

# The Nexus between Immigration in Southern Africa and International Conventions, Regional Protocols and Domestic Legislations for Management of Migration

Prosper Ng'andu

University of Zambia Great East Road Campus  
PO Box 32379 Lusaka-Zambia

**Abstract:-** The paper investigates the nexus between the migration in Southern Africa and the international conventions, regional protocols and domestic legal frameworks that are developed to regulate the movements and stay of migrants in awake of the penetrative globalization that is dismantling traditional boundaries and create global village. The paper is succinct of the designed Policy Frameworks and Instruments to manage migration. Therefore, it sketch out introduction, instruments at international, regional in reference to SADC and ECOWAS, thereafter, Zambian domestic legislature that regulate the entry and stay of migrants. This journal article evolves from one of the objectives contained in a three (3) years Doctorate of Philosophy case study on the challenges in combating illegal immigration among Southern Africa Development Community (SADC) member states. The primary data collected was triangulated with secondary data collected from the text book, journals, ad-hoc reports, and internet. The data was thematically analyzed. The paper established that there is connection between migration and the international convention, regional protocols, and domestic instruments developed to regulate the movements and stay of migrants. However, illegal immigration continues to be a challenge, even if such instruments are enshrined. It is recommended that a more architecture of sophisticated and holistic approach is needed to regulate migration.

**Keywords:-** Southern Africa, Migration, Illegal Immigration, Globalization, International Conventions, Protocols.

## I. INTRODUCTION

Immigration is a process of movement from the native land to a foreign state to establish permanent residence in the target country due to 'push' or 'pull' factors. The 'push' factors included economic distress, religion violence, war, or political persecution, whereas, the 'pull' factors could be employment because of better wages, business opportunity, buoyant economy (Twala, 2012). Mainly, the 'push' factors are recipe for involuntary migration while 'pull' factors are drivers for voluntary migration. In Africa, involuntary immigration is mostly caused by political turmoil, natural disaster or socio-economic instability in their native land.

Consequently, illegal immigration has assumed preponderance among the pervasive penetrative transnational border crimes in Southern Africa and world over following the collapse of traditional boundaries.

In the recent past, however, mobility of the population has become a serious matter that is discussed at various forums among politicians, policy makers, and senior government officials in the SADC region and globally. The region records high increase prevalence of illegal migration whereby, certain people deliberately disobey immigration laws or dodge border control posts. Furthermore, the phenomenon of migration is contributing to the spreading of HIV/AIDs and other communicable diseases among migrant communities and the skilled Africans were living their countries owing to emergence of the brain drain. It is worrisome that the aftermath of several conflicts, civil strife at regional and national levels has produced high numbers of refugees and other displaced persons. Albeit there are international conventions instruments, regional protocols and domestic legal frameworks that are developed to regulate the movement and stay of migrants, hence the investigations to established link or connections of these frameworks to the phenomenon of migration.

## II. LINKS BETWEEN MIGRATION AND INTERNATIONAL CONVENTIONS AND PROTOCOLS INSTRUMENTS

Internationally, over 200 million people are on the move from their native land to other countries in the world symbolizing 3 percent of the global population. It is estimated that 20 to 30 million of this 200 million are illegal migrants worldwide calculated to be at 10 to 15 percent of the world immigrants (WorldBank, 2011. P97). To regulate the movements and stay of migrants, at international level, Conventions and Protocols through United Nation (UN) General Assembly, European Union, African Union, and International Labor Organizations (ILO) have been established and adopted.

The regions like Southern Africa Development Community (SADC), Economic Community of West African States (ECOWAS) and individual states have also formulated instruments to govern the phenomenon by

providing protection of human rights for migrants and maintain laws and security of the state party. The establishment of conventions, protocols, regional and domestic frameworks is driver to contextualize the flow of migration.

#### A. *International Instruments*

##### ➤ *The 1951 Convention Relating to the Status of Refugees and it's The 1967 Protocol Relating to Status of Refugees*

In July 1951, it became imperative in the aftermath of World War II that refugees particularly those of European origin ought to be regulated, controlled and protected. The Convention was crafted under the UN outline the limitation of application with the deadline focused particularly on persons that became refugees due to effect of happenings sooner than 1<sup>st</sup> January, 1951 (Ogata,2015). However, while UN Conference was still in session, it was realize that the Convention was of universal in application and would cause complication if it remained by targeting particular persons, hence amendments were done and addendum Final Act, Recommended 'E' was annexed. The Article 2 of 1951 Convention mandates all refugees to abide by the laws and regulations which enshrined in the particular country they are found and ensure that public order is maintained. The Convention spells out who is the refugee, what treatment should be accorded to them by the state where such refugee are found and rights of individual seeking asylum and responsibilities of a particular state deciding to grant asylum.

In 1967, a protocol on the status of refugees was crafted and adopted with 146 countries that party to the protocol. The two thus; 1951 Convention and 1967 Protocol remain the comprehensive instruments aimed at safeguarding the fundamental rights of refugees and facilitate their stay in the country where they are accorded asylum. The successes of the two instruments depend on the effective implantation of the state party. There, however, a challenge of legal impediment to incorporate the two, Convention and Protocol into national law owing to lack of specific legislature (UNHCR, 1989).

##### ➤ *The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*

Later, in 1990 there was a realization of the value of migration and the effects it posed to international community in a number of states. In that connection, the UN General Assembly on 18 December, 1990 adopted an international Convention on the Protection of the Rights of All migrant workers and members of their families. This was in the backdrop of mistreatment of migrant workers who are engaged in remunerated activities in foreign countries. The nexus of migration with international instruments is explicit in Article 5 of the Convention (a) 'migrants and their families are considered documents or regular if they are authorized to enter, to stay and engage in remunerated activity in the state of employment pursuant to the law of that state and to international agreement to which the state is a party; (b) are considered as non-document of

in an irregular situation if they do not comply with the conditions provided. Migrant workers and their families are expected to follow the laws of the country they enter and stay while the state party has a responsibility to ensure that their rights are protected'.

Article 8. elaborates rights of freedom of migrant workers and their families to leave any state whenever they opted including their native land without any restriction except those provided by law aimed at protecting national security, morals, public order, the rights and freedom of others. The successful implementation of this Convention, can be a document on a shelf, unless the state parties apply vigour to it and migrants are develop a stimuli to acquire necessary valid migrations travel and employment documents to avoid being in confrontation with the law of the land. The state party also labor laws ought not to segregate any one basing on race, creed, or nationality be flexible to accommodate all as long as the law permits in the labor sector and uphold the human rights.

##### ➤ *The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. One of the Selected Articles of the Protocol States (UN Human Rights, 2000): Article 9 Prevention of Trafficking in Persons*

The Conventions and Protocols on the status of refugees and protection of migrant workers The protocol is a supplementary to UN Convention against the transitional organization crime and mandates all states who are party to the Convention to develop comprehensive policies and measures that would ensure that trafficking in human is combated by establishing meaningful policies and measures that shall facilitate the State party's need to conduct research on the subject, media campaigns, social-economic initiative with a view to negate and combat trafficking in person.

The state policies should also ensure that Article 11, total control and security and the borders to prevent the vice while respecting the free movement of people. The state party need to formulate domestic legislature and other relevant policies to monitor the transport used by commercial carriers are not used a model in committing offences of trafficking in human, if so sanction must be melted.

Similarly, Southern Africa member states monitor and regulate the movement of persons in pursuit with the International Labor Organization (ILO) legal instruments which developed to ensure that the rights of labor migrants are respected and protected. The ILO Convention of 1949 relating to labor migration for employment mandate all state parties to establish viable conditions of service for any migrant worker intended to be recruited regardless of nationality. Furthermore, the migrant worker should not be denied access to justice and social security. No 143 supplementary of 2011 Convention provides rights of Decent Work for Domestic Workers (UN DESA/PDIM Report, 2013).

### B. Africa Union Protocols

The earliest continent to develop a legal regime on migration is Africa. Abebe (2017) points out that in wake of the challenges confronted by the great numbers of African with refugees who were running away from conflicts ensued by anti-colonial struggles, the African Union (AU) formerly Organization of African Unity (OAU)), propagated a regional convention on refugees with a view to address the phenomenon. In 1969 OAU established first regional refugee convention in the world and the only relevant binding instrument in the developing world called Convention Governing the Specific Aspects of Refugee Problems in Africa.

To effectively tackle migration in 1991, Treaty of Africa Economic Community was developed with three fold objectives. Firstly, it gave credence to the Regional Economic Community (REC); secondly, establishment of RECs in regions which lacked; and thirdly, systematize policies for the setting up of EAC. The Abuja Treaty is relevant and significant legal framework in relation to migration in Africa as it championed the development through the free movement of person and capital and attained regional integration (Abebe, 2017).

In 2006 Africa felt the wave of globalization and the atrophy social-economic, decay political, dwindled environmental conditions, therefore, AU had to strategies on the migration and adopted African Common Position on Migration and Development as primary framework together with Migration Policy Framework.

Indeed the Migration Policy Framework was more critical and comprehensive covering nine key topical migration areas thus; illegal migration, labor migration, forced displacement, internal migration, partnership, border management, migration data, inter-State cooperation, as well as migration and development. The AU to regulate forced migration and voluntary migration in Africa has adopted a number of policy instruments and legal frameworks focusing on economically integration as per Abuja Treaty. Achiume & Landau (2015) argue that policy document mandating AU member states lacks legal binding among members even though member states are mandated to foster the international Law. Besides, the frame has weakness in terms of conceptual, political facets and institution fundamental.

There is no institutional mechanism in place by neither the African Common Position nor the Migration Policy Framework to monitor or guide the compliance of the content by AU member states. As such, member states cannot be held accountable within these frameworks, and even those states committed to implementing the frameworks must do so without much-needed guidance and support at the level of the AU. As a result, an important next step is for the AU to move towards establishing an institutional mechanism that would provide the necessary guidance and accountability measures necessary to achieve the vision it lays out in its existing policies (Achiume & Landau, 2015, p. 3).

Convention ISS (May, 2015) states that 45 out of 54 AU member states ratified the Refugee Convention which is one of the major instrument and framework developed to manage the problems of refugees in Africa. The AU has enacted and adopted numerous legal frameworks and instruments that were being used to govern migration inter alia; the 2006 Declaration of Ouagadougou on Refugees, Returnees and Displaced Persons of 2006. The International Conference on the Great Lakes Region's Protocol on the Protection and Assistance to Internally Displaced Persons, the 2006 African Union Joint Africa– European Union Declaration on Migration and Development, and the Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children (Convention ISS, 2015).

### III. RELATIONSHIP BETWEEN REGIONAL LEGAL INSTRUMENT AND MIGRATION

#### A. ECOWAS 1979 Protocol: Free Movement of Persons and Right of Residence and Establishment

ECOWAS regulate the movements of foreign nationals in the region under the protocol adopted in 1979 on the Free Movement of Persons and the Right of Residence and Establishment (ECOWAS Commission, 2008). The Article 59 mandates the member state to permit persons in the community the right to entry, residence and establishment and adhere to other Conventions and Protocols on the regulations of migration under UN, ILO and AU like UN General Assembly Resolution No 60/277, the Tripoli Declaration of 2006 and 1969 OAU Convention on the Status of Refugees in Africa.

#### B. SADC Regional Migration Instrument

In an effort to eliminate cross border control among citizens in SADC member state and provide visa free, in 1995 SADC drafted the first protocol on the free movement of people. However, the protocol heavily receive critique among member states particularly Botswana, Namibia and South Africa fearing that they are most desirable destinations in Southern Africa due to their attractive gross domestic product (GDP). Following such skepticism the member state made revision to the protocols and suggested for a gradual implementation of the protocol to include right to reside in any member state and right to employment. Meanwhile, the protocol faces impediments for successful implementation ranging from delay harmonization of documents and policies, certain member states take too long for the passport to issue. It is a disputable fact that the major instrument relating to migration in SADC is the Protocol on Facilitation of Free Movements of Persons drafted in 2005, though other scholars put into account the South Africa's bilateral Agreement with neighboring countries as also the second instrument in SADC on migration management.

Labor Migration Policy Draft (2013) pointed out that migration labor in SADC suffer regional policy regulation. The member states regulate migration labor through domestic crafted national legal framework and most of the have not ratified the international labor migration

conventions (Bamu, 2014). To ascertain the nexus of SADC regional instrument with migration, it is significant to establish the congruence the instruments have with

international instrument of migration among them C097, C118, C143, C157 and ICMW.

Country	Migration Convention				
	C097	C118	C143	C157	ICMW
Angola	-	-	-	-	-
Botswana	-	-	-	-	-
DR Congo	-	1/Nov/1967	-	-	-
Lesotho	-	-	-	-	-
Madagascar	14/Jun/2001	22/Jun/1964	-	-	-
Malawi	-	-	-	-	-
Mauritius	-	-	-	-	19/Aug/2013
Namibia	-	-	-	-	-
Seychelles	-	-	-	-	15/Dec/1994
South Africa	-	-	-	-	-
Swaziland	-	-	-	-	-
Tanzania	22/Jun/1964	-	-	-	-
Zambia	02/Dec/1964	-	-	-	-
Zimbabwe	-	-	-	-	-

Table 1:- SADC States' Ratification of International Migration Convention

Source: Bamu, 2014

From the table by Bamu (2014) shows that SADC member states were not willing to ratified international migration conventions particularly countries which are major destinations like Botswana, Namibia and South Africa. The Convention 97 on the migration employment only three (3) states ratified, the Convention 118 on the protection of the rights of All Migrant workers and their families on two (2) states ratified. This is an indication that SADC view these instruments of migration as a threat to security of their nations. It should be appreciated that a well regulated migration with the envisaged of policy and law with sophisticated approach would contributed to poverty alleviation, economic growth, employment and development.

Muneku (2016) postulate that SADC was in dilemma to regulate labor migration because of lack of policy framework. The rights by a foreign national to reside and be established in another Country which is also SADC Member State is remaining determined by the laws of individual states. However, the laws of most countries remain highly restrictive.

SADC member States regulate and monitor illegal/irregular immigrants using the existing domestic frameworks and policies. Since a very large part of illegal immigration involves surface crossing of international borders, it has been recommended that member states of SADC adopt a cooperative approach towards controlling illegal border crossing. In this respect, a Draft Protocol on the Facilitation of Movement of Persons in the Southern African Development Community was drafted in 2005. Currently, it provides a regional legal framework on migration in the SADC (SADC Labor Migration Policy, 2013) though the influx of illegal immigrants is still escalating.

The SADC regional framework on the migration lacks harmonization that can grant the retention of national sovereignty by member states over the governance of their immigration policies SADC Draft (2013). The SADC members are faced with illegal immigrants and the current domestic legislation and policies are based on the Southern Africa complex history of migration. Meanwhile, the question still rise as to what can be done to combat such



phenomenon, because the impact of the illegal immigrant will continue.

In the absence of concrete regional framework, SADC individual member states have designed policies to combat the influx of illegal immigrants (Migration Policy Brief No11 p. 2) by either removing or deporting those found wanting though the scourge has been on increase. Muneku (2016) points out that the futility of this approach is illustrated by the fact that despite the massive application of resources, these countries have failed to combat illegal immigrants.

#### IV. THE NEXUS BETWEEN MIGRATION AND DOMESTIC LEGISLATION

##### A. *Zambia Immigration and Deportation Act 18 of 2010*

Zambia is one of the states which are signatories to a number of UN, AU, ILO Conventions and protocols inter alia; Conventions on Status of Refugees; Rights of Migrant Workers and their Families; Transnational Organized Crime; and Against Trafficking in Persons.

The country has also domestic legislature to regulate and monitor migration and the Department of Immigration and Labor Commissioner. The Immigrations and Deportation Act 18 of 2010 is a supreme framework that governs migration in whereas Chapter 268 the Employment Act of the Laws of Zambia superintends on migration labor. The volume of migration that stem in the neighboring of Zambia like in the Eastern, Muchinga, Northern and Copperbelt provinces are labor related in farms, bricklaying, shop keeping, maid. The two (2) instrument need to operate in tandem to avoid the Department of Immigration being at cross roads with Labor Committee on the regulating of migration in country. For the domestic instrument to yield desired results on the connectivity with the migration a robust approach is inevitable.

#### V. CONCLUSION

To sum up, immigration is a complex phenomenon that needs concerted efforts and holistic measures to handle. The international Convention instruments, protocols, regional and domestic frameworks are pivotal in regulating and management of migration. Migrants are in categories thus, refuges, economic migrants, asylum seekers, illegal immigrants migrant workers. Without well crafted instruments, the connection between the two would be derailed and compromise the management of the phenomenon. In South Africa there is constant xenophobia due to heavy or high influx of illegal immigrants who are hired at low wages. A range of international, Regional, Sub-regional, domestic legal instruments and guideline have been framed to regulate the erupted movements and stay of people across the frontier migrants. These include those formulated under the auspices of the United Nations (UN), African Union (AU) and International Labor Organization (ILO), Conventions, SADC Policy and respective states domestic migration legal frameworks. The

Paper established there are a correlation between migration and the international, regional and domestic instruments developed to regulate and manage migration even though, illegal immigration has continued escalating globally inclusive Southern Africa despite most countries in SADC are hesitant to ratify international Conventions.

#### REFERENCES

- [1]. Abebe, T.T. (2017). *Migration Policy Framework in Africa*. As Migration within and from Africa increases policies managing the movement of people become critical. Institute of Security Studies. Retrieved from <https://reliefweb.int/report/world/migrant-policy-framework-africa> Reports2
- [2]. Bamu, P. (2014). An analysis of SADC Migration Instruments in light of ILO & UN Principles on Labor Migration
- [3]. ECOWAS Commission (2008) 33<sup>rd</sup> Ordinary Session of the Head of State and Government. ECOWAS Commission Approach on Migration
- [4]. SADC (2013) Draft Protocol on the facilitation of movement of persons.
- [5]. Twala, S.D. (2012). Impact and Management of illegal immigration into the Vaal Triangle (1994-2008)
- [6]. UNHCR the UN Refugee Agency (1989) implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.