surrounded by South Africa, Lesotho faces specific challenges with regard to its citizens’ free movement in the region. The fact that anyone wishing to leave the country via air or land will have to pass through South Africa puts restrictions to free movement of many Basotho, particularly those migrant workers South Africa would have declared ‘undesirables’ due to visa overstays. ‘Once South Africa classifies you as an undesirable, you are undesirable for the whole SADC because you cannot go anywhere’, one respondent stated. Respondents implored SADC to help Lesotho and South Africa resolve the impasse caused by this Lesotho’s landlocked status.

These obstacles and symptoms, in addition to SADC’s own lack of optimism (that free movement is possible in a context of great socio-economic development disparities), mean free and safe movement in Southern Africa is far from being a reality or even unfeasible at the moment and in the foreseeable future.

**Opportunities for safe and free movement in the region**

- **National migration policy frameworks:** Most countries in the region have started formulating/drafting comprehensive national migration policies with the assistance of regional and international partners. These policy frameworks are meant to form the basis for adequate protection for the people on the move and for a rights-based and developmental approach to the governance of migration and human mobility in the region as opposed to the
current largely security-based perspective. To achieve the expected protection outcomes however, the new policies must not only align with other continental, regional and national normative and legal frameworks, but also (and perhaps more importantly) must be implemented by respective members states. Indeed, as indicated earlier, the lack of political will and weak state capacity to implement existing laws leads to worse protection outcomes. Further, SADC and member states should be actively involved in the drafting of these policies to ensure that they reflect the region’s needs and realities. This will allay fears that the involvement of international partners might transmit external agendas and lead to policies shaped much less by the region/continent’s needs than by the interests of the external actors.

- **Bilateral agreements:** While the proliferation of bilateral agreements are largely seen as a states’ cop-out strategy or alternative to a coherent regional policy, they can also be used as an opportunity towards the realization of free movement in the region. Indeed, they can be used to allay SADC member states’ fears regarding national security, the spread of communicable diseases, cross-border crime and the influx of illegal migrants among others (see earlier discussion). While comprehensive research is needed to understand the full implication of these bilateral agreements for the security, socio-economic and political life of countries involved, there is thus far no indication that they have significantly altered migration patterns in the region or have had any negative impact of the socio-economic and political well-being of states involved. Research evidence to this effect could perhaps persuade reluctant states to agree to more multilateral agreements, which could ultimately lead to the adoption and implementation of a regional migration policy. Indeed, bilateralism is in any case a direction which the 2005 Protocol on Facilitation encourages as an important step towards integration.

- **New initiatives:** In addition to bilateral agreements, other new practices and plans (e.g. visa exemption agreements, visas on arrival, labour migration action plan, special dispensations) are not only evidence that free and safe movement remains on the agenda, but also offer optimism that it is achievable. Indeed, if the implementation of these bits is strengthened and standardized, it could eventually lead to the full implementation of the protocol on free movement in the region. For this to happen however, plans need to be translated into concrete actions and member states need to demonstrate greater commitment for their implementations.
Recommendations

That the realisation of free and safe movement in region face serious challenges and obstacles does not mean efforts in this regard should be discontinued. Rather all relevant stakeholders need to double effort and rethink strategies for best possible outcomes. More specifically, this report makes the following recommendations:

- **Formulation and implementation of a regional migration policy framework**: for free and safe movement to be achieved in Southern Africa, there is urgent need for SADC to formulate a comprehensive regional migration policy framework and adopt measures (e.g. positive and/or negative incentives) to ensure its ratification and implementation by all member states. The policy should be aligned with the AU protocol on free movement of persons while taking into consideration regional realities and interests. A successful formulation and implementation of such policy framework will require genuine consultations and involvement of all relevant actors involved in the governance of migration and human mobility. These inevitably include states, and non-state actors such as civil society, business/labour, women and youth associations and ordinary community members. Competing interests of these actors are currently an unsurmountable obstacle to the harmonization of the regional migration regime. The formulation of a comprehensive regional migration policy framework has also been recommended by MIDSA in 2017;

- **Promoting regional citizenship**: the formulation of the regional migration policy framework should be an opportunity for SADC and other relevant stakeholders to promote regional citizenship. SADC can draw lessons from other regions such as ECOWAS was this was achieved despite socio-economic disparities among members and even greater security concerns.

- **Expediting the formulation of national migration policies**: SADC member states should continue and expedite their current efforts to formulate and implement coherent and comprehensive national migration policies that address all migration-related matters and are in line with other national laws and policies. As indicated earlier, migration is a cross-cutting phenomenon that needs to be integrated into all facets of state policy-making and planning, including programmes and strategies to alleviate poverty and reduce inequality (Crush, et al, 2005). This means that mainstreaming migration and human mobility throughout all government sectors and levels and shifting approaches ‘from people to place’ is the most
sustainable and realistic approach in contexts of socio-economic insecurity where interventions targeted at migrants specifically often cause or exacerbate tensions. People who move are (just like people who don’t move) also children, parents, workers, entrepreneurs, renters, or landlords. As such, their needs can be addressed in ways much more politically palatable than current approaches focusing on migrant rights alone can. These national policies should also be aligned with all relevant regional and continental policy frameworks. Further, SADC and member states should be actively involved in the drafting of these national policies to ensure that they reflect the region’s needs and realities. This will allay fears that the involvement of international partners might transmit external agendas and lead to policies shaped much less by the region/continent’s needs than by the interests of the external actors.

- **Protecting migrant’s freedom of movement within and from host countries**: all SADC member states should ensure that migrants living legally in their territories (including refugees and asylum seekers) are allowed to move freely within and without. This means that the current pass system should be immediately abolished, arbitrary arrests/detentions arrested and permanent residents should be given travel documents that are universally recognised across the world.

- **Affording migrants opportunities for permanent settlement**: States should give long-term and complying migrants (including refugees) fair opportunities for permanent settlement and citizenship. The lack of opportunities for permanent settlement has significantly negative implications particularly for the socio-economic development of host societies. There is ample evidence that fostering immigrants’ integration and permanent settlement is less costly to host countries and communities than excluding and denying them opportunities to build a sense of belonging.

- **Addressing weak governance and administrative capacity**: to ensure free/safe movement and effective migration protection states need to build or strengthen their ability to control national borders and enforce rule of law within their territorial jurisdictions. Failure to do result in endemic corruption, exploitation through unfair labour relations, smuggling and trafficking and in migrants being denied access to services and opportunities to which they are entitled.
- **Protecting the portability of social security benefits:** SADC, all member states and migrant workers associations should work together to put in place concrete and enforceable measures to protect the social security benefits of migrants workers. This will require overcoming cumbersome administrative procedures; ensuring cross border social security coordination and organizing migrant workers themselves so that they are able to contribute to the policy debates and ensure that their national governments protect their rights.

- **Addressing xenophobic exclusion:** SADC, member states, civil society and host community need to make genuine efforts to fight xenophobia and its various forms of manifestations. Xenophobic exclusion is a threat not only to the lives and livelihoods of foreign nationals in their host countries but also to the regional stability and socio-economic integration due to retaliatory measures (or threat thereof) taken by citizens of other countries in the region and beyond. SADC in particular need to introduce measures to hold accountable states such as South Africa that have demonstrated lack of political will to address xenophobic violence that has become endemic in the country.

- **Addressing administrative obstacles in countries of origin:** since all countries in the regions are practically countries of migrants’ origin, transit and destinations, states need to make every effort possible to minimise obstacles to free and safe movement for their citizens wishing to go and live/work in other countries in the region and beyond. States should for example make passports and travel documents affordable and accessible for the majority of their citizens and not just for the privileged few. With the imperative to move to other countries for better socio-economic opportunities, the only choice left for poor citizens who cannot affords passports is to cross international borders illegally with all the risks and dangers this entails.

- **Considering the limits to migration policies and laws:** amongst researchers as well as activists, there is often a strong focus on the reform of policy and laws as well as public education about rights. Yet, such legalistic emphasis often conceals the socio-political conditions that determine the true reach of official frameworks. Even the best policy or law will not have any impact or provide actual protection in contexts where a lack of capacity or concrete political and material disincentives work against it. In addition, we need to consider the agency of migrants themselves in negotiating and circumventing official frameworks as well as the impacts of ‘non-migration’ related policies and laws. While not dismissing the importance of reforming policies and laws, there are limits to such approaches in contexts where one of the most policies and laws on paper may never be implemented in practice. Activists and other
relevant actors should therefore place equal emphasis on the actual implementation of existing laws and policies and not just on policy reform.

- **Take advantage of existing opportunities**: SADC, member states and migrant rights organisations should take advantage of existing opportunities that offer optimism that the realisation of free movement - or at least improved migrants’ protection - is possible in the region. These include national migration policies being currently formulated in most countries, bilateral agreements and other new initiatives such as visa exemption agreements, visas on arrival, labour migration action plan, special dispensations. SADC and migrants rights activists should in particular use these as examples to demonstrate to and convince member states that freer or better-facilitated human mobility and improved migrants’ protection does not necessarily result in feared catastrophes in terms of states’ security and socio-economic and political wellbeing. Therefore, instead of insisting on the formulation regional migration policy here and now, migrant rights organisations should rather focus on the standardisation and better implementation of these and other smaller and more manageable goals/steps/initiatives. They (activists) could then gradually expand on those as trust has been built, negative perceptions dispersed and evidence readily available that free and safe human mobility has the potential to achieve a triple win: the socio-economic development for migrants, their home and host countries.

- **Research for understanding how interests shape mobility regimes**: At all levels, ranging from local to global and amongst both formal and informal actors benefit politically, materially or both from either promoting mobility, containing it or leaving it entirely unregulated altogether. Approaches to migration are highly political and driven by various vested interests. Ongoing, independent and methodologically sound research is needed to understand these interests and to advise on appropriate approaches that may help advance a pro-migrant agenda. These approaches may include concrete targeted and accessibly communicated cost-benefit analyses for various sectors and levels of government (see Isaacs 2016) as well as identifying (and advertising) place, rather than people based interventions that foster common interests amongst diverse populations.

As part of leveraging interests for more proactive migration governance, there is also need to find allies in positions of power beyond government and the ‘traditional’ partners working on migration and human rights. These ‘new’ allies could include unions as well as the business sector: while empowering migrant workers may come at a cost to employers, so do
containment policies that impede supply of labour (Dünnwald 2015), a fact that could be leveraged in ways mutually beneficial to migrants and business.

Research and myth-busting are vital but need to happen through the effective channels. For example, the lack of solid data and research on trafficking has undoubtedly helped the instrumentalisation of the topic for the purposes of securitisation, and there is a need for addressing such knowledge gaps (Nshimbi and Moyo 2016, 168). Policies based on poor or misleading research will not only fail but could have negative unintended consequences. Yet, other areas of migration are well researched, but nevertheless misrepresented and (ab)used to further specific political objectives, despite abundant and reliable available evidence to the contrary. Thus, while addressing knowledge gaps and myth-busting are both important, there is also need to identify more effective channels and methods through which to communicate findings. Importantly, disseminating research findings stands no chance of success if we ignore how an underlying global architecture of power and inequality works against even the best facts. There is also need to consider collecting data and facts more strategically to promote a pro-migration agenda, just as other actors are doing to support agendas of containment and control.

Understanding how interests shape mobility regimes is critical. Informal and formal actors at various scales benefit politically, materially or both from either promoting mobility, containing it or leaving it unregulated altogether. Advancing a pro-migration agenda without trying to understand, harness or change such dynamics stands little chance of success.
Southern African synthetic report

Introduction

Migration in the Southern African region is a ‘historical phenomenon emerging particularly with the demand for labour resulting from the development of extractive industries in the last two decades of the 19th century...’ (Segatti, 2017:48). To date, the Southern Africa region continues to experience a significant rise in mixed and irregular migration, labour migration and displacement due to conflict and natural disasters (IOM, 2014). Following patterns observed elsewhere, the region is particularly characterized by intraregional migration (ibid). Due to:

‘[...] its strong economic position in the continent, Southern Africa experiences a high volume of migration due to work opportunities in the mining, manufacturing and agricultural industries. Industrial development in some countries in the region, especially in South Africa, Botswana and Zambia, and the oil wealth of Angola have been magnets for both skilled and unskilled labour migrants from within the region and elsewhere, notably the Horn of Africa and West Africa. (ibid: 6).

IOM (2014) notes that, in 2013 the Southern African region recorded over four million migrants, excluding irregular migrants. South Africa was the destination for the vast majority of these migrants (2.4 million). Of the four million, 200,000 are registered refugees primarily in the DRC and South Africa. Labour migration remains the dominant form of population movement in the region. IOM also notes that mobile populations face serious challenges including human rights violations, lack of protection, and xenophobic exclusion and violence (ibid).

As regional migration grows and diversifies, authorities face a challenging task of formulating and implementing regional, national, and local mobility governance regimes balancing migrant protection with the sovereign interests of states and their citizens. These policies must also satisfy domestic constituency along with competing interests of other non-state actors at international, national and subnational levels. For regional authorities, ‘maintaining a satisfactory migration policy that could respond to all interests is a real challenge’ (Raimundo, 2009:93). IOM similarly indicates that increasing mobility often overwhelms existing policies, systems and capacities related to migration and other important domains such as human security and public health.

Within this context, this report presents findings of a comparative research whose aim is to identify challenges and opportunities for safe and free movement in the region. More specifically, the research aims to identify and analyse the gaps and obstacles in migration laws, polices and practice,
with the aim of identifying opportunities for legislative and policy reform. It intends to empirically inform efforts to improve the governance and management of migration in Southern Africa. For present purposes, improved governance means enhancing the protection of migrants as they move across territory with the goal of crossing international borders. The research is also concerned with migrants after they have entered countries in which they are not citizens (i.e. our concern is only with international migrants including refugees and asylum seekers). In this regard, it research seeks to identify threats to their ability to achieve onward movement, to establish residence, to access legal protection, material and physical safety (i.e. all elements of socio-economic, physical and legal protection).

After this overview, the report is divided into five main section namely methodology, overview of the regional migration regime, regional obstacles and opportunities for free and safe movement, the South Africa case study, and conclusion and recommendations.

**Methodology**

This research project is designed to identify and analyse the gaps and obstacles in migration laws, polices and practice, with the aim of identifying opportunities for legislative and policy reform. More specifically, it intends to empirically inform efforts to improve the governance and management of migration in Africa. For present purposes, improved governance means enhancing the protection of migrants as they move across territory with the goal of crossing international borders. The project is also concerned with migrants after they have entered countries in which they are not citizens. In this regard, it wishes to identify threats to their ability to achieve onward movement, to establish residence, to access legal protection, and to physical safety. More specifically, we are concerned with legal status, protection from *refoulement*, access to labour and housing markets; access to public and private health services; access to water and sanitation; physical security and relations to police, and access to formal and informal judicial systems.

The project works from the position that while formal policy frameworks are often critical factors in determining the protection or violation of rights, they are by no means the only factor. In this regard, the goal is to identify all the greatest threats to safe movement. Poor policy frameworks may be part of this, but are not a priori seen as such. Indeed, the absence of policy and official engagement may allow for the relatively free and safe movements of people across borders. It is for this reason that the project’s primary focus is the lived experiences of people on the move and not just policy frameworks and boardroom deliberations. Lastly, the project seeks to identify opportunities and obstacles to
‘progressive’ reforms, that is identifying progressive avenues for changing policies and practices that threaten the rights of migrants.

The project’s scope is limited to those crossing international borders. While our initial concern was with those moving in search of work, education, and other ‘voluntary’ activities, it was impossible to exclude those seeking protection (i.e. the displaced). Indeed, the conceptual and legal divisions between voluntary and forced migrants are sometimes practically indistinguishable. Moreover, protections for one category of people are often closely connected to the rights and welfare of others. The project therefore includes experiences of ‘forced migrants’ i.e. asylum seekers and refugees.

**Geographic scope**

This is part of a multi-region study analysing migration policy and practices in Central, East, and Southern Africa. In all cases, these regions are defined by the groupings of the Regional Economic Communities (RECs). The scope of work at the regional level is the African Union, the East African Community (EAC), and the Southern African Development Community (SADC). Within those regions, we are focusing on Kenya, Tanzania, Uganda, Rwanda (EAC) and South Africa, Zambia, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe (SADC). Although the primary focus of the fieldwork is at two sites each in three selected countries (see below), the synthetic report includes information on all above-mentioned countries.

The project involved original fieldwork in two sites within three countries: Kenya and Tanzania in East Africa and South Africa in Southern Africa. Botswana was originally to be included but proved impossible due to our ability to secure official clearance within the designated research period. The research sites were urban and border areas in those selected countries. Researchers interviewed key stakeholders including, inter alia, government officials, humanitarian or development agencies, state and non-state service providers, local populations, advocacy organisations, and migrants and/or migration associations. The interviews conducted in the three selected countries were complemented by interviews (telephone) with stakeholders in the other countries covered by the study. The results from these interviews were included in the integrated thematic report.

**Methods and data sources**

This report specifically presents research findings on select Southern African countries. Three main sources inform our findings: document and literature review (policy analysis and review of scholarly
literature); qualitative individual and focus group interviews with relevant stakeholders in two sites in South Africa (Rosettenville and Komatipoort); and qualitative telephonic interviews with experts and key informants (migration scholars, practitioners, civil society organisations, labour unions, etc.) in other countries (i.e. Zambia, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe). ACMS conducted the empirical research between February and May 2018 and in total 37 individual interviews and 4 focus group discussions were conducted. The South Africa’s case study report provides detailed information on research sites and participants.

In all cases, we sought to compare the experiences of international migrants with those of host communities (i.e., citizens) living in similar areas (not on a national level but in the border and urban areas in which we fieldwork was undertaken). The purpose of doing so is to assess the degree to which levels of vulnerability/insecurity are due to people’s migration status as opposed to prevailing conditions of lawlessness, corruption, police abuse, or poverty. We also sought to identify potential obstacles or drivers to progressive change. This included considerations of who among the political constituency is benefiting from the status quo and who would benefit from freer and safer migration other than migrants themselves.

**Overview of the regional migration regime**

Like elsewhere, the Southern African migration regime consists of legal/policy frameworks and actors at global/international, continental, regional, national and subnational levers. Indeed, the regional migration regime is shaped by migration-related policies and practices situated at national, regional, continental and international level (see Policy Analysis Table in Appendix I). In general, the governance of migration and human mobility in the region (and indeed elsewhere) is predominantly informed by a security perspective, shaped by concepts of mobility as threat and symptom of crisis and geared towards ever increasing exclusion and containment.

Generally speaking, aspirations towards regional and continental integration (including those aimed at the free movement of people) get as gradually diluted the closer one gets to the level of the nation-state as actual capacity and power to make implementable decisions increases. This results in considerable discrepancies between policies articulated at supranational levels and the interests of national governments who have, at least potentially, the actual power to implement or not. With few exceptions, migration governance at the national level remains ad hoc and is not formalized in specific policy frameworks, at least not those labelled officially as related to ‘migration’. The lack of national and local coherent migration policies is a major gap and missed opportunity. Indeed, while the
principles driving aspirations towards free movement may be informed by more cosmopolitan principles, the various instruments at the regional level do give way to, and thus reinforce, national sovereignty by leaving implementation of policies at the discretion of the individual governments. There is considerable discrepancy between member states’ reluctance to delimit their powers within a multilateral governance framework, including their (potential) ability to control movement, and broader regional aspirations towards economic, political and social unity (Clottey, et al, 2007).

While there is progress towards the establishment of free movement within regions and the continent, this remains patchy in some regions, with SADC particularly lagging behind (African Union, 2009; Shimele, 2016; Isaacs, 2016). Similar to other regional communities, SADC’s 1993 founding treaty makes free movement an explicit goal (SADC Secretariat, 1993). Yet, the 1997 SADC Protocol on Free Movement faced an uphill battle against the resistance of South Africa — the strongest economy in the region by far - but also Botswana and Namibia (Crush, et al, 2015). ‘Freedom’ was then revised into ‘facilitation’ of movement, not only in the title but substantially in content (Oucho, et al, 2001) and in this form eventually finalised in 2005. However, this version of the protocol was effectively so watered down that it provided for little more than visa-free entry for up to 90 days, a courtesy also offered to many from beyond the region (Fioramonti, et al, 2016).

As of 2017, the majority of member states has signed the protocol, but not enough countries have ratified it for it to come into effect (so far, only Botswana, Lesotho, Mozambique, Swaziland, Zambia and South Africa). However, even if it was fully in effect, it adds almost nothing to already existing bilateral agreements and ‘does little to establish any form of regional citizenship’ (Crush, et al, 2015: 8). South Africa’s former minister of Home Affairs famously said in the late 1990s that ‘free movement of people spells disaster for our country.’ With its latest policy changes as well as actual rhetoric and exclusionary immigration practices, South Africa – the most powerful player and major migrant destination in the region - is clearly moving even further away from realising the goal of regional free movement: anxious to ‘lose out’ because ‘the gap in development between SA and other SADC states is much larger than differences between states in other regions’ (DHA, 2017).

Instead of multilateral approaches, the preferred mode of interacting with other countries on issues of migration remains the bilateral agreements, with all the power imbalances and drawbacks for advancing regional integration that this implies (Fioramonti, et al, 2016; Crush and Dodson, 2015). As Segatti (2017:61) notes, ‘Bilateral agreements and ad hoc arrangements between SADC Member States have multiplied in the past fifteen years alongside pre-existing labour agreements between
South Africa and its neighbours. This preference for bilateralism and the ineffectiveness of SADC instruments and processes is not specific to the area of movement. The impact of SADC on trade relations for instance was considered so poor…’

The 2014 SADC Protocol on Employment and Labour and the SADC Action Plan on Labour Migration 2013–15 are still new initiatives whose effect remains to be seen (Crush, et al, 2015), but in many ways it is likely they are headed for the same fate as other regional protocols related to mobility and the rights of migrant workers. The REC’s powers and leverage over national governments are extremely limited. The RECs, like the AU, can basically only issue and promote non-binding recommendations to member states (Crush and Dodson, 2015). Initiatives like MIDSA, a ‘high-level, inter-governmental forum’ on migration management and policy (Crush, et al, 2006) are also unlikely to affect any real change. As they remain talk-shops, largely removed from public scrutiny and influence.

In many ways, like for the rest of the continent, Southern African region’s migration regime is characterized by: significant gaps in protection regimes, tensions between migrants and hosts, protracted displacement situations, and ongoing concerns over human versus state security. Consequently, free and safe movement within a fully integrated Southern Africa REC is far from being a reality or essentially unfeasible at the moment. Dodson, et al (2015:22) argue in a similar vein that:

Although genuine freedom of movement across the region remains a worthwhile goal, it is too politically controversial for there to be any hope of its achievement in the short or even medium term. Improving the position of intra-regional and other migrants by securing at least their basic rights, including protection of person and property, labour rights, and protection against arbitrary detention or indiscriminate expulsion, is a more realistic goal, and one that would be significantly advanced through regional coordination and cooperation.

SADC acknowledges that it will be difficult to achieve free movement in the region as long as other aspects (e.g. industrialization and social/human development) of the regional integration and cooperation have not been achieved. Economic, social and human development disparities among SADC member states will continue to make the implementation or realization of free movement in the region difficult if not impossible. In the words of a SADC secretariat official:

This is the issue of frequency of interventions. The mission of SADC talks about integration and cooperation. If we talk about integration, we are not talking only about migration but also other aspects such as industrialization. We need to look at achievements on all aspects of integration and cooperation holistically and not just at one area of migration because migration has to happen in combination with other deliverables in the region. For example, if our industrialization strategy is not implemented in Malawi as it is in Botswana, it will be
difficult to promote free movement between Malawi and Botswana. So for us, to achieve certain targets in terms of migration, we also have to achieve other targets such as in trade and industry, social and human development and so forth. So the slow implementation of free movement has to relate to how we are faring on other targets. It is also slow in other areas and not just in migration. [...] It is difficult to achieve targets on migration if development is variable in the region. You find that one or two or three countries on a higher level of economic development compared to the rest of the region. So it will be difficult to promote free movement because it may mean migration in one direction... so in terms of programming, we have to achieve targets on migration in combination with achievements on other targets for the regional integration and cooperation. That should be the trajectory.¹

The statement above implies SADC’s own lack of conviction or optimism that free movement in the region is possible in the current regional socio-economic and political landscape. This is not encouraging because SADC is the institution which is supposed to be championing and working out strategies to make free movement in the region possible. Addressing socio-economic development disparities should not necessarily be a precondition for free movement. Rather free movement should be used as one of the strategies to lessen such disparities through proactive measures and efforts to make migration achieve its potential triple win: socio-economic development for migrants, their home and host countries.

Southern Africa is not alone in its approach: Indeed a global comparative study (Nita, et al, 2017: xxiii) reveals that:

[...] that the establishment of a regional free movement area is a long-term and complex process involving a multitude of different actors at various governance levels. People are not commodities, but human beings with complex social needs and relationships. Consequently, effective free movement requires the setting up of legal measures in policy fields that, though related to migration, are often not considered by political actors (at least not in the beginning of such a process). This can lead to both opportunities and challenges. On the one hand, there are plenty of possibilities to deepen regional integration and go beyond a purely economic agenda through the creation of regional citizenship rights and a feeling of ‘regional belonging’. On the other hand, this requires political measures that touch upon the core of state sovereignty with possible repercussions on public security, social cohesion and economic competitiveness.

It is thus important to develop more realistic goals and strategies that explicitly address misperceptions and disincentives working against regional integration. As part of this, we need more research on the reasons for the varying progress in terms of integration we can observe between the different RECs. Apart from aspects relating to obvious discrepancies between regional powerhouses and the rest of their respective REC, there is apparently a different ability to build consensus and/or exert pressure on national governments to push regional agendas forward. There are also different

¹ Telephone interview with a SADC secretariat official, Johannesburg, 19 April 2018
regional proclivities towards signing binding international conventions such as the 1990 Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (Fioramonti, et al, 2016; Minter, 2011). A comparative analysis of the various factors and contexts that account for these differences could prove critical to distil lessons for both regional and continental integration. It may also help to begin with smaller and more manageable steps, and then gradually expand on those as trust has been built and negative perceptions dispersed (Fioramonti, et al, 2016; Isaacs, 2016).

In sum, the Southern African migration regime is largely informed by a security perspective and the concept of mobility as a threat to states and their citizenries. In discussions on free movement, SADC member states always cite their ‘fears regarding national security, the spread of communicable diseases, cross-border crime and the influx of illegal migrants among others’ (Segatti, 2017:47). The security perspective unsurprisingly leads to policies and practices geared towards restriction and exclusion.

Exclusionary and restrictive migration policies and practices unfortunately affect the vast majority of (potential) migrants while selecting a few who qualify for entry. Exclusion involves inhibiting current migration before, during and after it happens through a variety of measures (including denying migrants legal entry and access to socio-economic, physical and legal protection). This is despite evidence that such ‘clamping’ down does not have the desired effect of stopping migrants from coming but only makes them more vulnerable in transit as well as at their destinations. Selection is about distinguishing between those who must be given the right to move and the many others that have to stay ‘out’: while highly skilled and ‘genuine’ refugees are eligible, there are limited legal avenues for the majority of migrants who fall into other different categories. Within this context, those promoting the notion of freer and safer movement for all face an uphill battle. Critically, their efforts have little chance of success without understanding the contexts, interests and incentives that shape current mobility regimes globally and locally.

**Regional level challenges and opportunities**

Drawing on the South Africa case study, interviews with relevant experts in different countries in the region, policy documents and scholarly literature, this research identifies the following key obstacles to and opportunities for free and safe movement in Southern Africa. These reflect gaps and opportunities in both policy and practice and their implications on migrants’ lived experiences.
Obstacles to safe and free movement

Lack of coherent regional migration regime

Like elsewhere, the Southern African migration regime consists of policy frameworks and actors at global/international, continental, regional, national and subnational levers. Competing interests result in lack of coherence among actors and tools they use in governance of migration and human mobility. There is lack of coordination between member states for protection and law enforcement purposes and absence of harmonized approaches (IOM, 2016). As indicated in the previous section, the lack of regional migration regime is due particularly to low rate of ratification of continental and regional legal/policy frameworks. Thus, while ‘many multilateral [and regional] migration instruments have been established... few countries have adopted them’ (Hannes, 2016: 3) let alone incorporated them into national laws for any chance of real impact (Millard, 2008; Fioramonti, et al, 2016). Segatti (2017:73) provides a useful summary of the current state of affairs:

The current state of affairs underscores the enduring prevalence of sovereignty in the face of weak institutional capacity at the SADC level, and an actual preference for the integration of labour markets and security management through bilateral agreements. To date, the development of migration policies remains the sole mandate of national government departments (usually Home Affairs). In the absence of the Protocol’s ratification, and apart from the externally funded and coordinated MIDSA, SADC has not created a single internal (or even external) structure devoted to migration policy development at the regional level. The MIDSA, as a consultative dialogue, cannot fully play a policy development role. Chronic instability and growing socio-economic disparities within and between Member States are the main challenges currently informing policy-makers’ reluctance to create and implement a more collective approach. Even in a sector like humanitarian intervention, which calls for collective reactions and relies on shared international legal frameworks, ‘burden sharing’ does not seem to be on the agenda, neither at the SADC nor UNHCR level, except in terms of sharing deportation costs for undocumented migrants, a measure clearly intended to relieve South Africa of its massive deportation expenditures (probably in the range of 500 million Rand annually, excluding policing costs).

Many other scholars and analysts have similarly noted the absence of the regional coherent migration regime. For example, Dodson, et al (2015:6) indicates that, ‘currently, intra-regional migration takes place in a context of non-harmonized and contradictory legal and policy frameworks, with uneven and weakly enforced protection and rights regimes.’ In a similar vein, Crush, et al (2005:1) argues that ‘the fundamental policy challenge is to move the states of Southern Africa to a regionally-harmonized and consistent set of policies that emphasize good governance, sound management and client-centred service delivery.'
Scholars have identified a number of obstacles to the regional harmonization of migration regime including negative public attitudes towards immigration and immigrants, the weakness of SADC as a regional institution, weak and uneven rights regimes at national level and lack of state capacity to implement national laws. In the words of Dodson, et al (2015:22):

One of the most formidable and intractable obstacles to regional harmonization is negative public attitudes towards immigrants, including those from other SADC countries, in the main migrant-receiving states. Another obstacle to harmonization is the weakness of SADC as a regional institution. It has limited resources and little political power over national governments, and thus little ability to shape the migration governance agenda. A further challenge is the weak and uneven rights regimes at the national level. Comparing individual SADC member states, even citizens’ rights are unevenly and inadequately protected, and still less migrants’ rights, which are widely perceived as undermining the socioeconomic rights and entitlements of individual countries’ own citizens. Furthermore, whether for citizens or migrants, rights on paper, as enshrined in various legal, constitutional and international obligations, do not necessarily translate into realization or protection of those rights in practice.

Clearly, current competing interests and uneven capacities among multiple actors involved in the regional governance of migration and human mobility mean that aspirations and efforts at harmonizing the regional migration regime will continue to face challenges and/or resistance unless there is a clear understanding the of the multiple incentive structures and evidence-based articulation that those interests will be better served by a change in the status quo.

**Lack of coherent national migration policies**

While all countries in the region have immigration laws/acts that govern the entry, stay, and employment of foreign nationals (Muneku, 2016), most (e.g. Angola, Mozambique, Lesotho, Zambia, Zimbabwe, Swaziland, Malawi, DRC) lack coherent and comprehensive migration policies that address all migration-related matters and are in line with other national laws and policies (e.g. on labour, health, education, etc.). As such, the national governance of migration is often compartmentalised with some aspects governed by different (and often contradictory) legislations and practices by different state departments/ministries or spheres of government. In Mozambique for example, there is not coordination among different national departments involved the governance or management of migration as noted by a local migration scholar:

The governance of migration in Mozambique is confusing. There are different departments involved and they work from different perspectives. The Minister of Home Affairs is in charge of entry and border control. The Minister of Foreign Affairs and Cooperation is in charge of
asylum seekers and refugees and the Minister of Labour is in charge of labour migration... but
these departments do not speak the same language, there is no coordination.

Similarly, talking about SADC in general, Muneku (2016) notes that, SADC member States’ national
migration and labour policies are often disconnected from each other internally (labour and
migration) and/or across countries. In most countries in the region, migration governance at the
national level remains ad hoc and is not formalized in specific policy frameworks, at least not those
labelled officially as related to ‘migration’. As Crush, et al (2005:5) note, ‘because migration is a cross-
cutting phenomenon, it needs to be integrated into all facets of state policy-making and planning,
including programs and strategies to alleviate poverty and reduce inequality’.

Recognising this as a major governance gap and a missed opportunity, many countries in the region
have started formulating/drafting national migration policies with the assistance of international
bodies such as IOM, UNHCR and ILO (see Table 1 below). Indeed, IOM (2014:12) indicates that,

The continued increase in mixed migration flows in the region has prompted requests from
governments for assistance in developing migration policies and initiating programmes to
respond to these flows, [...] Central to the Regional Strategy for Southern Africa is building the
capacity of Member States and regional organizations, as well as other key stakeholders, to
develop migration management strategies and policies in order to proactively put the
systems in place to respond to migration in a coherent, collaborative and rights-focused
approach.

<table>
<thead>
<tr>
<th>Country</th>
<th>Status</th>
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<tbody>
<tr>
<td>Angola</td>
<td>In the process of drafting, with assistance from IOM (IOM Southern Africa)</td>
</tr>
<tr>
<td>Botswana</td>
<td>In the process of drafting, with assistance from IOM (IOM Southern Africa)</td>
</tr>
<tr>
<td>DRC</td>
<td>In the process of drafting, with support from IOM. IOM is also assisting with the development of anti-trafficking policy and legislation as well as migration legislation in general (IOM)</td>
</tr>
<tr>
<td>Lesotho</td>
<td>In the process of drafting with assistance from IOM</td>
</tr>
<tr>
<td>Malawi</td>
<td>In the process of drafting ‘a comprehensive national migration and citizenship policy’ (IOM 2015b) developed with assistance from the International Centre for Migration on Policy and Development’ (ICMPD MIExU)</td>
</tr>
<tr>
<td>Mauritius</td>
<td>‘IOM’s assistance was requested by the Government of Mauritius to lead towards the development of a national migration and development policy for Mauritius’ (ICMPD, IOM)</td>
</tr>
<tr>
<td>Mozambique</td>
<td>‘diaspora engagement policy’ of 2014, with assistance from IOM (IOM 2014)</td>
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</tbody>
</table>

2 Skype interview with a Mozambican migration scholar; Johannesburg, 8 March 2018
South Africa | White paper on ‘International Migration Management Policy’ of 2017 is published and can be accessed online (DHA 2017).

Swaziland | No specific country information available

Zambia | In the process of drafting with assistance of IOM (IOM)

Zimbabwe | In the process of drafting with assistance from IOM, UNHCR and ILO (Zimbabwe Home Affairs Official³)

In most of the countries where IOM is involved in the formulation of migration policies, the organisation also a) undertakes profiling exercises (i.e. collection of detailed statistical and other mobility related information which is then published as country specific ‘migration profiles’); b) assists with ‘border and immigration management’ (i.e. training of officials, ‘conceptualisation of border management policies and strategies, technical assistance in identity management, installation of and training in IOM’s border information system, drafting of immigration standard operational procedures, capacity building in humanitarian border management, as well as upgrades of border infrastructure; and c) works in various areas related to ‘migrant assistance’ that, at least nominally, seem more geared towards migrants themselves (IOM, 2015).

In Zambia for example, IOM has assisted government in drafting guidelines to deal with mixed migration so that vulnerable migrants can be given proper assistance. IOM is currently training immigration officials and police in this regard. The official reason for this intervention: is the limited capacity of government and partners to provide adequate protection and assistance and this has resulted in various groups of migrants, including unaccompanied and/or separated children, asylum-seekers, refugees, victims of trafficking stranded without protection and assistance. These groups are further made vulnerable due to the difficulties in identifying them within broader mixed movements and their limited access to legal rights and protections once identified.

**Limited freedom of movement within and from host countries**

Migrants’ restricted freedom of movement in their host countries is perhaps one of the most visible signs or examples that free and safe movement in the region is far from being a reality. Indeed, in addition to the difficulties they face when crossing international borders, immigrants (particularly poor immigrants, refugees and asylum seekers) in many Southern African countries have limited freedom of movement within and from their host countries even when they are staying in those countries legally. Within host countries, their movement is particularly restricted by fears of arbitrary

³ Telephone interview with a Zimbabwe Department of Home Affairs official; Johannesburg, 21 April 2018
arrests, detention and deportation. In many countries in the region, asylum seekers and refugees (with valid asylum status) are expected to stay in closed-up camps. They are required to request and obtain permissions from camp managers to leave camps.

In Zambia, refugees are expected to stay in camps. They require gate passes or urban cards to leave the camp. Failure to do so results in arrest and detention. UNHCR and implementing partners can intervene to get the arrested released. The end result is that the arrested is sent back to the camp, or deported although deportations have decreased significantly due to the costs involved. Those arrested are now normally removed to border towns with hope/expectation that they will go back to their home countries⁴. Similarly, asylum seekers in Zimbabwe are expected to stay in Tongogara refugee camp and need to apply for a pass from the commissioner of refugees in the camp to temporarily leave the camp.

In Botswana, Refugees are mainly confined to the refugee camp and can only leave with a pass. It is very difficult to get a long-term pass thus working is usually not an option for them. Many of them run informal businesses from the camp or simply live outside of the camp without permission and work in the informal sector or have Batswana fronting for their businesses. They are allowed to own businesses on paper but it is difficult to do so if your address is supposed to be 'Dukwi Refugee Camp'. Refugees who is married to citizens are not afforded 'special treatment' based on their marital status. They still have to apply for a pass to live with their spouses and their spouses normally have to confirm this application in writing. Living outside of the camp with no papers could lead to refugee status being revoked and deportation⁵. Indeed, in March 2017, the Defence Minister threatened to revoke the status for refugees who do not ‘behave well’ (and this includes leaving the camp without a pass) and was contemplating the erection of a P13, 4 million parameter fence to control refugees’ movement.⁶

Asylum seekers, refugees and permanent residents’ freedom of movement out of their host countries is similarly restricted even for those lucky few who manage to get travel documents. Indeed, travel documents given to refugees and permanent residents by UNHCR or government departments are not universally accepted. For example, although accepted by most countries on the continent, the black travel document the South African government gives to permanent residents is not recognised

⁴ Interview with a migration scholar and researcher on migration in Zambia; Johannesburg, 19 March 2018
⁵ Botswana key informant’s written answer to interview questions; 16 May 2018.
⁶ http://www.thegazette.news/kgathi-threatens-misbehaving-refugees/
by many countries (particularly in the EU) and this impacts negatively the holders’ ability to move freely for social and/or professional reasons.

Limited opportunities for permanent settlement

Many long-term migrants in the region live in a ‘permanent temporality’ (Misago, 2016; Landau, 2006) as there are limited opportunities to establish permanent settlement and acquire citizenships. As elsewhere, migrants’ permanent settlement and integration in the region are undermined by multiple factors including exclusionary policies and practices by host governments and populations. Indeed, African migrants in the region are often met with restrictive immigration policies and prohibitive citizenship laws as well as xenophobic exclusion by host populations who perceive them as a serious threat to their lives and livelihoods (Misago, 2016). These exclusionary policies and practices are a constant reminder to immigrants that that they do not belong in their host societies and they not only deny them opportunities to settle but also discourage any effort in this regard. In many countries in the region, host communities are unable or unwilling to provide immigrants with the necessary bases on which to build feelings of belonging.

Another alienating factor is the perceived temporality of the migration situation. In the region, like elsewhere on the continent, the migration situation is considered temporally no matter how protracted. With opportunities for permanent settlement or citizenship rarely offered, immigrants are seen and even see themselves are temporary sojourners expected to eventually go back to their home countries. With little practical prospect of returning home or moving elsewhere, long-term immigrants often find themselves in a situation of ‘permanent temporality’ (Landau, 2006) that undermines their sense and practices of belonging in their host societies.

It is for example difficult or impossible for refugees and other long-term migrants to become permanent and citizens in Zimbabwe. Indeed, while the countries laws allow for naturalization, it is rarely accessible in practice at least for the majority of refugees and low-skilled migrants. Indeed an official from the Zimbabwe Home Affairs Department indicated that migrants can apply for naturalization only after holding formal uninterrupted employment for ten years. This obviously favours high skilled migrants and excludes the majority of refugees and poor economic migrants who long-term professional employment contracts.

In Botswana, before the encampment policy it was not unusual for refugees to seek and be granted permanent residence, and in some instances citizenship. However, the practical effects of the
Encampment Policy are such that it is hard to meet the requirements for permanent residence or citizenship. For instance, one must show that they have lived in the country for over 5 years (permanent residence) and 10 years (citizenship) and have contributed economically. No one is granted permanent residence or citizenship by naturalization as a right, it is a discretionary process. Economic migrants face similar difficulties in this regard. In the past 10 years, it has proven challenging for economic migrants to enter Botswana and work legally, and from that gain permanent residence status.\(^7\)

Similarly, the South African government is increasingly making it difficult for immigrants to become permanent residents or citizens. Indeed, the 2017 White Paper on International Migration\(^8\) seeks to articulate changes in South African governmental thinking on issues of migration. In particular, it proposes to restrict the conditions in which citizenship can be obtained by an immigrant by delinking residency and citizenship, removing the category of permanent resident and replacing it with a ‘long-term residency’ and finally only allowing refugees to apply for long term residence after 10 years of continuous residence in South Africa. It also proposes to change the asylum process by establishing ‘Asylum Seeker Processing Centres, removal of automatic right to work and study for asylum seekers, exploring options for resettlement of refugees to other countries, and criminalising the non-compliance with deportation orders.

The lack of opportunities for permanent settlement has significantly negative implications particularly for the socio-economic development of host societies. Indeed, for those many immigrants whose sense of belonging is ‘being here while belonging elsewhere’ (Misago, 2016), it is the chase of usufruct rights that motivates and maintains their presence and interactions with host societies (Landau, 2006). They have no interest in investing in local economy but rather contribute to resource outflows though remittances and investments in home countries. Further, they use public resources without necessarily contributing to the local and national resource base in return. African host communities and their leaders do not often realize that fostering immigrants’ integration would be less costly than excluding and denying them opportunities to build a sense of belonging.

Weak governance and administrative capacity

Most countries in the region have no capacity to effectively control their national borders. This means that their extensive, porous and unmanaged borders, in addition to corruption at official border posts

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\(^7\) Botswana key informant’s written answer to interview questions; 16 May 2018.

and check points (many of which lack the basic infrastructure, human resources and equipment to process increasing volumes of cross-border movements), increasingly facilitate the passage of undocumented migrants (Solomon, 1997).

Weak state capacity to effectively control borders not only leads to corruption -which, according to Crush, et al (2005), has become endemic at many border posts- but also means that other non-state actors (e.g. illegal labour recruitment syndicates, smugglers and traffickers) will fill the vacuum. This often puts migrants’ security and safety at risk (e.g. deaths, rapes, robberies, etc. while crossing borders) and leads to exploitation and other human rights abuses.

Weak and limited administrative capacity are also evident in member states’ inability to i) receive, screen and refer vulnerable migrants to appropriate services; and ii) enforce national laws resulting for example in large scale and unlawful and prolonged detention and deportations of migrants in violation of national laws and international norms (IOM, 2016; see Hiropoulos, 2017). They also manifest in frontline service providers’ lack of capacity and or willingness to correctly interpret and implement national laws/policies- this results in immigrants being denied services and protections they are entitled to9 (see also the South Africa case studies for detailed examples).

Limited or lack of portability of social security benefits

Millard (2008) rightly argues that the lack or limited portability of social security benefits of migrant workers is one of the most pressing issues in present-day Southern Africa. Portability in this context refers to the migrant worker’s ability to ‘preserve, maintain and transfer acquired social security rights’ independent of nationality and country of residence (Ibid: 38). Indeed, the Southern Africa Trust (2011:2) indicates that:

Migrant workers residing and working in southern African countries other than their home country ‘encounter great difficulties receiving social security and retirement benefits when they return home. These problems are inherited by the survivors of ex-migrant workers, widows or children, who are barred from accessing rights to social security’. [...] Non-citizens are mostly excluded as a result of the fact that most social security systems are territorial and nationality-based.

Migrant workers associations in Mozambique, Swaziland and Lesotho have indicated that migrant workers from their respective countries have no access to social special security benefits and rights they are entitled to when working in other countries in the region. These benefits include pension and

9 Interview with IOM officials; Pretoria, 16 March 2018
compensation for occupational hazards, amongst others. The Association for Mozambican Mineworkers for example indicates that:

Social benefits for Mozambican mineworkers, those working in South Africa are a burning issue. They do not get their pensions; when they get sick they get retrenched without compensation; many die without getting their money. Sick workers are sent home with the promise that money will be sent but that does not happen. The majority of mineworkers do not get their compensation. Their widows can also not access these benefits because they have no idea where their husbands were working.10

Basotho Immigrants Protection Organization expressed similar views and argued that this lack of social security benefits is largely due to lack of proper job/employment contracts. In the words of the organization’s representative:

Social benefits and rights are only covered or accessible when someone is employed correctly. Most migrant workers’ have not proper job contracts. Without a proper job contract, you cannot claim anything whatsoever; no pension, no medical aid, no compensation. Nothing even when they die because no proper contracts. You cannot not even take the employer to CCMA without a proper contract; you cannot approach any authority; you are threatened and exploited by employers.11

In the end, due to lack of social protection, most migrant workers in the region find that they have nothing to show after a lifetime of hard work (Millard, 2008: 58).

Analysts argue that this lack or limited social security portability in the region is a result of various factors including i) the lack of national insurance schemes in many countries, ii) cumbersome administrative procedures; iii) the lack of cross border social security coordination and iv) the fact that those affected by these issues are not well enough informed and organized not only to be able to contribute to the policy debate, but also to ensure that national governments bring about the necessary policy changes (Southern Africa Trust, 2011).

Xenophobic exclusion: Communities as space of immigration control

Xenophobia and related violent outsider exclusion are constant threats to lives and livelihoods of many immigrants in many countries in the region. Xenophobia broadly refers to attitudes and prejudices that reject, exclude and often vilify persons or groups based on the perception that they are outsiders or foreigners to the community, society or national identity (ILO, et al, 2001).

Xenophobia is usually perpetuated through a dynamic public rhetoric that actively stigmatizes and

10 Telephone interview with the representative of the Association for Mozambican Mineworkers; Johannesburg, 20 April 2018
11 Telephone interview with a representative of Basotho Immigrants Protection Organization; Johannesburg, 30 April 2018
vilifies some or all migrant groups by playing up the ‘threat’ posed by their presence and making them scapegoats for social and economic problems (Crush et, 2009). Xenophobia’s expressions range from discriminatory attitudes and remarks to institutional or social exclusion, harassment and overt forms of interpersonal and collective violence or attacks on outsiders and/or their livelihood assets (Misago, et al, 2015).

Numerous studies (see for example Nyamnjoh, 2006 and Crush, et al, 2009) have demonstrated that xenophobia and its different forms of manifestations are pervasive in Southern Africa. Crush, et al (2009) note for example that surveys on ‘citizens’ attitudes toward immigration in Southern Africa showed that xenophobia was rampant among diverse groups and communities particularly in South Africa, Namibia and Botswana. In recent times, communal violent xenophobic exclusion has taken place in South Africa (multiple incidents from 1994 to date) and Zambia (in 2016) and has resulted in murders, assaults, looting, destruction of property and displacement of those deemed outsiders (Misago, et al, 2015).

Xenophobic violence has in particular become a longstanding feature in post-Apartheid South Africa (Landau, 2011) and this is significant because South Africa is the preferred destination for most migrants from the region and the rest of the continent. Indeed, since 1994, tens of thousands of people have been harassed, attacked, or killed because of their status as outsiders or foreign nationals. Despite claims to the contrary, violence against foreign nationals in South Africa did not end in June 2008 when the massive outbreak that started a month earlier subsided (Misago 2011). Hostility towards foreign nationals is still pervasive and continues to result in rising cases of murder, injuries, and threats of mob violence, looting and the destruction of residential property and businesses, as well as mass displacement (Misago, 2016).

That violence continues to date is evidence that interventions by government and civil society have generally failed to effectively respond to and prevent xenophobic violence in the country. The reason for this failure is three-fold. First, there is denialism and lack of sustained political will by government which has consistently maintained that violence against foreign nationals and other outsiders as normal crime with no need for more specific or more targeted interventions. Second, there is lack of political muscle by civil society to hold government accountable for its failure to perform its core function of protecting all country’s residents. Third, social interventions by civil society to foster peaceful cohabitation and tolerance through social dialogues and campaigns aimed at changing attitudes have also largely proven ineffective in reducing violence. There are many reasons why these
interventions have and continue to fail. Chief among these reasons is the fact that interventions are not evidence-based and are not informed by a clear understanding of the drivers of the violence. Similarly past and current responses and interventions are based on shaky foundations and untested theories of change. Indeed, by focusing almost exclusively on public attitudes, interventions neglect factors and motivations that trigger violent behaviour; perhaps ignoring that attitudes are not always a good predictor of behaviour. Without a clear understanding of the drivers of the violence and of what type of responses work or do not work, intervention strategies can only be ineffective at best, and counter-productive at worst (for more on this in Misago, 2016).

Ongoing and unabated xenophobic violence in South Africa is a threat not only to the lives and livelihoods of foreign nationals in the country but also to the regional stability and socio-economic integration due to retaliatory measures (or threat thereof) taken by citizens of other countries in the region and beyond (e.g. Mozambique, Malawi, Zimbabwe and Nigeria). Indeed, in 2015 the South Africa’s government has issued warning to South Africans and businesses of the potential for reprisal attacks, and cautioned that the recent spate of attacks on foreign nationals could have serious consequences on the country’s economic and social relations. Such tensions resulting from xenophobic exclusion do not augur well for regional integration and cooperation.

Beyond South Africa, xenophobia and its various forms of manifestation are a reminder that communities are de facto spaces of immigration control. Indeed, through xenophobic exclusion, communities and their leaders decide who lives in and has access to resources held within certain spaces often in defiance of national laws and immigration policies. This means that host communities should be counted as important actors in the governance of migration and human mobility.

**Administrative obstacles in countries of origin**

Obstacles to free and save movement can often be traced back to countries of origin. This is particularly true not only for refugees and asylum seekers who flee persecution from their home countries but also for poor citizens who have no easy access to passports and/or visa application processes. With the imperative to move to other countries for better socio-economic opportunities, the only choice left is to cross international borders illegally with all the risks and dangers this entails.

For example, many Mozambicans are in South Africa illegally when they can get free 30-day visas (see details in South Africa case study) because passports are not accessible to the majority of poor citizens: they are expensive and unfordable for many ($50); they are available only at provincial
capitals that may be 500km away from potential applicants; and applications take 45 days (minimum) to process, which means that applicants either have to wait in the city or come back for collections, incurring other (accommodation or transport) costs. Similarly, while passports are relatively affordable in Lesotho (R150), applications take four to five to process. This inhibitive waiting period leads to many Basotho crossing the South African border illegally.

The above suggests that understanding obstacle and opportunities to free and save movement as well as migrant lived-experiences in host countries requires also looking at conditions and administrative practices in countries of origin. Free and safe movement can only start from countries of origin.

**Limits of migration policies and laws: Laws and policies do not guarantee protection**

The SA case study (later in this report) demonstrates that while legal/policy frameworks are important, their presence (even those deemed progressive) is not an accurate predictor of adequate immigrant protection (see also Landau, 2017). Indeed, without sustained political will and administrative capacity to properly interpret, implement and enforce existing legal and policy frameworks, migrants’ protection will always be compromised.

To advance a pro-migration agenda, there is often a strong focus on the reform of policy and laws as well as public education about rights (VeneKlasen, et al. 2004, 8). Such an approach is typically informed by the assumption that good laws and policies are key to achieving good outcomes for migrants. Yet, such legalistic emphasis often fails to consider the socio-political conditions that determine the true reach of official frameworks and the structures and practices that prevent people from claiming rights even where they are, on paper, defined well (VeneKlasen, et al. 2004, 8). While it there is often a strong belief that ‘the question of basic security is inseparable from legal status’ (Trad, et al, 2006:37), we need to be mindful of the fact that for migrants of all kinds, the existence of protection on paper does not equal protection in reality (Dodson, et al, 2015:11; VeneKlasen, et al, 2004:8). Instead, in many instances, laws are circumvented or simply ignored. At the local level, South Africa’s asylum and refugee laws - for long considered some of the most progressive worldwide - mean little where police officers tear documentation apart and a bribe often determines the ultimate fate of an asylum seeker (Amit, 2015), just as education about migrant rights can’t address the socio-

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12 Telephone interviews with a Mozambican Migration scholar and the representative of the Association for Mozambican Mineworkers; Johannesburg, 8 March and 20 April 2018 respectively
13 Telephone interview with a representative of Basotho Immigrants Protection Organization; Johannesburg, 30 April 2018
14 Recent changes, such as amendments proposed in 2015 and reiterated in South Africa’s new migration policy, however make existing laws increasingly restrictive.

As discussed earlier, regional and continental policy frameworks, charters and protocols promoting free movement have little chance of implementation in member-states who consider migration a threat to national security and economies. Thus, understanding that there are limits to migration policies and the rule of law is critical: even the best policy or law will not have any impact if a lack of capacity or political, material disincentives work against it or simply circumvent it ‘in the margins of the economic and political systems’ (Hyden, 2007: 16755).

In addition, there is the agency of migrants themselves in negotiating official frameworks as ‘opportunity structures’ that migrants navigate actively, not as ‘passive objects moved by opposing forces’ (Minter, 2011: 13–14,38; see also Czaika, et al, 2013; Castles, 2004; Kleist, 2015:139). In contexts where ‘most people have to learn to cope despite the state, not because of it, migration rules become just another barrier to be overcome in order to survive’ (Castles, 2004: 860). As such, for example, policies of ‘clamping down’ do not necessarily stop migrants from moving (De Haas, 2008; Bloch, 2010): often, migrants either keep coming or they readjust routes, timing or substitute legal categories (Dunnwald, 2015; Czaika, , et al, 2013). South Africa provides a good example for the latter: in the absence of other legal channels for low(er) skilled labour migrants, the ‘asylum seeker’ category (which, at least currently, still allows people to work) is used by many people who are not technically refugees. However, while Castles writes optimistically that ‘the formal power of governments and bureaucracies is being subverted by the human agency embodied in migration networks and transnational communities’ (Castles, 2004:878), Landau (2017) cautions that ‘we must be careful about romanticizing or over valorising these weapons of the weak’, especially knowing that while, for example, containment policies typically do not reduce overall flows, they do make mobility much more dangerous.

Finally, many consider policies and laws not specifically about migration – such as in the areas of trade, housing, labour, law enforcement or education - to be much more significant in shaping migration and protection outcomes than those specifically targeted at it (Czaika, et al, 2013; Landau, 2017).

In any case, the discussion above clearly indicates that migration laws and policies do not necessarily guarantee protection particularly in contexts of weak governance and limited state capacity to enforce rule of law by making sure that governance regimes at all levels correctly interpret and implement existing legal and policy frameworks.

The Lesotho Special Case

Landlocked and surrounded by South Africa, Lesotho faces specific challenges with regard to its citizens’ free movement in the region. According to respondents, the fact that anyone wishing to leave the country via air or land will have to pass through South Africa puts restrictions to free movement of many Basotho, particularly those migrant workers South Africa would have declared ‘undesirables’ due to visa overstays. One respondent narrated and lamented the current situation:

Lesotho is landlocked by South Africa. South Africa determines anyone’s movement in this country. Once SA classifies you as an undesirable, you are undesirable for the whole SADC because you cannot go anywhere. Lesotho does not have its own airlines to be able to air bypass South Africa if wanting to travel elsewhere. South African Airways planes do not accept undesirables. [...] Most migrant workers particularly domestic and farm workers become undesirables because they overstay their 30-day free visa. Overstaying is usually not deliberate because migrants would be still looking for job opportunities to make some money. They stay in South Africa illegally hiding from the police. When they come back to Lesotho, they are declared undesirables. [...] Undesirable status can stay up to 5 years. That is the reason why many migrant workers return to SA without passport, visas as illegals, without legal documents. [...] The majority of Basotho migrant works are affected by this undesirable status. And this significantly affects their free movement not only to South Africa but also to other countries in the region and beyond. [...] This is the reason why there is recruitment of cheap labour by South African employers: South African employers are given licences by the Ministry of Labour and Employment. They come to Lesotho; recruit Basotho for cheap labour without adhering to ILO standards: no proper job contracts, no decent salaries, just cheap labour and exploitation. The ministry offers licences but there is not follow up on working conditions, and rights of migrant workers. At the end of agreements with recruiters, migrants often do not come back home; they decide to stay over and look for jobs elsewhere. They overstay their visas, become illegals and eventually undesirables.\(^\text{16}\)

Respondents implored SADC to help Lesotho and South Africa resolve the impasse caused by this Lesotho’s landlocked status.

In sum, the above-described obstacles, combined with SADC’s own lack of conviction, mean that free and safe movement in Southern Africa is far from being a reality or even unfeasible at the moment and in the foreseeable future.

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\(^{16}\) Telephone interview with a representative of Basotho Immigrants Protection Organization; Johannesburg, 30 April 2018
Opportunities for safe and free movement in the region?

National migration policy frameworks

As indicated earlier, most countries in the region have started formulating/drafting comprehensive national migration policies with the assistance of regional and international partners. These policy frameworks are meant to form the basis for adequate protection for the people on the move and for a rights-based and developmental approach to the governance of migration and human mobility in the region as opposed to the current largely security-based perspective.\(^\text{17}\) To achieve the expected protection outcomes however, the new policies must not only align with other continental, regional and national normative and legal frameworks, but also and perhaps more importantly must be implemented by respective member states. Indeed, as indicated earlier the lack of political and will and weak state capacity to implement existing laws leads to worse protection outcomes. Further, SADC and member states should be actively involved in the drafting of these policies to ensure that they reflect the region’s needs and realities. This will allay fears that the involvement of international partners might transmit external agendas and lead to policies shaped much less by the region/continent’s needs than by the interests of the external actors.

Bilateral agreements

While the proliferation of bilateral agreements are largely seen as a states’ cop-out strategy or alternative to a coherent regional policy (SEF, 2015), they can also be used as an opportunity towards the realization of free movement in the region. Indeed, they can be used to allay SADC member states’ ‘fears regarding national security, the spread of communicable diseases, cross-border crime and the influx of illegal migrants among others (see earlier discussion). While comprehensive research is needed to understand the full implication of these bilateral agreements for the security, socio-economic and political life of countries involved, there is thus far no indication that they have significantly altered migration patterns in the region or have had any negative impact of the socio-economic and political well-being on states involved. Research evidence to this effect could perhaps persuade reluctant states to agree to more multilateral agreements, which could ultimately lead to the adoption and implementation of a regional migration policy. Indeed, Segatti (2017:57) notes that bilateralism ‘is in any case a direction which the 2005 Protocol on Facilitation encourages as an important step towards integration’.

\(^{17}\) Interview with IOM officials; Pretoria, 16 March 2018
New initiatives

In addition to bilateral agreements, other new practices and plans (e.g. visa exemption agreements, visas on arrival, labour migration action plan, special dispensations) are not only evidence that free and safe movement remains on the agenda, but also offer optimism that it is achievable. Indeed, if the implementation of these bits is strengthened and standardized, it could eventually lead to the full implementation of the protocol on free movement in the region. For this to happen however, plans need to be translated into concrete actions and member states need to demonstrate greater commitment for their implementations.
South Africa case study

Introduction

This case study presents findings of a research conducted by the African centre for Migration & Society (ACMS) in two South African sites: Rosettenville in Johannesburg (Gauteng Province) and Orlando in Komatipoort (Mpumalanga province) in February and March 2018. Part of parallel research conducted in sites in Southern and Eastern Africa, the study aims. This research aims to identify and analyse the gaps and obstacles (in migration laws, polices and practice) to free and safe movement in Africa, with the aim of identifying opportunities for legislative and policy reform.

The findings presented here are informed by qualitative individual interviews and focus group discussions with residents and relevant key informants conducted between 12 February and 5 March 2018. A team of four ACMS researchers conducted a total of 30 individual in-depth interviews with Key informants (16 in Johannesburg and 14 in Komatipoort) and 4 focus groups discussions. The study also relied on secondary literature to provide additional background and insight.

Research sites background information

Rosettenville

Located to the southern part of Johannesburg and serviced by the City of Johannesburg Municipality, Rosettenville has a history of being a migrant community dating back to the 1920s following the discovery of gold in the then Witwatersrand. Today, the community is home, either permanently or temporarily to people of different race and nationalities, both local and foreign. With specific reference to international migrants, Rosettenville, like other neighbourhoods in South Africa has been an attractive option for settlement owing to its proximity to economic opportunities and this is critically important for migrants who have been victims of civil wars, political persecutions and economic instabilities in home countries. Although statistical figures are scarce, general observations indicate that a large number of international migrants in this community are from West Africa. The area also hosts a significant number of other nationalities including Malawians, Zimbabweans and Mozambicans. The cultural diversity of this large community is reflected in the popular use of English, a language familiar with many, as a communicative tool amongst its residence.

A traditionally more ‘affluent suburb’, the social geography of Rosettenville seem to have been reconfigured in the contemporary period. With increasing population density owing to either
migration (both internal and external) or natural increase, some wealthy families have relocated to more affluent suburbs further South of Johannesburg. Despite boasting of a number of very good schools and colleges, the dilapidated buildings and challenges to the adequate provision of basic services by the City of Johannesburg Municipality and any other stake holders is a cause of concern. Basing on the responses from the respondents, crime, prostitution, drug abuse, gangsterism among other various forms of social ills have come to resemble the everyday life of this community. Disturbingly, there is are ongoing perceptions and in most cases, unfounded allegations by the locals that foreign nationals are at the centre of all these various ills bedevilling this community.

The prevailing scapegoating in Rosettenville reflects a general perception that some locals have on foreign nationals countrywide. In the face of slow pace of service delivery by the post-apartheid government and economic decline, immigrants become the easiest and most obvious target of resentment and are projected by citizens and authorities as the cause of social ills. Last year, some houses were reduced to ashes by the mob who alleged that these houses, owned by foreign nationals were being used for child prostitution and as drug dens.

**Komatipoort**

Komatipoort is a border town located in Nkomazi Local Municipality (NLM), Mpumalanga Province. It is an entry point for immigrants from Mozambique and Swaziland as it is connected to Lebombo and Mananga border posts. Komatipoort is located just over 5 Kilometres from Lebombo border post and 70 kilometres from Mananga border posts. The town is surrounded by hundreds of hectares of farm land involved in production of sugarcane. The town has a number of townships and villages including Orlando (the main focus of this study), Brink (Dludluma) and Albertsnek.

Orlando hosts a significant number of migrants from the neighbouring countries. The majority are from Mozambique and Swaziland. Immigrants mainly stay in the shacks or the informal area, while locals stay in RDP houses or the formal area with access to basic services such electricity, water and sanitation, a schools and a clinic.

**Primary findings and conclusions**

This case study finds the following main gaps in policy and practice that threaten the safe and free movement of international migrants in South Africa:
• **Limited freedom of movement**: Immigrants (particularly poor immigrants, refugees and asylum seekers) in South Africa have limited freedom of movement within and without the country due to fear of unlawful arrest/detention/deportation and lack of recognised travel documents respectively.

• **Limited access to legal protection**: Immigrants in South Africa generally have limited access to equal protection by the law due to lack of documentation or the infectiveness of law enforcement institutions (particularly the police).

• **Limited access to basic services and livelihoods**: This study finds that, despite constitutional guarantees, immigrants in South Africa generally have limited access to basic services (such as health care and education) and fair livelihood opportunities. The lack capacity and unwillingness of frontline service providers to accurately implement the controls laws and policies explain this limited access. Regarding fair livelihood opportunities, many immigrants face exploitation in the labour marked due to desperation and imperative to work as well as lack of proper documentation.

• **Xenophobic exclusion**: Xenophobia and related violent outsider exclusion are constant threats to lives and livelihoods of many immigrants in South Africa. They are a reminder that many communities in South Africa have become spaces of immigration control. Indeed, through xenophobic exclusion, these communities and their leaders decide who lives in and has access to the access to resources held within certain spaces often in defiance of national laws and immigration policies. This means that host communities should be counted as important actors in the governance of migration and human mobility.

In general, this case study illustrates that the presence immigration laws and policies, even those deemed progressive, are not always an accurate predictor of adequate migrant legal and socio-economic protection (see also Landau, 2016). Indeed, without sustained political will and administrative capacity to properly interpret, implement and enforce existing legal and policy frameworks, immigrants’ protection will always be compromised.

After this introduction, this report proceeds through three main sections. The first presents an analysis of the South Africa’s immigration legal and policy framework. The analysis shows that the country currently has relatively progressive legal and policy instruments although currently proposals reviews and amendments are likely to bring about policy changes that will undermine the rights of
migrants in the country. The second section gives a detailed presentation the findings. It discusses the lived experiences on migrants in the country and clearly shows their limited access to the legal, socio-economic protection. It concludes laws and policies do no really matter the lives of many immigrants, particularly those in the vulnerable, poor category. The third and concluding section summarise the key findings of the study

Migrants’ lived experiences: When law and polices do not matter

This section presents the case study’s findings focussing on migrants’ lived experiences with regard to free and safe movement in South Africa. By highlighting numerous and often unsurmountable difficulties and challenges immigrants in accessing legal, physical and socio-economic protection, it shows that even the presence of progressive immigration laws and polices is not always an accurate predictor of adequate immigrants’ protection (see also Landau, 2016).

Restrictions on freedom of movements, unlawful arrests, prolonged detentions and deportations

The study reveals that international migrants in South Africa (in both major cities and border areas), whether documented or undocumented, generally have some restrictions in their movements due to the fear of being prejudiced or being victims of police brutality. In Johannesburg, for example, there are certain areas that they always avoid. Asked if they (foreign nationals) freely move in Johannesburg, one respondent responds:

The answer is no, obviously with these operations, Operation FIELA and patrols by police volunteers, you cannot walk freely. Anytime they lock you or request you to produce a passport and if you don’t have money then you can find yourself in Lindela. Most migrants are fully aware of that so they avoid the CBD as much as possible.18

According to respondents, the police and those who do patrols in the city, like the members of the JMPD and the volunteers have an awkward way of identifying foreign nationals basing on dressing, hair-cuts and complexion. If you are dark skinned, you are more likely to be stopped and asked for papers.19 Respondents indicate that there is a general perception among the police that if one is either Zimbabwean or Nigerian, chances are high that they will be in possession of ‘fake documents’. The main challenge is that in many cases, the members of the police on their own are not well equipped to make distinctions between an original document and counterfeit documents. Indeed, a human rights lawyer notes that:

18 Interview with a foreign national of Ethiopian origin, Rosettenville 1 March 2018.
19 Ibid
Even the police don't have a right to ask for a permit because they are not equipped with the know-how of the ins and outs of the department of Home Affairs - asking for a permit is not the correct procedure because they do not understand what a passport looks like or valid or invalid permit. If the police have you, they should call Home Affairs to confirm your legality. In Joburg, they just throw you into a van and drive you around to get a bribe or take you to the police station and detain you. They can even say we don't want you to go to your house, they detain and deport you. Those gaps are not in policy but administrative. The administrators and law enforcers are not equipped and do not understand the immigration issues. What needs to be done is that interrelationship with those people who handle the public affairs - the police, nurses, and JMPD should be educated on these migrant issues. For me, it is serious and critical because we can change policy but if they don't know, they don't know. That is where everything starts.

However, the actions of some of the members of the police has not gone unnoticed and unchallenged. Narrating how he has visited some police stations due to unlawful arrests of some migrant communities, one respondent said:

Several times I have gone to the police station to fight with some junior officers who will have manhandled people with asylum documents telling that it's not it and we need to deport you. An asylum seeker is someone who has been exposed to violence and a lot of improper situations and he also faces these unfair arrests where he is to seek refuge. It means a lot disturbing for a migrant.

The respondent further charged that it is the mandate of the Home Affairs to ask for documentations and not the police. He said:

It's not the police's right to ask for a passport from foreigners unless you are caught committing a crime not just an individual walking in town. That is harassment and how is this different from the Pass laws of the apartheid system? When Home Affairs want to see who is and who is not documented, they have to do it through proper channels like an operation. It should be publicized as well with warnings that register yourselves. If you do not qualify to be documented then they give you 30 days to prepare and leave. But when it is done haphazardly like that it’s an infringement to rights. This is what migrants are facing here.

There is an ongoing perception that members of the police are anti-migrants and they are there to harass them. As one respondent from the Migrants Help Desk rightly put it: ‘Those perceptions exist. We hear this when we do our dialogues and workshops. They will complain that the police are not supportive.’ In cases where a crime is committed by a foreign national, the repercussions are in

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20 Interview with a human rights activist, Johannesburg, 22 February 2018.
21 Ibid
22 Interview with a Migrants Help Desk official, Johannesburg, 2 March 2018
most cases harsh due to the general perception that foreign nationals are coming to ‘...torment our people.’

In Komatipoort, respondents similarly reported regular harassment and threats of deportation by the police and DHA inspectors. Indeed, a migration manager at Lebombo port explained that by law state officials can arrest whoever they suspect to be an illegal migrant for 24 hours and deport these migrants back to Mozambique. He stated: ‘Foreigners are expected to walk around with their passports when they are in South Africa. If an official suspects that the person is an illegal foreigner, they have rights to arrest them for questioning up to 24 hours.’ He indicated that the migration office has inspectors who are responsible for checking the legal status of immigrants.

Respondents indicated however that migrants in Komatipoort live in fear because the police and inspectors harass them at night. One Mozambican national for example stated that: ‘We are afraid of police, they come at night and knock on our doors requesting passport. If we do not have they arrest us.’ A focus group (FG) discussion with locals (South Africans) confirmed indeed that sometimes the inspectors go to the shacks late at nights and demand to see passports. Migrants without documents are then arrested and charge R 800 for fine; those who are not able to pay are then deported. A member of the FG stated: ‘They arrest those without passports, they charge them about R800 if they do not have passport. If they do not pay, they are detained in the police station until they get be deported into Mozambique.’

The fear of harassment, detention and deportation is real for many undocumented Mozambicans who are in the area illegally either because they came without passports or because their visas would have expired. Asked why they do have passports, the Mozambican migrants in the FG responded that passports are expensive in their home country and it takes time to be processed. One undocumented Mozambican stated: ‘We do not have passports, passport is expensive in Mozambique’. A Mozambican migration scholar indeed confirmed that passports are very expensive and inaccessible for ordinary Mozambicans. She explained:

‘Passports are very expensive in Mozambique; they cost $50 which many Mozambicans do not have. They are also not accessible because you can only apply for a passport at the provincial office’.

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23 Interview with a local resident (South African), Rosettenville, 3 March 2018
24 Transcription 9, Audio 9, Lebombo port manager, 19 February 2018
25 Transcription 9, Audio 9, Lebombo port manager, 19 February 2018
26 Transcription 12, Audio 12, Focus Group Discussion with locals, 20 February 2018
capitals which can be as far as 500km away from potential applicants. So passports are
difficult to get for poor and ordinary Mozambicans.27

According to respondents, it is this inaccessibility of passports that explains why many come into
South Africa illegally, through the fence often with the assistance of smugglers (commonly known as
‘runners’, rather than through the border post. Lebombo border post officials are aware of these
illegal border crossings and the activities of the smugglers. One of migration managers for example
stated: ‘There are people next to the fence who assist fellow Mozambicans to jump into South Africa.
This is because we do not have jurisdiction in the other side; this means they cannot be arrested by
South African Police. These people are called ‘runners’.28

The above discussion suggests that understanding the lived experiences of immigrants in their host
communities also requires looking at socio-economic, legal and administrative conditions and
practices in countries of origin.

Those with passports enter the country on 30-day visitors’ visas and are expected to return to
Mozambique before their visas expire. Failure to do so results in arrest and deportation as a migration
as manager at Lebombo port explained:

Immigrants are expected to be in a country for 30 days and after this period either they
renew their visas or leave the country. They are further expected to carry their passports all
the time. [...] On the passport the immigrants can stay for 30 days, once they overstay the 30
days they are considered illegal in the country and can be deported. They will then need to
visit South Africa after a year.29

Mozambican immigrants however explained that it is not easy to go back and forth to renew visas
particularly when they do not get jobs they come looking for. Many end up overstaying their visas and
live in fear of detention and deportation like their undocumented counterparts. Indeed, deportation
of Mozambicans from South Africa is a regular occurrence. In June 2017, The Mail & Guardian quoted
a government official saying that ‘About 600 Mozambican nationals illegally living in South Africa are
being deported back to their country every week. [...]Most of the people normally coming to South
Africa stay for more than a planned 30 days, breaking the visa agreements between the two countries
signed in 2005.’30

27 A skype interview with a Mozambican migration scholar, on 8 March 2018
28 Transcription 9, Audio 9, Lebombo port manager, 19 February 2018
29 Transcription 9, Audio 9, Lebombo port manager, 19 February 2018
Migrant arbitrary arresters, detention and deportation practices that do not follow due process are well documented in South Africa. Hiropoulos (2017: 2) notes for example that:

The South African government’s primary response to the increase in immigration since 1994 has been to arrest and deport undocumented migrants. Deportations of undocumented migrants have risen steadily since 2000, with Zimbabwean deportations reaching some 150 000 in 2005. [...] The processes leading to deportation often occur outside of the legal framework and violate the procedural guarantees put in place by both domestic and international law. [...] More specifically, [a review of these practices] finds non-compliance with respect to procedures for arrest of foreigners; procedural rights, including sentencing procedures, the issuance of notice of deportation, extension of detention and the provision of interpreters; detention at police stations; and detention at the Lindela Detention Facility, including unlawful and arbitrary detention practices, the use of force, corruption, inadequate conflict management, general hygiene, access to health care, living conditions, access to phones, visitation and late-night searches.

Refugees and permanent residents similarly face restrictions of movement out of South Africa. Indeed, the travel document they get from DHA is not recognised or accepted by many countries, particularly in Europe (the Schengen zone). This makes it difficult for many in this category to for example attend professional and other work-related meetings and conferences.

In sum, the discussion above shows that immigrants (particularly poor immigrants, refugees and asylum seekers) in South Africa have limited freedom of movement within and from the country. Within the country, their movement is restricted by fear of arbitrary arrests, unlawfully prolonged detention and deportations. There is ample evidence these practices do not follow due process and violate both national and international law. Freedom of movement out of South Africa is generally for the undocumented immigrants but also for the documented refugees and permanent residents whose travel documents are not universally recognised.

**Access to legal protection and representation**

There seems to be a correlation between immigration status, nationality and access to justice. Respondents indicated that, in most cases, undocumented immigrants or those waiting for outcomes (on their applications) from the DHA have limited access to justice or legal services. An interview with one of the pro-poor organisations representing the interests of migrant communities revealed that migrants do not usually report to the police, ‘...because the police will start asking for documentation
and arrest the person instead of dealing with the case at hand. They are afraid to report the cases. They are labelled.  

Narrating on what transpired in Rosettenville when community members torched down buildings that were alleged to be owned by foreign nationals and being used as drug dens, for prostitution and many various forms of anti-social activities by Nigerians, a resident of Rosettenville expressed that it was difficult for foreign nationals who lost property to take legal action because of the related consequences. He said:

Even though many migrants are aware of their rights, they are afraid to use legal aid because that would be like starting a fight with the locals. For example, most people who lost their property during the ‘anti-drug campaigns’ were too afraid to engage the law. The fact that the police never arrested the culprits means that there is no hope anywhere.

Owing to their limited access to legal aid, migrant communities have instead formed their own associations where they share information and reach out to pro-poor organisations like the Lawyers for Human Rights, African Diaspora Forum, Migrant Workers Union of South Africa and the Migrants Help Desk collectively. The challenge with these organisations however is that they too are under-resourced and in most cases, their approach towards addressing the concerns of the minority groups is reactionary (dealing with problems as they arose) and less pro-active (identifying and dealing with the challenges first before they arise).

In this discussion, respondents clearly indicate that immigrants (particularly the poor, asylum seekers and refugees) in South Africa have no access to equal protection by the law due to lack of documentation or the infectiveness of law enforcement institutions.

Access to documentation

Respondents in this believe that documentation is often directly linked to immigrant experiences in South Africa. However, despite this real or perceived importance of documents for the migrant communities, respondents indicated that the South African government through the Department of Home Affairs has adopted an anti-immigration stance towards foreign nationals and in some cases, the processes and procedures of acquiring legal documents in South Africa have been tightened especially for those who do not fall within the ‘Critical Skills’ category. Supporting the argument that the South African government is tighten screws for international migrants, one respondent from the Lawyers for Human Rights noted that not even a single person has been granted asylum in Musina, a

31 Interview with a representative from the Migrants Help Desk, Johannesburg, 2 March 2018.
32 Interview with a foreign national, Rosettenville, 3 March 2018
border town servicing people from other SADC countries as well as those coming from as far as Burundi and DRC seeking political asylum in South Africa.  

Instead of increasing access to asylum application process, asylum and refugee centres are being closed. Only Marabastad, Durban, Eastern Cape (just opened) and Cape Town (which was opened after a challenge from lawyers from closing) are functioning though at limited capacity. Respondents characterised the relationship between the DHA and asylum seekers as being chaotic. One respondent stated:

The services between Home Affairs and asylum seekers are the most chaotic because a seeker is fleeing and in most cases undocumented. The policy on the ground says that the moment you flee from your country, you go to the home affairs office nearest to where you reside. In five days, you must create a link with home affairs department. If you go within that period to Marabastad, they will tell you to go back to Musina to get the transit permit- and when you get there you are deported which means technically, the borders are closed. They are no longer accepting new applicants. In Musina, they are not giving these permits. For a country like South Africa that has got 97% rejection rate in refugees and asylum seekers, their reasons are very shabby e.g. they can ask why only the younger people are coming here and not the old people yet it obvious that those between the age of 30 -50 constitute the highest volume of migrants than any other age because this is where you really feel you need to be a father and you need to have something of your own and start a proper life. I had a chance to meet the Director of Refugees and Asylum seekers at the Human Rights Commission (HRC) where he said that they have a rejection rate of 97% because of the age group (30-50) of those who apply for permits.

The respondents were concerned that there are less efforts from the South African government to address the concerns of refugees in this country. According to respondents, despite being a signatory of the UNHCR, and being regarded as a resettlement country by the United Nations, there is still to be refugee and migration policies aimed at improving the living conditions of immigrants in general and refugees in particular. Instead, in the words of one respondent: ‘[Policy] Documents that pass through parliament into law in this country infringe to some extent the rights of the migrants. For example Operation Fiela 1, Operation Fiela 2 and many other operations- they are migrant targeted instead of targeting a situation on the ground which is criminality.’

For this respondent, a country like South Africa that has ratified to become a host in terms of refugee convention and with all the respect it commands globally should have policies that are inclusive and

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33 Interview with the Lawyers for Human Rights representative, Braamfontein, 20 February 2018  
34 Interview with a human rights activist, Johannesburg, 22 February 2018.  
35 Interview with a Congolese refugee, Bertrams, Johannesburg, 28 February 2018.  
36 Interview with a human rights activist, Johannesburg, 22 February 2018.
allow easy access to documentation. This would help reduce corruption that is currently taking place in the country’s asylum regime.  

A Congolese refugee who has been staying in South Africa for the past 20 years summed up the lack of refugee assistance to refugees in South Africa:

[…] when you arrive in SA, there is no structure to welcome refugees or migrants. I started living on my own as from day one up until now, no help or assistance from anyone. The UN considers SA a resettlement country but there is nothing. Once you settle you will at least have accommodation and you should be put somewhere where you decide to study or work but it’s nothing like that here. You start thinking about survival when you arrive in the country’.  

Zimbabwean nationals seeking refuge in South Africa have to try hard to convince the authorities (DHA) that they indeed qualify for refugee status. According to respondents, there is a general ‘umbrellaization’ of the situation in Zimbabwe only as a temporal economic crisis and there is no war there. For this reason, gaining a refugee status if one is from Zimbabwe is very challenging. One respondent stated:

There is lack of understanding of the scenario and the political tension in Zimbabwe; so the world at large doesn't take the Zimbabwean situation seriously because maybe Zimbabwe has a literacy of an average standard so when things happen internally, it’s so sophisticated that you can’t see violence being unleashed in a foolish manner be it by junta, police or government.  

Respondents indicated that the challenge with using economic arguments to describe the Zimbabwean situation does not adequately capture what is really happening on the ground, particularly, bad governance which has made many people to flee due to fear of political persecution. Over the years, the political sphere in Zimbabwe has been very volatile and many members of the opposition parties especially the MDC have been subjected to various forms of violence and persecution by the ruling ZANU PF.

There is a long-standing argument by the Department of Home Affairs that they are under-resourced and not financed properly hence the persisting problems in addressing immigrant concerns. An informal conversation with an official from the Department of Home Affairs in Braamfontein suggested that the department is under-resourced and therefore incapacitated to address the

37 Ibid
38 Interview with a Congolese refugee, Bertrams, Johannesburg, 28 February 2018.
39 Interview with a human rights activist, Johannesburg, 22 February 2018.
concerns of the immigrants. However, one of the respondents had a different perception and did not agree that either the DHA or the government are under-resourced to tackle this thorny issue on migration. She noted that an economy like South Africa cannot claim to have insufficient resources to deal with immigration issues but there is just a lack of political will by those in positions of power to address the concerns of minority groups in the country.  

Another respondent however had a different view. For him, the problems being faced by both the government and its other structures like the DHA emanates from the fact that they do not have proper permanent physical structures of their own. He said:

Some of the challenges are that the government and the DHA itself doesn't seem to run at an official status because we cannot have home affairs being operated from areas where you lease from private individuals. When the lease is terminated, that affects the whole system and this is what the home affairs have suffered from mostly. It has suffered from management crisis because they have no permanent structures to administer migrants and refugees. They use structures from landlords not government.  

Access to education

Accessing education especially in government institutions is a struggle for foreign nationals’ children, both documented and undocumented, in Johannesburg and Komatipoort. The South African constitution is very clear and has made education a right for all children, without giving specific reference to nationality or documentation. However, even though the constitution says all children have the right to education, ‘...some schools here in Rosettenville still refuse to accept our kids on the basis of documentation’. Some respondents believe the criteria for accepting foreign students in many government schools are exclusionary. One responded for example noted:

In terms of action, a lot of migrant children are not affiliated to any government schools. The process of intake is a 13 digit ID document registration thereby even if you have a passport with a permit, you need to apply on campus not online. By the time you put everything in order, you go to try and register on campus and all the vacancies are filled.

This scenario creates many challenges for immigrants. Firstly, immigrants will be forced to send their kids to private schools where they have to pay very high fees, and in some cases, not less than R500 per month. Because many immigrants may not afford to send their kids to private schools, they

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40 Interview with a foreign national woman, Rosettenville, 5 March 2018.
41 Interview with a representative from the Migrants Help Desk, Johannesburg, 2 March 2018.
42 Interview with a foreign national in Rosettenville, 1 March 2018.
43 Interview with a human rights activist, Johannesburg, 22 February 2018.
44 Interview with a representative of the ADF, Centurion, 20 February 2018.
(kids) will end up loitering in the streets in town either begging on selling vegetables with their parents, but this comes at a cost, argues one of the respondent who said, ‘...for someone selling tomatoes on the streets the children cannot learn and you risk social workers coming to take the kids away because they will call it abuse’.45

Like in Rosettenville, children of school going age can be seen playing in Orlando Township (Komatipoort) during school going hours. Parents of most of these children are immigrants from Mozambique. These children could not get admission in schools due to strict admission requirements. A respondent in one of the local schools stated: ‘The school accepts learners who are in the country legally with documents such as study permits. The parents of these leaners are reminded always that they should be in the country legally or alternatively take their children to Mozambique or Swaziland to access education there.’46

The children of international migrants are accepted at the local Centre for Early Childhood Development (ECD) Centre but after graduation they are either taken to their home countries by their parents or stay home in Orlando. A respondent for the local ECD stated: ‘Schools do not accept children who do not have valid documents. In our crèche we accept children of both migrants and locals. But when they have to move to grade R, the children of migrants are not accepted because of invalid or lack of documents.’47

A respondent at a local school highlighted that due to children not going to schools, child labour is pervasive in Orlando. He stated: ‘Child labour exist in the area. Children start working at an early age because they do not qualify to attend schools in terms of required documents. Young boys as young as 14 years cross the border illegally to come to South Africa to find employment.’ 48

There are a number of organisations that are making efforts to ensure that human rights come first and children are be denied access to basic education simply on the basis of either documentation or nationality. Representatives of these organisations indicate that one of the major obstacle to foreign children accessing education results from the fact that some schools (principals and administrators) do not have an understanding of the country’s constitution and at times, they will have to reverse their decisions to expel a child from school after such cases were challenged in courts.

45 Interview with a representative of the Migrant Workers Union of South Africa (MIWUSA), 26 February 2018.
46 Interview with a local crèche manager, Komatipoort, 19 February 2018
48 Ibid
An official from the Migrants Help Desk in Johannesburg confirmed that there are various circumstances when they (organisation) had to intervene when kids of foreign nationals were, either’...kicked out of school or some were reported to the authorities to be arrested and deported.’

It is worth noting that pro-poor organisations like the LHR, ADF and the Migrants Help Desk were not necessarily encouraging immigrants not to make efforts to document their kids and by doing so promote ‘illegality’. What is central in their assessments is that kids should not be denied a basic right and should not be chased out of schools when their parents are busy trying to sort out their papers. Encouraging immigrants to send their kids to school without proper documentation would be unwise because even though there is a flexibility in lower grades, problems will still arise as they (forging learners) try to sit for matric examination or access higher education.

Access to health care

In both Johannesburg and Komatipoort, respondents indicated that access to basic healthcare services is generally better compared to other services. One of the respondents noted that she did not face any challenges when she gave birth in one of the clinics in Rosettenville and the local nurses there treated her like any other locals. She however indicated that she was asked to provide any form of identity for ‘records sake’.  

However, there have been many cases of ill-treatment of foreign nationals in some hospitals surrounding Johannesburg. Some of the cases are regularly reported to pro-poor and migrant organisations. Respondents indicated for example that some public hospitals will not assist pregnant mothers unless they provide necessary documents. The attitude of some health officials towards foreign nationals was also noted to be of huge concern. Narrating some of the experiences of immigrants, one respondent stated:

Those admitted to hospital are treated so badly with these xenophobic utterances targeted to them. Most of the time migrants prefer to stay away, they die in their homes or take the person back to their country of origin because they cannot easily access the service locally. There is institutionalized xenophobia at some of the hospital - sometimes they ask you in vernacular. This sometimes aggravates the sickness.

49 Interview with a representative of the Migrants Help Desk, Johannesburg, 2 March 2018.
50 Interview with a foreign national, Rosettenville, 5 March 2018.
51 Interview with a foreign national, Rosettenville, 1 March 2018
According to respondents, some health care providers do not seem to understand the country’s laws or deliberately ignore them. Respondents believe that this can be corrected through a top-down communication and information dissemination. As one respondent put it, ‘...there remain challenges of information dissemination from the department of health to put a poster and say migrants are supposed to be treated irrespective of their legality.’

Respondents in Komatipoort indicated that the local clinic provides their services to both South African and migrants during weekdays. In the FGD with locals, one of the respondents mentioned that: ‘The clinic used to request passports from migrants, but it has since changed because the management realised that the death rate of migrants was high due to HIV/AIDS.’

Respondents however indicated that that regardless of whether the sick person is South African or international migrant, emergency response by ambulances is extremely slow. One respondent stated: ‘When a community member is sick, the ambulance response rate is very low regardless of whether the patients is migrants/immigrant or locals.’

The clinic management indicated they face challenging in providing services to international migrants. In particular they indicated that language barrier is a challenge between the staff and international migrant patients. The clinic manager explained:

When the wives of the migrants are pregnant in Mozambique, they cross the fence illegally to come and give birth in South Africa. Language becomes a problem when they get here, because they do not hear anything. It is difficult to explain to them that they have HIV/AIDS. This worries us because it seems as if we are not doing anything because the child to mother transmission of virus is high in Komatipoort.

The clinic manager further noted that because of these their HIV mother to child transmission programme is failing and they are the worst performing clinic in Mpumalanga. The programme requires that both child and mother take medication for six months and return for check-ups. In most cases the children would have contracted the virus due to mother’s negligence. The clinic manager stated: ‘Sometimes after giving birth they disappear for three months whereas our programme requires that they must take the medication for two years.’

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52 Interview with a foreign national in Rosettenville, 5 March 2018  
53 Local focus group discussion; Komatipoort, 20 February 2018  
54 Interview with a local business owner, Komatipoort, 20 February 2018  
55 Interview with a Clinic manager; Komatipoort, 20 February 2018  
56 Ibid
Access to the labour market

Respondents indicated that accessing the labour market (both formal and informal), has become a very serious concern for low-skilled foreign nationals both those with and those without proper documents. Industries give preference to locals as government increasingly requires companies to comply with labour and immigration laws. From the labour side, companies are supposed to retain a certain percentage to the locals and a very small percentage to foreign nationals. In addition companies are also not allowed to hire ‘illegal immigrants’. This tight situation presents a very difficult situation for foreign nationals, particularly those who are less skilled and do not fall within the category of the Critical Skills. Desperate foreign nationals end up working in low skilled sectors like agriculture, security and construction. Respondents indicate that, in these sectors, labour exploitation is pervasive and a daily occurrence. Narrating on how this scenario has exposed many migrants to exploitation and abuse, one respondent said:

The migrant community - the majority, in general, are not so worried, they have given up on their rights. They have an option to work on a lower level or they don’t work at all. They say that at least as long as i am feeding. This is desperation. People are getting paid as domestic workers below the minimum wage. They have rights but the employer would say you can walk away. The law says everyone is equal, we do not discriminate based on gender or sexual preferences. This is based on the constitution. But now at work, a South African gets paid more than a migrant. The moment a migrant complains, they get kicked out of work. We have been faced with many of those situations. When you discuss with migrant workers, they would say it doesn’t matter; ‘I would rather work and earn half of the local person who does not work at all’. So it becomes not an issue of rights but an issue what matters most- they work because they have to.57

According to respondents, there is a general perception among employers that ‘...when you have no documents you have no rights as well’.58 The same respondent further explains:

You are employed by someone who knows that you are an asylum seeker and your document will expire on a certain date, your legality stands only when the asylum is still valid. After that you risk losing your job or working for a lower salary then there will be labour exploitation which is the biggest threat in this country. Migrant labour is very much exploited because people would want to keep their jobs to feed their stomachs offering services that are higher than their capacity and they suffer. The worker suffers and you can’t report because you are illegal in the country.59

Such a scenario benefits the employer most at the expense of the ordinary desperate immigrant. Indeed, respondents indicated that employers are aware that the majority of immigrants especially

57 Interview with a human rights activist, Johannesburg, 22 February 2018.
58 Ibid.
59 Interview with a representative of MIWUSA, Johannesburg, 26 February 2018.
from Zimbabwe are more educated and qualified than the locals and they are therefore preferred at a lower cost, to maximize profit. Respondents believe that it is for this reason that many companies are ‘packed’ with qualified employees who are in unskilled labour sector, are underpaid and not labour protected.

One of the drawbacks in attempts to claim rights and concessions within the workplace is that immigrants are generally not organised as compared to their general local counterparts.  

Labour exploitation is an everyday thing and this was reflected in the fact that, on a daily basis, the MIWUSA are always trying to represent someone who would have been unfairly dismissed or treated or dismissed on a daily basis. However, some efforts to represent the growing migrant community are being hampered by a lack of resources and people who are helping migrants with such issues are doing that on a voluntary basis.

Though the above discussions, this study shows that, despite constitutional guarantees, immigrants in South Africa generally have limited access to basic services (such as health care and education) and fair livelihood opportunities. Many face exploitation in the labour market due to desperation and imperative to work as well as lack of proper documentation.

Xenophobia and outsider exclusion: Communities as zones of immigration control

The study’s finds that there is a complex and often hostile relationship between ‘insiders’ (locals) and ‘outsiders’ (foreign nationals in this case) in Rosettenville. Respondents indicated that on a daily basis immigrants are exposed to symbolic and actual violence and other different forms of abuse, discrimination and exclusion. Indeed, respondents reported that immigrants regularly face negative attitudes and scapegoating from local residents and the local authority. According to respondents, locals accuse foreign nationals of committing most crimes, manipulating rentals because they can afford and therefore leading to the locals accessing rooms/accommodation at the peripheries, stealing jobs and of being the main reasons for the social decay in the community.

A strong example of the latter was last years’ burning of buildings that belonged to foreign nationals due to allegations that they were being used as drug dens and being used as brothels for prostitution in general and child prostitution in particular. A local resident pointed out that though prostitution is

60 Ibid
61 Interview with a local resident, Rosettenville, 3 March 2018.
not new in Rosettenville, it has skyrocketed since more and more foreigners started finding residence in the suburb. She pointed out that most of these immigrants were undocumented and the police were doing nothing to arrest them. According to this respondent, the Nigerians are the main culprits in this promotion of social decay in this community. ⁶²

Foreign respondents had however believed that locals’ perceptions were unfounded expressed that xenophobic attacks by the community in Rosettenville last year in January and February were pure hatred towards foreign nationals. He charged:

In the locations they stay, the migrants seem to be more successful and xenophobia rises. The government will not acknowledge that there is xenophobia because this would mean exposing themselves so they come up with issues like drug lords fighting for space etc. Can you burn the whole street because of a single drug lord? ⁶³

According to this respondent, the Johannesburg municipality should improve its service deliveries and admits failure instead of using other means to hide their incompetence. In this community, as may be the case with many other communities in South Africa, community members have always complained about foreign nationals coming to ‘...take their jobs, wives, and flooding our hospitals’. ⁶⁴

The hatred that emanates from competition for resources was also illustrated with one of the respondents from the ADF. He said:

There is a general perception among communities that foreign nationals are the trouble causers. Based on my background research that I did in Diepsloot, on the provision of health facilities, the community was saying that the migrant community was going to the hospital too early so when they eventually get there, the clinic would have taken the maximum number of people that it needs and now there is a shortage of medication for the local people so they fight the migrants. ⁶⁵

Local respondents argued that South Africans are generally peace-loving and very accommodative and they always react when immigrants are involved in processes that destroys their communities. ⁶⁶

This sentiment was also echoed by another local respondent who said; ‘...it's not always that locals act badly towards foreigners but sometimes foreigners act irresponsibly’. ⁶⁷

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⁶² Ibid
⁶³ Interview with a human rights activist, Johannesburg 22 February 2018
⁶⁴ Interview with a local resident in Rosettenville, 3 March 2018.
⁶⁵ Interview with a representative of the ADF, Centurion, 20 February 2018.
⁶⁶ Interview with a local resident, Rosettenville, 3 March 2018.
⁶⁷ Interview with a foreign national, Rosettenville, 5 March 2018.
In some instances, local politicians have been at the centre of inciting violence through their comments on foreign nationals. For example, many believe that the Mayor of Johannesburg, Mr Mashaba’s speech about foreign nationals flooding the streets contributed to the persecution of foreign nationals not only in Rosettenville but had the potential to escalate violence in any other part of the city and country. This is a typical example of politicians scapegoating foreign nationals for political gains. A LHR official indicated for example that, contrary to claims that there has been an influx of foreign nationals into South Africa, the numbers are in fact declining. She said:

It’s not all that it appears to be because a lot of what is being spread is just opportunism by politicians who scapegoat foreign nationals for not having addressed what they promised to address which is to eradicate poverty in our country. The inequalities in the country have gotten worse and that is because of failed policies and not because we are having an influx of people. The numbers are showing that our figures (migrants) are going down drastically over the years.  

The study equally finds negative attitudes on Komatipoort where locals are convinced that foreign nationals commit most of the crime in the area and steal jobs from locals. One local respondent for example stated:

High level of crimes mostly committed by immigrants is highest in the area. These crimes include house breaking; pick pocketing, farm theft etc. Some of these crimes results in death. [...] The propagators are being chased out of the community or beaten and burned. However, theft remains a big challenge in the community. Sometimes when tenants leave, they take our property and leave with them to Mozambique.

Another local respondent echoed similar sentiments: 'They came illegally in the Country and they get Jobs illegally in South Africa. They do not save their money in banks, some of them move around until they run out of things to do and finally still from us.'

Xenophobia and related violent outsider exclusion are unique in these two places. Indeed, research indicates xenophobic violence has become a longstanding feature in post-Apartheid South Africa (Landau, 2011). Indeed, since 1994, tens of thousands of people have been harassed, attacked or killed because of their status as outsiders or foreign nationals. Despite claims to the contrary, violence against foreign nationals in South Africa did not end in June 2008 when the massive outbreak that started a month earlier subsided (Misago, 2011). Hostility towards foreign nationals is still pervasive

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68 Interview with a LHR representative, Johannesburg, 20 February 2018.
69 Transcription 12, Audio 12, Focus Group Discussion with locals, 20 February 2018
70 Transcription 9, Audio 9, Focus Group Discussion with locals, 20 February 2018
and continues to result in rising cases of murder, injuries, and threats of mob violence, looting and the destruction of residential property and businesses, as well as mass displacement (UNCHR ROSA 2015).

Pervasive xenophobia and related violent outsider exclusion are evidence that many communities in South Africa have become spaces of immigration control. Indeed, through xenophobic exclusion, these communities and their leaders decide who lives in and has access to the access to resources held within certain spaces often in defiance of national laws and immigration policies. This means that host communities should be counted as important actors in the governance of migration and human mobility.

Conclusions and summary

Using empirical data from Rosettenville (Johannesburg) and Orlando (Komatipoort) and drawing from existing literature, this case study finds the following gaps in policy and practice that threaten the safe and free movement of international migrants in South Africa:

- **Limited freedom of movement**: Immigrants (particularly poor immigrants, refugees and asylum seekers) in South Africa have limited freedom of movement within and from the country. Within the country, their movement is restricted by fear of arbitrary arrests, unlawfully prolonged detention and deportations. There is ample evidence that these practices do not follow due process and violate both national and international law. Freedom of movement out of South Africa is also generally restricted for the undocumented immigrants but also for the documented refugees and permanent residents whose travel documents are not universally recognised.

- **Limited access to legal protection**: Respondents clearly indicate that immigrants (particularly the poor, asylum seekers and refugees) in South Africa have no access to equal protection by the law due to lack of documentation or the infectiveness of law enforcement institutions (particularly the police).

- **Limited access to basic services and livelihoods**: This study finds that, despite constitutional guarantees, immigrants in South Africa generally have limited access to basic services (such as health care and education) and fair livelihood opportunities. According to respondents, the lack capacity and unwillingness of frontline service providers to accurately implement the controls laws and policies explain this limited access to basic services. Regarding fair livelihood opportunities, many immigrants face exploitation in the labour marked due to desperation and imperative to work as well as lack of proper documentation.

- **Xenophobic exclusion**: Xenophobia and related violent outsider exclusion are constant threats to lives and livelihoods of many immigrants in South Africa. They are a reminder that many communities in South Africa have become spaces of immigration control. Indeed, through xenophobic exclusion, these communities and their leaders decide who lives in and has access to the access to resources held within certain spaces often in defiance of national laws and
immigration policies. This means that host communities should be counted as important actors in the governance of migration and human mobility.

In general, this case study illustrates that the presence immigration laws and policies, even those deemed progressive, are not always an accurate predictor of adequate migrant legal and socio-economic protection (see also Landau, 2016). Indeed, without sustained political will and administrative capacity to properly interpret, implement and enforce existing legal and policy frameworks, migrants’ protection will always be compromised.

Recommendations

This report presents findings of a comparative research whose aim is to identify challenges and opportunities for safe and free movement in Southern Africa. More specifically, the research aims to identify and analyse the gaps and obstacles in migration laws, polices and practice, with the aim of identifying opportunities for legislative and policy reform. This report specifically presents research findings on select Southern African countries: South Africa, Zambia, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe. Three main sources inform the findings: i) document and literature review (policy analysis and review of scholarly literature); ii) qualitative individual and focus group interviews with relevant stakeholders in two sites in South Africa (Rosettenville and Komatipoort); and iii) qualitative telephonic interviews with experts and key informants (migration scholars, practitioners, civil society organisations, labour unions, etc.) in other countries.

With a specific focus on lived-experiences of migrants and host populations, this report identifies serious obstacles to– and symptoms of lack of freedom of movement in the region. These include: i) lack of a coherent regional migration regime due particularly to low rate of ratification of continental and regional legal/policy frameworks; ii) lack coherent and comprehensive national migration policies that address all migration-related matters and are in line with other national laws and policies; iii) limited freedom of movement of migrants within and from host countries due to fears of arbitrary arrests, detention and deportation as well as lack of universally acceptable travel documents; iv) limited opportunities for permanent settlement for long-term migrants; v) weak governance and lack of state capacity to control national borders and enforce national laws (leads to corruption, migrants’ exploitation and other human rights abuses); vi) limited portability of social security rights due particularly to lack of cross border social security coordination; vii) xenophobic exclusion that continues to threaten the lives and livelihoods of those on the move; viii) administrative obstacles in countries in countries of origin (e.g. lack of access to passports that would facilitate legal entries); and
ix) limits of migration laws and policies (these do not guarantee adequate protection particularly when not enforced).

These obstacles and symptoms, in addition to SADC’s own lack of optimism, mean free and safe movement in Southern Africa is far from being a reality or even unfeasible at the moment and in the foreseeable future. Opportunities in this regard include current efforts by most countries in the region to formulate national migration policies; bilateral agreements and other new initiatives (e.g. visa exemption agreements, visas on arrival, labour migration action plan, special dispensations) that could be used to allay countries’ fears about the potential negative implications for free movement on their socio-economic and political well-being.

That the realisation of free and safe movement in region face serious challenges and obstacles does not mean efforts in this regard should be discontinued. Rather all relevant stakeholders need to double effort and rethink strategies for best possible outcomes. More specifically, this report makes the following recommendations:

- **Formulation and implementation of a regional migration policy framework**: for free and safe movement to be achieved in Southern Africa, there is urgent need for SADC to formulate a comprehensive regional migration policy framework and adopt measures (e.g. positive and/or negative incentives) to ensure its ratification and implementation by all member states. The policy should be aligned with the AU protocol on free movement of persons while taking into consideration regional realities and interests. A successful formulation and implementation of such policy framework will require genuine consultations and involvement of all relevant actors involved in the governance of migration and human mobility. These inevitably include states, and non-state actors such as civil society, business/labour, women and youth associations and ordinary community members. Competing interests of these actors are currently an unsurmountable obstacle to the harmonization of the regional migration regime. The formulation of a comprehensive regional migration policy framework has also been recommended by MIDSA in 2017.

- **Promoting regional citizenship**: the formulation of the regional migration policy framework should be an opportunity for SADC and other relevant stakeholders to promote regional citizenship. SADC can draw lessons from other regions such as ECOWAS was this was achieved despite socio-economic disparities among members and even greater security concerns;

- **Expediting the formulation of national migration policies**: SADC member states should continue and expedite their current efforts to formulate and implement coherent and comprehensive national migration policies that address all migration-related matters and are in line with other national laws and policies. As indicated earlier, migration is a cross-cutting phenomenon that needs to be integrated into all facets of state policy-making and planning, including programmes and strategies to alleviate poverty and reduce inequality (Crush, et al, 2005). This means that mainstreaming migration and human mobility throughout all government sectors and levels and shifting approaches ‘from people to place’ is the most
sustainable and realistic approach in contexts of socio-economic insecurity where interventions targeted at migrants specifically often cause or exacerbate tensions. People who move are (just like people who don’t move) also children, parents, workers, entrepreneurs, renters, or landlords. As such, their needs can be addressed in ways much more politically palatable than current approaches focusing on migrant rights alone can. These national policies should also be aligned with all relevant regional and continental policy frameworks. Further, SADC and member states should be actively involved in the drafting of these national policies to ensure that they reflect the region’s needs and realities. This will allay fears that the involvement of international partners might transmit external agendas and lead to policies shaped much less by the region/continent’s needs than by the interests of the external actors.

- **Protecting migrant’s freedom of movement within and from host countries**: all SADC member states should ensure that migrants living legally in their territories (including refugees and asylum seekers) are allowed to move freely within and without. This means that the current pass system should be immediately abolished, arbitrary arrests/detentions arrested and permanent residents should be given travel documents that are universally recognised across the world.

- **Affording migrants opportunities for permanent settlement**: States should give long-term and complying migrants (including refugees) fair opportunities for permanent settlement and citizenship. The lack of opportunities for permanent settlement has significantly negative implications particularly for the socio-economic development of host societies. There is ample evidence that fostering immigrants’ integration and permanent settlement is less costly to host countries and communities than excluding and denying them opportunities to build a sense of belonging.

- **Addressing weak governance and administrative capacity**: to ensure free/safe movement and effective migration protection states need to build or strengthen their ability to control national borders and enforce rule of law within their territorial jurisdictions. Failure to do result in endemic corruption, exploitation through unfair labour relations, smuggling and trafficking and in migrants being denied access to services and opportunities to which they are entitled.

- **Protecting the portability of social security benefits**: SADC, all member states and migrant workers associations should work together to put in place concrete and enforceable measures to protect the social security benefits of migrants workers. This will require overcoming cumbersome administrative procedures; ensuring cross border social security coordination and organizing migrant workers themselves so that they are able to contribute to the policy debates and ensure that their national governments protect their rights.

- **Addressing xenophobic exclusion**: SADC, member states, civil society and host community need to make genuine efforts to fight xenophobia and its various forms of manifestations. Xenophobic exclusion is a threat not only to the lives and livelihoods of foreign nationals in their host countries but also to the regional stability and socio-economic integration due to retaliatory measures (or threat thereof) taken by citizens of other countries in the region and beyond. SADC in particular need to introduce measures to hold accountable states such as South Africa that have demonstrated lack of political will to address xenophobic violence that has become endemic in the country.
• **Addressing administrative obstacles in countries of origin:** since all countries in the regions are practically countries of migrants’ origin, transit and destinations, states need to make every effort possible to minimise obstacles to free and safe movement for their citizens wishing to go and live/work in other countries in the region and beyond. States should for example make passports and travel documents affordable and accessible for the majority of their citizens and not just for the privileged few. With the imperative to move to other countries for better socio-economic opportunities, the only choice left for poor citizens who cannot afford passports is to cross international borders illegally with all the risks and dangers this entails.

• **Considering the limits to migration policies and laws:** amongst researchers as well as activists, there is often a strong focus on the reform of policy and laws as well as public education about rights. Yet, such legalistic emphasis often conceals the socio-political conditions that determine the true reach of official frameworks. Even the best policy or law will not have any impact or provide actual protection in contexts where a lack of capacity or concrete political and material disincentives work against it. In addition, we need to consider the agency of migrants themselves in negotiating and circumventing official frameworks as well as the impacts of ‘non-migration’ related policies and laws. While not dismissing the importance of reforming policies and laws, there are limits to such approaches in contexts where one of the most policies and laws on paper may never be implemented in practice. Activists and other relevant actors should therefore place equal emphasis on the actual implementation of existing laws and policies and not just on policy reform.

• **Take advantage of existing opportunities:** SADC, member states and migrant rights organisations should take advantage of existing opportunities that offer optimism that the realisation of free movement -or at least improved migrants’ protection- is possible in the region. These include national migration policies being currently formulated in most countries, bilateral agreements and other new initiatives such visa exemption agreements, visas on arrival, labour migration action plan, special dispensations. SADC and migrants rights activists should in particular use these as examples to demonstrate to and convince member states that freer or better-facilitated human mobility and improved migrants’ protection does not necessarily result in feared catastrophes in terms of states’ security and socio-economic and political wellbeing. Therefore, instead of insisting on the formulation regional migration policy here and now, migrant rights organisations should rather focus on the standardisation and better implementation of these and other smaller and more manageable goals/steps/initiatives. They (activists) could then gradually expand on those as trust has been built, negative perceptions dispersed and evidence readily available that free and safe human mobility has the potential to achieve a triple win: the socio-economic development for migrants, their home and host countries.

• **Research for understanding how interests shape mobility regimes:** At all levels, ranging from local to global and amongst both formal and informal actors benefit politically, materially or both from either promoting mobility, containing it or leaving it entirely unregulated altogether. Approaches to migration are highly political and driven by various vested interests. Ongoing, independent and methodologically sound research is needed to understand these interests and to advise on appropriate approaches that may help advance a pro-migrant agenda. These approaches may include concrete targeted and accessibly communicated cost-benefit analyses for various sectors and levels of government (see Isaacs 2016) as well as identifying (and advertising) place, rather than people based interventions that foster common interests amongst diverse populations.
As part of leveraging interests for more proactive migration governance, there is also need to find allies in positions of power beyond government and the ‘traditional’ partners working on migration and human rights. These ‘new’ allies could include unions as well as the business sector: while empowering migrant workers may come at a cost to employers, so do containment policies that impede supply of labour (Dünnwald 2015), a fact that could be leveraged in ways mutually beneficial to migrants and business.

Research and myth-busting are vital but need to happen through the effective channels. For example, the lack of solid data and research on trafficking has undoubtedly helped the instrumentalisation of the topic for the purposes of securitisation, and there is a need for addressing such knowledge gaps (Nshimbi and Moyo 2016, 168). Policies based on poor or misleading research will not only fail but could have negative unintended consequences. Yet, other areas of migration are well researched, but nevertheless misrepresented and (ab)used to further specific political objectives, despite abundant and reliable available evidence to the contrary. Thus, while addressing knowledge gaps and myth-busting are both important, there is also need to identify more effective channels and methods through which to communicate findings. Importantly, disseminating research findings stands no chance of success if we ignore how an underlying global architecture of power and inequality works against even the best facts. There is also need to consider collecting data and facts more strategically to promote a pro-migration agenda, just as other actors are doing to support agendas of containment and control.

Understanding how interests shape mobility regimes is critical. Informal and formal actors at various scales benefit politically, materially or both from either promoting mobility, containing it or leaving it unregulated altogether. Advancing a pro-migration agenda without trying to understand, harness or change such dynamics stands little chance of success.
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for Southern Africa 12th Regional Meeting of the ACP-EU Joint Parliamentary Assembly (Southern
Segatti, A. 2017. ‘The Southern African Development Community: a walk away from the free movement of persons?’ in Sonja Nita, Antoine Pécoud, Philippe De Lombaerde, Kate Neyts and Joshua Gartland (Eds.) Migration, Free Movement and Regional Integration. UNESCO Publishing
Annex 1: Table on legal and policy frameworks

Introduction

This table aims to identify and analyse legal and policy frameworks potentially facilitating migrants’ rights and welfare or presenting implicit or acute threats to them. It aims to analyse laws and policies explicitly labelled as migration related, along with other legislation or policies which may have an impact on migrants’ rights. This may include, among others, trafficking and smuggling; trade; discrimination (in access to labour, housing, municipal services, etc.), access to legal protections, as well as detention. Since the focus of this project is primarily those moving ‘voluntarily’, it only covers refugee legislation very briefly, recognizing that conceptually (and legally) voluntary and forced migrants are often indistinguishable.

Limitations

Due to limitations of time and access, this table offers an overview of the policies and laws governing movement in Africa; it is neither a comprehensive list nor a detailed analysis of those policies and laws. Research for this table relied primarily on secondary sources, and only considered English language sources. While a new wave of migration policies are reportedly being drafted across the African continent (often with assistance from the International Organization for Migration (IOM)), in many cases, draft policies remain unavailable to researchers. This limits the research on future directions of and changes to migration policies. This research is also only limited to an examination of current laws – specifically at the national level. The situation is slightly different for international treaties and protocols, etc. since those may be current, but may not be applicable in a national context until they are given effect (i.e. signed and/or ratified), by a current law (or other mechanism).

Geographically, this table is disaggregated into an analysis of global, regional and national policies. It is limited, therefore, to research on the African Union (AU) and the Southern African Development Community (SADC) at the regional level, and South Africa, Zambia, Lesotho, Mozambique, Swaziland, Botswana and Zimbabwe in SADC (together, the ‘study countries’ and each, a ‘study country’).
Structure

This section is divided into four sub-sections. The sections consider, in turn, global instruments, AU policies and protocols, and finally the regional and national policies and laws pertaining to migration (including, where possible, an analysis of sub-national and local policies and laws) in EAC and SADC.

Section I: Global Instruments

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Primary applicability</th>
<th>Signing/Ratification</th>
<th>Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>ILO Convention (C097) concerning Migration for Employment (Revised 1949) (Entry into force: 22 Jan 1952).</td>
<td>Migrant workers</td>
<td>Kenya &amp; Malawi (both, with reservations)</td>
<td>In force, but subject to ratification and reservations of national states. There have been 49 ratifications. Neither this, nor the Supplementary provisions (below) are well accepted standards of international law.</td>
</tr>
<tr>
<td>Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975.</td>
<td>Migrant workers</td>
<td>Kenya, only.</td>
<td>In force, but subject to ratification and reservations of national states. There have only been 23 ratifications.</td>
</tr>
<tr>
<td>1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families</td>
<td>Migrant workers</td>
<td>Only Lesotho, Madagascar, Mozambique and Seychelles</td>
<td>In force, but subject to ratification and reservations of national states. There have been 51 ratifications.</td>
</tr>
<tr>
<td>1951 Convention Relating to the Status of Refugees (as amended by the 1967 Protocol Relating to the Status</td>
<td>Refugees</td>
<td></td>
<td>In force, but subject to ratification and reservations of national states. Ratified by 145 state parties and is well accepted as a statement of international law.</td>
</tr>
</tbody>
</table>
### Section II: AU Instruments and policies

<table>
<thead>
<tr>
<th>Instrument</th>
<th>Primary applicability</th>
<th>Signing/Ratification</th>
<th>Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>1989 Convention on the Rights of the Child</td>
<td>Children (including migrant children and children of migrants)</td>
<td>All the study countries have signed and ratified the treaty.</td>
<td><strong>In force, has been ratified by all of the study countries.</strong> This is almost universally ratified, and is well accepted as part of international human rights law.</td>
</tr>
<tr>
<td>OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 1969</td>
<td>All the study countries have signed and ratified the treaty.</td>
<td><strong>In force: 1974</strong> The 1969 OAU Convention includes three interesting variations, compared to the 1951 Refugee Convention. (1) It expands the definition of refugee to include those fleeing their country of nationality or residence ‘owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality’ (Art. I); (2) exhorts states to provide asylum, by using ‘best endeavours’, and subject to national legislation (Art. II); and (3) prohibits ‘subversive activities’ by refugees (Art. III). It also includes provisions for non-refoulement, and voluntary repatriation (Arts. II, V).</td>
<td></td>
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In practice, states have used a security lens to manage and control refugee movement. Whatever the legal protections under the Convention and national laws, in practice, these protections have been subject to the overriding security imperatives articulated by states.\(^{74}\)

### Treaty establishing the African Economic Community, 1991 (Abuja Treaty)\(^ {75}\)

<table>
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<tr>
<th>INSTRUMENT</th>
<th>SIGNING AND RATIFICATION</th>
<th>ANALYSIS</th>
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</thead>
</table>
| Treaty establishing the African Economic Community, 1991 (Abuja Treaty)\(^ {75}\) | All the study countries have signed and ratified the treaty.\(^ {76}\) | In force: 1994
The Abuja Treaty encourages AU member states to adopt employment policies that will eventually allow free movement within the planned African Economic Community to be completed by 2028 (Art. 6, para 2(e)(iii)). Further, the Treaty calls on AU members to establish the right of residence and establishment for any citizen of a member state (Art.4, para 2(i)). The Abuja Treaty envisages the creation of an African Common Market (by 2017, and therefore highly unlikely) which will facilitate the movement of workers from labour surplus to countries with a shortage of workers (Art. 6, 71).

In practice, Regional Economic Communities (REC’s) have made varied progress in achieving free movement even within the REC’s, let alone across Africa. Movement remains subject to national laws. EAC has made greater progress, permitting travellers carrying the EAC passport multiple visits within 6 months. SADC countries (for the most part) extends visitors from outside and within SADC the same rights.\(^ {77}\) |

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\(^{77}\) Fioramonti and Nshimbi 2016.
<table>
<thead>
<tr>
<th>Instrument</th>
<th>Signing and Ratification</th>
<th>Analysis</th>
</tr>
</thead>
<tbody>
<tr>
<td>Migration Policy Framework for Africa (2006)</td>
<td>N/A</td>
<td>Not a binding instrument</td>
</tr>
<tr>
<td>African Common Position on Migration and Development (2006)</td>
<td>N/A</td>
<td>Not a binding instrument</td>
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</table>

This policy document, adopted by the Executive Council of the African Union (AU) along with the African Common Position on Migration and Development 2006, articulates the AU’s overarching approach to migration. Broadly, it emphasises the need for a ‘comprehensive migration policy strategy for Africa’, emphasises the need to keep working towards free movement of people across Africa, and points to the importance of ‘migration management’ – all aimed at harnessing migration for national and regional development. It also includes provisions for the strengthening of border management, and makes clear that the regulation of migration falls squarely within national competence.

Similar to the Migration Policy Framework for Africa, this policy document identifies thematic areas for action on migration in Africa, so as to harness migration for development. It places a great deal of emphasis on the control of migration – and asks states to strengthen borders, collect better data on migration, combat smuggling and trafficking. In short, it aims to: ‘Improve the management of migration flows by finding a balance between effective security for legal immigrants, freedom of the legal movement of persons and the humanitarian obligation towards those who need protection’ (Para. 5.2).

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79 See also Fioramonti and Nshimbi 2016, p. 15.

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<tr>
<th><strong>INSTRUMENT</strong></th>
<th><strong>SIGNING AND RATIFICATION</strong></th>
<th><strong>ANALYSIS</strong></th>
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</thead>
<tbody>
<tr>
<td>AU Labour Migration Governance for Development and Integration in Africa(^{81})</td>
<td>N/A</td>
<td><strong>Not a binding instrument</strong></td>
</tr>
<tr>
<td>Others</td>
<td>N/A</td>
<td><strong>None of these are binding instruments</strong></td>
</tr>
</tbody>
</table>

The Joint Labour Migration Programme (JLMP) is a four-year AU-led initiative for regional integration and development in Africa, co-sponsored by the AU Commission (AUC), the ILO, the International Organization for Migration (IOM) and the United Nations Economic Commission for Africa (UNECA).

The JLMP mainly aims to strengthen ‘the effective governance of labour migration’ and promote ‘decent work’ against the background of ‘regional integration and inclusive development in Africa’. The goals and objectives of this programme are ostensibly consistent with Articles 6 and 71 of the Abuja Treaty and the various AU goals seeking continental free movement and the exchange of labour between member countries.

In reality, as with many other such initiatives, the JLMP appears to promote migration management.

Many non-binding AU initiatives and declarations purport to govern/promote/manage migration. Some are listed below:

1. 2004 AU Plan of Action on Employment Promotion and Poverty Alleviation aiming to facilitate labour migration in Africa;
2. 2008 AU Social Policy Framework that recommended regional integration and collaboration of social security schemes in Africa to ensure benefits of labour circulation;
3. 2012 AU Plan of Action on Boosting Intra African Trade recognizing the key role of free movement of people and labour migration regulation;
4. The 9th Ordinary Session of the AU Labour and Social Affairs Commission (April 2013), identified regional labour

\(^{81}\) This is also known as the Joint Labour Management Program for Africa.
migrations as an important factor in sustainable development and regional integration and also adopted the Youth and Women Employment Pact including ‘Promotion of regional and subregional labour mobility’. The Pact called for an AU and RECs Labour Migration Plan; (5) 2014-2017 AUC Strategic Plan pursues the strategy to ‘Promote labour migration to support cross border investment and to fill the skills gap’; (6) The 24th AU Assembly adopted the AU Declaration and Plan of Action on Employment, Poverty Eradication and Inclusive Development, which prioritized labour migration governance for regional integration as a key priority area of action in Africa. The Summit also endorsed the Joint Labour Migration for Development and Regional Integration (JLMP) as the continental programme to foster regular migration in Africa (January 2015); (7) The 25th AU Assembly adopted the Declaration on Migration (June 2015) which reiterates skills mobility and the continental free movement as core priorities for Africa.82

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## Section III: SADC Instruments and National laws and policies

### Part A: SADC Instruments and bilateral treaties

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<tr>
<th>INSTRUMENT</th>
<th>SIGNING AND RATIFICATION</th>
<th>ANALYSIS</th>
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<tbody>
<tr>
<td>SADC Instruments</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Treaty of the Southern African Development Community, 1992 (SADC Treaty)</td>
<td>All SADC Countries.</td>
<td><strong>In force; not a binding provision</strong></td>
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<tr>
<td></td>
<td></td>
<td>Article 5(2)(d) of the SADC Treaty (1992) states that the SADC shall</td>
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<td></td>
<td></td>
<td>‘develop policies aimed at progressive elimination of obstacles to the</td>
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<td></td>
<td></td>
<td>free movement of capital and labour, goods and services, and of the</td>
</tr>
<tr>
<td></td>
<td></td>
<td>people of the region generally, among Member States.’</td>
</tr>
<tr>
<td>2005 SADC Protocol on the Facilitation of Movement of Persons</td>
<td>Ratified by: Botswana,</td>
<td><strong>Not in force</strong></td>
</tr>
<tr>
<td></td>
<td>Lesotho, Mozambique,</td>
<td></td>
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<tr>
<td></td>
<td>South Africa, Swaziland</td>
<td></td>
</tr>
<tr>
<td></td>
<td>and Zambia</td>
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84 A detailed analysis of the draft Protocol as well as the reasons for its abandonment is contained in Oucho and Crush 2001.


87 In practice this means that the Protocol contains broader policy changes – for instance, visa-free entry for 90 days. These broader policies remain subject to constraints imposed by domestic laws. Domestic laws are unlikely to completely negate the provisions of the Protocol, but would may run counter to the Protocol’s goal of promoting mobility and inter-connectivity within SADC.
<table>
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<tr>
<th><strong>INSTRUMENT</strong></th>
<th><strong>SIGNING AND RATIFICATION</strong></th>
<th><strong>ANALYSIS</strong></th>
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<tbody>
<tr>
<td>2008 SADC Code on Social Security&lt;sup&gt;88&lt;/sup&gt;</td>
<td>Not a binding instrument – there is no provision for ratification,</td>
<td>countries for 90 days, (2) facilitation of temporary or permanent residence for SADC citizens in other SADC countries; and (3) setting up of establishments (i.e. businesses) by SADC citizens in other SADC member countries. (Arts. 3, 14-21). The Protocol also contains provisions meant to harmonise national laws and immigration processes (Arts. 7, 11, 13). In general, the provisions of the Protocol remain subject to the national constitutional protocols, and the precise implementation of the provisions is left to individual states. <strong>In force, not binding.</strong> This deals with migrants, foreign workers and refugees in Article 17, and explicitly states that member states should progressively reduce migration controls, that all legally employed migrants are entitled to the same social security as citizens, and that ‘illegal residents and undocumented migrants’ should enjoy ‘basic minimum protection’ as per the laws of the host country (Art. 17.3). The Code therefore acknowledges that the rights of migrants require attention. Art. 17.2 states: (a) ‘Migrant workers should be able to participate in the social security schemes of the host country’; (b) ‘Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country’; (c) Migrant workers who are already participating in the social security schemes of one country ought to be able to maintain acquired rights and benefits in similar schemes of other states;</td>
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<th>INSTRUMENT</th>
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<tbody>
<tr>
<td>SADC Protocol on Employment and Labour⁹⁹</td>
<td>It has been signed by 8 countries:</td>
<td>(d) Member States should ensure the facilitation of exportability of</td>
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<td></td>
<td>DRC, Lesotho, Madagascar,</td>
<td>benefits, including the payment of benefits in the host country;</td>
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<tr>
<td></td>
<td>Mozambique, Namibia, Seychelles,</td>
<td>(e) States should identify applicable law for implementing these</td>
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<tr>
<td></td>
<td>Zambia and Zimbabwe</td>
<td>principles, and</td>
</tr>
<tr>
<td></td>
<td>No state has ratified the protocol.</td>
<td>(f) coverage of self-employed migrant workers should be on the</td>
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<td></td>
<td>same basis as employed migrants.</td>
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<td></td>
<td></td>
<td><strong>Not in force; subject to state action</strong>⁹⁰</td>
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<td></td>
<td></td>
<td>Article 19 deals with Labour Migration and Migrant Workers and</td>
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<td></td>
<td></td>
<td>contains several rights-based provisions, stating that member states will</td>
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<td></td>
<td><strong>endeavour</strong> to: (a) strengthen mechanisms to combat smuggling and</td>
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<td></td>
<td></td>
<td>human trafficking; (b) ensure that fundamental rights are accorded to</td>
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<td></td>
<td></td>
<td>non-citizens, in particular labour/employment and social protection</td>
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<td>rights; (c) adopt measures to provide for the special needs of migrant</td>
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<tr>
<td></td>
<td></td>
<td>women, children and youth; (d) adopt a regional migration policy in</td>
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<td></td>
<td></td>
<td>accordance with international conventions to ensure the protection of</td>
</tr>
<tr>
<td></td>
<td></td>
<td>the rights of migrants; and (e) adopt measures to facilitate the</td>
</tr>
<tr>
<td></td>
<td></td>
<td>co-ordination and portability of social security benefits for migrants.⁹¹</td>
</tr>
<tr>
<td>SADC Regional Labour Migration Policy Framework⁹²</td>
<td>Not a binding legal instrument,</td>
<td><strong>Not binding.</strong></td>
</tr>
<tr>
<td></td>
<td>there is no provision for ratification.</td>
<td>States are asked to put in place (by 2019) national migration policies</td>
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<tr>
<td></td>
<td></td>
<td>with explicit rights for migrants. It specifically aims to protect the</td>
</tr>
<tr>
<td></td>
<td></td>
<td>rights of migrant workers generally and in the workplace, in consonance</td>
</tr>
<tr>
<td></td>
<td></td>
<td>with the provisions of UN/IL/0/AU and SADC instruments. It contains a series</td>
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</table>


⁹¹ See also Crush, et al 2017.

⁹² The text of the framework can be obtained from Landau and Vanyora 2015.
<table>
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<th>INSTRUMENT</th>
<th>SIGNING AND RATIFICATION</th>
<th>ANALYSIS</th>
</tr>
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<tbody>
<tr>
<td><strong>Bilateral Instruments/ Mechanisms</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Agreement between South Africa and Lesotho, 1973(^93)</td>
<td>1973</td>
<td>Before the 1990s, this treaty was used only by The Employment Bureau of Africa (TEBA) and various smaller companies recruiting exclusively for the gold and coal mines. In the mid 2000’s it began to be used by farmers to recruit labour legally in Lesotho, through the use of agents.(^94) Essentially, this Agreement (and the agreements between South Africa and Botswana, and South Africa and Swaziland) governs the interview and selection of migrant workers by employment agencies to a limited extent. They require that the governments of the sending and receiving states approve recruitment arrangements between recruiting organisations and the respective government. Articles IV of the Agreements require the BLS States to establish facilities in their territories where prospective employers interview, select and engage migrant workers. See Agreement between South Africa and Lesotho above.</td>
</tr>
<tr>
<td>Agreement between South Africa and Botswana, 1973(^95)</td>
<td>1973</td>
<td>See Agreement between South Africa and Lesotho above.</td>
</tr>
<tr>
<td>Agreement between South Africa and Swaziland, 1975(^96)</td>
<td>1975</td>
<td>See Agreement between South Africa and Lesotho above.</td>
</tr>
</tbody>
</table>

\(^94\) See Ulicki and Crush 2007 for a detailed analysis.  
\(^96\) Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a Swaziland government Labour Representative in the Republic of South Africa, certain Swaziland citizens in the Republic of South Africa and the movement of such persons...
<table>
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<tr>
<th>INSTRUMENT</th>
<th>SIGNING AND RATIFICATION</th>
<th>ANALYSIS</th>
</tr>
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</table>
| Post-Apartheid Agreements and MOU’s | Post 1994 | - Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho on the Facilitation of Cross Border Movements of Citizens, 2009⁹⁸: This agreement allows citizens of the respective countries to cross borders without going through immigration procedure (in accordance with SADC treaty rules), for ‘visits’.
- Zimbabwe-South Africa MOU on Employment and Labour (2009) & South Africa-Zimbabwe MOU on Migration (2009): The MOU on Migration was concluded on the 4th of May 2009 and the MOU on Employment and Labour was concluded on the 27th of August 2009. South Africa’s MOUs with Zimbabwe provide for the establishment of One-Stop Border Posts and a Beitbridge labour migration centre to facilitate cross-border movement and provide assistance to migrant workers at borders.
- Tanzania-South Africa MOU (2007)
These agreements follow a similar format and contain provisions on the following: i) Identification of the competent authorities responsible for the implementation of the agreements; ii) Objectives and areas of cooperation; iii) Forms of cooperation, that is, the nature of activities to be undertaken by the parties; iv) The coordination of programmes and financial arrangements relating to cooperation; v) Rules governing amendment, dispute resolution, entry into force, duration and

⁹⁷ See Bamu 2014 for an exhaustive analysis.

### Part B: National laws and policies of select SADC member countries

#### Botswana

<table>
<thead>
<tr>
<th>INSTRUMENT</th>
<th>SIGNING AND RATIFICATION</th>
<th>ANALYSIS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Constitution of Botswana, 1966&lt;sup&gt;99&lt;/sup&gt;</td>
<td>National legislation</td>
<td>Chapter II relates to the protection of fundamental rights and freedoms of the individual. Chapter III which originally related to citizenship has been repealed. Most of the freedoms in Ch.II apply to all persons – important protections relate to (a) life, liberty, security of the person and the protection of the law; (b) freedom of conscience, of expression and of assembly and association, and (c) protection for the privacy of his home and other property and from deprivation of property without compensation (Arts. 3-19).</td>
</tr>
<tr>
<td>Immigration Act 2011&lt;sup&gt;100&lt;/sup&gt; read with the Immigration Regulations 2011&lt;sup&gt;101&lt;/sup&gt;</td>
<td>Immigration &amp; employment of non-citizens (National)</td>
<td>This replaces two previous, and longstanding acts: (1) The Immigration Act of 1966 (as amended by the Immigration Amendment Act, 1991; the Immigration Act 2002) and (2) The Employment of Non-Citizens Act (S. 58, Immigration Act 2011).&lt;sup&gt;102&lt;/sup&gt; The legislation is very restrictive, and contains a great deal of</td>
</tr>
</tbody>
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<sup>102</sup> See Kiwanuka and Monson 2009; Campbell and Crush 2015; and Galvin 2015.
administrative discretion. It includes 6 substantive ‘parts’. These deal with, in turn: immigration procedures, the constitution of immigrant selection boards, different kinds of permits available to migrants, ‘prohibited migrants’, ‘undesirable migrants’ and finally procedures for the removal of migrants.

S.8 specifies that a person who cannot prove that they are (a) a citizen, or (b) a resident/visitor, is liable to be deported from Botswana. Immigration officers have wide ranging powers of investigation, examination and inquiry – for instance by asking anyone they deem suspicious to submit to an enquiry, or conducting searches of vessels, trains and aircraft without a search warrant.

S.18 specifies the categories of permits that may be used by foreigners to visit/remain in South Africa. These are visitor permits/work permits and permanent residence permits. The immigrant selection boards are responsible for awarding of work permits. It is illegal (punishable by fines/imprisonment for a Botswana citizen to employ a non-citizen without a work permit (S.22). Visitor’s permits are to be issued for a maximum of 90 days in each 12-month period but do not permit a ‘visitor’ to take up employment without a work permit. (S.19(1)).

The Act gives Botswana wide rights of deportation in case a visitor is either a (a) prohibited immigrant (i.e. a person imprisoned without the option of a fine, or notified by the President of Botswana as a
prohibited migrant – See S.41)\textsuperscript{103} or (b) an undesirable migrant (without the means to support herself or a dependent, for example – see S.50).

Botswana reportedly permits one-day visitor passes in the border areas (for travel within 50 km of the border) through bilateral arrangements under SADC protocols.\textsuperscript{104}

The Immigration Regulations of 2017 specifies the various forms/procedures to be followed. Botswana’s migration system is marked by a bifurcation into separate legal regimes for refugees and other migrants. Those who enter the asylum system are detained in Francistown pending refugee status determination and then removed to Dukwi refugee camp if successfully recognized.\textsuperscript{106}

The Refugee Act itself is a schematic document, and grants a great deal of administrative discretion to the Botswana authorities – it sets out the conditions of recognition, defines refugees and sets out the various restrictions which apply to them. Refugees are not entitled to work without obtaining a work permit (S.14).

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|}
\hline
\textbf{Law/Policy} & \textbf{Applicability (Sector/Administrative Level)} & \textbf{Analysis} \\
\hline
Refugees (Recognition and Control) Act of 1968\textsuperscript{105} & Refugees (national) & prohibited migrant – See S.41 or (b) an undesirable migrant (without the means to support herself or a dependent, for example – see S.50). \\
\hline
\end{tabular}
\caption{Applicability of the Law/Policy to Refugees (Recognition and Control) Act of 1968}
\end{table}

\textsuperscript{103} These changes were in response to a court case, where the President of Botswana sought to expel Kenneth Good, a professor at the University of Botswana, and was initially prevented from doing so by the courts, which cited the provisions of the old Immigration Act. See Good 2017.

\textsuperscript{104} Kiwanuka and Monson 2009, p.41.


\textsuperscript{106} Betts 2013, p.78.
<table>
<thead>
<tr>
<th>LAW/POLICY</th>
<th>APPLICABILITY (SECTOR/ADMINISTRATIVE LEVEL)</th>
<th>ANALYSIS</th>
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</thead>
<tbody>
<tr>
<td>Anti-Human Trafficking Act, 2014[107]</td>
<td>Human-trafficking (national applicability)</td>
<td>This Act states that it was enacted to give effect to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons (preamble). S.9 defines and makes trafficking a punishable offence, and makes the recruitment, transport, transfer, harbouring or receiving of a trafficked person punishable by imprisonment and fines or both. S.11 makes abetment a crime. S.16-26 contains provisions for victims, setting out special rules of procedure for protection of their identities, establishment of separate victim centres for adults and children, and for special court procedures.</td>
</tr>
<tr>
<td>Revised Botswana National Policy on HIV and AIDS, 2012[108]</td>
<td>Replaces the National Policy on HIV and AIDS developed in 1992, and then revised in 1998.</td>
<td>S.26 contains provisions for repatriation of trafficked persons. The policy is restricted to citizens and does not mention migrants. There are conflicting reports on this: One set of authors seem to suggest that after 2009 migrants and refugees can access free anti-retroviral drugs (ARVs) in Botswana. Another report, however, states that migrants have to pay to access ARV treatment and the prevention of mother-to-child-treatment programme (PMTCT) unlike Batswana who receive these medications at no cost. In general, use of government healthcare facilities is free of cost for</td>
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<tr>
<th>LAW POLICY</th>
<th>APPLICABILITY (SECTOR/ADMINISTRATIVE LEVEL)</th>
<th>ANALYSIS</th>
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<tbody>
<tr>
<td>National Migration policy</td>
<td>Not a legal instrument.</td>
<td>Batswana, and a source of anxiety for undocumented migrants, who prefer to use private clinics (which may be more expensive) instead. This is reportedly being formulated with assistance from the IOM. The current status of this is unknown.</td>
</tr>
<tr>
<td>Major social protection programmes</td>
<td>Legal policies.</td>
<td>Migrants are excluded from all social protection programmes in Botswana.[12] Eligibility for most are assessed on the basis of identification documents. The only exception may be the school feeding programme where all children enrolled in school ‘irrespective of family background’ are entitled to midday meals.[13]</td>
</tr>
<tr>
<td>- Revised National Policy on Destitute Persons</td>
<td></td>
<td>The provisions are contained in multiple legislations.</td>
</tr>
<tr>
<td>- Orphan Care Programme</td>
<td></td>
<td>The Constitution does not directly guarantee the right to education – neither for citizens, nor others. The Education Act of 1966 organizes the educational sector, but does not include any provisions either permitting or prohibiting education of migrants.[14]</td>
</tr>
<tr>
<td>- Vulnerable Groups Feeding Program</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- School Feeding Programme</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Old Age Pension Scheme</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Education</td>
<td>The provisions are contained in multiple legislations</td>
<td></td>
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**South Africa**

| Constitution of South Africa        | National                                    | S. 10 and 11 state that all persons have the right to life, and the right to live with dignity. Similarly, S.12, which would also apply to migrants states that no-one can be arrested, or be detained without due |

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<tr>
<td></td>
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<td>process of law.</td>
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<tr>
<td></td>
<td></td>
<td>S. 27 states that <em>all persons</em> have the right to have access to the following: (a) healthcare services (b) sufficient food and water and (c) social security ass well as social assistance.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>S. 152 and S. 153 of the Constitution deal with Municipalities which have the right to govern the local government affairs of its own community, subject to national and provincial legislation. The objectives of local government are to, among others, ‘provide democratic and accountable government for local communities’, ‘ensure the provision of services to communities in a sustainable manner’, promote economic and social development, a safe and healthy environment, etc. They are not limited to only acting for the benefit of citizens.¹¹⁵</td>
</tr>
<tr>
<td>Immigration Act 2002, as amended by the Immigration Amendment Act 2004, and the Immigration Amendment Act, 2011¹¹⁶</td>
<td>Immigration/National</td>
<td>The Immigration Act regulates the entry, exit and residence of migrants in South Africa. Undocumented migrants are referred to as Illegal Foreigners (S.31-32). It authorises the Department of Home Affairs to inspect workplaces to ensure that ‘illegal foreigners’ are not working there. The Immigration Amendment Act 2011 changed some of the categories of visas/permits (solely called ‘permits’ prior to the amendment) available from the Dept. of Home Affairs.</td>
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The Act divides foreigners in South Africa into two categories –

¹¹⁵ Segatti 2011.
permanent residents (s.25-28), and temporary visitors (s.10-24). The expression ‘permit’ used universally across the 2004 Act, was replaced by the word ‘visa’ by the 2011 amendment.

Sections 11 to 23 of the Immigration Act provide for various types of temporary visas that could be granted to foreign nationals. These are as follows:
S11 for visitors permits, S13 for study visas, S14 for treaty permits, S15 for business visas, S16 for crew permits, S17 for medical treatment permits, S18 for relative permits, S19(2) for general work visas, S19(4) for critical skills visas, S19(5) for intra-company transfers, S21 for corporate visas (which are utilized for hiring staff for specific industries – e.g. mining), S20 for retirement, S22 for exchange programmes, and S23 for Asylum Transit visas (these are granted at the port of entry to asylum seekers, allowing them to travel within the country and apply for asylum at a Refugee Reception Office (RRO) – they are valid for only 5 days).

Permanent residence permits are rarely granted – the 2017 White Paper on International Migration (see below) proposes to make this even more restrictive.

The legislation is quite restrictive, and grants a great deal of bureaucratic discretion to immigration officers.

An ‘illegal foreigner’ is to be deported unless that person is in the country pending his or her application for a status, i.e., permanent or temporary residence permits issued to a person under the Act (S. 32).
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<tbody>
<tr>
<td>South African Citizenship Act, 1995, as amended by (a) South African Citizenship Amendment Act 69 of 1997; (b) Immigration Act 13 of 2002; (c) South African Citizenship Amendment Act 17 of 2004; and (d) the South African Citizenship Amendment Act, 2010 (which came into effect in 2013)(^{117})</td>
<td>Citizenship; national legislation</td>
<td>S.34 states that no warrants are required for the arrest and subsequent deportation of ‘illegal foreigners’. S.38 specifies that no person shall employ an illegal foreigner, and also specifies the various offences for either contravening the act or abetting the contravention of the Act (S.49). S.39 prohibits training institutes from providing any training or instruction to ‘illegal foreigners’. This law establishes three types of citizenship (S.2): citizenship through birth in South African territory, citizenship through birth by virtue of having at least one South African parent, or citizenship through birth by virtue of being the child of permanent residents in South Africa and who has been resident in South Africa from birth to the date of becoming a major. A person may also become a citizen by naturalization (S. 4) if that person has been resident in South Africa for 5 years prior to the date of application, and satisfies a number of conditions including being able to speak an official language, being ‘of good character’, etc (S.5). The White Paper on International Migration proposes to make the path to citizenship more difficult.</td>
</tr>
<tr>
<td>Refugee Act, 1998 as amended by Refugees Amendment Act, 2008 (Act No. 33 of 2008), Refugees</td>
<td>Refugees and asylum seekers; national legislation</td>
<td>The Refugee Act has been amended thrice, but retains the basic character of the original legislation. Amendments have been made to the provisions related to the confidentiality of the asylum process, the establishment of Refugee Reception Offices and to clarify the</td>
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<tbody>
<tr>
<td>Amendment Act, 2011 (Act No. 12 of 2011) and</td>
<td></td>
<td>procedures related to the determination of refugee status.</td>
</tr>
<tr>
<td>Refugees Amendment Act, 2015 (Act No. 10 of 2015)</td>
<td></td>
<td>S.3 sets out the circumstances which allow a person to qualify for refugee status. The expanded definition under the OAU Refugee Convention is used here (See SII in this paper).</td>
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<tr>
<td></td>
<td></td>
<td>S.4 sets out the circumstances which disqualify a person from claiming refugee status and S.5, the circumstances in which a person ceases to have refugee status. The circumstances set out in S.4 are fairly broad and well established: for instance, a person cannot claim refugee status if that person has committed war crimes, crimes against humanity, or committed any other crime which would be punishable solely with imprisonment in South Africa.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>An interesting distinction is drawn in the Act between asylum seekers and refugees. Refugees are entitled to various explicit protections and rights (S.27) including identity and travel documents and more broadly, full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Asylum seekers, as per the terms of the Act are entitled to ‘sojourn in the Republic temporarily’, subject to any conditions, specified on their asylum seeker permit (S.22). In reality, a number of scholars have pointed out that the system is overstretched, unduly</td>
</tr>
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</table>

bureaucratic and grants immigration officers too much discretion. For instance the asylum seeker permit is valid for 6 months, but renewal (and how many times it can be renewed) is often at the discretion of immigration officers (S.22(3)).

South African courts have expanded the rights available to asylum seekers to include the right to study, work, trade or open their own businesses. Asylum seekers may not be deported while their application is being considered. See the case of Somali Association of South Africa & Ors. v. Limpopo Dept. of Economic Development, Environment and Tourism & Ors.

In December 2017, the Refugee Act in South Africa was amended. The changes relate primarily to the right of asylum seekers to seek work. This is done by amending S. 22 of the Act, as follows:

1. asylum seekers' applications are to be assessed to see if they can 'sustain themselves', either on their own or for a period of four months. If so, then they are denied the right to work.
2. if they cannot sustain themselves, then they may be offered shelter by civil society or humanitarian organisations. In such circumstances, they are denied the right to work.
3. it is not clear how the determination of either (1) or (2) will take place - i.e. a great deal of bureaucratic discretion is granted to the status determination officer.
4. In case an asylum seeker cannot sustain themselves (1) or get assistance from UNHCR, etc (2) they may be given the right to

work, but only to the extent that they can produce a letter from an employer within 6 months, stating that they are employed. This rules out the possibility of informal/self employment.

- The second major change relates to the time available to asylum seekers to lodge an asylum claim. The procedure, as amended requires them to obtain a transit permit from the port of entry and then lodge a claim within 5 days at a refugee reception office. It is an offence to enter SA other than through a port-of-entry. This has sever implications given the arbitrary denial of transit permits and consequent illegal entry by migrants and asylum seekers.

- The amendments create the possibility of spatially segregating asylum seekers of a specific nationality, etc.

- They include a number of other (relatively) minor amendments - including in relation to dependents, children who can be described as dependents, etc.

2017 White Paper on International Migration\(^\text{122}\) National policy, not a binding legal instrument.

This draft ‘White Paper’ seeks to articulate changes in South African governmental thinking on issues of migration. It seeks, in general, to move towards a ‘migration management’ approach, that is aimed at excluding ‘undesirable’ migrants and welcome highly skilled migrants.

This consists of (a) strengthening border management techniques (by collecting data more stringently), (b) establishing a border management authority, (c) restricting the conditions in which citizenship can be obtained by an immigrant (by delinking residency and citizenship, removing the category of permanent resident and

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<tbody>
<tr>
<td>Prevention and Combating of Trafficking in Persons Act 2013</td>
<td>Anti-trafficking; national legislation.</td>
<td>replacing it with a ‘long-term residency’ and finally only allowing refugees to apply for long term residence after 10 years of continuous residence in South Africa, and (d) moving to a points-based system of migration to privilege higher skilled migrants. In general, the approach to international migration articulated in the White Paper is predicated on the assumption that there are a large number of irregular migrants from Zimbabwe and Lesotho staying in SA, and a need to prioritise the needs of poor South Africans whose lives are being negatively affected by these migrants (p.64). The White paper proposes to change the asylum process by (a) establishing ‘Asylum Seeker Processing Centres’ (p.70), (b) removal of automatic right to work and study for asylum seekers, (c) exploring options for resettlement of refugees to other countries, and criminalising the non-compliance with deportation orders. This law criminalises trafficking by specifying that any person who ‘delivers, recruits, transports, harbours, sells, exchanges, leases or receives’ another person within or across South African borders is guilty of trafficking if they do so by means of threat, force, fraud, deception, abuse of vulnerability, etc (S.4). Facilitation of trafficking is a crime, and carriers who transport victims of trafficking knowingly are also liable under the Act (Ss. 8, 9). The Act contains provisions for the protection of victims of trafficking, - they are entitled to be granted visitors visas (s. 15-17), to receive public</td>
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<th>LAW/POLICY</th>
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<tbody>
<tr>
<td>Border Management Authority Bill</td>
<td>Immigration control and administrative efficiency; national legislation.</td>
<td>health care services in accordance with s.27 of the Constitution (s. 21) and may receive other services from accredited organizations. They may also receive monetary compensation from the trafficker. The bill seeks to establish one centralised authority to handle all matters involving South Africa’s ports of entry, including policing and customs. This is in keeping with the White Paper.</td>
</tr>
<tr>
<td>Municipal Systems Act 2000 as amended by the Municipal Systems Amendment Act of 2011</td>
<td>National legislation, but for the express purpose of devolving power to municipalities.</td>
<td>S. 4(3) specifies that Municipalities need to respect the rights of all persons (other than citizens) who are protected by the Constitution. Municipalities are expected to function and use its resources in the best interests of the local ‘community’ which is defined in the Act to include all ‘residents’ and is not restricted to ‘citizens’ only (S.4(2)(a) and S.1). No specific reference is made to migrants.</td>
</tr>
<tr>
<td>Education</td>
<td>Education, contained in multiple legislations</td>
<td>Article 29 of the Constitution states: (1) Everyone has the right— (a) to a basic education, including adult basic education; and (b) to further education, which the State, through reasonable measures, must make progressively available and accessible. (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where</td>
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that education is reasonably practicable. ...

(3) Everyone has the right to establish and maintain, at their own expense independent educational institutions that:
(a) do not discriminate on the basis of race;
(b) are registered with the state; and
(c) maintain standards that are not inferior to standards at comparable public educational institutions.\footnote{South African Schools Act (SASA), 1996 (Act 84 of 1996), available at: http://www.unesco.org/education/edurights/media/docs/d72c18210e8717d19da3c2ad08dc0ff5f691d11b.pdf. Accessed 14 February 2018.}

\textit{The South African Schools Act (SASA), 1996 (Act 84 of 1996),}\footnote{Education Laws Amendment Act No. 24 of 2005, available at: http://www.unesco.org/education/edurights/media/docs/83e1c02fa9c3c57073f545d072ff109b3a3c272.pdf. Accessed 14 February 2018.} is aimed at ensuring that all learners have the right of access to quality education without discrimination, and makes schooling compulsory for children aged 7 to 15. It provides for two types of schools, namely independent and public schools. The provision in the Act for democratic school governance through school governing bodies has been effected in public schools countrywide. The school funding norms outlined in SASA prioritise redress and target poverty regarding the allocation of funds for the public schooling system. The Act has been amended by the \textit{Education Laws Amendment Act No. 24 of 2005},\footnote{Education Laws Amendment Act No. 24 of 2005, available at: http://www.unesco.org/education/edurights/media/docs/83e1c02fa9c3c57073f545d072ff109b3a3c272.pdf. Accessed 14 February 2018.} so as to authorize the declaration of schools in poverty-stricken areas as ‘no-fee schools’.
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<tbody>
<tr>
<td>National Health Act 2003[^130] as amended by the National Health Amendment Act, 2013[^131]</td>
<td>Health, National law</td>
<td>The <em>Adult and Basic Education Training Act No. 52 of 2000</em>[^129] regulates adult basic education and training (ABET) and provides for: the establishment, governance and funding of public adult learning centres; the registration of private adult learning centres; and quality assurance and promotion in adult basic education and training. S. 4 specifies that the State of South Africa and clinics and health centres funded by the state must provide all persons, except members of medical aid schemes and their dependents and persons receiving compensation for compensable occupational diseases, with free primary health care services (S. 4(3)(b)). S. 5 states that a ‘health care provider, health worker or health establishment may not refuse a person emergency medical treatment.’ These sections remain un-amended and are not restricted solely to citizens. Note however: In <em>Soobramoney v Minister of Health, KwaZulu-Natal</em> 1998 (1) SA 765 (CC), free medical treatment was denied to the applicant in an instance where a hospital could, due to financial constraints, only provide dialysis treatment to a limited number of patients. At para 11, the Constitutional Court held that the obligations imposed on the state ‘in regard to access to housing, health care, employment and social security’ are a violation of the right to ‘an adequate standard of living’ prescribed in Art. 25(1).</td>
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<tbody>
<tr>
<td>Social Assistance Act, 2004(^{132})</td>
<td>Social protection; national legislation</td>
<td>food, water and social security are dependent upon the resources available for such purposes. Given this lack of resources ..., an unqualified obligation to meet these needs would not presently be capable of being fulfilled. This Act, which makes provision for social assistance and payment of social grants, is restricted to only South African citizens (or others as may be notified from time to time by the Minister of Finance) – S.5(1)(c). This has been extended by judicial pronouncement to ‘permanent residents’ – see Khosa v Minister of Social Development; Mahlaule v The Minister of Social Development 2004 (6) BCLR 569 (CC). It does not extend to irregular/undocumented migrants.</td>
</tr>
<tr>
<td>Other Social Protection Legislation</td>
<td>Social protection; national legislation</td>
<td>Pension Funds Act – regulates Pension Funds rather than providing a pension. Primarily aimed at the protection of South African citizens (s. 2(2)(a)(iii)). Road Accident Fund Act is not directly applicable. Although it provides for payment of compensation for damage caused by driving of motor vehicles, it is concerned with the administration of the Fund itself rather than eligibility of claimants. Compensation for Occupational Injuries and Diseases Act, 1993 provides for compensation for all employees and is not restricted to</td>
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<tr>
<td>Mines Act, 1973 (amended 1994 and 2002).</td>
<td>citizens only (S. 1(xix)).</td>
<td>The Occupational Diseases in Mines Act, 1973 governs the lifelong monitoring and surveillance of former miners and evaluation of both former and active miners for possible compensable occupational lung diseases. It covers all employees, and is not restricted to citizens.</td>
</tr>
<tr>
<td>Unemployment Insurance Act, 2001</td>
<td></td>
<td>The Unemployment Insurance Act provides protection to workers who become unemployed. It prescribes the circumstances for claiming unemployment benefits, maternity benefits, illness benefits, adoption benefits and dependents' benefits. It does not apply to non-citizens working on contract (S.3(1)(d)). [Some authors seems to suggest that the unemployment insurance act applies to migrant workers – this appears to be incorrect].</td>
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Zambia

The Constitution of Zambia as amended by the Constitution of Zambia (Amendment) – Act No.2 of 2016. The Constitution was amended in 2016, but the Constitution drafting process has been underway since the early 2000s. Part IV of the Constitution deals with Citizenship. It specifies that citizenship may be acquired by birth, descent, registration

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A second Constitutional Amendment Bill was introduced in 2016, to amend and significantly expand the ‘Bill of Rights’ and although approved by the majority of voters, failed to come into effect because of poor overall turnout (41%) in the referendum.139

Citizenship by registration is permitted in case the applicant is 18 years old and (a) was born in Zambia, and been ordinarily resident there for 5 years, (b) was born outside Zambia, has or had an ancestor who is, or was, a citizen and has been ordinarily resident in Zambia for a period of at least five years, or (c) has been ordinarily resident in Zambia for a continuous period of at least ten years. (A.37). Persons married (or who were married) to Zambian citizens person for a period of at least five years, are entitled to apply to the Citizenship Board of Zambia, to be registered as a citizen (A.37(2)). Children may also gain citizenship if adopted by citizens (A.38).

The unamended Bill of Rights (Part V of the Constitution) contains a number of rights which belong to ‘all persons’ and other rights which are solely reserved for citizens.

Among notable rights available to all persons are: right to life, personal liberty, protection from slave and forced labour, protection of the law, Protection for privacy of home and other property, freedom of conscience, expression and freedom of movement, protection from discrimination, etc.

In practice Zambian courts have interpreted these provisions narrowly and excluded refugees and ‘prohibited immigrants’ from

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<tbody>
<tr>
<td>Refugees Act 2017[^{142}^]</td>
<td>Refugees Act, national legislation.</td>
<td>these protections.[^{140}^] Its application to other categories of migrants is unclear, though in theory they ought to apply to labour migrants. Undocumented migrants are considered ‘prohibited migrants’ and deported if apprehended by immigration officials.[^{141}^] The Refugees Act 2017 replaces the Refugee Control Act of 1970.[^{143}^] It uses the expanded definition of ‘refugee’ to include those fleeing external aggression, disturbances of public order, internal conflict, generalised conflict, etc. The Refugee Act makes a distinction between asylum-seeker and refugee which is different from the position under the 1970 Act,[^{144}^] and establishes a Refugee Status Determination Committee. Zambia maintains an encampment policy – applicants for refugee status and asylum seekers are initially housed in refugee reception areas and then moved to designated refugee settlements (s.9). The right against refoulement in the Act (s. 23), as well as his rights to appeal are circumscribed if he is considered a threat to national security. Once recognised, refugees have the right to be issued with a work permit (if they have an identity card) or a study permit, may work or</td>
</tr>
</tbody>
</table>

\[^{141}^\] Ibid.
\[^{143}^\] As a consequence, there isn’t a great deal of secondary/policy research on this topic.
\[^{144}^\] Darwin 2005.
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<tr>
<th>LAW/POLICY</th>
<th>APPLICABILITY (SECTOR/ADMINISTRATIVE LEVEL)</th>
<th>ANALYSIS</th>
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<tbody>
<tr>
<td>Immigration and Deportation Act, 2010¹⁴⁵ as</td>
<td>Immigration (enabling/enacting) legislation - national legislation.</td>
<td>study (with a study permit, in institutions of higher education, although it is not required in primary educational institutions). They also have the right to establish businesses (S.41-43).</td>
</tr>
<tr>
<td>amended by the Immigration and Deportation</td>
<td></td>
<td>Refugees may reside outside ‘refugee settlement’ areas if authorised to do so (S.71). Doing so without authority is a violation of the terms of the Act (s.63). The Refugee Act also makes it an offence to lie to a refugee status determination officer (s.62), forge or destroy identification documents (s. 65).</td>
</tr>
<tr>
<td>Amendment Act, 2016¹⁴⁶</td>
<td></td>
<td>Broadly, as with most of the other acts of this nature in Southern Africa, this is a highly restrictive legislation. It replaces the Immigration and Deportation Act 1965.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>It makes provisions for the creation of an Immigration Department and creates the post of Director General of Immigration (DGI). Interestingly, S.5(3)(a) of the Act specifically states that the DGI will adopt a human rights based approach to migration control. S.6, however, grants immigration officers sweeping powers of search and seizure including entering and searching workplaces and residences, as well as ships/flights/veess all without warrants. searching educational institutions, arresting, detaining and removing ‘illegal immigrants. Decisions of immigration officers can be appealed within 48 hours. Arrests may be made without warrants, and persons</td>
</tr>
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suspected of being illegal immigrants can be detained for up to 30 days without a court hearing.

Part IV of the Act specifies the different permits which may be used non-citizens to enter and reside in Zambia. Similar to the other SADC countries – this makes a distinction between permanent and temporary residence permits. Among the temporary residence permits are the following: diplomatic permits, a spousal permit, a business permit, a visitor permit, study permit, permits for. Most of these do not allow the permit-holder to work or start businesses. S.30 allows the issuance of cross-border permits to members of regional groupings of which Zambia is a member (for up to 90 days) – this is in keeping with the relevant SADC protocols. An asylum seekers permit under s.31 is valid for 30 days and non-compliance with its terms makes an asylum seeker an ‘illegal immigrant’ under the Act.

S.35 defines the category of prohibited immigrants – including people capable of transmitting a prescribed disease (the diseases are defined in subsidiary legislation), prostitutes or persons engaged in human trafficking, persons previously deported, persons who permits have been voided, persons entering without appropriate travel documents (i.e. undocumented migrants), persons convicted of offences in Zambia.

S.42 authorises the creation of a national monitoring and information system on immigration issues. S. 45- 46 makes it an offence for Zambian nationals (punishable with a large monetary fine) to assist illegal/prohibited migrants in any way. Employment of foreigners
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<tbody>
<tr>
<td>Passport Act of 2016(^{147})</td>
<td>National enabling legislation, replaces the Passports Act 2003</td>
<td>Without work authorisation is prohibited under s.44.</td>
</tr>
<tr>
<td>Citizenship of Zambia Act, 2016(^{148})</td>
<td>National enabling legislation, replaces the Citizenship of Zambia Act, 1975.</td>
<td>This Act contains the provisions under which persons (including in some cases, Stateless persons) are entitled to passports under Zambian law. It is largely procedural in that it gives effect to provisions of other laws like the Zambian Constitution and the Immigration and Deportation Act.</td>
</tr>
<tr>
<td>Access to healthcare and education</td>
<td></td>
<td>Zambia permits dual citizenship. This Act creates a Citizenship Board and specifies the procedures for its operation. As with the Passports Act, this is also largely procedural giving effect to the provisions of the Constitution.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>UNHCR notes that the Government of Zambia provides all refugees with access to the national healthcare system.(^{149})</td>
</tr>
<tr>
<td></td>
<td></td>
<td>It also allows all refugee children in Zambia to access primary and secondary education at par to nationals. Though primary school education is free in government schools, de facto there are indirect education costs (PTA contributions, uniforms, books, etc.) that may</td>
</tr>
</tbody>
</table>


\(^{149}\) UNHCR 2017.
hinder access to education. In addition, due to limited capacity, limitations remain in place in government schools in urban areas where priority is given to Zambian children at the time of enrolment. The majority of urban refugee children are forced to enrol in community schools which require payment of user fees and often do not meet national standard in term of quality of education.

The basis of this educational policy is the Education Act No. 23 of 2011. This Act sets out a person’s right to early childhood care and education and to basic and high school education. Under this, Government is obligated to make general and vocational education progressively available and accessible to all persons. This Act also recognises a child’s right to free basic education (S. 14-15). Free basic education has however already been implemented under the Free Basic Education Policy and this Act only provides a firm legislative basis for implementation of the Policy.

The Constitution of Zimbabwe, enacted in 2013, includes provisions on Citizenship in Chapter 3. It also includes a Declaration of Rights in Chapter 4 with enumerated ‘Fundamental Rights and Freedoms’.

Zimbabwe

Constitution of Zimbabwe152 National legislation. Note that this may have been amended by the Constitution of Zimbabwe Amendment Bill 2017 – it is

The Constitution of Zimbabwe, enacted in 2013, includes provisions on Citizenship in Chapter 3. It also includes a Declaration of Rights in Chapter 4 with enumerated ‘Fundamental Rights and Freedoms’.

Zimbabwe’s legal system is a curious hybrid of the Roman (civil) law system and the English (common) law system. This makes the architecture of Zimbabwe’s laws a little different to the other SADC Countries included in this study which are extremely similar.
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<tr>
<td></td>
<td>not clear in the absence of a gazette notification.</td>
<td>Some of these ‘fundamental rights and freedoms’ are available to all persons, while the others are only available to citizens.</td>
</tr>
</tbody>
</table>

Citizenship is obtained either by birth, descent or by registration (Arts. 35-38). Of these only the provisions relating to citizenship by registration are applicable to migrants in Zimbabwe – foreigners may become citizens if (a) they have been married to a Zimbabwean national for five years and satisfy the procedures of the Citizenship Act, 1984, or (b) they have been ordinarily and continuously resident in Zimbabwe for ten years and satisfy the procedures of the Citizenship Act.

Some of the rights available to all persons are: the right to life, personal liberty (i.e. not to be detained without trial), various rights upon arrest including the right to legal representation and to be produced at a court within 48 hours of detention, freedom from torture and other forms of inhuman and degrading treatment, right to a fair hearing, right to equality and non-discrimination (including on the basis of nationality), freedom of association, and right to free expression. Importantly for migrants – all persons are guaranteed the right to a fair wage, safe labour practices, satisfactory work conditions and join unions and/or engage in collective bargaining (Art.65).

Some of the rights only available to citizens are: the right to move freely, reside in any part of and leave Zimbabwe (Art. 66), the right to a basic State-funded education, and right to healthcare (Arts. 75-
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| Refugee Act, 1983 | Refugee law, national legislation. | 76).\(^{153}\) Zimbabwe follows an encampment policy for refugees.\(^{155}\) This Act is interesting because in addition to provisions drafted by the Zimbabwean legislature, it also includes which are directly included from the 1951 Refugee Convention. It uses the expanded definition of ‘refugee’ in S.3 (see S.II of this note). It creates the bureaucratic apparatus for governance of refugees – namely – a Commissioner for Refugees and a Zimbabwean Refugees Committee. Asylum seekers are exempt from criminal proceedings only on account of their illegal entry into Zimbabwe, until their application for refugee status is either adjudicated or until all their appeals have been exhausted. Refugees are subject to the same restrictions as are imposed on all non-nationals in terms of seeking employment (s.12). S. 15 grants the commissioner for refugees sweeping powers to expel refugees on grounds of ‘national security or public order’.

The Refugee Act includes a number of provisions from the Refugee Convention of 1951 by incorporation. Notable among these is the right for refugees to engage in self-employment (i.e. ‘the right to engage on his own account in agriculture, industry, handicrafts and

\(^{153}\) Although the Zimbabwean state is allowed to make provision for the progressive realisation of these rights, since it does not have the capacity to implement these rights at the moment.


\(^{155}\) UNHCR 2015a.
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|                      |                                            | commerce and to establish commercial and industrial companies’), although the treatment accorded only has to be on par with other ‘aliens’ in Zimbabwe (Art. 18, Sch I). As with all similar legislation across Southern Africa, the Immigration Act creates the bureaucratic structure for the administration of immigration and prescribes the different methods by which persons may enter the country.157  
|                      |                                            | S.7 gives immigration officers broad powers of search and inquiry, and s.9 contains provisions relating to detention – although such a person may be released on furnishing a ‘bond’. Part III of the Act regulates entry into Zimbabwe. It requires migrants to enter from specified ports of entry and places the burden of proving otherwise on persons accused of having entered Zimbabwe illegally. Illegal entry is punishable with imprisonment. (s.11-12)  
|                      |                                            | S.14 sets out a number of categories of ‘prohibited persons’ under the Immigration Act. This includes those, among others, persons who are ‘prostitute[s] or homosexual[s]’, those previously deported from Zimbabwe, those believed to be ‘undesirable’ either on account of their economic situation or ‘standards and habits’ of life, persons with specific infectious diseases, etc.  
|                      |                                            | Interestingly, the Immigration Act in Zimbabwe is the least  

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157 In general, this is a very restrictive act as illustrated by S.3A which gives discretion to Immigration Officers to nullify marriages as ‘marriages of convenience’ if they feel that the marriage was entered into for the purposes of entering Zimbabwe. See also IOM 2009.
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<tr>
<td>Citizenship Act, 1984(^{158})</td>
<td>National legislation.</td>
<td>prescriptive in terms of entry permits i.e. it has the greatest degree of bureaucratic discretion. S.19 of the Act sets out the three kinds of permits – student, temporary and temporary employment which are to be granted to persons wishing to enter Zimbabwe. Zimbabwe prohibits dual citizenship (s.9). The Citizenship Act sets out in greater detail the provisions for citizenship by birth, descent and registration. S.9A makes slightly easier provision for gaining of citizenship by other SADC citizens (and especially those who entered Zimbabwe as migrant workers). This is a procedural law which does not outline substantive rights and duties.</td>
</tr>
<tr>
<td>Education</td>
<td>In multiple legislations</td>
<td>Art. 75 of the Constitution reserves basic state funded education for Zimbabweans and other permanent residents. Subject to the constitutional provisions, presumably, S. 4 of the Education Act [Chapter 25:04] of 1987 as amended by Act 2 of 2006 and Act 2 of 2008(^{159}) states that every child in Zimbabwe has the right to a school education, and prohibits discrimination against children (including in matters of admission) on the grounds of race, tribe, place of origin, political opinions, colour, creed or gender. The Public Health Act specified certain diseases as infectious, and specifies that the right to liberty of certain persons (suffering from those diseases) may be circumscribed. Of course, the Immigration Act</td>
</tr>
<tr>
<td>Public Health Act, 1924(^{160})</td>
<td>National legislation.</td>
<td></td>
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\(^{160}\) See analysis in: IOM 2008.
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<tr>
<td>Lesotho</td>
<td></td>
<td><strong>Applies</strong> to many of these same persons as ‘prohibited persons’ barring them from entry into Zimbabwe.</td>
</tr>
<tr>
<td>Constitution of Lesotho 1993(^{161})</td>
<td>National legislation.</td>
<td>The Constitution provides for equal rights between all people without any form of discrimination.(^{162})</td>
</tr>
</tbody>
</table>

Section 4 stipulates that ‘every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms’. Sections 6 and 7 emphasize the right to personal liberty and the freedom of movement. Section 8 stresses freedom from inhuman treatment. Section 9 provides for freedom from slavery and forced labour. Sections 12 and 19 provide for the right to fair trial and the right to equality before the law and the protection of the law. Sections 13, 14, 15 and 16 recognize that every person shall have freedom of conscience, freedom of expression, freedom of peaceful assembly and freedom of assembly. Section 18 recognizes the freedom from discrimination.

Section 29 protects the right to work by providing that ‘Lesotho shall endeavor to ensure that every person has the opportunity to gain his living by work which he freely chooses or accepts’, although this is, of course, circumscribed by immigration law (the Aliens Control Act, see below). Sections 30 and 31 state that policies aimed at securing just


\(^{162}\) See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015a.
and favourable conditions of work will be adopted and independent trade unions will be developed to protect workers’ rights and interests, and promote sound labour relations and fair employment practices for all workers (presumably including migrant workers). Section 32 provides for protection of children and young persons from economic and social exploitation (presumably applicable to young migrants and children of migrant workers).

Part IV of the Constitution contains some brief provisions on citizenship. Lesotho follows the system of *jus soli*, granting citizenship to those born within its borders (s.38) – it is one of perhaps 3 countries across the African continent to do so.\(^{163}\) S. 41 prohibits dual citizenship.

This legislation, enacted at or just after the independence of Lesotho is the equivalent of the Immigration Acts in other SADC Countries. It makes provision for restriction and regulation of the movement of non-citizens into and out of Lesotho, and for their ‘sojourn’ in it. The Act sets out a procedure for persons who want to enter, stay in Lesotho whether temporarily or permanently, expulsion and deportations (see s.14). The Act provides for two kinds of permits (1) permanent/indefinite and (2) temporary sojourn (S. 6 and 7) which state that, a non-citizen including migrant workers and members of their families may apply for these permits before entry into Lesotho in the form prescribed by the Minister. Sections 6(3) and 7(2) uphold the right to family reunification by

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<tbody>
<tr>
<td>Aliens Control Act, 1966(^{164})</td>
<td>Immigration control – national legislation</td>
<td>and favourable conditions of work will be adopted and independent trade unions will be developed to protect workers’ rights and interests, and promote sound labour relations and fair employment practices for all workers (presumably including migrant workers). Section 32 provides for protection of children and young persons from economic and social exploitation (presumably applicable to young migrants and children of migrant workers).</td>
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\(^{163}\) For a comparative analysis of citizenship laws across African countries, see Manby 2016.  
<table>
<thead>
<tr>
<th><strong>Law/Policy</strong></th>
<th><strong>Applicability (Sector/Administrative Level)</strong></th>
<th><strong>Analysis</strong></th>
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</thead>
<tbody>
<tr>
<td>Refugee Act 1983[165]</td>
<td>Refugees – national legislation.</td>
<td>Providing for issuance of similar residence permits to wives and children of [migrant] workers who have been granted residence permits. Section 10 empowers the Minister with the discretion to cancel any permit if it appears that false information was given during application, reasons of public safety security among others as stipulated in the first Schedule of the Act. Section 19(1) and (2) impose a duty on non-citizens to register on entry in Lesotho.</td>
</tr>
<tr>
<td>Lesotho Citizenship Order 1971[166]</td>
<td>Citizenship - national legislation</td>
<td>This Act uses the expanded definition of ‘refugee’ (See Section II of this note) in s.3. The Act creates the bureaucratic apparatus for the determination of refugee status, through setting up an ‘Interministerial Committee for the Determination of Refugee Status’ (s.5). Persons who may have entered Lesotho both legally and illegally are allowed to apply for refugee status. Given its geographical location (i.e. landlocked status) it has seen very few refugees, but interestingly – increasing numbers of migrants from East Asia (China). Lesotho Citizenship Order, 1971 makes provision for citizenship of Lesotho, for the acquisition, deprivation and renunciation of citizenship. Section 10 of the Order reaffirms the right to nationality if</td>
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<tr>
<td>Education Act 2010(^{167})</td>
<td>national legislation</td>
<td>a migrant child or a child of a Lesotho migrant worker abroad has returned to Lesotho and stayed there as a stateless person for a period of three years and that such a child has attained eighteen years; the Minister may order that such a person be registered as citizen of Lesotho.</td>
</tr>
<tr>
<td>Labour Code 1992, as amended by the Labour Code Amendment Act 2000</td>
<td>national legislation</td>
<td>Sections 9, 11, 12 and 13 of the Order set out procedures to be followed when applying for Lesotho citizenship allowing a migrant worker and members of his family to apply for citizenship of Lesotho if they have decided to settle in Lesotho permanently after residing there continuously for a period of five years. Makes provision for free primary education for all – S.3, though it is not clear what the recourse would be if fees were charged. Secondary and tertiary education are not free for migrant children.(^{168})</td>
</tr>
</tbody>
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\(^{168}\) Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015a.
forced labour.

Section 48 (1) establishes the Minimum Wage Advisory Board which has annually meetings aimed at determining and revising minimum wages. The minimum wages apply to the following sectors: clothing, leather and manufacturing, construction, wholesale and retail, hospitality, service sector comprising of security, funeral parlour, cleaning services, transport sector, small business and domestic work.

Section 66 provides that workers may only be dismissed for misconduct and incapacity. Section 118 and Section 120 set out maximum hours of work and leave or rest days. According to Section 122, employees have a right to technical and vocational training. Sections 138-152 provide for regulation of Private Recruitment Agencies. Section 150 provides payment of transport expenses by employers for employees during recruitment process. Section 168 gives workers the right to join trade unions. Section 196 prohibits discrimination against Union members and employers.

Lesotho Passports and Travel Documents Act, 1998\textsuperscript{170}  

Lesotho Anti-trafficking in Persons Act, 2011\textsuperscript{171}  

Lesotho Passports and Travel Documents Act, 1998\textsuperscript{170} is a national legislation. It is a Procedural act setting out the provisions for obtaining passports and travel documents in Lesotho.

Lesotho Anti-trafficking in Persons Act, 2011\textsuperscript{171} is a national legislation. It is The Anti-Trafficking in Persons Act, 2011 and its 2015 Anti-Trafficking in Persons Regulations provide for protection of the rights of victims of trafficking. Ss. 30 and 31 provide for regularization of victims of trafficking through issuance of special residence permits. Section 32

\textsuperscript{169} See also Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015a.


provides for repatriation of victims from Lesotho. The Act makes specific provisions for the safety of migrant children who are victims of trafficking to protect them from harm (including being trafficked again) before repatriation.

The government of Lesotho has said in its representation to the OCHCR (UN) that migrant workers in Lesotho are entitled to free healthcare on par with citizens.\(^{172}\) They state ‘Every person resident in Lesotho enjoys the right to access to health care. There are policy guidelines to almost all areas of health but most of them are still in draft form such as. Migrant workers and members of their families are not excluded in anyway; they have equal access to health care services.’\(^{173}\)

Swaziland

Chapter III of the Constitution contains provisions for the ‘Protection and Promotion of Fundamental Rights and Freedoms.’

The fundamental rights and freedoms apply to all individuals irrespective of ‘gender, race, place of origin, political opinion, colour, religion, creed, age or disability’ (Art. 14(3)). These contain the following: (a) protection of the right to life and personal liberty (save as authorised by law) – which includes procedural safeguards against unfair detention, (b) protection from forced labour, (c) protection from inhuman treatment (including torture), (d) the right to acquire and hold property, (e) equality before the law, (f) the right to a fair

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\(^{172}\) See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015a, p.26.


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|            |                                           | hearing, (g) the right to freedom of peaceful assembly and association, (h) the right to freedom of movement in Swaziland (though this can be circumscribed for non-citizens), and (i) the right of workers to carry on a 'lawful' profession or trade, form trade unions, receive equal pay for equal work, to safe working conditions, etc.

In short, the fundamental rights are largely all applicable to migrant workers – but the language of the Constitution makes it fairly easy to circumscribe two important rights – (a) to movement and residence, and (b) to carry on any profession.

Chapter IV of the Constitution includes provisions on Citizenship. It prescribes the conditions by which a person may acquire the citizenship of Swaziland – namely, birth, if that person's father was a citizen, descent, marriage and registration. Dual citizenship does not appear to be permitted by the Constitution, although there is some ambiguity about the wording of the relevant provisions (See for instance Art.50 which seems to suggest that renunciation of citizenship is at the discretion of the citizen, and Art.49 which is worded so as to make deprivation of Swazi citizenship an act of bureaucratic discretion).

Although the Constitution stipulates that any child born inside or outside of Swaziland prior to 2005 to at least one Swazi parent acquires Swazi nationality by descent, children born after 2005 only acquire Swazi nationality from their fathers, as Articles 43 and 44 of the 2005 Constitution do not allow a Swazi woman to transfer her nationality to her children or foreign spouse on an equal basis with
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<th><strong>Applicability (Sector/Administrative Level)</strong></th>
<th><strong>Analysis</strong></th>
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<tbody>
<tr>
<td><strong>Swaziland Citizenship Act, 1992</strong>&lt;sup&gt;176&lt;/sup&gt;</td>
<td>Enabling citizenship legislation; national laws</td>
<td>Swazi men.&lt;sup&gt;175&lt;/sup&gt; These provisions are not applicable where Swazi men marry foreign women. This legislation gives effect to the provisions set out in the Constitution. The language on dual citizenship is worded similarly to the Constitution, and is ambivalent (Ss. 10-11). It is worth noting that similarly to some other legislation across the region, deserted infants are deemed to have been born in Swaziland and are entitled to citizenship (Ss. 17, 7(4)).</td>
</tr>
</tbody>
</table>
| **The Refugees Control Order 1978**<sup>177</sup> | National refugee legislation – although note that a Refugee Control Bill was drafted in 2015, but does not appear to have been passed yet.<sup>178</sup> | The national legislative framework governing asylum in Swaziland consists of the Refugee Control Order No 5 of 1978. The Government of Swaziland, through the Ministry of Home Affairs is responsible for the physical and legal protection of refugees. Implementation is administered through a tripartite agreement between the Government, UNHCR and the INGO Caritas. A Political Asylum Committee is responsible for determining the refugee status of asylum-seekers.<sup>179</sup> S. 12-13 sets out the requirement for refugees to reside in a particular area or region (i.e. includes the basis for an encampment policy). This was enforced in the 1980’s and 1990’s during the movement of asylum seekers from Mozambique, but appears not to

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<sup>175</sup> UNHCR 2016a.
<sup>178</sup> See UNHCR 2016a.
<sup>179</sup> *Ibid.*
The Immigration Act, 1982

This came into effect in 1987. Immigration law, nationally applicable.

The Immigration Act contains provisions relating to the entry and removal of immigrants from Swaziland.

It allows a great deal of discretion to an administrative officer (the Chief Immigration Officer) to exclude persons or a class of persons from Swaziland by declaring them prohibited persons (s.3).

Immigration permits are categorized into several ‘classes’. When obtained by fraud or misrepresentation (s.7) they are liable to be invalidated. S. 12-13 grant immigration officers sweeping powers of search, entry and arrest (without warrants in the first instance). They may also compel any person to submit to an examination by a medical examiner (S. 12(d)). The burden of proof in any proceeding under the immigration legislation – for instance, regarding citizenship, validity of entry permits, etc., lies on the person suspected of wrongdoing (s.16). Entry permits include those for employment (Class A), dependents of those who are employed (and have an independent offer of employment) (Class B), etc.

Interestingly, no special provision appears to have been made for SADC citizens.

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180 Ibid.
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<tbody>
<tr>
<td>Health</td>
<td>Non-enforceable policies.</td>
<td>The right to health under the Constitution of Swaziland is not a justiciable right but a principle of state policy. The state is obliged to ‘take all practical measures to ensure the provision of basic health care services to the population’ S. 60(8). In theory a progressive interpretation of the right to life and non-discrimination would accord migrants in Swaziland a right to access health services especially in emergency medical situations, but it is not clear to what extent this is practically enforceable.(^{182})</td>
</tr>
<tr>
<td>Education</td>
<td>Although there is an Education Act (of 1981) provisions for education are actually contained in the Constitution of 2005, and other non-justiciable policies.</td>
<td>S. 29(7) states that every Swazi child has the right to free education in public schools, at least till the end of primary school, beginning with first grade. This provision was to have taken effect in 2008.(^{183}) Migrants’ children would not be able to take advantage of this provision.</td>
</tr>
</tbody>
</table>

\(^{182}\) See IOM 2008.  
\(^{184}\) See Ministry of Education, Kingdom of Swaziland 2008. See also UNESCO 2017.
National legislation. Note however, that a number of legislations appear not to have been amended to reflect the changes made by the Constitution and are therefore, potentially illegal.

Interestingly, the Constitution reserves the right to life and other individual rights, only for citizens. Art. 59 states however that all persons have the right to liberty and shall not be put on trial except in accordance with law. Although only citizens have the right to choose their profession (Art. 84) – all workers have the right to freedom of association, to form trade unions, and to receive fair wages, etc. (Arts 85-86).

The rights to education and health are reserved solely for citizens (Art. 88).

Mozambique maintains reservations to Articles 13 (‘Movable and Immovable Property’), 15 (‘Right of Association’), 17 (‘Wage-earning Employment’), 19 (‘Liberal Professions’), 22 (Public Education’), 26 (‘Freedom of Movement’) and 34 (‘Naturalization’) of the 1951 Refugee Convention, although these reservations have not been implemented in legislation. Article 16 of the Refugee Act refers to the reservations in general and grants a right to the Council of Ministers...

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to determine the scope of the implementation of the Refugee Act by issuing regulations – i.e. refugees’ enjoyment of the rights covered by the reservations is subject to bureaucratic discretion.\textsuperscript{187}

UNHCR notes that: Mozambique has, in practice, allowed full access to education, health and other basic services for persons of concern and a flexible policy on freedom of movement.

It has, however, strictly enforced procedures for the issuance of work and business permits, access to land, ownership of real state and acquisition of nationality through naturalization. ‘Thus, rather than restrictions based in the legal framework, refugees and asylum-seekers mostly struggle with the arbitrary, and sometimes inconsistent manner in which authorities apply legal provisions. These difficulties often arise due to gaps in local authorities’ knowledge of refugee rights and lack of recognition of their documentation. This results in inconsistent practices depending on the geographic location, the type of services and the concerned applicant’s level of knowledge and capacity to argue for his/her rights.’\textsuperscript{188}

In addition to the constitutional provisions (above) Law No. 6/92 of 6 May 1992 guarantees basic education for all Mozambicans and ensures all Mozambicans access to vocational training, establishing educational support and complementary measures to promote equality of opportunity in school access and achievement.\textsuperscript{189}

<table>
<thead>
<tr>
<th>Education</th>
<th>Contained in multiple legislative enactments</th>
<th>Analysis</th>
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<td>to determine the scope of the implementation of the Refugee Act by issuing regulations – i.e. refugees’ enjoyment of the rights covered by the reservations is subject to bureaucratic discretion.\textsuperscript{187}</td>
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\textsuperscript{187} See UNHCR 2016b.

\textsuperscript{188} Ibid, p. 4.

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<th>ANALYSIS</th>
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<tr>
<td>Labour legislation&lt;sup&gt;190&lt;/sup&gt;</td>
<td>Anti-trafficking, national legislation.</td>
<td>The Legal Regime of Foreign Citizens (Law No 05/1993), with its amendments and Regulations sets general rules relating to: entry, stay, exit, rights and the duties of foreign citizens. This is a restrictive legislation.</td>
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<td>In addition, Decree No. 37/2016 - Regulation of Mechanisms and Procedures for Contracting Citizens of Foreign Nationality, complements the general guidelines set out in the Labor Law – Law No 23/2007, and regulates the hiring of foreign nationals. It is essentially a legislation which tries to safeguard the national labour market by imposing a quota of workers that may be hired by employers.&lt;sup&gt;191&lt;/sup&gt;</td>
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<tr>
<td>The Counter-Trafficking in Persons Act 2010&lt;sup&gt;192&lt;/sup&gt;</td>
<td>Anti-trafficking, national legislation.</td>
<td>Enacted to comply with the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.</td>
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<td>S.3 defines the crime of panicking as one where a person recruits, transports, transfers, harbours or receives another person for the purpose of exploitation by means of— (a) threat or use of force or other forms of coercion; (b) abduction; (c) fraud; deception; (e) abuse of power or of position of vulnerability; (f) giving payments or benefits to obtain the consent of the victim of trafficking in persons; or (g) giving or receiving payments or benefits to obtain the consent</td>
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<tr>
<td>The Citizenship and Immigration Act 2011(^{193}) as implemented by the Citizenship and Immigration Regulations 2012.(^{194})</td>
<td>Citizenship law, national legislation.</td>
<td>of a person having control over another person. Abetment of trafficking – whether by knowingly allowing the trafficker to use property (s.5), or facilitation of entry or exit into the country is also a crime (s. 7). S.14 provides that the victim of trafficking will not be criminally liable for any offence related to being in Kenya illegally or for any criminal act that was a direct result of being trafficked. The other provisions in the Act relate to restitution for the victim, the conduct of trial for such that the rights of the victim are protected, and finally the creation of a series of administrative bodies meant to deal with issues arising under the Act. This Act regulates citizenship, establishes the visa regime, border control, including work permits and passes. Together they specify the different kinds of visas/permits/etc. which can be used to enter Kenya. The Act and Regulations address the administration of citizenship and immigration matters, and matters related to citizenship, rights and duties of citizens, passports and travel documents, immigration controls, management of foreign nationals, and management of immigration related records. Of note, the Act brings in measures that allow the Government of Kenya to restrict entry or movements of</td>
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certain foreign nationals in times of war or emergency.

The Regulations classify entry and work permits, allow for inspections of ‘places of employment, business, training and education, or residence for the purposes of verifying information contained in the applications, monitoring compliance with the terms and conditions contained in permits or passes issued to the owners, residents or persons-in-charge of the premises,’ and limits eligibility for a Class K residence permit to those who have an assured annual income of not less than USD 24,000 a year.

The Kenya Citizens and Foreign Nationals Management Service Act 2011\textsuperscript{195} establishes the Kenya Citizens and Foreign Nationals Management Service; provides for the creation and maintenance of a national population register; provides for the administration of laws relating to births, deaths, identification and registration.

The Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act 2012\textsuperscript{196} Internally displaced persons, national legislation.

This specifically deals with the issue of internally displaced.

The Act establishes the following offenses related to internal displacement: causing arbitrary displacement (as defined within the Act); impeding access to IDPs or the work of humanitarian personnel; causing harm to IDPs or humanitarian personnel; obstructing provision of humanitarian assistance to IDPs; stealing, destroying, or misusing humanitarian supplies intended for IDPs; misrepresenting him or herself as an IDP or providing false information during


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<tr>
<td><strong>The Security Laws (Amendment) Act 2014</strong>&lt;sup&gt;197&lt;/sup&gt;</td>
<td>Anti-terrorism law, national legislation</td>
<td>verification or profiling; and establishing an institution or camp of persons pretending to be IDPs. The Security Laws (Amendment) Act makes a few changes to the Refugees Act 2014. Some of the more important changes are:</td>
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<td>(a)</td>
<td>Every person who has applied for recognition of their status as a refugee and every member of their family is required to remain in a designated refugee camp until the processing of their status is completed (s.12(3) of the Refugees Act, as amended).</td>
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<tr>
<td>(b)</td>
<td>No refugee and asylum-seeker is to leave the designated refugee camp without the permission of a Refugee Camp Officer. (Amendment to S.14 of the Refugees Act).</td>
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<td>(c)</td>
<td>A new section is added which limits the number of refugees and asylum seekers permitted to stay in Kenya to 150,000. The National Assembly is given the authority to change this number for a renewable period of not more than six months. S.16(A)(1). This provision was struck down by the High Court of Kenya and has, since been appealed by the Government.</td>
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<tr>
<td><strong>Kenya National Commission on Human Rights &amp; another v Attorney General &amp; 3 others</strong>&lt;sup&gt;198&lt;/sup&gt;</td>
<td>Case law.</td>
<td>The judicial decision which held that the order to close Dadaab prisoner camp was unconstitutional.</td>
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<tr>
<td><strong>Policies</strong></td>
<td>Draft or not in force</td>
<td>A number of un-enforceable policies in Kenya deal with migration. Very broadly, they approach migration from outside Kenya through a</td>
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security lens, and seek to capitalise on the Kenyan diaspora and protect Kenyan workers working in other countries. IOM (2015) contains a comprehensive listing of these policies, but the most important of these are:

- Draft Kenya National Migration Policy (prepared in 2009, originally, but an advance draft appears to have been put together under the auspices of the IOM\textsuperscript{199})
- Kenya National Labour Migration Policy (This appears to have been adopted, but deals primarily with Kenyans working outside the country – dealing with their protection, return and reintegration, etc.)

According to Article 43,(1),(f) of the new Constitution of 2010, ‘Every person has ...the right to education’. Article 53,(1),(b) adds that ‘Every child has the right ...to free and compulsory education.’

The Basic Education Act no. 14 of 2013\textsuperscript{200} was enacted to ‘give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education.

The Children Act No. 8 of 2001, revised in 2010,\textsuperscript{201} requires ‘the government to undertake all the necessary steps to make available


**Law/Policy**  
**Applicability (Sector/Administrative Level)**  
**Analysis**

Free basic education to every child, which shall be compulsory in accordance with the Convention on the Rights of the Child.\(^{202}\)

Article 7 recognizes the right to education as follows: ‘(1) Every child shall be entitled to education the provision of which shall be the responsibility of the Government and the parents. (2) Every child shall be entitled to free basic education which shall be compulsory in accordance with Article 28 of the United Nations Convention on the Rights of the Child.’

Article prohibits discrimination on the ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. Article 12 concerning disabled children provides that ‘A disabled child shall have the right to be treated with dignity, and to be accorded appropriate ...education and training free of charge or at a reduced cost whenever possible.’

Art. 22 makes it possible for an aggrieved person to approach the High Court for enforcement of the Act.

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**Uganda**

Constitution of the Republic of Uganda\(^{203}\)  
National legislation  
The Ugandan Constitution follows the architecture of most post-colonial constitutions. Chapter 3 contains provisions relating to citizenship and Chapter 4 is titled ‘Protection and Promotion of Fundamental and Other Human Rights and

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Ch. 3 sets out the conditions under which a person may be considered/become an Ugandan citizen. Citizenship may be by birth, adoption, registration and naturalisation. Abandoned young children (below 5) are to be considered Ugandan citizens (Arts. 10-14). The Constitution permits dual citizenship (Art. 15). All births, deaths and marriages are to be registered by the State (see also Registration of Persons Act 2015). The Constitution expressly exempts children of refugees from being registered as citizens by birth.\textsuperscript{204}

Ch. 4 includes detailed provisions enumering fundamental rights and freedoms of all persons in Uganda. In theory, the wording does not distinguish between documented (‘legal’) migrants and undocumented migrants, but the Govt. of Uganda in its representation to the UN Office of the High Commissioner for Human Rights (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families) has argued that they only apply to those migrant workers who are in the country legally: ‘All these rights apply to migrant workers resident in Uganda that have fulfilled the immigration requirements that permit them to be resident in the country and engage in employment’.\textsuperscript{205} The provisions are ambiguous enough to be interpreted in either way.

Article 21 (2) outlaws discrimination based on ethnic origin, tribe,
birth, race, colour, sex, social or economic standing, creed or religion, political opinion or disability and any act or omission construed as such is punishable under the law. The Constitution further stipulates in Article 21 (1) that ‘all persons are equal before and under the law in all spheres and have the right, without any distinction, to enjoy equal protection of the law.’ The Constitution also guarantees decent work under the following articles: Articles 25 (1), which outlaws slavery and servitude; Article 25 (2) which outlaws forced labour; Article 29 (1) on the freedom of association including forming and joining a trade union; and Article 34 (4) on protection of children from economic exploitation and hazardous work. According to Article 189 the government retains the responsibility of managing the affairs of immigrants and emigrants (read with Schedule 6). Article 40 recognizes the right of every person to practice their profession and to freely choose their employment without any discrimination, the right to equal pay for work of equal value, and the right to form or join a trade union for the protection and promotion of economic and social interests.

Unlike many other countries, Uganda has consolidated provisions with regard to citizenship and immigration in a single legislation.

A migrant worker and members of his/her family may enter Uganda under Section 53 of the CICA after obtaining a valid entry permit, a certificate of permanent residence or a pass and such a person must be in possession of a passport, certificate of identity, convention travel document or any other valid travel document. Section 53 (4)

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Uganda Citizenship and Immigration Control Act (Cap. 66), 1999 as amended by the Uganda Citizenship and Immigration Control (Amendment) Acts, of 2006 and 2009

This is the single nationally applicable Citizenship and Immigration Control Legislation. It came into effect in 2002. This has to be read with:

(a) Uganda Citizenship and Immigration Control Regulations, 2004; and
(b) The Uganda Citizenship and Immigration Control of Aliens

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specifically provides that a person intending to take on employment under permit Class G (taking up employment) may only enter Uganda after the application for an entry permit has been granted. The different classes of persons who can apply for entry permits to Uganda to engage in remunerated work are indicated in Annex II to the CICA. All persons who are not citizens but have received a permit or pass which is not for a short stay (less than 90 days), are required to apply to the Uganda Citizenship and Immigration Board for an Aliens Card as provided for under Section 57 of the CICA.²⁰⁷

Section 59 (1) of the CICA provides that a person who is not a citizen of Uganda shall not take up employment (of any kind either as a private person or in employment with a public or private business), unless that person is in possession of a valid entry permit, certificate of permanent residence or special pass under the CICA.

A person who is not a citizen of Uganda, who engages in any employment or any profession (i.e. business, informal trading, etc.), whether or not for gain, contrary to Section 59(1) above or who employs any alien, whether or not for gain, whom he or she knows or has reasonable cause to believe is contravening subsection (1), commits an offence and is liable on conviction to a fine or imprisonment not exceeding two years or both. Under the Uganda Citizenship and Immigration Control Regulations, 2004 a migrant worker in Uganda may apply for a dependant’s pass to regularize the stay of a family member in the country (Regulation 4). If a person

²⁰⁷ See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015b for greater detail. See also IOM 2016.
wishes to enter the country for purposes of investigating possibilities of business or settlement he/she may apply for a visitor’s pass. However, a holder of a visitor’s pass is not allowed to take up any employment for gain or otherwise. A person may also be issued with a special pass to enable him/her complete immigration procedures to complete a short assignment of not more than 3 months.  

This Act makes provisions for the registration of all persons in Uganda at any time – and for the creation of a national identification register, and the issuance of national identification cards (in case of migrants – it makes provision for the alien identification number (s. 72) and for the issuance of an alien identification card (s.73).

Essentially, the alien identification number/card have been made pre-requisites for accessing any public service (s. 66), and for accessing services from any institution offering the following services: employment, voter identification, passport issuance, bank account opening, purchase of insurance policies, purchase, transfer and registration of land, pension and social security, consumer credit, tax payment and financial services (See S. 66(2)). Obviously, at least in principle, this makes the task of obtaining of services by any undocumented migrant much more precarious.

The Employment Act imposes a duty on all parties involved in employment matters to seek to promote equality of opportunity with

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| Registration of Persons Act 2015<sup>209</sup> | National identity registration legislation | wishes to enter the country for purposes of investigating possibilities of business or settlement he/she may apply for a visitor’s pass. However, a holder of a visitor’s pass is not allowed to take up any employment for gain or otherwise. A person may also be issued with a special pass to enable him/her complete immigration procedures to complete a short assignment of not more than 3 months.  

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The Employment Act imposes a duty on all parties involved in employment matters to seek to promote equality of opportunity with |
| Employment Act, No. 6, of 2006<sup>210</sup> | National level employment act. Has to be read with: | |

<sup>208</sup> Ibid.  
LAW/POLICY | APPLICABILITY (SECTOR/ADMINISTRATIVE LEVEL) | ANALYSIS
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(a) The Employment Regulations, 2011; and (b) Employment (Sexual Harassment) Regulations, 2012; | the view of eliminating any discrimination in employment (S. 6(3)). Section 6 (2) requires all parties to promote and guarantee equality of opportunity for employment for persons who, as migrant workers or as members of their families, are lawfully within the territory of Uganda. This does not apply to undocumented workers. 

The Employment (Sexual Harassment) Regulations 2012 prohibit sexual harassment and set out procedures for investigation and resolution of claims.

*The Occupation, Safety and Health Act, No. 9 of 2006*: The Act protects all persons who may be affected by activities carried out in a workplace. For example, it protects wellbeing of workers and people in proximity to the workplace. It provides for the duties and responsibilities of parties in ensuring a safe and health working environment. 

*The Workers’ Compensation Act, No. 5 of 2000*: The Act provides the procedure and the requirements of the employers and workers when accidents occur in the course of employment. It establishes Medical Arbitration Board (MAB) which is a referral body for disputed final assessment of incapacities of injured workers.

*The Labour Disputes (Arbitration and Settlement) Act, No. 7 of 2006*: The Act establishes the Industrial Court which is presided over by a High Court Judge. The Court handles labour disputes that have not

Other Labour legislation


212 See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2015b for greater detail.
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<tr>
<td>Prevention of Trafficking in Persons Act, 2009(^2)</td>
<td>National anti-trafficking legislation</td>
<td>The Labour Unions Act, 2006 read with Labour Union (Access of Union Officials to a Workplace) Regulations, 2011: Regulates the functioning of labour unions. In practice, of course, the enforcement of these laws varies in rigor depending on the institution and person enforcing. This makes the trafficking of persons a crime, punishable with imprisonment – s.3 (there are aggravated provisions providing for punishment of those found guilty of trafficking children – s. 4).</td>
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<tr>
<td>Education</td>
<td>Constitution of Uganda, The Education (Pre-Primary, Primary, and Post-Primary) Act 2008, Universities and Other Tertiary Institutions Act 2001</td>
<td>Refugees are allowed freedom of residence, either in rural settlements or in urban centres. The good asylum system allows refugees to stay in urban centres if they do not wish to stay in settlements.(^{216}) It is worth noting that while the provisions for de facto integration are well developed, refugees are excluded from de jure integration i.e. they are precluded from claiming citizenship, etc. Art. 34 of the Constitution states that ‘A child is entitled to basic education which shall be the responsibility of the State and the parents of the child’. There are provisions in the Constitution for affirmative action (Arts. 21, 32). S. 10(3) of the Education (Pre-Primary, Primary, and Post-Primary) Act, states that ‘primary education shall be universal and compulsory for pupils aged 6 (six) years and above which shall last seven years.’ S. 28 of the Universities and Other Tertiary Institutions Act provides for admission of both citizens and non-citizens who are found to be qualified.</td>
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<td>Health</td>
<td>Public Health Act, 2000&lt;sup&gt;219&lt;/sup&gt;, the Constitution of Uganda, the Refugee Act</td>
<td>Provisions of multiple acts are applicable to the health of migrants – or rather, none of them seem to contain express provisions regulating access of migrants to health services. A non-justiciable provision of the Constitution states that one of the objectives of the Constitution is the access of all Ugandans to health services. The Public Health Act, 2000 makes provision for infectious diseases, etc. but does not contain any provisions for healthcare access. The Refugee Act does not include any specific provisions on access to healthcare.</td>
</tr>
<tr>
<td>National Migration Policy</td>
<td>Non-justiciable policy document</td>
<td>This acknowledges that if migration is ‘well managed’ it can contribute to the socio-economic development of the country. It is concerned with the following forms of migrations: labour migration, irregular migration, trafficking in persons, forced displacements, the Ugandan Diaspora, foreign direct investment and the free movement of persons within EAC.</td>
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**Rwanda**

| Constitution of the Republic of Rwanda<sup>220</sup> | National legislation; in force – last amended in 2015. | The Rwandan Constitution was adopted in 2003 and has since been amended multiple times. Chapter IV (Arts. 12-43) contain the various fundamental rights and freedoms which accrue to all persons, though of course some of these may be circumscribed by law. Some of these provisions are applicable to all persons, and some are only applicable to Rwandans. Other provisions are drafted in an ambiguous way. |

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<sup>221</sup> See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2011, for additional analysis.
All persons have the right to life (Art. 12), and enjoy the right to physical and mental inviolability (Art. 14). All persons are entitled to equal protection and treatment of/in law (Art. 15). Art. 19 makes provision for the protection of all children, but does not specify what such protection would consist of. Art. 23-24 state that all persons have the right to privacy and to their liberty. Art. 28 affirms the right of a person to seek asylum in Rwanda. All persons enjoy the right to due process of law and access to justice (Art. 29). All persons have the right to acquire and hold private property (including land) – Arts. 34-35). Arts. 38-39 grant freedom of association and freedom of peaceful assembly.

Articles 30-32 recognize to any person the right to free choice of employment without any discrimination, the equality of salary for equal work, the right to form trade unions for the defence and the promotion of legitimate professional interests. Labour unions of workers and associations of employers are free to have collective or specific agreements governing their working relations. The right of workers to strike is recognized and exercised under conditions defined by the law (Art.33).

It is not clear whether non-Rwandans are entitled to protection from non-discrimination – Art. 16 states that all Rwandans are born and remain equal, and then prohibits discrimination ‘based on, inter alia, ethnic origin, family or ancestry, clan, skin colour or race, sex, region, economic categories, religion or faith, opinion, fortune, cultural differences, language, economic status, physical or mental disability
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<tr>
<td>Organic Law №. 30/2008 relating to Rwandan Nationality225</td>
<td>Law on citizenship – national legislation.</td>
<td>Only Rwandans have an express right to education – Art. 20. This Article also states that ‘Primary education is compulsory and free in public schools’ – in practice, Rwanda seems to have offered 12 years of basic free education to all. 224 Similarly, only Rwandans ‘have’ a right to good health. Art. 25 permits dual citizenship, makes provision for a law on citizenship (see below) and specifies that: ‘All persons of Rwandan origin and their descendants are, upon request, entitled to Rwandan nationality’. The right to free movement across Rwanda is also only guaranteed to Rwandans – Art.26. Rwandan nationality can be acquired by decent, birth, marriage and naturalization.</td>
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<tr>
<td>This needs to be read with PRESIDENTIAL ORDER N° 21/01 OF 27/05/2009</td>
<td>ESTABLISHING THE PROCEDURE FOR THE APPLICATION AND ACQUISITION OF RWANDAN NATIONALITY226</td>
<td>Art. 3 permits dual nationality. Art. 9 provides for children of either unknown or stateless parents (or children who cannot acquire the citizenship of their parents) to be considered as Rwandan. The same applies for infants born to unknown parents.</td>
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222 This seems to be a change from the earlier amendment of the Constitution. See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2011.
224 See UNHCR 2015, p.8.
A person may acquire Rwandan nationality three years after marriage to a Rwandan national (Art. 11). Persons over 18 who have lived in Rwanda for longer than 5 years (and are considered to be economically independent) may apply for citizenship by naturalization (Art. 13-14). Persons acquiring citizenship through ‘manoeuvres, false statement, falsified or erroneous documents, fraud, corruption’ may be deprived of their citizenship (Art 19).

Labour legislation which has been given effect by a number of ministerial orders. Article 12 of the ‘Labour law’ forbids direct or indirect discrimination aiming at denying a worker the right to equal opportunity or to the salary, especially when the discrimination is based upon race, colour, sex, marital status or family responsibilities, religion, faith or political opinions, social or economic conditions, country of origin, disability, previous, current or future pregnancy or any other type of discrimination.

Article 18 stipulates that employment contracts are to be written – this represents a long-standing demand of the ILO, although it leaves provisions of work permits for foreigners to be determined by immigration and emigration laws. The Law aims to protect high risk workers and their families; it prohibits child labour, forced labour and gender-based violence in the framework of employment (arts. 4, 6, 8 of the Labour Law).

Additional relevant (enacting) provisions include those aimed at

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LAW N° 04/2011 OF 21/03/2011 ON IMMIGRATION AND EMIGRATION IN RWANDA

This is the applicable national immigration law for Rwanda. There are a number of enabling legislations and ministerial declarations which have been issues to give effect to this law. Important among these are:

- Ministerial order n°02/01 of 31 May 2011 establishing regulations and procedures implementing immigration and emigration law
- Ministerial order n°03/01 of 31 May 2011 determining the fees charged on travel documents, residence permits, visas and other services delivered by it.

It establishes a Directorate General of Immigration and Emigration (DGIE) as the primary bureaucratic organization for overseeing the Act.

In general, the law provides for two kinds of permits – temporary, or permanent residence permits and three kinds of visas – entry, transit and tourist. The DGIE may refuse either visas or permits to a person on grounds of criminality or if they believe that the person poses a threat to national security and public order in Rwanda (Art. 7). It defines the categories of prohibited immigrants (those accused or convicted of serious criminality, among others), undesirable immigrants (those who do not have funds to support themselves on their visit, persons violating the terms of their initial entry permits, etc.) – Arts. 12-13.

Arts. 15-16 make provision for deportation of foreigners (and their dependents) convicted of crimes or when that person is involved in

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<tr>
<td>Law No. 13ter/2014 of 21/05/2014 relating to Refugees[^234]</td>
<td>the directorate general of immigration and emigration</td>
<td>acts that are detrimental to the national security, public order and Rwandan culture and good morals’. Arts. 18-20 impose duties on (a) employers, (b) heads of educational institutions, and (c) accommodations to ensure that any foreigners working/studying/staying has the authority or right to do so.</td>
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<td>Art. 30 makes provision for border passes which may be used by persons near the border for cross-border trading, etc.</td>
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<td>The Act also makes it an offence to re-enter Rwanda after being deported, while the conditions of deportation are persisting.</td>
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<td>Rwanda follows an encampment policy (Art. 23).[^235] The bureaucratic body intended to oversee the adjudication of asylum applications is the Refugee Status Determination Committee. The definition of Refugee is the expanded one (see S. II of this Note).</td>
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<td>Asylum seekers are required to apply to local authorities immediately upon entering Rwandan territory (Art. 8). Art. 19 allows refugees to obtain Rwandan Nationality in accordance with the immigration law (The Rwandan Nationality Law15 allows for the naturalization of refugees and asylum-seekers married to Rwandan nationals16 (3 years from the date of the marriage) and for all children born in Rwanda to refugees and asylum-seekers after they reach adulthood. However, in practice, it seems that the occurrence of naturalization is</td>
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[^235]: See UNHCR 2015c.
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<tr>
<th>LAW/POLICY</th>
<th>APPLICABILITY (SECTOR/ADMINISTRATIVE LEVEL)</th>
<th>ANALYSIS</th>
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| LAW N°23/2012 OF 15/06/2012 GOVERNING THE ORGANIZATION AND FUNCTIONING OF NURSERY, PRIMARY AND SECONDARY EDUCATION | Basic law organising the education sector, national legislation | Art. 34 of the law states that ‘Primary school education is compulsory and free both in public and Government subsidized schools. Free education refers to lessons freely offered to a student by a teacher as well as basic teaching aids.’  

Rwanda follows a universal health care model, which provides health insurance through a system called Mutuelles de Santé. The system is a community-based health insurance scheme, in which residents of a particular area pay premiums into a local health fund, and can draw from it when in need of medical care.  

This is administered through LAW N° 48/2015 OF 23/11/2015 GOVERNING THE ORGANISATION, FUNCTIONING AND MANAGEMENT OF HEALTH INSURANCE SCHEMES IN RWANDA. Every person residing in Rwanda, technically enjoys the right of access to health care.

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236 UNHCR 2015c, pp. 9-10.  
239 See also Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 2011.
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<tr>
<td>National Migration Policy and Strategies⁴⁰</td>
<td>Non-justiciable national policy</td>
<td>Sets out a policy intended to promote economic growth by promoting skilled migration.</td>
</tr>
</tbody>
</table>

Appendix I: References


UNHCR. 2016a. ‘UNHCR Submission on Swaziland: UPR 25th Session.’
UNHCR. 2016b. ‘UNHCR Submission on Mozambique: UPR 24th Session.’
http://www.refworld.org/docid/5a12ae242.html.