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THE PARADOX OF MIGRATION AND THE INTERESTS OF THE ATOMISTIC NATION-STATES: THE SOUTHERN AFRICAN PERSPECTIVE

PJ Ngandwe*

1 Introduction

The subject of migration falls under the ambit of regional integration and within the peace and security sphere of international law. The peace and security mandate departs from the position that it is in cultivating the spirit of good neighbourliness that peaceful neighbourhoods can be built. Subsequently, the world will as a corollary be free of a myriad security concerns.

Within the African context in general and Southern Africa in particular, this happens against the backdrop of the constraints of limited and meagre resources. At the same time states and governments have a duty and vested interest in ensuring and facilitating not only the free movement of goods and services but the freer movement of people as well, especially in this era of the advent of regional integration and globalisation. These duties emanate from the regional legal framework *inter alia* as constituted by the *Constitutive Act of the African Union*,¹ the *African Charter on Human and People's Rights*,² and the *Treaty of the Southern African Development Community*.³

The *African Charter on Human and People's Rights* in this regard provides that the member states of the Organisation of African Unity⁴ parties to the Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall

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¹ The Act was adopted in Lome, Togo, 11 July 2000 and entered into force on 26 May 2001.

² The Charter was adopted on the 27th of June 1981 and entered into force on 21 October 1986.

³ *Treaty of the Southern African Development Community* (1993).

⁴ As it was then known. It is now currently known as the African Union, after the adoption of the New *Constitutive Act of the African Union* adopted in Lome, Togo, 11 July 2000, which entered into force on 26 May 2001.

undertake to adopt legislative or other measures to give effect to them.⁵ It further provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the Charter without distinction of any kind, such as race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune or birth.⁶

Empirical examples will be utilised to demonstrate the practical issues attendant on migration, especially the methods of mobility and the processes and practices *vis-a-vis* immigration at ports of entry within the member states. This will include addressing the sensitive issues relating to the treatment of migrants such as refugees, asylum seekers and illegal immigrants. Abuses and the ill-treatment of migrants by government officials and xenophobic attacks by the ordinary nationals of host states is another contentious reality that the research will cover. As said earlier, the gravamen of the paper is that the bottle necks to migration result from the failure of the nation-states to integrate. Whereas migration should be pertinent to the objectives of regional integration, the individualistic and nationalistic interests of the member states defeat the collective interest of the integration of the region.

2 The state's duties and responsibilities towards its citizens

The modern state has more sovereign responsibilities towards its citizens than its medieval version had. Many of these responsibilities constitute what are called the interests of the atomistic-nation state. These are nationalistic interests that tend to exalt the interests of the individual state above common and collective regional and global interests.⁷ They come about partly as a corollary of the legitimate expectations and demands that the citizenry places at the door of their national governments. They are also a result of the self-serving interests of states to maintain and retain control over their nationals and those within its territory.

⁵ Article 1 *African Charter on Human and Peoples Rights* (1981).

⁶ Article 2 *African Charter on Human and Peoples Rights* (1981).

⁷ Gumede *Thabo Mbeki* 258-260.

Most of the duties and responsibilities of states towards their citizens are enunciated in international covenants and treaties such as the *Charter of the United Nations* of 1945, the *Universal Declaration of Human Rights* of 1948, the *International Covenant on Civil and Political Rights* of 1966, and the *International Covenant on Economic, Social and Cultural Rights* of 1966.⁸ These duties are also enshrined in the domestic constitutions, statutes and other policy documents of the individual states.⁹

The State's sovereign responsibilities are, *inter alia*, nation building, to protect and maintain borders, to confer nationality and to determine the criteria for such conferment, to admit and expel foreigners, to combat human trafficking, to create jobs and to safeguard national security. The listing of the responsibilities of the sovereign state, as above, naturally raises a number of questions such as why protect and maintain borders? Against whom or what? Against whom or what and for whom is national security being safeguarded? The state also has a duty to provide travel documents or passports to its nationals and permanent residents in accordance with set criteria. The travel documents remain the property of the state. The individual merely possesses the document for the purpose of usage and not for the ownership thereof.

It is not difficult to find answers to these questions, because only fellow human beings can threaten national security both from within the frontiers of a state and from beyond them. Hence one of the salient responsibilities and rights of a state is to admit and expel foreign nationals and to confer nationality. These interests of atomistic nation-states do not augur well for migrants, because the state is more interested in protecting itself from migrants than in protecting migrants and refugees from human rights abuses and ensuring that their vulnerability is not exploited. Statutes on migration largely indicate that migrants and refugees are a problem and that they need to be controlled and preferably repatriated.¹⁰

⁸ The following treaties are pertinent to the African continent: the *African Charter on Human and Peoples Rights* (1981), the *Charter of the Organisation of African Unity* (1963), the *Constitutive Act of the African Union* (2000), and the *Treaty of the Southern African Development Community* (1993).

⁹ These include Citizenship Acts, Refugee Acts, Immigration Acts and Aliens Acts.

¹⁰ Olivier *Immigration and the Refugee Legislation* 7-8.

The stigma attached to being a migrant flow from the interests of the atomistic nation-state and in particular from the actions of the states in promulgating legislation that tends to cast aspersions on and impugn the status of migrants. These statutes are offensive in both their content and their titles. They include *inter alia* the following: citizenship acts, refugee acts, immigration acts and aliens control acts.¹¹

2.1 *Migrants in the domestic labour markets of host states*

Migrants face many hardships and find it very difficult to find employment in their host states, as there are many laws that discriminate against them, contrary to what the International Labour Organisation (ILO), the *African Charter* and the *SADC Draft Protocol on the Facilitation of the Movement of Persons* envisage. These laws are *prima facie* discriminatory, as they discriminate based on nationality, which is one of the forbidden grounds of discrimination according to Article 2 of the Charter.¹² Migrants are often exploited and used as cheap labour in the domestic labour markets of host states.

The ILO, to which Southern African Development Community (SADC) member states are party, is the only tripartite United Nations agency with government, employer, and worker representatives. This tripartite structure makes the ILO a unique forum in which the governments and the social partners of the economy of its 183 Member States can freely and openly debate and elaborate labour standards and policies. The ILO is the only United Nations agency with a constitutional mandate to protect migrant workers, which mandate was reaffirmed by the 1944 *Declaration of Philadelphia* and the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*.¹³ The ILO has been dealing with labour migration issues since its inception in

¹¹ There is a plethora of these statutes in Southern Africa: Lesotho's *Aliens Control Act*, 1966; Namibia's *Refugees Control Act*, 1978; Zambia's *Refugee Control Act*, 1976; as well as the *Immigration and Deportation Act*, 1967 as amended in 1994.

¹² Article 2 *African Charter on Human and Peoples Rights* (1981).

¹³ These declarations are annexures to the *Constitution of the International Labour Organisation* (1919).

1919. It has pioneered international conventions to guide migration policy and the protection of migrant workers. The central theme of the work of the ILO is that of "decent work for all" as it adopts a rights-based approach to labour migration and promotes the tripartite participation of governments, employers and workers in migration policy.¹⁴

In this regard, Juan Somavia articulated the rationale of the objectives of the ILO by contending that "migrant workers are an asset to every country where they bring their labour. Let us give them the dignity they deserve as human beings and the respect they deserve as workers".¹⁵

The mobility of the migrant workforce takes place for many different reasons, as some seek higher wages and better opportunities, but many others are forced to migrate because of famine, natural disasters, violent conflict, persecution or simply a lack of decent work in their home countries. At the same time, in major destination countries the increased demand for skilled workers, the reluctance by local workers to accept certain low-skilled jobs, population decline and population ageing act as strong drivers. International migrants today are a very mixed group, including seasonal workers, temporary contract workers, skilled migrant workers, students, asylum seekers and refugees, workers with irregular status, and the victims of trafficking and forced labour.¹⁶

In South Africa the *Constitution*,¹⁷ the *Immigration Act*¹⁸ and the *Refugee Act*¹⁹ are instructive instruments regarding migration in general and migrant labour in particular. Whereas the South African *Constitution*²⁰ guarantees everyone the right to equal treatment and protection of the law,²¹ regardless of nationality, origin and

¹⁴ ILO Date unknown <http://bit.ly/1037XBp>.

¹⁵ Juan Somavia is the Director General of the International Labour Organisation (ILO Date unknown <http://bit.ly/ZWwQ3c>).

¹⁶ ILO Date unknown <http://bit.ly/ZWwQ3c>.

¹⁷ *Constitution of the Republic of South Africa*, 1996 ("the Constitution").

¹⁸ *Immigration Act* 13 of 2002.

¹⁹ *Refugee Act* 130 of 1998.

²⁰ *Constitution of the Republic of South Africa*, 1996.

²¹ Section 9 of the *Constitution*.

other criteria enunciated in the listed grounds, in practice and to a large extent migrants are marginalised in reaction to what are perceived to be national interests. This fact manifests itself for instance in the strict and stringent nature of the criteria for the employment of migrant workers, including the process to be followed to receive work permits.

In order to work legally in South Africa, migrants are required to have valid work permits which are issued by the Department of Home Affairs.²² The issuance of such permits is a long, tedious and bureaucratic process. For instance, a general work permit may be issued by the Department to a foreigner if the prospective employer satisfies the Department in the manner prescribed that despite diligent search, he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant. The prospective employer is also enjoined to produce certification from a chartered accountant to the effect that the terms and conditions under which he or she intends to employ such a foreigner, including the salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents, taking into account applicable collective bargaining agreements and other applicable standards, as recorded by the Department of Labour.²³

In practice this means that the migrant must get an offer of employment from a prospective employer, who has to provide a motivation for employing a foreign national. In other words, the South African law allows the employment of foreign nationals only where there is a skills shortage or where nationals are unwilling to take up such employment. This is manifestly unfair discrimination on the grounds of nationality and origin, which is in violation of the domestic legal framework, the trend towards regional integration, and the objective of globalisation. This *prima facie* discriminatory law, as it is in theory, may be justifiable in terms of section 39 of the *Constitution*. However, it will be hard to conceive of the justification, given the fact that the discrimination falls on one or more of the listed grounds. The test for

²² Section 19 *Immigration Act* 13 of 2002.

²³ Section 19(2)(a) and (b) *Immigration Act* 13 of 2002.

unfair discrimination was formulated in *Harksen v Lane*.²⁴ According to the two pronged test, there is a presumption of unfair discrimination once it is established that the grounds of justification fall within the listed grounds.²⁵ This then shifts the onus of proof onto the party who alleges that there is no such unfair discrimination or that the discrimination is justified in terms of the limitation clause.²⁶

The procedure involved in securing a work permit and the time it takes leave much to be desired. The whole process takes at least five to twelve months, or even more. This frustrates the migrant job seeker and the prospective employer. It further discourages employers from employing migrant workers, which in turn leads to the illegal employment of migrants without work permits. Because of the stringent procedures involved in applying for work permits, employers have resorted to employing job-seeking migrants who already have existing work permits rather than those who do not have work permits. The challenge is that the job seekers cannot get work permits unless and until the prospective employer is willing to make the offer of employment, is willing to satisfy the tedious legal requirements, and is willing to wait for long periods of time for the permit to be issued.

Moreover, the general work permit is specific about the kind of work that may be done and the employer for whom it may be done. In order for migrants to change employment, they have to make a similar application to the Department of Home Affairs for a change of the conditions of employment and this process takes the same period of time as a new application for a work permit. The lack of flexibility within the labour market exacerbates the plight of migrant workers and has exposed them to exploitative working conditions and abuse, including low income. The work permit is limiting as it ties the employee to a specific employer and does not allow for flexibility of employment. However the work permit for special skills allows the holder better flexibility and greater chances of permanent employment and career

²⁴ *Harksen v Lane* 1998 1 SA 300 (CC).

²⁵ These grounds are encapsulated under s 9(3) of the *Constitution* and they include and are not limited to the following; race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

²⁶ Section 39 of the *Constitution*.

development and advancement. This is because the permit is not employer-specific and therefore does not tie the migrant worker to a particular employer.

One can safely surmise that the current state of affairs is a betrayal of the pre-democratic South African mantra contained in the *Freedom Charter*, that South Africa belongs to all who live in it!²⁷

At independence, Botswana's economy was based largely on agriculture and migrant labour, and it was among the poorest countries in the world. The reason for the over-reliance on migrant labour was that the Botswana population at that time was largely illiterate and without the necessary skills to develop and drive the economy. The then government devised a lucrative recruitment and retention policy that saw the expatriate labour earning more than the local labour due to the need for expatriate skills.²⁸ In recent years Botswana has become less generous with the recruitment of migrant labour due to the fact that the investment that the country made in educating its people is bearing fruit and the demand for expatriate skills has declined.

The *Control of Employment of Non-Citizens Act of Botswana*,²⁹ like its South African equivalent, similarly requires migrant workers to have a work permit before they can assume employment. It determines that no non-citizen shall engage in any occupation for reward or profit unless he is the holder of a work permit issued to him under the Act, permitting him to be so employed. Alternatively such a person should be the holder of a certificate of exemption issued to him under the Act. It further requires that no person shall employ a non-citizen unless the non-citizen is the holder of a work permit issued to him under the Act, permitting him to be

²⁷ The *Freedom Charter* was adopted at the Congress of the People at Kliptown, Johannesburg, on 25th and 26th June, 1955. The notion of a Charter was first mooted at the annual Congress of the African National Congress in August 1953. Prof. Zacharia Keodirelang Mathews formally suggested convening a Congress of the People (COP) to draw up the Freedom Charter. The idea was adopted by the allies of the ANC, the South African Indian Congress, the South African Coloured People's Organisation and the South African Congress of Democrats.

²⁸ Coleman Report of Countrywatch Review.

²⁹ Chapter 47:02 *Control of Employment of Non-Citizens Act* 11 of 1981.

employed, and is employed in accordance with the terms thereof, unless the non-citizen is the holder of a certificate of exemption issued to him under the Act.³⁰

The nation-states have focused so much of their interest on protecting the market that they at times have failed to realise the positive spin-offs from migrant labour. In destination countries, migration has rejuvenated populations and workforces, contributed to job creation, rendered traditional sectors such as agriculture and services economically viable, fostered entrepreneurship, supported social security and welfare schemes, satisfied the demand for skills in emerging high-tech industries, and promoted urban renewal. Evidence to this effect debunks a number of popular myths, for instance that migrant workers displace local workers, increase the crime rate and exploit public welfare systems. Nonetheless, many migrant workers do not enjoy decent work, but instead suffer from low wages, unsafe working environments, the non-payment of wages, a virtual absence of social protection, the denial of freedom of association and workers' rights, discrimination and xenophobia.³¹

Migrant workers tend to be concentrated in economic sectors that are less attractive to native workers: agriculture, construction, labour-intensive manufacturing and services, including domestic work, hotel work and tourism. These sectors include some of the most vulnerable migrant workers: women domestic workers, construction workers, workers with irregular status, and trafficked persons. They are more likely to be over-qualified for their work and they experience considerable job insecurity and less advantageous working conditions. Overall, temporary migrant workers, women and young migrants are particularly vulnerable. And in times of recession, the main adjustment burden often falls on migrant populations.³²

A key message is that sound migration policy and law should mean much more than fighting irregular migration and tightening border controls. It means identifying long-term interests and labour market needs, anchoring policies in basic human rights

³⁰ Sections 4(1) and (2) *Control of Employment of Non-Citizens Act 11 of 1981*.

³¹ International Labour Office *International Labour Migration*.

³² International Labour Office *International Labour Migration*.

and finding effective mechanisms for broad social consensus. Policies should be based on the recognition of mutual benefits to both origin and destination countries.

The focus of migration policies and laws within the nation-states across the world is nationalistic and is premised on enforcement, control and exclusion as illustrated above with examples from Botswana and South Africa. This approach is repugnant to the exigent objectives of regionalism and globalisation as it hinders the objective of the free movement of people within the regions and the global hinterland at large, as will be demonstrated below.

3 The imperatives of regionalism

Contrary to the interests of the nation-states as enunciated above are the realities and imperatives of regionalism and globalisation. Regionalism or regional cooperation, harmonisation and integration are terms that generally refer to a grouping of states sharing a common bond of policy, economic or political, and driven by a common primary objective. Regionalism can significantly augment the process of replacing nationalism and intolerance with political dialogue and tolerance in the region.³³

It may also refer to the tendency towards or practice of regional systems or methods. Regional cooperation forms part of international law; hence the latter governs and regulates the conduct of the former. International Law is essentially made up of treaties, reflecting the express agreement of states, and custom, which comprises those rules of international conduct to which states have given their tacit consent.³⁴

States, as actors and subjects of international law within the broader global hinterland, engage in international intercourse by entering into various treaties and instruments aimed at achieving different objectives. The most common objectives are the attainment and maintenance of peace and security, socio-economic

³³ Feil, Klein and Westerkamp 2009 <http://bit.ly/11x3rS0>.

³⁴ Dugard *International Law* 51. See also Schaffer 1983 *ICLQ* 277; Bridge 1971 *ICLQ* 746.

development and political development. The most common and conspicuous treaties and conventions are the following: the *Charter of the United Nations* of 1945, the *Universal Declaration of Human Rights* of 1948, the *International Covenant on Civil and Political Rights* of 1966, and the *International Covenant on Economic, Social and Cultural Rights* of 1966.

On the African continent and pertinent to this research, the following treaties are instructive in this regard: the *African Charter on Human and People's Rights*, the *Charter of the Organization of African Unity* of 1963, the *Constitutive Act of the African Union*, and the *Southern African Development Community Treaty*. These instruments echo the common sentiment that regardless of where they are and their circumstances notwithstanding, all human beings are inviolable³⁵ and have inalienable³⁶ rights, including the right to dignity and the integrity of the person and their families.

In the same vein, Article 3 of the *Constitutive Act of the AU*³⁷ provides that the objectives of the AU are *inter alia* the following:

- to accelerate the political and socio-economic integration of the continent and its people;
- to promote and defend African common positions on issues of interest to the continent and its people;
- to promote sustainable development at the economic, social and cultural levels as well as the integration of African economies;
- to promote cooperation in all fields of human activity to raise the living standards of African people; and
- to coordinate and harmonise policies between existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union.

³⁵ Article 4 *African Charter on Human and Peoples Rights* (1981).

³⁶ See the *Universal Declaration of Human Rights* (1948).

³⁷ See Article 3 of the *Constitutive Act of the African Union* (2000) for a catalogue of the objectives of the African Union.

Article 5(1) of the *SADC Treaty* of 1992 states some of the objectives of the SADC which are pertinent to this research as follows:

- to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, to enhance the standard and quality of life of the people of Southern Africa and to support the socially disadvantaged through regional integration; and
- to promote self-sustaining development on the basis of collective self-reliance, and the interdependence of member states.

Article 5(2) provides that in order to achieve the objectives set out in sub-article (1) of the Treaty, the SADC shall:

- harmonise the political and socio-economic policies and plans of member states;
- encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of programmes and operations of the SADC; and
- develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states.

The *Draft SADC Protocol on the Facilitation of the Movement of Persons*³⁸ main objective is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the region generally into and within the territories of state parties.³⁹ Its specific objectives in relation to every citizen of a state party are to facilitate the following:

³⁸ SADC 1998 <http://bit.ly/X3epgq>.

³⁹ Article 2 of the Draft Protocol (SADC 1998 <http://bit.ly/X3epgq>).

- Entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned;
- Permanent and temporary residence in the territory of another State Party; and
- Establishment of oneself and working in the territory of another State Party.⁴⁰

The above legal framework in a nutshell establishes an obligation and enjoins the member states to integrate, as regional integration is the common goal that runs across all the instruments constituting the legal framework. The bedrock of this integration is the movement of people across borders or migration.⁴¹ Despite the excellent theoretical integration espoused in the international and regional legal framework, as shown above, migration in practical terms remains a nightmare. It is instructive at this juncture to point out that within the sub-region there is an evident eagerness and impetus to fast-track the free movement of goods and services, whereas the same cannot be said about and is not the case with the movement of people.⁴² The stress placed in practice on the perceived narrow interests of individual nation-states is an effective barrier to the realisation of the ideals expressed in the instruments referred to above.

For instance, the objective of the SADC pertinent to this research is to promote self-sustaining development on the basis of collective self-reliance and the interdependence of member states, and to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among member states.⁴³

⁴⁰ Article 3 of the Draft Protocol (SADC 1998 <http://bit.ly/X3epgq>).

⁴¹ See a 5(2)(d) *Treaty of the Southern African Development Community* (1993), and the *SADC Protocol on the Facilitation of Movement of Persons* (2005).

⁴² There is a plethora of legal instruments within the broader sub-regional legal frame work on the free movement of goods and services including and not limited to the following: the *Constitutive Act of the African Union* (2000), the *Treaty of the Southern African Development Community* (1993), and the *Southern African Customs Union Agreement* (2004).

⁴³ Article 5 *Treaty of the Southern African Development Community* (1993).

4 The paradox of nationalism and regionalism

Whereas there is a plethora of legislation both regionally and internationally crystallising the ostensible common goal of regional integration especially in the area of the movement of people, the interests of the nation-states prove to be at variance with this objective. The interests of the nation-states, more often than not, tend to militate against the free movement of people as envisioned by the African Union (AU), the New Partnership for Africa's Development (NEPAD)⁴⁴ and the Southern African Development Community (SADC). This paradox is largely due to the reluctance of the African states *in casu* to embrace and incorporate international instruments into their domestic and municipal legislation and policy. This is a typical case of the flourishing of nationalist tendencies among the nation-states as opposed to global frames of thought.

The nationalist mentality which the nation-state are inclined to creates problems for migrants because of the stigma that attaches to the migrant label. For instance, in Southern Africa, with the exception of South Africa, by legislation, refugees are required to stay in confined and designated areas. In Botswana, for example, refugees and asylum seekers are confined to what is called a refugee camp in a village called Dukwi. This is the only village where refugees are housed and they are required to get permits in order for them to leave the camp either to find employment or to visit nearby dwelling places or towns. This segregates them from the rest of the social structure within the host state. They are deprived of interaction and integration into the local communities.

This further exacerbates the psycho-social impact of migration.⁴⁵ The implications of this segregation and the message to be understood from such practice are that migrants and nationals are different people, with migrants occupying a lower, subsidiary position within the social structure. They are "undesirables". This then

⁴⁴ The New Partnership for Africa's Development (NEPAD) framework document, adopted in October 2001 in Abuja, Nigeria (NEPAD 2001 <http://bit.ly/14eWKUZ>).

⁴⁵ Botswana's *Immigration Act*, 1966 allows unrestricted entry for nationals from most countries in the region.

fuels xenophobic tendencies among the nationals of host states because once migrants are severed from the rest of the social structure they become more conspicuous and visible. They then become easy targets for victimisation, abuse and other forms of xenophobia. They are victimised in different ways, especially at ports of entries and in immigration departments, when they seek to renew their documents and legalise their presence in host states. They are also susceptible to abuse by prospective employers, as said earlier, as they are generally desperate for employment.

An empirical example is that of the border post in Ramatlabama in the North West Province, where the writer performed an inspection *in loco*. There are separate queues for "South African passport holders" and "foreign passport holders". This is common to both the South African and the Botswana border posts. At OR Tambo International Airport the same separation of the queues is the order of the day. The same goes for Sir Seretse Khama International Airport in Botswana. The service offered to citizen passports holders is normally friendly and quick, whereas the foreign passport holders queue is often slow and the service unfriendly. There are no justifiable and compelling grounds for this differentiation, and the authorities in charge could not provide any when the author questioned them on this matter. Therefore it is safe to say that there is no justifiable government and administrative purpose for this separation of the queues other than to confirm the stigma and suspicion visited upon foreign nationals.

Because migrants are labelled as "undesirables", most of the social ills and challenges that bedevil the society such as unemployment, criminality and the shortage of resources are sometimes unduly blamed on these "undesirables". The xenophobic hostility in South Africa is instructive in this regard. Contrary to the much anticipated reciprocation of the warm reception by South Africans of migrants from the African region, the reception of fellow Africans is so hostile that in May 2008 62 non-citizens of South Africa were horribly killed in what was believed to be attacks motivated by xenophobia. However, it is noteworthy that 21 of the people who lost their lives were citizens of South Africa. This news was not well received by the

South African authorities, because at that juncture South Africa was enjoying international attention to her *nouveau* democracy. This was the last thing that South Africa needed, as it would be damaging to her moral high ground gained through the reconciliation processes that followed the advent of democracy.

Diplomatic responses to the catastrophe did not help much, as the attacks had incontrovertibly taken place, as had the destruction of the country's reputation. One of the arguments advanced in denying that the attacks were xenophobic was that if indeed these were xenophobic attacks, then more white people would have been killed, as xenophobia constitutes itself in the hatred of those that are different.⁴⁶

The argument was that most conspicuously different people would have been the white population in South Africa, since these attacks were carried out by black South Africans.⁴⁷ Any amount of justification or diplomacy on this subject is inconsequential, because black South Africans said in their own words in various interviews on the world media that they wanted Africans from neighbouring countries to leave their country as they were taking both their employment and their business opportunities. Again, within the SADC, the influx of Zimbabwean nationals, especially illegal immigrants, into neighbouring countries of the sub-region⁴⁸ creates and presents serious challenges to the rest of the Southern African neighbourhood.

The statistics of immigrants to South Africa and Botswana remain speculative, as is the case with most parts of the world, due to the irregular nature of immigration. It is extremely difficult to mobilise accurate data on the statistics as the data, more often than not, only cover cases of legal and illegal immigrants who have been apprehended and deported. It is always deficient in the case of illegal immigrants

⁴⁶ Hornby and Turnbull *Oxford Advanced Learner's Dictionary* defines xenophobia as an intense fear or dislike of foreign people, their customs and culture, or foreign things - a deep dislike of foreigners.

⁴⁷ Crush Date Unknown <http://bit.ly/14eXwl6>.

⁴⁸ The countries that are recipients of most Zimbabwean immigrants in the SADC region are Botswana, South Africa and Namibia. Zambia is another recipient, albeit not in the same volumes that the other countries receive. This is because these countries are politically more stable and economically vibrant and are therefore seen as providing better opportunities for employment and safety.

who are never apprehended. The statistics are therefore biased in this regard. Immigrants are classified as illegal due to their having entered at un gazetted places. This is generally known as border-jumping. In other instances, they are classified as such because they are in a foreign state without valid travel and identification documents, or because they were legal immigrants and have over-stayed their leave and have not sought permission to extend their permits.

However, the foregoing notwithstanding, the available statistics suggest that there are about 5 million illegal immigrants in total in South Africa. The number is said to be made up of migrants from Zimbabwe, Mozambique, Somalia and the Democratic Republic of the Congo, to mention but a few Southern African origins of the migration. The Zimbabwean population of illegal immigrants in South Africa is estimated to be about 3 million.⁴⁹ There are no official and reliable statistics of illegal immigrants in Botswana except for the fact that the number of repatriations from the country per day stands at 2500.⁵⁰

The Southern African governments have not done enough to deal with the real problem. They have resorted to dealing with the symptoms of the disease rather than with the disease itself. They spend millions from the tax payer's revenue in reconstructing their border fences and electrifying them and employing more immigration personnel in trying to ward off their neighbours. The fundamental question that then follows naturally is if these secure and strong fences make good neighbourhoods or neighbourliness as envisioned by the African regional integration agenda.

⁴⁹ Official statistics of undocumented immigrants provided by the South African Police Service suggest that in 1995 there were between 5.5 million and 8 million illegal immigrants in South Africa. In the same year the Ministry of Home Affairs estimated that there may have been approximately 4 million undocumented immigrants in the country. These statistics are available on the web at MPI 2008 <http://bit.ly/14eXNUY>.

⁵⁰ Campbell *Reflections on Illegal Immigration*.

5 Concluding remarks

In order to reconcile the rather paradoxical objectives of the nation-states and those of regional integration and globalisation with regard to migration and refugee laws and policies, nation-states have to adopt a rights based approach to migration and refugee laws and policies. This will mean that domestic laws and policies should embrace the universality of human rights protection regardless of nationality, creed or the status of the person. This will entail a review of the national domestic legislations and the expeditious incorporation and domestication of international instruments into national laws and policy.

Migrants such as refugees should be integrated into the national communities of their host states in order to do away with the misunderstandings and misperceptions that lead to xenophobic tendencies. This would create an open atmosphere for dialogue between the locals and the migrants, and the process would give both parties a better understanding of one another's milieu.

The nation-states should open better communication between the government bureaucracy and the nationals in order to obviate the perception that migrants take the work of the local communities. Education on the skills transfer from migrants to the local people has to be undertaken in order for the local people to realise and understand the benefits of expatriate labour.

Comprehensive approaches to irregular migration, beyond treating it as a law-and-order issue, are needed to address its root causes, to protect the basic human rights of workers with irregular status in line with international norms, and to consider regularisation options, as appropriate. There is still a largely unfinished agenda before the international community in terms of making migration work, and providing a fair deal to migrant workers. In the long run, the goal should be migration in conditions of freedom, dignity, equity and security, consistent with the

concept of decent work initially advanced by the ILO, which is now a common vision of the international community.⁵¹

Because the misperceptions which lead to stigmatization and victimization of migrants primarily stem from political exchanges, politicians have a greater role to play than others in realising the ideals of open dialogue and tolerance. Only when the nationals of host states understand the plight of migrants will they be able to show compassion and understanding for their fellow human beings, and interact and co-exist side by side with them. Once domestic laws and policies are in harmony with international law, the central question of this contribution will automatically fall away, as there will be synergy in legislation and policy at national level and on an international plane.

⁵¹ International Labour Office *International Labour Migration* ch 7.

Bibliography

Bridge 1971 *ICLQ*

Bridge JW "The Relationship between International Law and the Law of South Africa" 1971 *ICLQ* 746-749

Campbell *Reflections on Illegal Immigration*

Campbell KE *Reflections on Illegal Immigration in Botswana and South Africa* (University of Botswana Gaborone 2007)

Coleman *Report of Countrywatch Review*

Coleman DY *Report of Countrywatch Review* (CountryWatch Houston, TX 2011)

Dugard *International Law*

Dugard J *International Law - A South African Perspective* 3rd ed (Juta Cape Town 2005)

Gumede *Thabo Mbeki*

Gumede WM *Thabo Mbeki and the Battle for the Soul of the ANC* (Zebra Cape Town 2005)

Hornby and Turnbull *Oxford Advanced Learner's Dictionary*

Hornby AS and Turnbull J *Oxford Advanced Learner's Dictionary of Current English* 8th ed (Oxford University Press Oxford 2011)

International Labour Office *International Labour Migration*

International Labour Office *International Labour Migration: A Rights-based Approach* (International Labour Office Geneva 2010)

Olivier *Immigration and the Refugee Legislation*

Olivier L *Immigration and the Refugee Legislation in Southern Africa: Protecting the State or Protecting Migrants?* (Open Society Initiative for Southern Africa Rosebank Date Unknown)

Schaffer 1983 *ICLQ*

Schaffer RP "The Inter-relationship between Public International Law and the Law of South Africa: An Overview" 1983 *ICLQ* 277-315

Register of cases

Harksen v Lane 1998 1 SA 300 (CC)

Register of legislation

Aliens Control Act, 1966 (Lesotho)

Constitution of the Republic of South Africa, 1996 (South Africa)

Control of Employment of Non-Citizens Act 11 of 1981

Immigration Act, 1966 (Botswana)

Immigration Act 13 of 2002 (South Africa)

Immigration and Deportation Act, 1967 (Namibia)

Refugee Act 130 of 1998 (South Africa)

Refugee Control Act, 1976 (Zambia)

Refugees Control Act, 1978 (Namibia)

Register of international legal instruments

African Charter on Human and Peoples Rights (1981)

Charter of the Organisation of African Unity (1963)

Charter of the United Nations (1945)

Constitution of the International Labour Organisation (1919)

Constitutive Act of the African Union (2000)

Declaration of Philadelphia (1944)

Declaration on Fundamental Principles and Rights at Work (1998)

Freedom Charter of the African National Congress (1955)

International Covenant on Civil and Political Rights (1966)

International Covenant on Economic, Social and Cultural Rights (1966)

SADC Protocol on the Facilitation of Movement of Persons (2005)

Southern African Customs Union Agreement (2004)

Treaty of the Southern African Development Community (1993)

Universal Declaration of Human Rights (1948)

Register of internet sources

Crush Date Unknown <http://bit.ly/14eXwl6>

Crush J (ed) Date Unknown *Immigration, Xenophobia and Human Rights in South Africa - Migration Policy Series No 22* <http://bit.ly/14eXwl6> [date of use 20 Jan 2012]

Feil, Klein and Westerkamp 2009 <http://bit.ly/11x3rS0>

Feil M, Klein D and Westerkamp M 2009 *Regional Cooperation on Environment, Economy and Natural Resource Management Cluster Synthesis Report* <http://bit.ly/11x3rS0> [date of use 14 Jan 2012]

ILO Date unknown <http://bit.ly/ZWwQ3c>

International Labour Organisation Date unknown International Migration Programme <http://bit.ly/ZWwQ3c> [date of use 13 Mar 2012]

ILO Date unknown <http://bit.ly/1037XBp>

International Labour Organisation Date unknown *Structure* <http://bit.ly/1037XBp> [date of use 13 Mar 2012]

MPI 2008 <http://bit.ly/14eXNUY>

Migration Policy Institute 2008 *South Africa* <http://bit.ly/14eXNUY> [date of use 18 Jan 2012]

NEPAD 2001 <http://bit.ly/14eWKUZ>

New Partnership for Africa's Development 2001 NEPAD Framework Document <http://bit.ly/14eWKUZ> [date of use 13 Mar 2012]

SADC 1998 <http://bit.ly/X3epgq>

Southern African Development Community 1998 *Draft Protocol on the Facilitation of Movement of Persons* <http://bit.ly/X3epgq> [date of use 20 Apr 2012]

List of abbreviations

AU	African Union
ICLQ	International and Comparative Law Quarterly
ILO	International Labour Organisation
MPI	Migration Policy Institute
NEPAD	New Partnership for Africa's Development
SADC	Southern African Development Community

THE PARADOX OF MIGRATION AND THE INTERESTS OF THE ATOMISTIC NATION-STATES: THE SOUTHERN AFRICAN PERSPECTIVE

PJ Ngandwe*

SUMMARY

The "paradox of migration and the interests of the atomistic nation-states" interrogates the phenomenon of migration in general and in the Southern African Development Community in particular. The point of departure of the paper is the African Union and the Southern African Development Community's legal framework on migration, as read with the national legal instruments of the different member states. Its focal point is the *raison d'être* of this phenomenon of migration and the corresponding approaches and attitudes of the nation-states within which migration takes place *inter se*. This includes the psycho-social impact of migration. Internationally as well as regionally, States are concerned with issues of sovereignty, the preservation of the welfare of the citizenry, ensuring social cohesion social, cultural and economic development including job creation, and fighting against transnational organised crime, including terrorism. The theme of the paper is that whereas migration should form the bedrock of regionalism and globalisation, the negative attitudes of the nation-states to migration are more often than not at variance with the objectives of regionalism and globalisation.

The central question of the research is how states can discharge their duties and obligations *vis-à-vis* their nationals without perpetuating the bottlenecks to and the stigma that attaches to migration and thereby upsetting the international as well as regional integration objectives of the free movement of people. This is the issue that the paper is intended to explore. The main areas of concern are that the negative attitudes of the nation-states are manifested in the hostile treatment of migrants at

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all ports of entry, including illegal or un gazetted points of entry, within the nation-states in general, and in their labour markets in particular. This research therefore explores the paradoxical nature of the duties and responsibilities of states within the migration and mobility discourse. The paper will conclude by making practical recommendations aimed at influencing policy and law.

KEYWORDS: Citizenry; globalisation; migration; mobility; regional integration; paradoxical; phenomenon; psycho-social; nation-states