

Migrant Rights in Southern Africa: A Study of Attitudes, Policies and Regional Context of Rights of Migrants

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ABSTRACT Around the globe today, millions of people are on the move - living or trying to live in countries not their own. In some cases, this movement is voluntary. People move across borders for work, education or family reasons. In many more cases, the migration is forced, as people flee civil unrest and war, or search for adequate agricultural land or employment simply for survival.

The focus of this study is on the displacement and the typical response to migrants and other displaced people which has deteriorated from acceptance and assistance to hostility and rejection.

The fundamental human rights of migrants which come under review are too easily violated or ignored. This is most true for those who do not qualify within one of the categories (e.g. citizen, refugee, registered foreign worker, student) that normally secure people legal protection. The violation of their rights contributes to increasing social disintegration and declining respect for the rule of law.

It is argued that there is more need than ever before to promote the development and application of international standards which underline a fundamental fact: Migrant's rights are human rights.

BACKGROUND TO HUMAN RIGHTS OF MIGRANTS

Recognizing the need to explicitly define and uphold the human rights of migrants, the United Nations created the International Convention on the *Protection of the Rights of all Migrant Workers and Members of their Families*. It was approved on 18 December 1990, by the UN General Assembly. (WCC/ICFTU, 1999)

The decision of the UN to draft and adopt this convention was a strong statement of international consensus concerning the need for greater protection of the rights of migrants. This decision may well be implemented through national ratification and legislation - two related instruments for political and awareness building about the convention as well as incorporating standards in national laws and practices.

The importance of this convention may be highlighted by the following six points:

- Migrant workers are viewed as more than labourers or economic entities. They are social entities with families and accordingly have rights, including that of family reunification.
- It reorganizes that migrant workers and members of their families, being non-nationals residing in states of employment or in transit, are unprotected. Their rights are often not addressed by the national legislation of receiving states or by their own states of origin. Therefore, it is the responsibility of the international community, through the UN, to provide measures of protection.
- It provides, for the first time, an international definition of migrant worker, categories of migrant workers. It also establishes international standards of treatment through the elaboration of the particular human rights of migrant workers and members of their families. These standards would serve to uphold basic human rights of other vulnerable migrants as well as migrant workers.
- Fundamental human rights are extended to all migrant workers, both documented and undocumented, with additional rights being recognized for documented migrant workers and members of their families, notably equality of treatment with nationals of states of employment in a number of legal, political, economic, social and cultural areas.
- The International Convention seeks to play a role in preventing and eliminating the exploitation of all migrant workers and members of their families, including end to their illegal or clandestine movements and to irregular or undocumented situations.
- It attempts to establish minimum standards of protection for migrant workers and members

of their families that are universally acknowledged. It serves as a tool with which to encourage those States lacking national standards to bring their legislation in closer harmony with recognized international standards.

The convention, in its central importance, places emphasis on human rights. The central notion of human rights is "the implicit assertion that certain principles are true and valid for all peoples, in all societies, under all conditions of economic, political, ethnic and cultural life. Further, human rights implies that these principles are somehow present in the very fact of our common humanity..." The notion places on individuals, every organ of society, and especially the State, responsibility for respecting and protecting these principles with regard to each and every human being.

This notion recognizes a fundamental relationship between individual rights and society. As the Universal Declaration of Human Rights begins, "...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" (Taran et al., 1998: 6).

Having provided a sketch of the important elements regarding migrant rights and the significance of the International Convention in providing standards of treatment through the elaboration of particular human rights of migrant workers, we now turn our attention to a situational analysis of the Southern African region with special reference to the people's feelings towards foreigners.

Southern African Attitudes Towards Migrants and Migrant Rights

The movement of people across the South African border from Lesotho, Mozambique and Zimbabwe - the three largest sources of migration to South Africa - would appear to be a much more formal and regularized process than previously thought. This means the potential to manage cross-border migration in the future may not be as difficult as one might have anticipated. This is not to suggest that there are no problems on the South African border or that effective cross-border migration is going to be a simple task. It is

essential, however, that South Africa policy makers and the South African public at large be exposed to a more balanced and more informed debate on this extremely important policy topic.

Given the increased media attention to manifestations of anti-migrant feelings since the 1994 election, an extensive 1997 Idasa/Samp survey of South Africans' attitudes about migrants reveals that, when prompted for their views about migrants and government policy toward them, South Africans hold fairly negative opinions about foreigners and favour a very restrictive migration and immigration policy.

In 1994, not one person mentioned migration or immigration as an important issue. This figure increased to 3.4 per cent in 1995 but decreased to 1 per cent in the most recent survey of June-July 1997 (which was done in conjunction with the Southern African Migration Project). Obviously, immigration and migration is not the national obsession it is often made out to be. Yet when asked for their views on official policy toward migrants, one quarter of the South African public want a total prohibition of migration or immigration. Support for a total ban increased by nine percentage points since 1995. A total of 62 per cent prefer some form of managed or regulated policy comprising of 17 per cent wanting migration policy tied to the availability of jobs, and 45 per cent wanting strict limits placed on migrants and immigrants. Only 6 per cent favour a totally liberal policy of letting anyone in who wants to enter.

South Africans are considerably more opposed to migration and immigration than any other African country where opinion has been measured. Less than 5 per cent of people in Zimbabwe, Lesotho, and Southern Mozambique called for a prohibition of migration into their own countries (in the 1997 Samp Three Nations Survey). South Africans are even said to be more opposed to migration than Americans, a country facing relatively more similar situations with regard to regional migration where only 8 per cent supported a total ban in 1995. (Matte, 1998: 2).

Despite the negative attitudes towards foreigners, it cannot be disputed that for decades migrant workers have contributed significantly to, among others, the agricultural and industrial production of South Africa. However, for decades undocumented migrant workers have also been

physically abused, their payments withdrawn and their undocumented status systematically exploited. As yet, the law and law enforcement officials have insufficiently dealt with these instances of human rights and labour rights violations. The abuse needs to be addressed to ensure basic human rights, and the exploitation of migrant workers to be stopped. This exploitation combines with the high unemployment rate to create a ticking xenophobic bomb, that threatens to explode if left unchallenged.

South Africans do not, however, hold an undifferentiated view of foreigners. Many people would be willing to give preferential treatment to different groups of migrants, either in terms of entry or repatriation policy. Some 63 percent would give special preferences to skilled workers, while 50 percent supported favouring those with mining contracts, and 34 percent supported preferences for refugees. In terms of place of origin, 31 percent favour preferences for Europeans or North Americans, 27 percent for Southern Africans, and 22 percent for other Africans (Mattes, 1998: 2).

Another hot issue is whether migrants should be granted a range of differing rights. Majorities or pluralities of South Africans oppose giving them the same access to a house as a South African (54 per cent), the right to vote (53 per cent), or the right to citizenship (44 per cent). The situation was much more mixed with regard to granting migrant children access to equal education (39 per cent opposed, but 37 per cent supported) and equal access to medical service (where 39 per cent opposed and 38 per cent supported). (Mattes, 1998).

So far, the attempt has been made to situate and conceptualize the problems and perceptions of South and Southern Africans towards migrants. In the next section, focus is on policy measures aimed at the effective and sustainable treatment of migrant workers. It will be demonstrated, that these measures have not been without controversy among the regional stakeholders, especially within the South African state - as an attractive destination for the region's migrants. Two such measures, to which attention is now being focused, comprise the Green Paper on International Migration and SADC Draft Protocol on the free movement of persons.

The Green Paper on International Migration also recommends that SADC citizens should have free access to South Africa, but in very specific and well-regulated areas. It further recommends that access to South Africa of SADC citizens should be temporary, where there is clear mutual benefit, and does not violate South African labour laws and employment standards. There are key areas to which this should apply: labour quotas, students, and cross-border visits. Only the former will be examined in brief.

Labour Quotas

The mines of South Africa enjoy a long-standing and privileged access to unskilled and semi-skilled labour from the rest of the SADC region (Milazi, 1995). The number of people working on the gold and coal mines is currently around 200 000 (or 50% of the mine workforce). The majority of miners are from Lesotho, Mozambique, Swaziland, and Botswana.

Bilateral agreements govern the mines' access to non-South African labour. These ensure that migrants come without dependents, that they never acquire residence rights, that they return home each year to renew their contracts, and that a significant proportion of their pay is compulsorily deferred. The Compulsory Deferred Pay (CDP) system, whereby a portion of migrant wages are deferred home (a forced system of savings) is exerted on workers from Mozambique and Lesotho. The mining industry, through The Employment Bureau of Africa (TEBA), also has efficient systems for voluntary deferral of wages. These are extensively used by workers who remit more funds voluntarily than are transferred to the CDP system.

Such movement of wages back to the sending countries provides for a measure of economic stability for their economies. However, there seems to be growing concern for the continued existence of the special inter-governmental labour agreements, the CDP system and privileged access to non-South African labour outside immigration legislation (by farmers in Mpumalanga and the Northern Provinces). The latter involves bilaterals by arrangement with the Department of Home Affairs regarding farmers employing undocumented workers that are issued with exemptions under the Aliens Control

Amendment Act.

The Green Paper

The Green Paper on International Migration (1997) provides a fundamental shift in the thinking which frames immigration policy in South Africa as a security issue. It advocates a right-based enforcement of a new policy, and argues that "immigration policy needs to be refocused as an issue of growth and development".

The Green Paper looks beyond domestic concerns, identifying the challenge of developing a policy which enhance "the country's integration into and competitiveness within the global economy" and furthers "the process of regional integration and development within SADC". Paper, which regulates migration matters relative to the South African state interests, there is the SADC Draft Protocol, perhaps the most controversial innovation region's migration control.

SADC Draft Protocol on the Free Movement of Persons

South Africa, as a member of SADC, has also participated in the successive drafting of the Draft Protocol on the Free Movement of Persons in SADC. The first draft was released in March 1996, with subsequent drafts being released in January 1997 and May 1998.

The preamble to the protocol affirms SADC's "duty to promote the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the region, as well as the need to involve the people of the region centrally in the process of development and integration," and recognizes "that full popular participation in the process of building the region into a community is only possible where the citizens of the community enjoy freedom of movement of persons, namely visa-free entry, residence and establishment in the territories of member states".

The first release of the draft protocol caused considerable controversy within SADC, and was temporarily shelved, largely as a result of widespread criticism of the policy within South African decision-making circles. The subsequent draft protocol - which insignificantly dropped the concept of free movement of people and was reformulated as the: Draft Protocol on the Facilitat-

tion of Movement of Persons in SADC - is extensively characterized by similarities with South Africa's Aliens Control Act. Notwithstanding, it too was shelved as a result of perceptions of migrants as a threat to South Africa's law and order, and the social security of its citizens. The most recent version of the protocol calls for member states to review and amend their existing legislation for it to accord with the provisions of the protocol and the compliance of member states.

In the light of its stated commitment to regional economic integration, the document is strangely silent on the issue of labour migration, except for stating that the provisions of the protocol shall not prohibit any member of state from issuing employment permits.

Thus far, attention has been focused on International measures which have a direct impact on migration, largely undocumented and irregular, within the framework of national and regional protocols. In the next section, brief emphasis is on the likely consequences of a SADC - based intervention policy, this is followed by a detailed case study of the South African intervention in the interest of migrant rights.

Towards a SADC Migration Policy

There is a school of thought that SADC could develop a regional labour migration regime, less informed by a security paradigm, more by principles of the Green Paper, namely human rights and economic development. Such a shift is said to have a number of consequences.

It would displace crime from the ambit of migration policy and enforcement agencies. This is not to suggest that crime is not a crucial issue which SADC must address, but that it must be confronted directly, and not through migration policy.

It would confront the circular argument against legalizing the status of foreign workers - that because they are illegal, they are undercutting South Africans, therefore they must remain illegal. Regularizing the status of migrant labour might undermine the sole competitive advantage of some illegal workers by formally excluding those prepared to work for sub-minimum wages under exploitative conditions.

If a migrant labour regime were instituted within SADC, the nature and conditions of this

regime would have to be debated and negotiated with all affected stakeholders. While debate and regional formal protocols are being pursued, South Africa as a key host country for migrant workers is grappling with problems of migrant rights.

It is to these problems that we now turn our attention. In the process, it will be pointed out, that the host country constitutes a case study for the region in so far as tackling issues of economic development and transnational human rights is concerned. (Milazi, 1995; Milazi, 1999)

South Africa and Migrant Rights

After 1994, political changes had an impact on in-migration flows: These changes fueled the attraction of South Africa as a destination for immigrants worldwide, including Western Asians and Eastern Europeans as well as Black Africans. For the first time black political refugees from neighbouring countries entered a post-apartheid South Africa.

What sort of international migration scenario confronts the new South Africa? For one thing, the new scenario is characterized by weekend control of immigration as well as:

- increased out-migration of skilled workers;
- massive in-migration of unskilled foreigners;
- government desire to recognize the human rights of immigrants;
- deterioration of data quality on international immigration into South Africa.

South Africa's migration policy seeks to establish a balance - between national interests and human rights of immigrants. Increasingly, however, political and economic implications of large scale international immigration are often disturbing that balance. Though this may be debatable, illegal immigrants are assumed to exacerbate unemployment and to contribute to crime, especially smuggling of drugs and firearms. These allegations are, however, a subject of dispute within South African Society. (Teitzes, 1996; Heldnawarg, 1996) But, as we shall point out, the illegal immigration has a negative impact on the labour market.

It is, perhaps, from the economic viewpoint that the balance of the pros and cons must be considered. Thus, employers benefit most from the disarray illegal immigrants introduce into

South Africa's labour market, which has the outcome of lowering labour costs. South African labour unions see their calls for a living wage, safety at the workplace, and other benefits that would improve the quality of life for workers evaporate, as illegal immigrants simply accept the offered wages.

Similarly, in the informal sector, immigrants frequently undercut the prices of local traders to the benefit of consumers. This generates friction within the sector.

Regarding government social service delivery, it is reasonable to assume that part of the shortfalls which government departments face are attributable to immigrant service users, who are not taken into account in planning, particularly in the large cities.

In the section below, we examine how South African blacks are contemptuous of darker Africans from other countries whom they give the derogatory tag, *Makwerekwere*, foreigners. It will be clear that those who have been oppressed tend to look for others to oppress. Ironically, these are 'illegals' with a darker shade of skin than the average South African, illegals who themselves fought apartheid and housed South Africans during their struggle. With the world on the verge of globalization, South Africans must realize they cannot afford to be xenophobic to fellow Africans, subjecting them to humiliation just because they are of a darker shade and from another country.

Xenophobia in South Africa

This is the reality of the New South Africa for "foreigners, strangers, those with darker skins or higher foreheads". They include such cultural groupings as Nigerians, Ethiopians, Zimbabweans, and Mozambicans. It is the arrest and detention of suspected illegal immigrants among these groupings that has turned up the dark underbelly of the South African psyche. Not only are foreigners targeted, but a disturbingly large number of local people get picked up, harassed, intimidated, and thrown into transit camps for illegals. These are South Africans from minority groupings, like the Venda, Pedi, Shangaan from the North of the country.

It is perhaps for this reason, that South Africans are known as the "bully boys" of Africa and

its neighbours said to be "sick and tired" of being labelled as "amakwerekwere" (foreigners). While there is the need to control the influx of outsiders into South Africa (to preserve its own economy and standard of living, for example), it is worrying that the country's xenophobic tendencies as a nation will torpedo the vision of an African Renaissance held by people such as president Thabo Mbeki.

Police and Department of Home Affairs officials are not only detaining aliens illegally but also seem to be targeting and discriminating against specific South African tribes. In terms of the latter, official statistics show that one in nine people picked up as illegals are later released (Saturday Star, 20 March 1999: 1). Because of this factor, the Commission on Human Rights is of the view that it appears the immigration system "does not operate as it should" and that there is a "grossly unacceptable rate of detention". Indeed, apprehension has been expressed that there are South Africans who are forced to prove their citizenship "by describing certain parts of their body in Zulu and Xhosa". The general impression upon detention is one of being subjected to ill-treatment by officials, inadequate nutrition and medical care, degrading treatment and intimidation.

The implications of such a scenario are, needless to say, serious. It appears as if Shangaans, the Northern Province community, people with a darker skin and those with no South African accent are citizens most likely to be accused and/or detained for being in the country illegally. Put differently, there is a perception that darker people or people without the right accent are not from South Africa. Implicit also is the revelation that, by and large, there exists no reasonable grounds for an apprehending officer to suspect persons as non-national. Rather, it has been found that extortion and bribery are extremely widespread among apprehending officers. In sum, black people with dark skin and those who do not know certain words in Zulu or Xhosa or spoke in a non-South African accent are at risk. Hence, growing hatred and ignorance about the rights and realities of refugees and migrants.

Official Reaction to Xenophobia in South Africa

Much of the discussion around this phenom-

enon are couched in "alarmist" terms as murders of foreign residents in South Africa, violence against foreigners, discrimination and other forms of hostility against illegal immigrants take their toll. Whilst many of the incidents against foreigners are criminal, too many pass without this alarming trend and conscious of the damage this is causing to the country's international reputation, friendly relations with neighbouring states, treaty obligations, and to the constitutional democracy, South Africa's Human Rights Commission along with other stakeholders have sought to focus public awareness on migration and refugee policy and practice, the presence of foreigners in the country, and the rights they are entitled to under the constitution.

Two important documents have been drawn up as a response to the rising tide of xenophobia in South Africa. The one document entitled the "Braamfontein Document" (1998), urges individuals and sectors of South African society to acknowledge their responsibility in combatting xenophobia and to push forward the long-term process of its eradication. The second document, called the "Roll Back Xenophobia 99" National Action Plan (1998), outlines that there is more to xenophobia than killings and attacks in the streets of South Africa. Extortion and abuse at the hands of some sections of public and civil servants, and discrimination in areas of education, health care, and *labour markets* are but examples of institutions and segments of society where xenophobia manifests itself.

The country's present plan of action serves as a point of departure and highlights six focal issues that need to be addressed in 1999 and beyond. These issues are:

- the violence against foreign hawkers;
- the violations of the rights of migrant workers;
- the plight and rights of refugees and asylum seekers;
- the conduct of police and civil servants in dealing with refugees, asylum seekers, and migrants;
- the media coverage on refugees, asylum seekers and migrants;
- the role of education in combatting xenophobia.

Two of these issues - foreign hawkers and

migrants - are now discussed below both in terms of their implications for migration as well as measures to resolve negative consequences for human rights.

Foreign Hawkers

In fighting xenophobia, sensitivity is called for among citizens and foreigners alike towards South Africans whose entire livelihood depends on informal trading. However, the plan of action advocates open competition with non-South Africans who often possess better entrepreneurial skills and capitalized businesses, and concludes that supporting South Africans to compete in the informal sector is a possible way of rolling back xenophobia in the informal sector of the economy but also of improving their standing in the labour market.

To this end city councils are called upon to design strategies to bring the hostile campaigns against foreign traders to an end; national and provincial governments to recognize the particularity of xenophobic motivated violence and to include it in national and provincial programmes against crime, police to intensify efforts to stop violence against foreign traders, governments at all levels to consider the possibilities of regulating trade within the informal sector, trading associations to prevent fostering hostility and making non-South Africans scapegoats for their current situation.

Migrant Workers

Migrant workers, both documented and undocumented, have contributed significantly to, among others, the agricultural and industrial production of South Africa. It has already been pointed out however, that it is the undocumented migrant workers - by an large - who have been physically abused, their payments withdrawn and their undocumented status systematically exploited. The law and law enforcement officials have insufficiently, dealt with these instances of human rights and labour rights violations. The labour market has, as a result, been ridden with hostile sentiments with migrant workers increasingly seen as occupying jobs that should be occupied by the local populace.

Against this background, and with a view to fostering better understanding (and enhancing)

contribution of migrant labour to South African society, the departments of Safety and Security, Labour and Home Affairs have been encouraged to bring the malpractice in the agricultural sector to an end, employers associations to deter employers from violating basic human rights, including labour rights of all workers, trade unions and NGOs to sensitize shop stewards to the rights of refugees, asylum seekers and migrants, and create team-building exercises to restore good relations between local and foreign workers and perhaps, more importantly, to design information campaigns about labour rights and the South African labour markets targeted at refugees, asylum seekers, and migrant communities.

While these measures were being threshed out, a group, calling themselves the Unemployed People of South Africa (UPSA), accused the Human Rights Commission (HRC) of being more concerned about the rights of illegal immigrants than with the rights of the unemployed citizens. Specifically, they accuse the HRC of not protecting the basic human rights of unemployed people to the extent that illegal immigrants are by law violating the law of the land by being in South Africa illegally (City Press, 2 May 1999: 2).

So far, the preceding section has dealt, *inter alia*, with issues of inequalities of treatment with respect to employment practices between migrants and nationals, xenophobic discrimination against migrants in the labour market and in society, all of which are pointers to the need for migration policies to take cognisance of economic and social needs of both sending and receiving countries, thereby placing international migration within the broader context of socio-economic development.

Unless there are conscious measures in place, the typically negative associations and sweeping generalisations about the migrants mean that the public is likely to be unaware of the useful skills and qualifications possessed by migrants. A massive public education programme has to be implemented in order to foster tolerance and better understanding of the reasons for the presence of migrants, and to creatively use the skills which they bring to South Africa.

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