

**THE PROTECTION OF THE NATIONAL LABOUR FORCE AGAINST
FOREIGN COMPETITION UNDER LABOUR MIGRATION LAWS
AND POLICIES: A COMPARATIVE ANALYSIS BETWEEN THE
DEMOCRATIC REPUBLIC OF CONGO AND SOUTH AFRICA**

By

KASONGO THEODORE KAMWIMBI

Student No: 57660816

submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

MODULE:

SUPERVISOR: PROF. M BUDELI-NEMAKONDE (UNISA)

CO-SUPERVISOR: EMERITUS PROF. ER KALULA

YEAR OF FINAL REGISTRATION: 2022

DECLARATION

Name: **KASONGO THEODORE KAMWIMBI**

Student Number: **57660816**

Degree: **Doctor of Laws**

Thesis title:

**THE PROTECTION OF THE NATIONAL LABOUR FORCE AGAINST FOREIGN
COMPETITION UNDER LABOUR MIGRATION LAWS AND POLICIES: A
COMPARATIVE ANALYSIS BETWEEN THE DEMOCRATIC REPUBLIC OF
CONGO AND SOUTH AFRICA**

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements of originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.



SIGNATURE

14 November 2022_____

DATE

DEDICATION

It is with genuine gratitude and warm regard that I dedicate my thesis to my family and many friends who have been inspirational and supportive in my life. A special feeling of gratitude to my loving wife, Monique Kamwimbi and our children, Brown Kamwimbi, Isaac Kamwimbi, Samuel Kamwimbi and Noah Kamwimbi, for always being supportive and very special to me, for their patience, encouragement and push for tenacity. To my parents, Fridolin and Rose Kamwimbi, as well as my brother, Frydolin and my sisters, Genevieve, Colette, and Sylvie, thank you for being loving and supportive of everything I work to accomplish. With deep gratitude I also dedicate this thesis and extend my heartfelt thanks to my many friends and church family who have supported me throughout the entire doctorate programme.

ABSTRACT

Labour migration, which involves both labour immigration and labour emigration, refers to 'the cross-border movement of people from a homeland to a location outside that homeland, with the purpose of taking up employment'.¹ Labour migration has become an ever more important feature of the globalising world as it plays an important role and has a direct impact on African countries' economies and societies.² Recognising the significant benefits of labour migration to countries of origin and destination, the African Union urges African States to enact labour migration laws, regulations, and policies in a regular, transparent, and comprehensive manner at both continental and country levels.³ In this regard, many African countries have exercised their prerogative to regulate labour migration, which falls within each state's sovereign discretion.

By way of illustration, this thesis focuses on two specific countries, namely the Democratic Republic of Congo (DRC) and South Africa, which have regulated the employment of foreign-born workers. The two countries have established a legal and regulatory framework aimed at protecting the national labour force against foreign competition. The two countries have been selected for this study because they are comparable in many ways while differing as much as possible in terms of the institutional set-up of their migration systems and labour markets. In fact, this study seeks to compare the DRC's and South Africa's labour migration laws, regulations and policies, particularly how these legal and regulatory instruments effectively protect the national labour force against foreign competition. In this sense, the study explores the overall successes and challenges of these legislative and regulatory endeavours, while identifying the shortcomings and merits of the implementation of the laws and policies in the two countries.

1 Omoniyi T "Outsourcing and migrational anxieties in discourse perspectives," in Gupta S & Omoniyi T (eds) *The cultures of economic migration: international perspectives* (Routledge London 2016) 37; Abdurazakova D "Social impact of international migration and remittances in Central Asia" 2011 *APPJ* vol. 26(3) at 30.

2 Abdurazakova 2011 *APPJ* vol. 26(3) at 30.

3 See AU Executive Council ACPMD (Ninth Ordinary Session 25 – 29 June 2006, Banjul, the Gambia [*Doc. EX.CL/277 (IX) Assembly/AU/JUN. 2006*] AU Addis Ababa) 4 & 5 para. 3.3.

RÉSUMÉ

La migration de main-d'œuvre, qui implique à la fois l'immigration et l'émigration de main-d'œuvre, désigne les mouvements transfrontaliers de personnes pour des raisons professionnelles. Ce type de migration est devenu une caractéristique de plus en plus importante de la mondialisation, car il joue un rôle important et affecte directement l'économie et la société des pays africains.⁴ Reconnaisant les avantages considérables de la migration de main-d'œuvre pour les pays d'origine et de destination, l'Union africaine exhorte les États africains à « établir des politiques, des législations et des structures de migration de main-d'œuvre régulières, transparentes et globales à l'échelle nationale et régionale ». ⁵ À cet égard, de nombreux pays africains ont exercé leur prérogative de réglementer la migration de main-d'œuvre, qui relève de la discrétion souveraine de chaque État.

À titre d'illustration, la présente thèse se penche sur deux pays spécifiques, à savoir la République démocratique du Congo (RDC) et l'Afrique du Sud, qui ont respectivement réglementé l'emploi des ressortissants étrangers. En particulier, les deux pays ont établi un cadre légal et réglementaire visant à protéger la main-d'œuvre nationale contre la concurrence étrangère. Les deux pays ont été choisis dans le cadre de cette étude parce qu'ils sont comparables à bien des égards, à la fois pour ce qui est de la mise en place institutionnelle de leurs systèmes migratoires et pour ce qui touche à leurs marchés du travail.

En fait, la présente étude vise à comparer les lois, les règlements et les politiques de la RDC et ceux de l'Afrique du Sud en matière de migration de main-d'œuvre. Un accent particulier est mis sur la manière dont ces instruments juridiques et réglementaires protègent la main-d'œuvre nationale contre la concurrence étrangère. Dans cette optique, la présente étude explore les réalisations et les défis globaux de ces efforts législatifs et réglementaires, tout en identifiant les

4 Commission de l'Union africaine, *Cadre de politique migratoire pour l'Afrique révisé et plan d'Action (2018 – 2030)* (Commission de l'Union africaine /Département des Affaires sociales : Addis Abeba 2018) 34.

5 Conseil exécutif de l'Union africaine, *Décision sur la Position africaine commune relative à la Migration et au développement – Doc.EX.CL/277(IX) Neuvième session ordinaire 25 – 29 juin 2006, Banjul (GAMBIE), UA Addis Ababa* 4 & 5 para. 3.3.

avantages et les inconvénients de la mise en œuvre des lois et des politiques dans les deux pays.

KEY TERMS

Labour migration ; immigration emigration ; migration control ; irregular immigrant ; illegal immigrant ; undocumented immigrant ; migrant worker ; employment ; national labour force local workforce ; foreign competition ; labour market ; refugee ; asylum ; residence ; foreigners ; foreign nationals ; nationality ; citizenship ; xenophobia ; brain drain ; brain circulation ; brain gain ; skills shortages ; vocational training ; skilled workers ; contract of employment ; foreign skills ; unemployment ; workforce nationalisation ; work permit ; work visa ; quotas of foreign workers ; passports ; legislative inertia ; statutory obsolescence ; implementation ; statutory policies ; regulatory policies.

ACKNOWLEDGEMENTS

Thesis writing is the most daunting and toughest task, and a challenging and painful experience for many students, which requires dedicated work, commitment, encouragement and assistance from many people. I, therefore, am obliged to all those who have, in one way or another, supported me in my work with this thesis, to whom I am deeply indebted and grateful. First of all, I thank God Almighty for granting me the strength needed to complete this thesis.

I wish to thank and convey my deepest appreciation and gratitude to my supervisor and co-supervisor, namely Professor Mpfariseni Budeli-Nemakonde and Emeritus Professor Evance Kalula for allowing me to conduct research work under their supervision. I am deeply grateful to them for their patience, encouragement, support, inspiration, thoughtful guidance, collaboration and friendship, from the early to the final stages of my research over several years.

I would like to extend special thanks to Ms Tracey Saunders for her time and dedication in editing and proofreading the draft of this thesis. Her guidance, enlightening suggestions, and encouragement in ensuring that this thesis complies with the required format are hereby acknowledged and greatly appreciated.

I am deeply grateful and thankful to UNISA for granting me some bursaries, which enabled me to pursue and complete my studies with little financial strain.

Lastly, I am indebted to my family for their love and patience with me during the research process. I am also grateful to my many friends and church family for praying constantly for me, for being so loving, supportive and inspiring to me.

LIST OF ACRONYMS

ABA Journal	American Bar Association Journal
ACP	African, Caribbean and Pacific Group of States
ACP	Angolan Cessation Permit
ACPMMD	African Common Position on Migration and Development
ACRO	African Central Recruiting Organisation
ADB	Asian Development Bank Institute
AEH	African Economic History
AEP	Angolan Exemption Permit
AFDA-RIDA	Association Française pour la Diffusion du Droit d'Auteur National et International
AFD	Agence Française de Développement
AfDR	African Development Review
African Charter	African Charter on Human and People's Rights
AISA	Africa Institute of South Africa
AJS	American Journal of Sociology
AISA	Africa Institute of South Africa
AJCL	American Journal of Comparative Law
AJS	American Journal of Sociology
ALR	Adelaide Law Review
ANC	African National Congress
ANCYL	African National Congress Youth League
ANN7	Africa News Network 7
AP	Academic Press
APPJ	Asia-Pacific Population Journal
APWLD	Asia Pacific Forum on Women, Law and Development
ARC	Amalgamated Recruiting Corporation
Art.	Article
ASC	Autorisation Spéciale de Circulation
AsgiSA	Accelerated and Shared Growth Initiative for South Africa
ASP	Angolan Special permit
AU	African Union
AUP	Amsterdam University Press
AWP	Africa World Press
BCEA	Basic Conditions of Employment Act
BCLR	Butterworths Constitutional Law Reports
BL	German Basic Law (or Constitution)
BLMA	Bilateral Labour Migration Agreement
C	Convention
CC	Constitutional Court of South Africa
CCMA	Commission for Conciliation, Mediation and Arbitration
CDM	Congo Dong Fang International Mining Sprl
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEN-SAD	Community of Sahel-Saharan States
CEPAS	Centre d'Études pour l'Action Sociale

CEPR	Centre for Economic Policy Research
CESCR	Committee on Economic, Social and Cultural Rights
CF	Congolese Franc
CILSA	Comparative and International Law Journal of Southern Africa
CIPC	Commission on Intellectual Property and Companies
CJAS	Canadian Journal of African Studies
CLLPJ	Comparative Labour Law and Policy Journal
CLR	California Law Review
CMAJ	Canadian Medical Association Journal
CMP	East African Community Common Market Protocol
CNEE	National Committee for the Employment of Foreign Nationals
CNSS	National Social Security Fund
COIDA	Compensation for Occupational Injuries and Diseases Act
COLUP	Columbia University Press
COMESA	Common Market for Eastern and Southern Africa
COMMUS	Compagnie Minière de Musonoï Sprl
COMPAS	Centre on Migration, Policy and Society
CoUP	Cornell University Press
COVID-19	Coronavirus Disease 2019
CRC	Convention on the Rights of the Child
CSJ	Supreme Court of Justice
CSWV	Critical Skills Work Visa
CUP	Cambridge University Press
DEL	Department of Employment and Labour
DGDA	General Directorate of Taxation and Customs and Duties
DGM	General Directorate for Migration
DGRAD	General Directorate for Administrative, Judicial, Property and Share Revenues
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
Doc.	Document
CESCR	Committee on Economic, Social and Cultural Rights
CILSA	Comparative and International Law Journal of Southern Africa
CJLPP	Cornell Journal of Law and Public Policy
DRC	Democratic Republic of Congo
DSA	Development Southern Africa
DUP	Duke University Press
DZP	Dispensation of Zimbabweans Project
EAC	East African Community
ECCAS	Economic Community of Central African States
ECGLC	Economic Community of the Great Lakes Countries
ECOWAS	Economic Community of West African States
EEA	Employment Equity Act
EJ	Economic Journal
ESA	Employment Services Act

EU	European Union
EUP	Edinburgh University Press
FCK	Facultés Catholiques de Kinshasa
FCO	Foreign and Commonwealth Office
FFWA	Fletcher Forum of World Affairs
FLR	Federal Law Review
FOSAD	Forums of South African Directors-General Clusters
GATS	General Agreement on Trade in Services
Gécamines	Générale des Carrières et des Mines
GFMD	Global Forum on Migration and Development
GLJ	Georgetown Law Journal
HCSS	The Hague Centre for Strategic Studies
HRH	Human Resources for Health
HSRC	Human Sciences Research Council
HUP	Harvard University Press
IBP	International Budget Partnership
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICLQ	International & Comparative Law Quarterly
ICT	Information and Communications Technology
IDASA	Institute for Democratic Alternatives in South Africa
IDRC	International Development Research Centre
IFPRI	International Food Policy Research Institute
IGAD	Intergovernmental Authority on Development
IILS	International Institute for Labour Studies
IJAHS	International Journal of African Historical Studies
IJARS	International Journal of African Renaissance Studies
IJCL	International Journal of Constitutional Law
IJR	Institute for Justice and Reconciliation
ILERA	International Labour and Employment Relations Association
ILJ	Indiana Law Journal
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMF	International Monetary Fund
IMISCOE	International Migration, Integration and Social Cohesion in Europe
IMR	International Migration Review
IOM	International Organisation for Migration
INPP	National Institute for Vocational Training
IPPR	Institute for Public Policy Research
ISEAS	Yusof Ishak Institute (formerly Institute of Southeast Asian Studies)
ISILYBIHRL	ISIL Year Book of International Humanitarian and Refugee Law
ISS	Institute for Security Studies

IT	Information technology
IUP	Indiana University Press
JAL	Journal of African Law
JBR	Journal of Business Research
JCFS	Journal of Comparative Family Studies
JIA	Journal of International Affairs
JIPSA	South African Government launched the Joint Initiative on Priority Skills Acquisition
JLMP	Joint Labour Migration Programme
JMAS	Journal of Modern African Studies
JRD	Journal of Race Development
JRS	Journal of Refugee Studies
JSAS	Journal of Southern African Studies
LEP	Lesotho Exemption Permit
LPA	Legal Practice Act
LRA	Labour Relations Act
LSP	Lesotho Special Permit
Mich. L. Rev.	Michigan Law Review
MIKAS	Société Minière de Kasombo Sprl
MLO	Mine Labour Organisation
MLR	Modern Law Review
MONUC	United Nations Organisation Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organisation Stabilisation Mission in the Democratic Republic of Congo
NAI	Nordic Africa Institute
NCEFW	National Committee for Employment of Foreign Workers
NCOLA	Natal Coal Owners Labour Organisation
NCWO	National Council of Women's Organisations Malaysia
NEP	Nationalism and Ethnic Politics
NGO	Non-governmental organisation
NHS	National Health Service
NJIL	Nordic Journal of International Law
NLMP	National Labour Migration] Policy
No.	Number
NRC	Native Recruiting Corporation
NSAR	New South African Review
NYU Press	New York University Press
ODIMWA	Occupational Diseases in Mines and Works
OECD	Organisation for Economic Co-operation and Development
OHADA	Organisation for the Harmonisation of Business Law in Africa
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHSA	Occupational Health and Safety Act
OIDA IJSD	OIDA International Journal of Sustainable Development
ONEM	National Employment Board

OUP	Oxford University Press
PACHPRRWA	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
Para.	Paragraph
PDA	Protected Disclosures Act
PDR	Population and Development Review
PNEFP	National Employment and Vocational Training Policy
PRQ	Political Research Quarterly
PTIS	Protocol on Trade in Services
P.U.F	University Press of France
PUK	Kinshasa University Press
PULP	Pretoria University Law Press
PUP	Princeton University Press
RDSPG	Revue de Droit et de Science Politique du Graben
REC	Regional Economic Communities
REMI	Revue européenne des migrations internationales
RFI	Radio France Internationale
RLPSSA	Rule of Law Programme for Sub-Saharan Africa
ROAPE	Review of African Political Economy
RSA	Republic of South Africa
s	section
SA	South Africa
SABC	South African Broadcasting Corporation
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAICA	South African Institute of Chartered Accountants
SAIIA	South African Institute of International Affairs
SAJHRM	South African Journal of Human Resource Management
SAJHR	South African Journal on Human Rights
SALDRU	Southern Africa Labour and Development Research Unit
SALJ	South African Law Journal
SAMP	Southern African Migration Programme
SAPS	South African Police Service
SAQA	South African Qualifications Authority
SCA	Supreme Court of South Africa
SDA	Skills Development Act
SDLA	Skills Development Levies Act
SEC	Sub-Regional Economic Community
SIAS	Scandinavian Institute of African Studies
SOPEMI	Permanent System Migration Observer
STUP	Stanford University Press
SUNYP	State University of New York Press
SUP	Stanford University Press
SUP	Syracuse University Press
SWAC	Sahel and West Africa Club
SYSOAHADA	OHADA Accounting System
TES	Temporary Employment Services
TLR	Tennessee Law Review

TP	Transnational Press
TVET	Technical and Vocational Education and Training
TWQ	Third World Quarterly
TESG	Tijdschrift voor Economische en Sociale Geografie (Journal of Economic & Social Geography)
UCHP	University of Chicago Press
UCL	Catholic University of Louvain
UCP	University of California Press
UCP	University of Chicago Press
UCT	University of Cape Town
UDHR	Universal Declaration of Human Rights
UIA	Unemployment Insurance Act
UICA	Unemployment Insurance Contributions Act
UK	United Kingdom
ULB	Université Libre de Bruxelles
UMA	Arab Maghreb Union
U. Mich. J. L. Reform	University of Michigan Journal of Law Reform
UMP	University of Michigan Press
UN	United Nations
UNC Press	University of North Carolina Press
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCR	United Nations High Commissioner for Refugees
UNIKIN	University of Kinshasa
UNILU	University of Lubumbashi
UNTS	United Nations Treaty Series
UPP	University of Pennsylvania Press
URP	University of Rochester Press
US	United States
USA	United States of America
USD	US Dollar
US GPO	United States Government Publishing Office
UTS	University of Toronto Press
UWP	University of Wisconsin Press
v	versus
Vol.	Volume
WESO	West Sodimico Sprl
WHO	World Health Organisation
WTO	World Trade Organisation
WUP	Wesleyan University Press
WUP	Wits University Press
YUP	Yale University Press
ZAGPPHC	South Africa: North Gauteng High Court, Pretoria
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (HJIL Heidelberg Journal of International Law)
ZASCA	Supreme Court of Appeal of South Africa

ZEP
ZSP

Zimbabwean Exemption Permit
Zimbabwean Special Dispensation Permit

TABLE OF CONTENTS

DECLARATION.....	i
DEDICATION	ii
ABSTRACT	iii
RÉSUMÉ.....	iv
KEY TERMS.....	v
ACKNOWLEDGEMENTS	vii
LIST OF ACRONYMS	viii
TABLE OF CONTENTS	xivi
CHAPTER ONE.....	1
INTRODUCTION AND BACKGROUND	1
1.1 General introduction to the study	1
1.2 Background information	7
1.3 Subject matter of the study, research questions and feasibility	8
1.4 Aims and objectives of the Study	10
1.5 Importance of the Study.....	13
1.6 Justification for the study.....	15
1.7 Problem statement	17
1.8 Research focus.....	20
1.9 Literature review	23
1.10 Research methodology	33
1.11 Assumptions and expected findings	35
1.12 Structure of the thesis and chapter synopsis.....	37
1.13 Conclusion	41
CHAPTER TWO	42
LABOUR MIGRATION: A THEORETICAL FRAMEWORK	42
2.1 Introduction.....	42
2.2 Definitions of key concepts	46
2.2.1 Notion of labour migration.....	46
2.2.2 Scope of the definition of labour migration	49
2.2.2.1 The narrow approach to the definition of labour migration	50
2.2.2.2 The broader approach to the definition of labour migration	55
2.2.3 Defining the terms “foreigner” and “foreign national”	56
2.3 A brief discussion of the intersection and interaction between migration law and labour law	58
2.4 Labour migration as a component of the “brain drain” and “brain circulation” processes, and brain gain.....	60
2.4.1 Brain drain.....	60
2.4.2 Brain circulation	63
2.4.3 Brain gain	65
2.5 DRC and South Africa’s solution to the skills shortages	67
2.5.1 DRC’s solution to the skills shortages	67
2.5.1.1 National employment and vocational training policy.....	68
2.5.1.2 The use of the skills and experience of the diaspora	69
2.5.1.3 Transfer of skills (training) and knowledge to the local workforce	70
2.5.2 South Africa’s solution to the skills shortages	71
2.5.2.1 Training and transfer of skills to the local workforce	71
2.5.2.2 Skilled immigration strategies.....	73

2.5.2.3 Free regional labour movement	75
2.5.2.4 Bilateral agreements	78
2.6 Conclusion	82
CHAPTER THREE	85
STATE'S AUTHORITY AND RESPONSIBILITY FOR REGULATING AND CONTROLLING LABOUR MIGRATION.....	85
3.1 Introduction.....	85
3.2 A brief introduction to the concept of the state's authority and responsibility for regulating and controlling labour migration	86
3.2.1 Introduction.....	86
3.2.2 The protection of the domestic labour market: an underlying factor for migration control	87
3.2.3 The states' sovereign prerogatives over migration	89
3.3 State institutions tasked with regulating and controlling labour migration	91
3.3.1 Introduction.....	91
3.3.2 State institutions tasked with regulating and controlling labour migration in the DRC	94
3.3.3 State institutions tasked with regulating and controlling labour migration in South Africa	99
3.4 The protection of irregular immigrants' labour rights	102
3.4.1 Introduction.....	102
3.4.2 Defining irregular/ illegal/undocumented immigrant and migrant worker	103
3.4.3 Discussing approaches to the protection of irregular immigrants' labour rights	105
3.4.4 A brief review of the legal and judicial consideration of irregular migrants' employment contracts	111
3.4.4.1 Legal and judicial consideration of irregular migrants' employment contracts in South Africa	112
3.4.4.2 Legal and judicial consideration of irregular migrants' employment contracts in the DRC	114
3.5 Conclusion	117
CHAPTER FOUR	118
HISTORICAL AND STATUTORY FOUNDATION OF DRC AND SOUTH AFRICA'S LABOUR MIGRATION POLICIES	118
4.1 Introduction.....	118
4.2 The statutory foundation of South Africa's and DRC's labour migration policies.....	118
4.2.1 The statutory foundation of South Africa's labour migration policies	119
4.2.1.1 Pre-colonial labour migration policy	119
4.2.1.2 Labour migration policy in colonial times.....	123
4.2.1.3 Post-colonial labour migration policy	127
4.2.1.3.1 Labour migration policy under apartheid.....	128
4.2.1.3.2 Post-apartheid labour migration policy.....	130
4.2.2 The statutory foundation of DRC's labour migration policies	133
4.2.2.1 Precolonial labour migration policy.....	133
4.2.2.2 Labour migration policy in colonial times.....	134
4.2.2.3 Post-colonial labour migration policy	136

4.3 The basic legal framework pertaining to labour migration in contemporary DRC and South Africa	138
4.3.1 International legal framework.....	138
4.3.1.1 Multilateral Agreements	138
4.3.1.2 Regional Agreements.....	139
4.3.1.3 Bilateral Agreements.....	141
4.3.2 Key principles of the national legal framework regulating labour migration.....	142
4.3.2.1 The right to freedom to choose an occupation	142
4.3.2.2 The right to engage in work.....	143
4.3.3 Access of foreign nationals to the DRC's and South African labour market	144
4.4 Conclusion	144
CHAPTER FIVE	146
PROTECTION OF THE NATIONAL LABOUR FORCE AGAINST FOREIGN COMPETITION IN THE DRC AND SOUTH AFRICA	146
5.1 Introduction.....	146
5.2 Notions of the national labour force	146
5.2.1 Distinctions	147
5.2.1.1 Self-employment and contingent employment.....	147
5.2.1.2 Voluntary and compulsory work	150
5.2.2 Definition of labour force	152
5.2.2.1 Broad definition of labour force	152
5.2.2.2 Narrow definition of labour force	153
5.2.3 Limitations to the definition.....	153
5.2.3.1 Employers who are part of the national workforce	153
5.2.3.2 Non-labour-intensive occupational activities	154
5.2.3.3 Exporting the national workforce.....	154
5.3 Notions of labour or skills shortage	155
5.3.1 Definition of labour or skills shortage	156
5.3.2 Remedies for skills shortages.....	156
5.3.2.1 Vocational skills training	156
5.3.2.2 Recruitment of foreign skills	157
5.3.2.2.1 Positive perception of the recruitment of foreign skills	158
5.3.2.2.2 Negative perception of the recruitment of foreign skills	159
5.3.2.2.3 Consequences of the negative perception of the recruitment of foreign skills.....	160
5.3.2.2.4 Lasting solutions to social unrest	161
5.4 Motivations of the protection of national labour force	162
5.4.1 The legal and political grounds for protecting the national workforce	162
5.4.1.1 Work as a right and a duty for every citizen	163
5.4.1.2 Work as a vehicle for humanitarian or neighbourly ideals.....	163
5.4.2 Economic and social grounds for protecting the national workforce.	164
5.4.2.1 The fight against unemployment	164
5.4.2.2 Concern for currency savings.....	167
5.5 Conclusion	170
CHAPTER SIX.....	172
BASIC PRINCIPLES GOVERNING THE PROTECTION OF NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA.....	172

6.1 Introduction.....	172
6.2 Objectives of the principles.....	172
6.2.1 Tackling foreign competition in the national labour market	173
6.2.2 Workforce nationalisation.....	175
6.3 Contents of the principles	176
6.3.1 Employment priority for local employees	177
6.3.2 Requirement to hold a work permit and/ or visa	178
6.4 Scope of application of the principles.....	180
6.4.1 Diplomatic and consular personnel and representatives of international organisations	181
6.4.2 Refugees.....	183
6.4.3 Nationals from neighbouring countries	184
6.4.3.1 South Africa’s special regime for nationals from neighbouring countries.....	184
6.4.3.2 DRC’s special regime for nationals from neighbouring countries ...	187
6.5 Conclusion	189
CHAPTER SEVEN	191
MEASURES FOR IMPLEMENTING BASIC PRINCIPLES GOVERNING THE PROTECTION OF NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA.....	191
7.1 Introduction.....	191
7.2 Mechanisms for limiting the use of foreign labour	191
7.2.1 Drawing up a list of jobs prohibited to foreign nationals	192
7.2.1.1 The DRC legislation.....	192
7.2.1.2 The South African legislation	194
7.2.2 Employment quotas for foreign workers in a company.....	197
7.2.2.1 Under the DRC legislation	197
7.2.2.2 Under the South African legislation.....	201
7.2.3 Application procedure for work permits/ visas	202
7.2.3.1 Types of work permits/ visas.....	202
7.2.3.1.1 Types of work permits in the DRC	202
7.2.3.1.2 Types of work visas in South Africa.....	205
7.2.3.2 Handling of applications for work permits/visas.....	209
7.2.3.2.1 Application procedure for work permits/visas in DRC and South Africa.....	209
7.2.3.2.2 Renewal procedure for work permits/visas in DRC and South Africa	213
7.2.3.3 Fate of the employment contract entered into in absence of a work permit/visa.....	214
7.2.3.3.1 Fate of the contract of employment in the DRC	215
7.2.3.3.2 Fate of the contract of employment in South Africa	215
7.2.3.4 Formalities required of the employer for hiring foreign nationals...	216
7.2.3.4.1 Formalities for hiring foreign nationals in the DRC	217
7.2.3.4.2 Formalities for hiring foreign nationals in South Africa	220
7.3 Exemptions from restrictions on foreign labour	221
7.3.1 Direct exemptions.....	221
7.3.1.1 Exemptions relating to the authorised quotas of foreign workers ...	221
7.3.1.2 Exemptions from application procedure for work permits.....	222
7.3.2 Indirect exemptions.....	223
7.4 Conclusion	225

CHAPTER EIGHT	227
CRITICAL REVIEW OF REGULATORY COMPLIANCE AND EFFECTIVENESS OF LEGISLATION PROTECTING THE NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA	227
8.1 Introduction.....	227
8.2 The DRC's and South Africa's efforts to enforce labour migration legal and regulatory policies.....	228
8.2.1 The prevention of illegal entries.....	228
8.2.1.1 Entry screening.....	229
8.2.1.2 Inspection of passports and work permits/ visas	231
8.2.1.3 Workplace and other raids.....	232
8.2.1.3.1 Workplace and other raids in South Africa	233
8.2.1.3.2 Workplace and other raids in the DRC	235
8.2.1.4 Employer sanctions.....	236
8.2.2 Deportation of unauthorised or illegal foreign nationals.....	238
8.2.2.1 Deportation of illegal foreigners in South Africa.....	238
8.2.2.2 Expulsion of illegal foreign nationals in the DRC.....	239
8.2.3 Deterrence of unauthorised or illegal immigration	241
8.3 Introducing a distinction between the two spheres of law-making competence in the DRC and South Africa.....	244
8.3.1 Two spheres of law-making competence in the DRC	244
8.3.2 Two spheres of law-making competence in South Africa	246
8.4 Conclusion	248
CHAPTER NINE.....	250
THE IMPLEMENTATION OF LABOUR MIGRATION STATUTORY AND REGULATORY POLICIES IN THE DRC AND SOUTH AFRICA: CHALLENGES AND POSSIBLE REMEDIES	250
9.1 Introduction.....	250
9.2 Challenges and problems encountered by the DRC and South Africa in the implementation of labour migration legal and regulatory policies	251
9.2.1 Substantial impairment of existing legislation by regulatory authorities	251
9.2.1.1 Practical case studies on impairment of existing legislation in the DRC	252
9.2.1.1.1 The position of doctrinal writing and case law.....	252
9.2.1.1.2 Specific practical examples of impairment of existing legislation by regulatory authorities	254
9.2.1.1.2.1 Ministerial decisions relating to the overall limitation of the number of foreign workers	254
9.2.1.1.2.2 The Prime Minister's and ministers' letters concerning the treatment of nationals and refugees from neighbouring countries... 	256
9.2.1.1.2.3 The Minister's decision requiring work permits from foreigners hired by employers based abroad on the basis of a contract for services, equipment supply contract or turn-key and plant supply contract.....	259
9.2.1.2 Practical case studies on impairment of existing legislation in South Africa.....	262
9.2.2 Interference with the sphere assigned to lawmakers by the regulatory authority.....	263

9.2.3 Compliance and non-compliance of labour migration policies with the international and regional human rights instruments and international labour standards	265
9.2.4 Legislative inertia and statutory obsolescence	269
9.3 Remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies in the DRC and South Africa	272
9.3.1 Remedies to the challenges and problems in the DRC	272
9.3.2 Remedies to the challenges and problems in South Africa	275
9.3 Conclusion	277
CHAPTER TEN	279
CONCLUSIONS AND RECOMMENDATIONS	279
10.1 Introduction	279
10.2 Conclusions	279
10.3 Recommendations	282
10.3.1 Recommendations to the DRC	283
10.3.2 Recommendations to South Africa	284
10.3.3 Recommendations to both the DRC and South Africa	285
CHAPTER ELEVEN	287
BIBLIOGRAPHY	287

CHAPTER ONE

INTRODUCTION AND BACKGROUND

1.1 General introduction to the study

For various reasons, including, among others, socio-economic growth and development, most countries⁶ on the African continent have decided to protect the employment prospects of local workers in relation to foreign competition in the labour market.⁷ It has been held that where employment opportunities are limited, any state should ensure that available jobs are in the first instance made available to its citizens.⁸ As the DRC⁹ and South African¹⁰ case law correctly points out, 'every state has the sovereign right to draw a distinction between citizens and foreign nationals in matters of access to employment'.¹¹

The purpose of this study is to compare the DRC's and South Africa's labour migration laws, regulations and policies aimed at protecting the national labour force against foreign competition. The DRC and South Africa have been chosen for this comparative study and are being compared to each other to the exclusion of other African nations for several reasons. First, in the context of the rate of immigration in sub-Saharan Africa, South Africa receives the highest number of

6 These countries include Botswana, Burundi, Cameroon, DRC, Kenya, Rwanda, Senegal, South Africa, Uganda, Zambia, and Zimbabwe, to name but a few.

7 Ruhs M "Immigration and labour market protectionism: protecting local workers' preferential access to the national labour market," in Costello C & Freedland M (eds) *Migrants at work: immigration and vulnerability in labour law* (OUP Oxford 2014) 61.

8 *Larbi-Odam and Others v Member of the Executive Council for Education and Another* 1996 (12) BCLR 1612 (B) para. 8 fn14.

9 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished, cited in Musubao L *La jurisprudence congolaise en droit du travail et de la sécurité sociale – vol. 1 (Congolese case law in labour and social security law – vol. 1)* (Ed. On s'en sortira Kinshasa 2006) 89.

10 See the *Larbi-Odam* case 1998 1 SA 745 (CC) paras. 30-31; see also *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC).

11 See also Van Rensburg L & Lamarche L "The right to social security and assistance," in Brand D & Heyns C *Socio-economic rights in South Africa* (PULP Pretoria 2005) 225; Joubert W *The Law of South Africa - Volume 33* (LexisNexis Butterworths Durban 2008) 50; Joubert W & Faris J *The law of South Africa – vol. 11* (LexisNexis Butterworths Durban 2003) 36.

labour immigrants¹² while the DRC has the fourth highest number of labour emigrants.¹³

Second, as a lawyer from the DRC having lived, studied, and worked in South Africa for two decades, I am uniquely equipped with all the necessary skills and resources to conduct this comparative study of the DRC and South African labour migration systems. It is, indeed, argued that comparatists¹⁴ are expected to be thoroughly familiar with the legal systems and the general political, historical, social, and cultural context of the countries they are studying.¹⁵

Third, both countries' legal systems are for the most part derived from Roman law,¹⁶ and are, more specifically, based on the German and Roman-Dutch legal traditions, which are characterised by the codification of existing legal norms.¹⁷ It is worth specifying, nevertheless, that the DRC legal system is based on the mixed

12 According to the most recent statistics, South Africa is the top net migrant-receiver in Africa with the total number of migrants estimated to have increased by about 62.5 per cent to 3.6 million, the majority of whom migrating thereto in search of better employment prospects. See Karombo T "62% rise in African migrants" *Business Report* (28 January 2019) <https://www.iol.co.za/business-report/economy/62-rise-in-african-migrants-19004740> (Date of use: 14 April 2022); UNCTAD *Economic development in Africa: migration for structural transformation* (UNCTAD Geneva 2017) <https://unctad.org/en/Pages/ALDC/Africa/EDAR2018-Key-Statistics.aspx> (Date of use: 14 April 2022).

13 The DRC is the fourth net emigration country of in Sub-Saharan Africa after Somalia, Sudan, and South Sudan. See UNCTAD *Economic development in Africa*.

14 The term "comparatist" or "comparativist" is defined in the Concise Oxford English dictionary as a person who employs the comparative method, or who carries out comparative study. For the purposes of this study, the term shall refer to a student or a scholar in the field of comparative law, or a comparative lawyer. See Stevenson A & Waite M *Concise Oxford English dictionary: luxury edition* (OUP Oxford 2011) 291; Husa J "Melodies on comparative law: a review Essay" 2005 *NJIL* Vol 74 (1) at 163 fn 5; Georges R "The Folklorist as comparatist" 1986 *Western Folklore* Vol. 45 (1) at 1 fn 1; Glenn H "Against method?" in Adams M & Heirbaut D (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Hart Publishing Oxford 2014) 177.

15 Millns S "Making the case for European comparative legal studies in public law," in Adams M & Heirbaut D (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Hart Publ. Oxford 2014) 286; Lemmens K "Comparative law as an act of modesty: a pragmatic and realistic approach to comparative legal scholarship," in Adams M & Bomhoff J (eds) *Practice and theory in comparative law* (CUP Cambridge 2012) 307.

16 The DRC is a Romano-Germanic law country, and South Africa a Roman-Dutch law country.

17 Mousourakis G "The sources of Roman law," in Mousourakis G *Roman law and the origins of the civil law tradition* (Springer Cham 2015) 32; Letterman G *Letterman's law of private international business, Vol. 1* (Lawyers Co-operative New York 1990) 34; Schabas W & Imbleau M *Introduction to Rwandan law* (Les Editions Yvon Blais Cowansville, Quebec 1997) 34; Merryman J & Pérez-Perdomo R *The civil law tradition: an introduction to the legal systems of Europe and Latin America - 3rd ed.* (SU Press Stanford Calif. 2007) 27; David R & Brierley J *Major legal systems in the world today: an introduction to the comparative study of law - 2nd ed.* (Free Press New York 1978) 31.

system of Romano-Germanic civil law and customary law (referred to as the indigenous system of law of black Africans).¹⁸ South Africa retains a “hybrid” or “mixed” legal system,¹⁹ which comprises three distinct legal traditions, namely the civil law system (Roman-Dutch law), common law system, and customary law system.²⁰ The terms “mixed legal system” or “mixed jurisdiction” are mainly used to describe a number of legal systems at the intersection of civil law and common law.²¹

With regard to the State’s sovereign right referred to above, one may wonder whether the DRC and South Africa fail to comply with the existing international,²² regional²³ and sub-regional²⁴ human rights instruments and international labour standards,²⁵ which enshrine the principles of equality and non-discrimination as

18 Crabb J *The legal system of Congo-Kinshasa* (The Michie Company Charlottesville Va. 1970) 20 & 83; McQuoid-Mason D “Mixed legal jurisdictions and clinical legal education: latest trends,” in Palmer V, Mattar M & Koppel A (eds) *Mixed legal systems, East and West* (Routledge London 2016) 279.

19 Rautenbach C “South Africa: legal recognition of traditional courts — legal pluralism in action,” in Kötter M et al (eds) *Non-state justice institutions and the law: decision-making at the interface of tradition, religion and the state* (Palgrave Macmillan London 2015) 121.

20 Zimmermann R & Visser D “Introduction: South Africa law as mixed legal system,” in Zimmermann R & Visser D *Southern cross: civil law and common law in South Africa* (Juta Cape Town 1996) 2-3; du Bois D (ed) *Wille’s principles of South African law - 9th ed.* (Juta Cape Town 2007) 33.

21 Smith T *Studies critical and comparative* (W Green & Son Ltd Edinburgh 1962); Dainow J (ed) *The role of judicial decisions and doctrine in civil law and in mixed jurisdictions* (1974), cited in Zimmermann & Visser *South African law* 2 fn 9.

22 See UDHR (Art 23); ICESCR (Arts 6, 7, & 8); ICCPR (Art. 8(3)(a)); ICERD (Art 5(e)(i)); CEDAW (Art. 11 (1)(a)); CRPD (Art. 27); CRC (Art 32); *Migrant Workers’ Convention* (Arts 11, 25, 26, 40, 52 & 54); *UN Refugee Convention* (Arts 17, 18, & 19); *Declaration on the human rights of individuals who are not nationals of the country in which they live*, 1985 (Arts 5 & 8); CESCR Committee, *General Comment No. 18: The Right to Work* (Art 6), *UN Doc. E/C.12/GC/18*, 6 Feb. 2006, para. 1; CESCR *General Comment No. 18* para 6.

23 *Banjul Charter* (Art. 15); *PACHPRRWA (Maputo Protocol)* (Art. 22 & 23); *African Youth Charter* (2006/2009) (Art. 23); *Solemn Declaration on Gender Equality in Africa* (2004) (para. 6 & 9); *African Charter on Democracy, Elections and Governance* (2007/2012) (Art. 2(11)).

24 See *SADC Protocol on Gender and Development* as revised to date on 23 June 2016 (Art. 19).

25 Particularly the eight fundamental ILO conventions: *Freedom of Association and Protection of the Right to Organise Convention*, 1948 (No. 87); *Right to Organise and Collective Bargaining Convention*, 1949 (No. 98); *Forced Labour Convention*, 1930 (No. 29); *Abolition of Forced Labour Convention*, 1957 (No. 105); *Minimum Age Convention*, 1973 (No. 138); *Worst Forms of Child Labour Convention*, 1999 (No. 182); *Equal Remuneration Convention*, 1951 (No. 100); *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111). And the four priority conventions: *Labour Inspection Convention*, 1947 (No. 81); *Labour Inspection (Agriculture) Convention*, 1969 (No. 129); *Tripartite Consultation (International Labour Standards) Convention*, 1976 (No. 144); *Employment Policy Convention*, 1964 (No. 122). Furthermore, through the *ILO Declaration on Fundamental Principles and Rights at Work* (1998), all ILO members have committed to four principal values, regardless of whether they are party to relevant ILO conventions.

regards access to employment.²⁶ These two principles are regarded as ‘the cornerstone of international human rights treaties, which enshrine the notion that dignity and equality [shall] be accorded to all human beings’.²⁷ These include ‘non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation’.²⁸ Equality is regarded as the most fundamental of the rights of man according to most written constitutions,²⁹ including the Constitution of the DRC³⁰ and that of South Africa.³¹

More discussion here is about why one cannot separate out “equality” and “human rights” from this analysis. Some would claim that foreign nationals’ human rights are secondary to the human rights of a nation’s citizens. It is argued that ‘there is a continuum of rights attached to membership of a state rather than a sharp distinction between citizen and non-citizen,’³² and in various jurisdictions, such as western Europe, many of the rights of nationals are extended to foreigners.³³

This research study, therefore, attempts to answer the question of whether non-nationals effectively enjoy the right to work provided for in the domestic legislation

26 Breen C “‘Difference’ or discrimination? Exploring the concepts underpinning children's Rights, discrimination and the need to acknowledge difference,” in Breen C *Age discrimination and children's rights: ensuring equality and acknowledging difference* (Martinus Nijhoff Leiden 2006) 12; Helfer L et al *The world blind union guide to the Marrakesh Treaty: facilitating access to books for print-disabled individuals* (OUP Oxford 2017) 18.

27 Breen ‘Difference’ or discrimination? 42.

28 See Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, 30, U.N. Doc. E/C. 12/GC/20 (July 2, 2009) para. 5 & 30; *General Comment No. 30* (2004) of the Committee on the Elimination of All Forms of Racial Discrimination on non-citizens (para. 29, 33 & 35).

29 Lauterpacht H *An International Bill of the Rights of Man* (OUP Oxford 2013) 115; Gutto S *Equality and non-discrimination in South Africa: the political economy of law and law making* (New Africa Books Claremont 2001) 131; Rehman R “Minorities and the right to equality and non-discrimination in international law,” in Rehman R *The weaknesses in the international protection of minority rights* (Kluwer Law International The Hague 2000) 104; McDougal M, Lasswell H & Che L *Human rights and world public order: the basic policies of an international law of human dignity* (OUP Oxford 2019) 561.

30 See Art. 12 of the *Constitution of the DRC as revised by Act No. 11/002 of 20 January 2011 revising certain Articles of the Constitution of the DRC of 18 February 2006*.

31 See s 1(a); 7(1); & 9 of the *Constitution of South Africa, 1996*.

32 Layton-Henry Z “Citizenship and migrant workers in Western Europe,” in Moran M & Vogel U (eds) *The frontiers of citizenship* (Palgrave Macmillan Basingstoke 1991) 118.

33 Guiraudon V “Citizenship rights for non-citizens: France, Germany, and The Netherlands,” in Joppke C (ed) *Challenge to the nation-state: Immigration in Western Europe and the United States* (OUP Oxford 1998) 272; Skogly S *Beyond national borders: States' Human Rights obligations in international cooperation* (Intersentia Antwerpen Oxford 2006) 21.

of the DRC,³⁴ and South Africa,³⁵ as well as in international, regional, and sub-regional human rights instruments and international labour standards referred to above.

While addressing this question, the study assesses at the same time, the DRC and South Africa's compliance with their international and regional human rights treaty obligations concerning access to employment. In fact, having the sovereign right to create their own migration policy, states regulate the stay and employment of foreign labour according to domestic laws, which are not always in line with international and regional human rights standards.³⁶

A particular focus is put on the 'four levels of commitment to human rights treaties, [namely] signature, qualified ratification, ratification in general, and ratification with enhanced monitoring and enforcement'.³⁷

The study also focuses on the tension between the fundamental principle of international economic law, in particular the principle of equal treatment between foreigners living in a particular country and citizens or nationals³⁸ of that particular

34 See Art. 36 of the *Constitution of the DRC as revised to date*; Art. 2 of the *DRC Labour Code (Act No. 015/2002 of 16 October 2002 as amended and supplemented by Act No. 16/010 of 15 July 2016)*.

35 See s 23 of the *Constitution of South Africa, 1996*; s 4 of *Labour Relations Act (Act No. 66 of 1995)*; s 5 & 6 of *Employment Equity Act (Act No. 55 of 1998)*.

36 Battistella G "Labour migration in Asia and the role of bilateral migration agreements," in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave New York 2015) 320.

37 Cole W "Human rights as myth and ceremony? re-evaluating the effectiveness of human rights treaties, 1981–2007," in Weston B & Grear A (eds) *Human rights in the world community: issues and action – fourth ed.* (Penn Press Phil. 2016) 306; Cole W "Human rights as myth and ceremony? re-evaluating the effectiveness of human rights treaties, 1981–2007," 2012 *AJS* Vol. 117 (4) at 1137.

38 This also raises the issues surrounding the distinction between discrimination based on migrant status and discrimination based on national origin, on the one hand, and between discrimination based on citizenship status and discrimination based on national origin, on the other hand. See *Espinoza v. Farah Manufacturing Co.*, 1973, [6 EPD T8944] 414 U. S. 86, 94 S. Ct. 334, 38 L. Ed. 2d 287; Ontiveros M "Migrant labour in the US: working beneath the floor for free labour?", in Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014) 185; Tham J, Campbell I & Boese M "Why is labour protection for temporary migrant workers so fraught? a perspective from Australia," in Howe J & Owens R (eds) *Temporary labour migration in the global era: regulatory challenges* (Hart Oxford 2016) 181.

country and the fundamental principle of State sovereignty in determining immigration policy.³⁹

Based on this fundamental principle enshrined in international law, states have the power 'to set their own laws and standards in matters related to migration',⁴⁰ whether it is legal or illegal migration.⁴¹ It is, indeed, argued that 'governing migration [and citizenship] is [regarded as] a central prerogative of the sovereign nation-state'.⁴²

Therefore, matters relating to 'border control, security, citizenship, and migration are central to the very principle of state sovereignty in the tradition of the modern nation-state'.⁴³ This has been confirmed by several domestic⁴⁴ and foreign court decisions,⁴⁵ which emphasized that the admission of foreigners 'falls within the competence of [...] host state[s] as a consequence of [their] territorial

39 Van Themaat P *The changing structure of international economic law: a contribution of legal history, of comparative law and of general legal theory to the debate on a new international economic order* (Martinus The Hague 1981) 16; Van Themaat P & Petersmann E "The Changing structure of international economic law," 4. Quartal 1984 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* Vol. 17 (4) at 506; Vosko L "Out of the Shadows? The non-binding multilateral framework on migration (2006) and prospects for using international labour regulation to forge global labour market membership," in Davidov G & Langille B (eds) *The idea of labour law* (OUP Oxford 2011) 379; Howe J & Owens R "Temporary labour migration in the global era: the regulatory challenges," in Howe J & Owens R (eds) *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publ. Oxford 2016) 31.

40 Schmidtke O "Introduction: national closure and beyond," in Schmidtke O & Ozcurumez S (eds) *Of states, rights, and social closure: governing migration and citizenship* (Palgrave Macmillan New York 2008) 5.

41 Noorani A & Law A "Federal policy versus decentralised policy," in Gans J, Replogle E, & Tichenor D (eds) *Debates on U.S. Immigration* (SAGE London 2012) 132.

42 Schmidtke Introduction 5.

43 Schmidtke O "Justice, freedom, and security," in Brunet-Jailly E, Hurrelmann A, & Verdun A (eds) *European Union governance and policy making: a Canadian perspective* (University of Toronto Press Toronto 2018) 168; Schmidtke National closure 5.

44 See *The Watchenuka case [Minister of Home Affairs and Others v Watchenuka and Another 2004 (4) SA 326 (SCA)]* para. 29.

45 See *Nishimura Ekiu v. United States* [1982] 142 U.S. 651, Gray J., 659. See also: *Attorney-General for Canada v. Cain* [1906] AC 542, 546; *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *The Chinese Exclusion Case (Chae Chan Ping v. U.S.)*, 130 U.S. 581 (1889); *Musgrove v. Chun Teong Toy*, 60 L. J., P. C.28; [1891] A.C. 272; *Habeas Corpus de Irene Amor Magaz de Gonzalez*, 148 Fallos, 410, 414; *Habeas Corpus de Francisco Macia*, et al., No. 282, 74 Gaceta del Foro, 169; *Habeas Corpus de Everardo Dias*, 26 Revista de Supremo Tribunal, 19, 20. *Corpahnia de Seguros Garantia v. Uniao Federal*, No. 696, 88 O Direito, 250, 264, Supreme Court, Brazil.

sovereignty'.⁴⁶ However, given the limits of states' right to sovereignty contemplated in international law, the states' power and right to admit or forbid the entry of foreigners into their territory is subject to constant challenges,⁴⁷ which are discussed in depth in this study.

This study provides a critical and empirical analysis of specific measures, namely the adoption of labour protective-legislation and migration control policies, to protect the domestic labour force against foreign competition, focusing on the DRC and South Africa's labour migration laws and regulations. It is, therefore, worth providing some background information concerning the subject matter of this study.

This chapter, therefore, introduces the subject matter of the study and provides some background information on the protection of the national labour force against foreign competition in the DRC and South Africa. Furthermore, this chapter outlines a set of research questions; the feasibility, aims and importance of, and the justification for the study; the problem statement; the research focus; the literature review; the research methodology, the assumptions and expected findings; the expected original contribution to knowledge; the structure of this thesis; and a chapter synopsis.

1.2 Background information

Most countries around the globe accommodate people emigrating from other countries for various reasons, including geographical considerations, environmental incentives, academic or scholarly pursuits (student migration),

46 Chetail V "History of international migration law," in Chetail V *International migration law* (OUP Oxford 2019) 33; Chetail V "The transnational movement of persons under general international law – Mapping the customary law foundations of international migration law", in Chetail V & Bauloz C (eds) *Research handbook on international law and migration* (Edward Elgar Cheltenham UK 2014) 28; Kelley N "Rights in the balance: non-citizens and state sovereignty under the Charter," in Dyzenhaus D (ed) *The unity of public law* (Hart Publishing Oxford 2004) 253; Witt J "A social history of international law: historical commentary, 1861-1900," in Sloss D, Ramsey M, & Dodge W (eds) *International law in the U.S. Supreme Court: continuity and change* (CUP Cambridge 2011) 185; Puente J "Exclusion and expulsion of aliens in Latin America," 1942 *AJIL*, vol. 36(2) at 255.

47 Schmidtke National closure 5; Dauvergne C "Sovereignty, migration and the rule of law in global times," 2004 *MLR* vol. 67(4) at 595.

political and religious reasons (refugees), forming a family (marriage migration),⁴⁸ or economic and employment reasons (labour migration).⁴⁹ Many scholars agree that migrants, in general, and labour migrants,⁵⁰ in particular, have become an indispensable element of the economic, social, cultural, scientific, and human development in receiving countries.⁵¹

This study does not constitute a conclusion per se, but it merely provides a supplementary perspective, a fresh look or point of view on the subject. The study further presents arguments to support the improvement of legislation in the wake of a loud and persistent outcry against the continued and intense foreign stranglehold on the host countries' economy. A particular focus is, of course, on the DRC and South Africa, both of which are the subject of this comparative study.

1.3 Subject matter of the study, research questions and feasibility

The subject matter of this study is 'the protection of the national labour force against foreign competition under labour migration laws and policies: a comparative analysis between the DRC and South Africa'. This comparative study is conducted within the context of comparing specifically two existing national labour migration systems. However, the subject matter focuses on a critical

48 Pedersen P J, Røed M & Wadensjö E "The extent of mobility," in Pedersen P J, Røed M & Wadensjö E *The common Nordic labour market at 50* (TemaNord Copenhagen 2008) 43; Gold S & Nawyn S "Refugees and forced migrants", in Gold S & Nawyn S (eds) *Routledge international handbook of migration studies* (Routledge London 2013) 97.

49 Lucas R "International migration to the high-income countries: some consequences for economic development in the sending countries," in Bourguignon F, Pleskovic B & Sapir A (eds) *Are we on track to achieve the Millennium Development Goals?* (World Bank/ OUP Washington DC 2005) 130.

50 For the purposes of this study, the terms "labour migrant," "migrant worker", "foreign worker", "migrant for employment", and "economic migrant" are used interchangeably to cover a foreign national who has been admitted into the state for the purpose of employment. See Cholewinski R "Introduction," in Cholewinski R *The legal status of migrants admitted for employment - a comparative study of law and practice in selected European states* (Council of Europe Publications Strasbourg 2008) 8; Freedland M & Costello C "Migrants at work and the division of labour law", in Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014) 4; Trémolières M "Glossary," in Trémolières M (ed) *Regional challenges of West African migration: African and European perspectives* (OECD Paris 2009) 245.

51 Bertossi C "The regulation of migration: a global challenge" *Politique étrangère*, 2008/5 (Hors série) 196; Tirkkeistudien Z "Migration movements from Turkey to the European Community" (Brussels 1993) 183; Sen F "The economic, social and political impact of Turkish migration," in Spencer S (ed) *Immigration as an economic asset: the German experience* (IPPR/Trentham Books London 1994) 106 fn 34.

research problem, which is the identification of the challenges that impede effective enforcement of domestic labour migration laws and regulations in the DRC as compared to South Africa.

In addition, the subject matter focuses on how these challenges can be addressed to ensure that national labour force is fully protected against foreign competition for a better labour market environment in both countries. The subject matter also focuses on the investigation of existing national labour migration policies and the mechanisms for their enforcement. This will help identify any shortcomings in the two systems being compared, and therefore the ways in which they can be reformed and adapted to achieve more ideal systems. The relevance of the research problem and its implications to the millions of DRC and South African citizens affected by lack of proper implementation and execution of their rights to preferential access to the national labour market makes this study not only interesting and fascinating, but also a challenging and valuable source of knowledge.

By analysing the subject matter, this study seeks to empirically explore the following research question: 'How and in what ways do the DRC and South Africa implement, monitor, and enforce labour migration laws, regulations, and policies, which are aimed at promoting the protection of national labour force against foreign competition?' This overall research question is broken down into the following focal questions:

- Which categories of jobs are directly affected by competition between foreign-born and local workers in the DRC and South Africa?
- Why is it important for the DRC and South Africa to protect their national labour force against foreign competition?
- To what extent should the two countries protect their national labour force against foreign competition?
- How do the two countries effectively ensure protection of 'local workers' rights to preferential access to the national labour market'?⁵²

⁵² See similar question concerning nation states at Ruhs Labour market protectionism 77.

- What are the legal definitions, scope of, and principles governing the protection of a national labour force against foreign competition?
- Who are the beneficiaries of the protection of a national labour force against foreign competition in the DRC and South Africa?
- What are the legal and regulatory regimes governing labour migration in the DRC and South Africa?
- How do the two countries deal with impairment of labour migration laws, regulations, and policies?
- What are the consequences and remedies of non-compliance with labour migration laws, regulations, and policies in the two countries?
- Have the two countries signed and ratified international, regional, and sub-regional standards relating to labour migration? If so, are both countries in compliance with these labour migration standards?
- What are the similarities and differences between the two countries in terms of the legislation governing labour migration?

These questions are clearly feasible at an empirical level as the laws, regulations and policies under study are susceptible to be empirically investigated to see 'how they are interpreted and applied by administrative bodies, regulatory agencies, and courts'.⁵³ The above raised questions are feasible as it is possible to answer them given the availability of resources.

1.4 Aims and objectives of the Study

Considering all those studies⁵⁴ conducted so far, it is evident that the focus has been centred on the labour migration regime in South Africa and some neighbouring countries in the Southern African Sub-region, including Botswana,

53 Galligan D "Legal theory and empirical research," in Cane P & Kritzer H (eds) *The Oxford handbook of empirical legal research* (OUP Oxford 2010) 984.

54 See Oucho J "Cross-border migration and regional initiatives in managing migration in southern Africa," in Kok P, Gelderblom D, Oucho J & Van Zyl J (eds) *Migration in South and Southern Africa* (HSRC Press Pretoria 2006) 47-70; Adepoju A "Regional and intercontinental migration in Sub-Saharan Africa," in Inglis C, Li W, & Khadria B (eds) *The SAGE Handbook of International Migration* (SAGE London 2019) 232-246; Crush J & Chikanda B "Forced migration in Southern Africa," in Qasmiyeh E et al (eds) *The Oxford handbook of refugee and forced migration studies* (OUP Oxford 2014) 554-570; Banda C *Migration from Malawi to South Africa: a historical and cultural novel* (African Books Collective Oxford 2017).

the Kingdom of Eswatini, Lesotho, Malawi, Mozambique, Namibia, Tanzania, Zambia, and Zimbabwe.⁵⁵ There have never been any significant records of research publication that compares and analyses the DRC and South African legal and regulatory framework aimed at protecting the national labour force against foreign competition.

Therefore, this study aims to:

- fill the existing research gap in the labour migration law literature by assessing the protection of the national labour force against foreign competition in the DRC and South Africa and provide an insight for the future studies;
- assess the extent to which the DRC and South Africa uphold the protection of the national labour force against foreign competition;
- assess how the persistent local outcry against the heavy presence of foreign workers in the host country's labour market is addressed;
- examine the contradictory and paradoxical developments in which migration politics and policy are increasingly implicated. In fact, many African countries, including the DRC and South Africa, restrict the entry of foreign labour to reduce unemployment and underemployment of graduates and to address politically sensitive situation that prevail.⁵⁶ Paradoxically, these restrictions are coupled with the labour demands of the knowledge-intensive sectors, which experienced shortages and actively sought to recruit skilled labour;⁵⁷ Although the influx of foreign workers may bring much needed skills and meet the labour demands of specific sectors, it may create problems that can have a more serious impact on various aspects of the economy and social life of the receiving countries.⁵⁸ This is a great

55 Nshimbi C & Moyo I "History, trends and dynamics of cross-border movements and trade in the SADC region," in Nshimbi C & Moyo I (eds) *Migration, cross-border trade and development in Africa: exploring the role on non-state actors in the SADC Region* (Palgrave MacMillan Cham 2017) 4.

56 Fox L & Gaal M S *Working out of poverty: job creation and the quality of growth in Africa* (World Bank Group Washington DC 2008) 20.

57 Gabriel C & Pellerin H "Introduction," in Gabriel C & Pellerin H (eds) *Governing international labour migration: current issues, challenges and dilemmas* (Routledge London 2008) 4 & 5.

58 Ahmad R & Hansson B "Employing foreign workers in Sweden in construction sector," in Bust P *Contemporary ergonomics 2008* (Taylor & Francis Chippenham 2008) 215.

challenge facing these countries regarding effective promotion and protection of human rights. Therefore, this study provides an insight into the fact that addressing this socio-economic challenge contributes to the national enforcement of international and regional human rights law, peace, and development;

- understand and discuss trends, policy and legal issues relating to labour migration to and from the DRC and South Africa;
- provide an insight into the governance of labour migration by addressing the legal and regulatory frameworks for both countries;
- explore the way in which international labour migration has evolved in the two countries and investigate the causes of the different trends and formulate assumptions regarding their future development; and
- emphasize systematically a few issues and concerns that are of particular importance and that are raised within the scope of the subject matter.

Therefore, this study seeks to accomplish the following research objectives:

- to investigate the DRC and South Africa's mechanisms, which are aimed at protecting national labour force against foreign competition, the degree of operating effectiveness and public acceptance that they have achieved. This, on the one hand, involves assessing the said mechanisms through an analysis of the issues and challenges they face and how to overcome them. On the other hand, assessment of the said mechanisms is made through a comparative analysis, which involves examining similarities and differences between institutional and normative instruments of the DRC and those of South Africa. This amounts to examining the relationship between migration regulatory practices and labour regulatory regimes in the countries under study;
- to compare and contrast the two countries' existing labour migration legal and regulatory framework and enforcement mechanisms. This will help identify the shortcomings and merits of the implementation of the laws and policies, as well as the challenges that impede effective enforcement of

domestic labour migration laws and regulations in the DRC as compared to South Africa;

- to provide recommendations and suggestions that will help to achieve meaningful reforms to existing labour migration policies, which will, in turn, help to meet challenges and to overcome problems that labour migration regimes⁵⁹ currently face and ensure that national labour force is fully protected against foreign competition for a better labour market environment in both countries; and
- to assess the intersections between these areas of regulation that govern the entry of foreign-born workers into the local labour market in order to understand the construction of labour markets, the nature of work relationships and the manners in which they are shaped by legal, political, social, economic and cultural contexts.⁶⁰

1.5 Importance of the Study

The main incentive for this research study is to make a sixfold contribution.

Firstly, the study is of significant help in understanding the problems and challenges that the DRC and South African market-led labour migration regimes are facing in ensuring the effective protection of national labour force against foreign competition.

Secondly, this study is important insofar as it will help in assessing the extent to which the DRC and South Africa comply with their own labour migration laws and policies as well as regional and international standards applicable to labour migration.

59 A labour migration regime can be regarded as defining “the existing principles and rules, procedures and practices of governments, which govern the immigration or emigration of persons” for the purpose of employment. See Wickramasekara P “Migration regimes and their linkages for family unity, integrity and development,” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave New York 2015) 146; Podolskaya T “Migration policy and problems of ensuring economic security of countries,” in Ushakov D (ed) *Migration and urbanisation: local solutions for global economic challenges* (IGI Global Hershey PA 2019) 80.

60 Howe & Owens *The regulatory challenges* 33-34.

Thirdly, this study is important because it could provide a certain degree of legal certainty, which in turn, presupposes a certain degree of democratic values, including respect for human rights and the rule of law.⁶¹

Fourthly, the study is important insofar as it could also assist the authorities of the countries under study in ensuring effective and proper implementation and enforcement of all labour migration policies. This justifies the need to thoroughly analyse and review the DRC and South African labour laws and migration policies as well as the challenges they face to fully understand how labour migration is addressed in the two countries.

Fifthly, this research is of great importance as a resource for the study of labour migration law, insofar as the discussion raises the issue of the interaction between these different branches of domestic law, as well as the intersection between labour law and migration law. This gives rise to a distinctive intermediate new body referred to as “labour migration law” or the “law of labour migration”.⁶² In fact, while most states address labour migration in their migration laws,⁶³ in some other jurisdictions ‘the entry of foreign-born workers into the local labour market’⁶⁴ is governed by various areas of law. These include labour laws, immigration laws, anti-discrimination laws, social security laws, trade laws, refugee and asylum law, nationality law, human rights law to name but a few.⁶⁵

Sixthly, the importance of this study lies in the fact that not only does it outline the challenges and problems the labour migration regimes face, but also uncovers barriers and prospects for the future of labour migration policy enforcement in the DRC and South Africa.

61 Raitio J “Legal certainty as an element of objectivity in law,” in Husa J & Van Hoecke M (eds) *Objectivity in law and legal reasoning* (Hart Publishing Oxford 2013) 85; Peczenik A “The Dilemma of legal reasoning: moral evaluation or description of the law?,” in Peczenik A *On law and reason* (Kluwer Dordrecht 1989) 40; Jagland T “Inclusive societies,” in Jagland T *State of democracy, human rights and the rule of law: role of institutions threats to institutions - Report by the Secretary General of the Council of Europe* (Council of Europe Pub. Strasbourg 2018) 83.

62 Freedland & Costello Division of labour law 1.

63 Podolskaya Migration policy 80.

64 OECD, *OECD Territorial Reviews: Stockholm, Sweden 2006* (OECD Publ. Paris 2006) 117.

65 See Howe & Owens The regulatory challenges 33; Tham, Campbell & Boese Labour protection 174 fn 6.

1.6 Justification for the study

This study consists of a few core components that, when brought together, provide considerable justification for the scholarly inquiry, and such justification is twofold: justification for studying the labour migration laws and policies protecting national labour force against foreign competition, and justification for comparing the DRC labour migration system with the South African system.

In terms of the first justification, as pointed out by Katansi,⁶⁶ the question relating to the protection of national labour force against foreign competition refers directly to the regulation of the employment of foreigners in a country. In fact, enacting such protectionist laws or policies is not about promoting or inciting racist ideologies and xenophobic tendencies, but it is rather a way of preserving internal peace and justice of the state as well as interstate peace and justice.⁶⁷

Finding effective and lasting solutions to social and political issues has, therefore, become a priority not only in South Africa, but also in the whole southern Africa sub-region. This study, indeed, makes a modest contribution to such an effort, focusing specifically on the DRC and South African labour migration systems. A particular emphasis is placed upon examining and addressing the dilemma existing between the three types of immigration policies,⁶⁸ which are generally adopted by States.⁶⁹

While they have been identified in a fragmented manner in the general migration literature,⁷⁰ these types of immigration policies have not been clearly established and discussed extensively in the literature on intra-African migration.

66 Katansi L "Protection de la main d'œuvre nationale" (Protection of the national labour force), in Gilombe M Philosophie africaine: paix-justice-travail: actes de la 10ème semaine philosophique de Kinshasa du 30 novembre au 6 décembre 1986 (African philosophy: peace-justice-work: proceedings of the 10th Philosophical Week in Kinshasa from 30 November to 6 December 1986) (Facultés Catholiques de Kinshasa, Kinshasa 1988) 193.

67 Katansi Protection 194.

68 The three types of immigration policies are: restrictive immigration policies; liberal immigration policies; and regional migration arrangements.

69 See DeLaet D "Domestic politics, liberal ideas, and U.S. Immigration Policy," in DeLaet D *U.S. immigration policy in an age of rights* (Praeger Pub. Westport CT 2000) 9.

70 See Johnson K "The economic benefits of liberal migration of labour across borders," in Johnson K *Opening the floodgates: why America needs to rethink its borders and*

This study, therefore, fills the gap in the literature concerning the types of migration policies adopted by the Southern African Development Community (SADC) member states.⁷¹ The study also focuses on the migration policy frameworks adopted by the African Union (AU),⁷² which cover most African countries, including the DRC and South Africa. Given that the AU Commission depends on Africa's Regional Economic Communities (RECs) to enforce its decisions on migration,⁷³ it is worth analysing the migration policies developed by the sub-regional organisations⁷⁴ currently recognised by the AU.

However, in the context of this study, the focus is specifically on the SADC, the Common Market for Eastern and Southern Africa (COMESA),⁷⁵ the Economic

immigration laws (New York University Press New York 2007) 160; Johnson K et al "The future of U.S. immigration law," in Johnson K et al *Understanding immigration law* (LexisNexis New Providence NJ 2015) 517-523; Boswell C "The politics of irregular migration," in Azoulay L & de Vries K (eds) *EU migration law: legal complexities and political rationales* (OUP Oxford 2014) 41-68; Chang H "Immigration policy, liberal principles, and the Republican tradition" 1997 *GLJ* 85(7) at 2112.

71 It is, indeed, important to focus on the SADC as a sub-regional body (consisting of Angola, Botswana, Comoros, DRC, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia Seychelles, South Africa, Tanzania, Zambia, and Zimbabwe) considering the "regional migration arrangements," which is identified as one of the types of immigration policies.

72 AU Migration Policy Framework for Africa, EX.CL/276 (IX), adopted in the Ninth Ordinary Session of the Executive Council of the AU, Banjul, The Gambia (25–29 June 2006). See also AU Commission The Migration Policy Framework for Africa (MPFA) and Plan of Action (2018–2030) (AU Department for Social Affairs Addis Ababa 2018) https://au.int/sites/default/files/documents/35956-doc-au-mpfa_2018-eng.pdf (Date of use: 14 April 2022).

73 Welz M "The roles of the African Union and its Member States in managing migration across the Mediterranean," in Ippolito F & Trevisanut S (eds) *Migration in the Mediterranean: mechanisms of international cooperation* (CUP Cambridge 2016) 109.

74 The Africa's RECs recognised by the AU are: CEN-SAD (Community of Sahel-Saharan States), with 18 member states; COMESA with 23 members, including the DRC; EAC with 7 members, including the DRC; ECCAS, with 11 members, including the DRC; ECOWAS (Economic Community of West African States), with 16 members; IGAD (Intergovernmental Authority on Development), with 7 members; SADC, with 14 members, including the DRC and South Africa; and UMA (Arab Maghreb Union), with 5 members. See Horne D "21st Century Pan Africanism: Legitimising the African Diaspora 6th Region," in Muchie M, Olorunju P & Akpor O (eds) *The African Union ten years after: solving African problems with Pan-Africanism and the African Renaissance* (AISA Pretoria 2013) 431-432.

75 The COMESA is the largest regional trade organisation in Africa, with 21 Member States, including the DRC.

Community of Central African States (ECCAS),⁷⁶ the Economic Community of the Great Lakes Countries (ECGLC)⁷⁷ and the East African Community (EAC).⁷⁸

As regards the second justification, the comparative study between the DRC and South African labour migration policies is justified by the fact that both countries may learn a good deal from each other by putting their own context into perspective. South Africa's *2017 White Paper* acknowledges that the country 'can learn from other countries as they have established effective systems and institutions for making strategic decisions based on national interests and for competing in the global skills market'.⁷⁹ Similarly, the DRC's lawmakers are encouraged to use the lessons learned from South Africa's advanced institutional environments consisting of strong normative and regulatory frameworks.⁸⁰

1.7 Problem statement

Like many countries, the DRC and South Africa have exercised their sovereign prerogative to put in place policy mechanisms or rules designed to protect the domestic labour market against foreign competition with a view to fostering socio-economic development and social cohesion.⁸¹ These existing normative stances raise a threefold problem, which is of current interest and worth researching: the

76 The ECCAS, which was established in 1983, started operation in 1985, and became a REC in 1999, is currently consisted of 11 member states, including the DRC. See Abebe T "Migration policy frameworks in Africa," *2017 Africa Report 2* (ISS Pretoria) at 10.

77 The (ECGLC (in French CEPGL - Communauté Économique des Pays des Grand Lacs) is composed of Burundi, the DRC, and Rwanda. See the Treaty of 20 September 1976 establishing the Economic Community of the Great Lakes Countries (CEPGL), as amended on 9 September 1977.

78 The EAC is a regional intergovernmental organisation composed of seven Partner States in the African Great Lakes region in East Africa, including the DRC. See the Treaty for the Establishment of the East African Community, signed on 30 November 1999 and entered into force on 7 July 2000 (as amended to date). <https://www.eac.int/> (Date of use: 10 June 2022).

79 DHA White Paper on International Migration for South Africa (Government Gazette No. 41009 of 28 July 2017) 48.

80 Dibwa K "Quel modèle pour la République démocratique du Congo," in Dibwa K *La justice constitutionnelle en République démocratique du Congo: fondements et modalités d'exercice* ["What model for the DRC," in Dibwa K *Constitutional justice in the DRC: foundations and implementation methods*] (Éd. Eucalyptus Kinshasa-Gombe; Academia-l'Harmattan, Louvain-La-Neuve 2013) 263.

81 For South Africa, see DHA White Paper 3; DHA Green Paper on International Migration (No. 40088 Government Gazette of 24 June 2016) 9-10; see also Carciotto S "International migration and development in South Africa," in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 65; for the DRC, see Katansi Protection 196-197.

implementation gap; the tension between globalising labour market and protecting local workers; and problematic rules governing labour migration.

Firstly, the implementation gap is defined as the difference, discrepancy, or disparity between policies on paper or included in legal documents and their actual implementation in practice.⁸² As Cheru and others⁸³ have pointed out, the implementation gap 'affects countries across the globe and applies to laws and policies passed at all levels of government', and both South Africa and the DRC are not an exception. In fact, the discrepancy between labour migration policies on paper and their actual implementation in practice is well established in the contemporary literature of labour migration in South Africa⁸⁴ and the DRC.⁸⁵

Secondly, the DRC and South Africa have enacted statutory or regulatory provisions, which protect local workers' preferential access to the national labour market. At the same time, South Africa has indicated a willingness and an intent to address the serious skills shortages by attracting foreign skills, particularly through improved visa issuing procedures and broad changes in approach, capacity, and regulations.⁸⁶

82 Czaika M & de Haas H "The effectiveness of immigration policies," 2013 PDR Vol. 39 (3) at 496; Cheru F, Materu J, & O'Reilly D (eds) "Overcoming the implementation gap: the way forward," in Cheru F, Materu J, & O'Reilly D *Structural transformation in Ethiopia: the urban dimension building 'economically productive, socially inclusive, environmentally sustainable & well governed' cities* (UN-Habitat Nairobi 2014) 86.

83 Cheru, Materu, & O'Reilly Overcoming the implementation gap 86.

84 See Segatti A "Reforming South African immigration policy in the post-apartheid period (1990-2006): what it means and what it takes," in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD Paris 2008) 55-113; Czaika & de Haas PDR 487-508; Carciotto International migration and development 57-73.

85 See Mutshipangu T *Droit congolais des relations de travail (Congolese labour relations law)* (Editions Connaissance du droit Kinshasa 2017) 120-125; Lule L *Précis de droit du travail congolais – 2nd ed (Congolese labour law handbook - 2nd ed.)* (Lule Kinshasa 2017) 212-226; Katansi Protection 193-228; Shutsha D *Six leçons de droit du travail (Six lessons of Labour Law)* (Ed. Espérance Paris 2018) 293-295; 398-400; Bonyi M *Droit du travail (Labour law)* (CRDS Brussels 2008) 140-141.

86 DHA White Paper 48; the Joint Initiative for Priority Skills Acquisition (JIPSA) launched in March 2006 to identify solutions to major skills shortages constraining South Africa's ability to meet the economic growth objectives contained in the Accelerated and Shared Growth Initiative for South Africa (AsgiSA). HRDC *Joint Initiative on Priority Skills Acquisition (JIPSA) Oct 2009* (HRDC Pretoria 2021). <https://hrdcsa.org.za/2-jipsa-artisan-report-final-october-2009/> (Date of use: 14 April 2022); Ellis S "South Africa and international migration: the role of skilled labour" in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD Paris 2008) 131.

Similarly, the DRC is facing, due to the substantial brain drain observed in recent years in many sectors, particularly in the health sector, increasingly acute skills shortages in both urban and rural areas.⁸⁷ In addition, while the booming mining industry requires highly skilled technical manpower, the country is facing a growing shortage of qualified mining sector specialists due to the lack of relevant skills training.⁸⁸ In the absence of such highly skilled manpower, the DRC has decided to hire foreign technical expertise in mining industries, particularly from China.⁸⁹ In the DRC, many employers have expressed their preference and need for foreign high-skilled labour force, especially from Western countries, which they consider as one of the keys to success for their businesses.⁹⁰

As many scholars have suggested, employers' calls for better access to highly skilled, creative, and autonomous 'migrant workers are typically at the heart of [not only] the economic case for more labour immigration',⁹¹ but also of productivity and competitiveness.⁹² In any country, the need to attract foreign skills falls under the notion of a globalising labour market, which is inconsistent with the notion of protecting local workers' preferential access to the national labour market.⁹³ This is the second problem, which this study attempts to deal with as it lies at the very heart of the DRC and South African legal and regulatory frameworks and is worth studying in a thorough manner. As Ruhs⁹⁴ rightly concludes,

87 Ngoie G & Lelu D (eds) *Migration en République Démocratique du Congo: profil national [Migration in the Democratic Republic of Congo: national profile]* (OIM Genève 2009) 44 & 93. https://publications.iom.int/system/files/pdf/drc_profile_2009.pdf (Date of use: 14 April 2022).

88 Ngoie & Lelu Migration 37; Andrews C "Democratic Republic of Congo: growth with governance in the mining sector," *Report No. 43402-ZR* (World Bank Washington DC 2008) at 39.

89 Jansson J "The Sicomines Agreement: change and continuity in the DRC's international relations," *Occasional Paper No. 97* (SAIIA Johannesburg 2011) at 10.

90 Lule *Droit du travail congolais* 215; Mutshipangu *Relations de travail* 42.

91 Ruhs Labour market protectionism 60.

92 See Ruhs Labour market protectionism 60; Castells M "The transformation of work and employment: networkers, jobless, and flex-timers," in Castells M *The rise of the networked society – 2nd ed* (Blackwell Oxford 2010) 257; Robinson G & Carson D "The globalisation of agriculture: introducing the Handbook," in Robinson G & Carson D *Handbook on the globalisation of agriculture* (Edward Elgar Cheltenham UK 2015) 17.

93 Pilat D et al "The development of global innovation networks and the transfer of knowledge," in Chandra V et al *Innovation and growth chasing a moving frontier: chasing a moving frontier* (The World Bank/ OECD Paris & Washington DC 2009) 100; Ruhs Labour market protectionism 60.

94 Ruhs Labour market protectionism 77.

‘the ‘right to preferential access to the national labour market’ provides an interesting and relatively unexplored conceptual lens for studying a fundamental tension, in all nation states, between opening national labour markets to more migrant workers (‘globalising labour markets’) and protecting local workers—however defined—from unfettered foreign competition’.

This study, therefore, explores how the DRC and South Africa have managed the tension between labour market protectionism and the need for policies to minimise skills shortages, and determines whether the approach used in each country has been effective. The focus is placed on policy and regulatory mechanisms used to regulate international migration in the two countries under study and which raise some problematic issues.

Thirdly, the DRC and South Africa have both enacted national legislations concerning labour migration, either by way of labour and employment laws, and/or other regulations governing immigration, emigration, asylum, the entry, residence, and employment of foreign citizens. However, in each of the two countries, these legal and regulatory instruments raise a few issues that challenge their successful implementation, and which form the research focus of this study.

1.8 Research focus

The DRC and South Africa face some issues, which do raise complex legal problems in terms of legal framework governing labour migration. This study attempts to discuss and address the said issues in the most thorough way possible. The first focus is on legislative inertia and statutory obsolescence,⁹⁵ which is regarded as a serious problem⁹⁶ that has become a ground on which to

95 Legal or statutory obsolescence is defined as “[t]he combination of lack of fit and lack of current legislative.” See Calabresi G “Choking on statutes,” in Calabresi G *Common law for the age of statutes* (Harvard University Press Cambridge MA 1982) 2; Henket M “Statutes in common law and civil law: their interpretation and status,” in Kevelson R (ed) *Law and semiotics - vol 2* (Springer New York 2012) 182.

96 In countries such as France and Armenia, immediate priorities for proposed growth strategies include removing outdated and obsolete laws and regulations from the regulatory framework. See Delattre N “Bill - Improving the readability of the law,” Report No. 365 (2018-2019) passed by the Senate on 13 March 2019. [Delattre N « Proposition de loi - Améliorer la lisibilité du droit » Rapport n° 365 (2018-2019) adoptée par le Sénat le 13 mars 2019]. http://www.senat.fr/rap/l18-365/l18-365_mono.html (Date of use: 14 April

challenge any legislation.⁹⁷ Legislative inertia is raised with respect to the rules that are usually affected by changes over time and are adaptable to varying circumstances.⁹⁸ The DRC is particularly concerned with this issue of legislative inertia and statutory obsolescence, as most of the regulations governing labour migration remain substantially unchanged despite numerous constitutional and legislative amendments.

The second focus lies on the unconstitutionality of laws, regulations and measures governing labour migration, including national policy protecting the national labour force against foreign competition in the DRC and South Africa. As far as the DRC is concerned, in many instances of the implementation and enforcement efforts for the said national policy, there have been cases of unconstitutionality, and illegality of acts and decisions issued by administrative bodies or authorities. There has, indeed, been substantial impairment of existing laws by regulatory authorities,⁹⁹ including the Prime Minister,¹⁰⁰ ministers,¹⁰¹ deputy ministers and local authorities, whose decrees, orders, decisions, and circular letters have been issued unlawfully.

2022); Freinkman L "Executive summary," in Freinkman L (ed) *Growth challenges and Government policies in Armenia* (World Bank Washington DC 2002) 11.

97 Hetzel O, Libonati M & Williams R (eds) *Legislative law and statutory interpretation: cases and materials* (LexisNexis New York 2008) 66; Hetzel O, Libonati M & Williams R (eds) *Legislative law and process: cases and materials* (Michie Co. Charlottesville, Va. 1993) 184.

98 Parisi F & Fon V "Optimal specificity of laws: rules versus standards," in Parisi F & Fon V *The economics of lawmaking* (OUP Oxford 2009) 17; Langevoort D "Statutory obsolescence and the judicial process: the revisionist role of the courts in federal banking regulation" 1987 *MLR* 85 at 67.

99 For instance, *Departmental Order No. 87/005 of 21 Jan 1987 determining terms and conditions for hiring expatriates* should be declared unconstitutional, because it is inconsistent with Article 122 (14) of the *2006 Constitution* as revised to date, which provides that the subject matter of labour or employment law falls within the scope of the law, notably Act of Parliament.

100 For instance, the Prime Minister's *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010 concerning the treatment to be granted to nationals of neighbouring countries and refugees in respect of employment* has no regulatory authority and fails to comply with Articles 185 & 209 of the Labour Code. See Lule *Droit du travail congolais* 215.

101 For instance, the Minister of Labour's *Circular letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983 on the protection of the national labour force (in case of nationals of African countries that became independent after 6 June 1974)* fails to comply with the provisions of Article 2 of *Ordinance No. 74-098* insofar as it assimilates to national workers foreign workers who are nationals of already independent African countries. See Lule *Droit du travail congolais* 215 fn 376. In addition, the Minister's decision to set the overall limitation of 50% for the number of foreign workers authorised to work in companies by way of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005* has no legal basis, given that it fails to comply with the provisions of the *Labour Code*. See also Bonyi *Droit du travail* 141.

Regarding South Africa, although specific rules concerning migration for employment are found in Acts of Parliament, some regulations seeking to protect the national labour force have been *ultra vires* the enabling legislation, and inconsistent with constitutional provisions. This is illustrated by a few cases in which the court of competent jurisdiction found that the authors of the relevant regulations, including ministers, have acted beyond the powers conferred on them, which means that they have exceeded the bounds of their authority.¹⁰²

It is safe to argue that in both the DRC and South Africa the legislative and regulatory framework described above stems from the lawmakers' concern to protect the national labour force against foreign competition. The focus is, therefore, put on all the necessary steps taken by the two countries towards regulating the labour market as well as tightening labour and immigration control measures. The study explores the interaction between immigration and refugee law and policy, as well as employment and labour law and 'labour market regulation, including access to and mobility within the national labour market'.¹⁰³

Although the study briefly discusses the historical context of labour migration legislation and different key steps of the implementation process, particular emphasis is placed on how the relevant laws and policies are currently being enforced by regulatory authorities in both countries. This, therefore, involves studying and critically reflecting upon or analysing the enforcement of existing laws, regulations and policies relating to immigration and, to some extent, emigration for employment purposes. As such, this research study critically assesses labour migration regulatory challenges and problems faced by various interested parties, including DRC-born foreign nationals¹⁰⁴ working in the DRC as well as other migrant workers, including women. This would obviously raise the question of whether both the DRC and South Africa are the same in terms of

102 See the *Larbi-Odam* case 1998 (1) SA 745 (CC); *Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration (CCMA) & others* (2008) 29 ILJ 1480 (LC); and *Ndikumdavyi v Valkenberg Hospital and Others* (2012) 33 ILJ 2648 (LC) (23 April 2012)].

103 Appave G & Cholewinski R (eds) *World Migration Report 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008) 305.

104 Under DRC law, a DRC-born person holding citizenship of another country shall be regarded as a foreign national in the DRC, because the law maintains the principle of the uniqueness and exclusivity of Congolese citizenship. See Art. 10 of the 2006 Constitution as revised to date; Art. 1 of Act No. 04/024 of 12 November 2004 relating to Congolese citizenship.

citizenship rights based on *jus soli* or *jus sanguinis*.¹⁰⁵ The study also focuses on gauging the DRC's and South Africa's compliance with international, regional, and sub-regional standards relating to labour migration and with policies that protect domestic labour forces against foreign competition.

1.9 Literature review

In the context of this research study, the literature review serves to systematically examine the scholarly literature¹⁰⁶ about the protection of national labour force against foreign competition in the DRC as compared to South Africa. The specific purpose of this review is to demonstrate how and to what extent the proposed research study expands the existing knowledge and contributes to a fuller understanding of the topic.¹⁰⁷ As far as the protection of the national labour force against foreign competition is concerned, it seems safe to argue that to date, there is no systematic comparative study of the DRC and South Africa that this research study can rely upon. Such comparative study would be based on a comprehensive set of 'empirical data (whether collected in support of doctrinal studies or normative research by critical scholars) from any substantive legal field'.¹⁰⁸

The question relating to the enforcement of labour migration laws and policies in the DRC and South Africa falls under various legal fields, including labour and employment law, immigration law, refugee law, civil law, contract law, mining law, constitutional law, administrative law, tax law, and human rights law. Therefore,

105 Two widely recognised principles govern the acquisition of nationality by birth: *jus soli* (law of the soil or citizenship by residency), and *jus sanguinis* (law of the blood or citizenship by bloodline). According to *jus soli*, a person acquires citizenship in the country where they were born. In terms of *jus sanguinis*, a person obtains citizenship through his or her relationship with parents or grandparents. See Cohen E F *Semi-citizenship in democratic politics* (CUP Cambridge UK 2009) 38; Gansallo A "Citizenship and naturalisation," in Gansallo A *Understanding immigration law and practice* (Wolters Kluwer New York 2017) 601; Koser K "Who is a migrant?" in Koser K *International migration: a very short introduction* (OUP Oxford 2007) 22; Edwards A "The meaning of nationality in international law in an era of human rights : procedural and substantive aspects," in Edwards A & Van Waas L (eds) *Nationality and statelessness under international law* (CUP Cambridge UK 2014) 16; Omelaniuk I et al "Migrants in an enlarged Europe," in Omelaniuk I et al *World migration 2005: costs and benefits of international migration* (IOM Geneva 2005) 142.

106 Efron S & Ravid R *Writing the literature review: a practical guide* (The Guilford Press London 2019) 2.

107 Efron & Ravid *Writing the literature review* 3.

108 Macdonald R "Access to civil justice," in Cane P & Kritzer H (eds) *The Oxford handbook of empirical legal research* (OUP Oxford 2012) 496.

existing literature on these legal fields has been accessed with a view to identifying those that have covered labour migration in each of the two countries, respectively.

As far as the DRC is concerned, it emerges from this investigation that, to date, labour migration has not been extensively explored in the literature focusing on the country, except for a law review article on foreign workers in the DRC¹⁰⁹ and a 2009 country report on migration prepared for the International Organisation for Migration (IOM) by two Congolese researchers.¹¹⁰

There is also a significant number of scholarly works in the area of international migration in general, focusing on the country's migration history¹¹¹ as well as immigration into¹¹² and emigration from the DRC.¹¹³

109 Ilunga K « Le travailleur étranger en République Démocratique du Congo » (Foreign workers in the DRC) in *Revue Juridique du Congo (Congo Law Review)* n° 1 (1971) at 14-19.

110 Ngoie & Lelu Migration.

111 Tshiswaka L « L'immigration étrangère au Zaïre (1970-1984) : historique, évolution récente et facteurs explicatifs » [Foreign immigration to Zaire (1970-1984): history, recent developments and explanatory factors], in AIDELF Les migrations internationales: problèmes de mesure, évolutions récentes et efficacité des politiques - Séminaire de Calabre (8-10 septembre 1986) [International migration: measurement issues, recent developments and policy effectiveness - Calabria seminar (8-10 September 1986)] (AIDELF Paris 1988) 235–241 ; Wa-Dondo K « La législation et la protection des réfugiés en République du Zaïre » [Legislation and refugee protection in the Republic of Zaire], in Veiter T *Entwurzelung und Integration: rechtliche, soziale und politische Probleme von Flüchtlingen und Emigranten [Uprooting and Integration: legal, social and political challenges faced by refugees and emigrants]* (Wilhelm Braumüller, Wien 1979) 31-43 ; Wa-Dondo K « La législation et la protection des réfugiés en République du Zaïre » [Legislation and refugee protection in the Republic of Zaire], in Association for the Study of the World Refugee Problem *A.W.R. Bulletin*, No.4, Volumes 23 à 24 (Wilhelm Braumüller, Wien 1976) 223-234.

112 Tshibambe G & Kabunda G (eds) *La dynamique migratoire en RDC: morphologie, logique et incidences à Lubumbashi - Rapport final pour le projet financé par le MacArthur Foundation: "Perspectives Africaines sur la Mobilité Humaine"* (UNILU Lubumbashi 2010); Tshibambe G & Mukohya V (eds) "Profil migratoire par pays: cas de la RDC," [Migration profile per country: the case of the DRC] in Country Paper: The DRC (UNILU Lubumbashi 2008); Lelu D (ed) *Amélioration des données sur les migrations dans la RDC: évaluation et recommandations [Improving migration data in the DRC: assessment and recommendations]* (OIM & Observatoire ACP sur les Migrations Kinshasa 2013); DRC Ministry of the Interior, Decentralisation & Security & DGM, *General Directorate for Migration – DGM Booklet* (ZK Advertising Kinshasa 2016); Flahaux M & Schoumaker B *DRC: a migration history marked by crises and restrictions* (Migration Policy Institute Washington DC 2016). <https://www.migrationpolicy.org/article/democratic-republic-congo-migration-history-marked-crises-and-restrictions> (Date of use: 14 April 2022).

113 Schoumaker B, Flahaux M & Mangalu M "Congolese migration in times of political and economic crisis," in Beauchemin C *Migration between Africa and Europe* (Springer Paris 2018) 189-216; Schoumaker B et al "Congolese migrants' economic trajectories in Europe and after return," in Beauchemin C *Migration between Africa and Europe* (Springer Paris

Although no comprehensive analysis has been made on the subject, there has been very little critical assessment of legal and regulatory regimes relating to employment of foreigners in the DRC. A very limited number of Congolese law scholars have discussed briefly, in their respective work focusing on employment and labour law, the issue relating to the capacity of foreign nationals to enter into contracts of employment in the DRC.¹¹⁴ Analysis of the protection of national labour force against foreign competition has been virtually minimal and input from the academic legal community has been limited.

From the research conducted so far, the policy protecting domestic labour force against foreign competition has been discussed more or less thoroughly by two renowned legal and university scholars,¹¹⁵ whose work focused on the legal aspects of nationalisation in what was then known as Zaire.¹¹⁶ This policy has also been briefly discussed by academic writers, particularly those in labour law,¹¹⁷ and social security law¹¹⁸ whose work provides a good introduction to the foreigners' access to the DRC's national labour market. An in-depth study of this policy is, therefore, required as it aims to launch a debate within the legal community, fill the literature gap and provide valuable resource for further research on this topic.

2018) 217-238; Beauchemin C et al "Congolese migration and family life between Africa and Europe," in Beauchemin C *Migration between Africa and Europe* (Springer Paris 2018) 239-64; Brock G & Blake M *Debating brain drain: may governments restrict emigration?* (OUP Oxford 2015); Mangalu M "Migrant's remittances and living conditions of households of origin: evidence from Kinshasa," in Emina J & Shapiro D *Population and development challenges in Sub-Saharan Africa- Dounia Review N°7* (L'Harmattan RDC & CISRI Kinshasa-Bruxelles-Paris 2014) 99-126; Lututala B "Les migrants Congolais en Belgique et en Grande-Bretagne: entre rêves et frustrations" [Congolese migrants in Belgium and Great Britain: between dreams and frustrations], in Emina J & Shapiro D *Population and development challenges in Sub-Saharan Africa - Dounia Review N°7* (L'Harmattan RDC & CISRI Kinshasa-Bruxelles-Paris 2014) 127-146; Ngoie & Lelu *Migration* 95.

114 See Mutshipangu *Relations de travail* 120-125; Lule L *Précis de droit du travail zaïrois (Zairian labour law handbook)* (Editions LULE: Kinshasa 1989) 212-126 ; Bayolo H C *Code du travail congolais: annoté et commenté (DRC Labour Code: annotated and commented)* (éd Concordia, Kinshasa 2022) 489-504.

115 Katansi Protection 193-228; Nghenda L *Zaïrianisation, radicalisation, rétrocession en République du Zaïre : considérations juridiques [Zaireanization, radicalisation, retrocession in the Republic of Zaire: legal considerations]* (PUZ Rectorat Kinshasa 1979) 234-238.

116 Schatzberg M "The State and the economy: the "Radicalisation of the Revolution" in Mobutu's Zaire," 1980 *CJAS* vol. 14 (2) 239-257.

117 Mutshipangu *Relations de travail* 120-125; Lule *Droit du travail congolais* 212-226; Shutsha *Six leçons* 398-400. Lunda J "La protection de la main d'œuvre nationale en RDC face aux ambitions intégrationnistes de l'OHADA" 2018 *Ohadata D-18-20*. <http://www.ohada.com/doctrine/ohadata/D-18-20.html> (Date of use: 30 March 2022).

118 Ne-Wembo L "Social security in the Republic of Zaire," 1977 *ISSR* vol 30 (3) 368-388.

In addition, the question relating to the enforcement of laws and regulations has been discussed by several legal scholars specialising in the areas of constitutional and administrative law.¹¹⁹ Their work examines, in particular, major opinions and decisions handed down by the administrative section of the Supreme Court, while focusing on the DRC's administrative justice system, particularly the role of the courts in ensuring that administrative decision-makers comply with the law.¹²⁰

While some administrative law writers and teachers¹²¹ discuss the basic and constitutive principles of the DRC's administrative law, others¹²² analyse the legal doctrinal writings and case law of the DRC's administrative litigation and administrative procedure law. A particular focus has been put on describing the procedures before the administrative section of the Supreme Court¹²³ and discussing the origin, organisation and jurisdiction of the DRC's Constitutional Court.¹²⁴ The research study further relies on a report, which makes interpretations of the meaning of legislative Acts as provided in a Supreme Court's landmark

119 Batanga B *Précis du contentieux administratif congolais - Tome 2 [Congolese administrative litigation handbook - Volume 2]* (Academia – L'Harmattan Louvain-la-Neuve 2018) 117-166; Kabu O *Cour suprême de Justice: Héritage de demi-siècle de jurisprudence [Supreme Court: a half-century legacy of case law]* (Les Analyses Juridiques Kinshasa 2015) 921-1052.

120 Batanga B *Précis du contentieux administratif* 117-166; Kabu *Cour suprême de Justice* 921-1052.

121 Te Pemako V & DJ'Andima J *Traité de droit administratif de la République démocratique du Congo – 2e édition [Treatise on Administrative Law of the Democratic Republic of the Congo - 2nd edition]* (Bruylant Bruxelles 2020) 143-190 ; Te Pemako V *Traité de droit administratif [Administrative law treatise]* (Afrique Editions & Larcier Bruxelles 2007) 117-147; Ntabala K *Droit administratif - volume 3 [Administrative law - vol 3]* (UNIKIN Kinshasa 2001) ; Ntabala K *Droit administratif et institutions administratives – Tome 1 [Administrative law and administrative institutions - Volume 1]* (PUK Kinshasa 1997).

122 N'songo W *Contentieux administratif congolais: essai d'analyse de doctrine et de jurisprudence [Congolese administrative litigation: an attempt to analyse doctrinal writings and case law]* (Collection Informations juridiques Kinshasa 1998); Kabuinji D *Procédure devant la section administrative de la Cour Suprême de Justice [Procedure applicable before the administrative section of the Supreme Court]* (Ed Connaissance et pratique du droit zaïrois Kinshasa 1987); Gingombe R *Le contentieux administratif dans le système juridique de la RDC [Administrative litigation within the DRC's legal system]* (Academia-Bruylant, Louvain-la-Neuve 2004).

123 It is worth emphasising that the Constitution has brought about the break-up of the Supreme Court into three separate courts: the Constitutional Court (Cour Constitutionnelle), the Court of Cassation (Cour de Cassation), the Council of State (Conseil d'Etat) (see Art. 149 of the 2006 Constitution as revised to date).

124 Kahombo B 'The origin of the Congolese Constitutional Court: organisation and jurisdiction,' in Hamann H & Kumbu J (eds) "Rule of Law Programme for Sub-Saharan Africa," in *KAS law study library* vol 6 (June 2011) 1-26; Kabuinji *Procédure*.

judgment¹²⁵ in the light of the *2006 Constitution*.¹²⁶ The study also relies on a series of Gazettes,¹²⁷ which contain the judgments handed down by the Supreme Court from 1980 to date. A further valuable resource for this research study is the DRC's Official Gazette Website,¹²⁸ which provides a useful electronic legal searching and database.

This study on labour migration relies heavily on and seeks to build upon scholarly work published on migrant workers in international human rights law, with particular focus on their protection in countries of employment.¹²⁹ The study also relies on other publications specifically discussing migration for employment, as part of international migration law.¹³⁰

Moreover, the study builds upon ideas shared in a collection,¹³¹ which aim to shed light on the intersections and interactions between immigration, migration law, and labour law. The study also critically analyses relevant arguments contained in a

125 See CSJ, *Trésor Kapuku Ngoy c/Assemblée provinciale du Kasai Occidental*, R.Const.51/TSR du 31 juillet 2007; inédit. [CSJ, *Trésor Kapuku Ngoy v/ Kasai Occidental's Provincial Assembly*, RConst 051/TSR of 31 July 2007; unpublished]. In this ruling, the Supreme Court (CSJ), then acting as the Constitutional Court, drew up an extensive list covering the expression "legislative acts". See Adjolohoun S "Made in courts' democracies? – Constitutional adjudication and politics in African constitutionalism," in Fombad C (ed) *Constitutional adjudication in Africa* (OUP Oxford 2017) 264.

126 Senga W "La définition des actes législatifs dans l'arrêt de la CSJ N° R.CONST. 51/TSR du 31 juillet 2007 à l'épreuve de la Constitution du 18 février 2006" [Definition of legislative acts as provided in the Supreme Court judgment N° R.CONST. 51/TSR of 31 July 2007 in the light of the Constitution of 18 February 2006] in 2008 RDSPG (No. 5).

127 CSJ *Bulletin des arrêts de la Cour suprême de justice, Années 2004 à 2009, 2 tomes* [Gazettes of Judgments of the Supreme Court, Years 2004 to 2009, 2 volumes] (Éditions du Service de Documentation et d'Études du Ministère de la justice et Droits humains, Kinshasa 2010); CSJ *Bulletin des arrêts de la Cour suprême de justice, Années 2000 à 2003* [Gazettes of Judgments of the Supreme Court, Years 2000 to 2003] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2004); CSJ *Bulletin des arrêts de la Cour suprême de justice, Années 1990 à 1999* [Gazettes of Judgments of the Supreme Court, Years 1990 to 1999] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2003); CSJ *Bulletin des arrêts de la Cour Suprême de Justice, Années 1980 à 1984* [Gazettes of Judgments of the Supreme Court, Years 1980 to 1984] (Éditions du Service de Documentation et d'Études du Ministère de la justice et des Affaires parlementaires, Kinshasa 2001).

128 See at <http://www.journalofficiel.cd> (Date of use: 14 April 2022).

129 Cholewinski R "International migration for employment, aliens and citizens," in Cholewinski R *Migrant workers in international human rights law: their protection in countries of employment* (Clarendon Press Oxford 1997) 11-76.

130 Cholewinski R "Migration for employment," in Plender R (ed) *Issues in international migration law* (Brill Nijhoff Leiden Boston 2015) 27–80; Abebe 2017 Africa Report; Freeman G "Migration policy and politics in the receiving states," 1992 *IMR* Vol. 26 (4) 1144-1167.

131 Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014) 1-445.

volume of essays,¹³² which ‘explor[e] the complex interaction of immigration law and policy and labour law and labour market regulation’.¹³³

As far as the assessment of laws, rules and regulations is concerned, this study relies on a volume of essays¹³⁴ discussing the regulatory challenges for temporary labour migration in the global era. In terms of the DRC’s economic, labour, and employment law, there exists a vast and rich literature, which analyses in depth the country’s regime, including books published by both Congolese¹³⁵ and foreign¹³⁶ scholars.

As far as South Africa is concerned, a considerable amount of legal academic literature has been published on labour migration¹³⁷ and the protection of domestic labour force against foreign competition.¹³⁸ While focusing on contemporary

132 Jørgensen M & Schierup C (eds) *Politics of precarity: migrant conditions, struggles and experiences* (Brill NV Leiden 2017).

133 Zou M “Migrant precarity under China’s new immigration” in Jørgensen M & Schierup C (eds) *Politics of precarity: migrant conditions, struggles and experiences* (Koninklijke Brill NV Leiden 2017) 161.

134 Howe J & Owens R *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publishing Oxford 2016) 3-412.

135 Bonyi Droit du travail ; Bonyi M *Grands arrêts de la jurisprudence congolaise de droit du travail [Major Congolese labour case law decisions]* (CRDS Kinshasa 2000); Bikari G *Droit congolais du travail [Congolese labour law]* (C.P.T.T: Kinshasa 2014); Musubao *La jurisprudence congolaise*; Mvioki JMP *Droit congolais du travail [Congolese labour law]* (L’Harmattan Paris 2015); Shutsha *Six leçons*; Sumata C “Migradollars & poverty alleviation strategy issues in Congo (DRC),” 2002 *ROAPE* vol. 29 (No. 93/94) State failure in the Congo: perceptions & realities (Le Congo entre Crise et Régénération) 619-128.

136 Reynolds C *Labour law and practice in the Republic of Zaire - Report No. 393* (U.S. Bureau of Labour Statistics Washington DC 1972); Bureau du Président *Profiles of Zaire* (President of the Republic of Zaire’s Office Kinshasa 1976); Schatzberg M “‘Le mal zairois’: why policy fails in Zaire,” 1982 *African Affairs* vol. 81 (324) at 337-348.

137 Posel D & Casale D “What has been happening to internal labour migration in South Africa, 1993–1999?” 2003 *SAJE* 71(3) 455–479; Parshotam A & Ncube C “Managing economic migration in South Africa” September 2017 *SAIIA Occasional Paper* 265; Anderson B “Migration in South Africa in comparative perspective,” in Kok P et al (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 97-117; Landau L & Segatti A *Human development impacts of migration: South Africa case study - human development research paper 2009/05* (UNDP New York 2009) 24; Budlender G & Davis D “Labour law, influx control and citizenship: the emerging policy conflict,” 1984 *Acta Juridica* 141-172.

138 Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011); Fauvelle-Aymar C “Migration and employment in South Africa: an econometric analysis of domestic and international migrants (QLFS (Q3) 2012)” - *MiWORC Report* No.6 (African Centre for Migration & Society, University of the Witwatersrand Johannesburg 2014); Peberdy S “Competition or co-operation? South African and migrant entrepreneurs in Johannesburg,” 2017 *SAMP Migration Policy Series No. 75*, SAMP; Crush J “Complex movements,

migration to South Africa, most scholarly work discusses 'migration in post-apartheid South Africa', specifically the 'challenges and questions to policymakers'.¹³⁹

In addition, there is a set of scholarly research collections focusing on the roles played by migrants to help stimulate economic growth and development of South Africa.¹⁴⁰ Considering the nexus between labour law, migration law, and refugee law, as discussed above, this research study relies on the work of scholars discussing the contexts and principles of South African labour law,¹⁴¹ and immigration law and policy,¹⁴² as well as refugee law.¹⁴³ Despite the fact that

confused responses: labour migration in South Africa," *SAMP Policy Brief- No. 25* (SAMP Waterloo ON 2011) 1-27.

- 139 Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD Paris 2008); Klaaren J & Ramji J "Inside illegality: migration policing in South Africa after Apartheid," 2001 *Africa Today* vol. 48 (3) Evaluating South African immigration policy after apartheid 35-47; Amit R & Kriger N "Making migrants 'il-legible': the policies and practices of documentation in Post-Apartheid South Africa," in Uma Dhupelia-Mesthrie (ed) *Paper regimes*. *Kronos* 40, November 2014, 269-291; Hoag C "Fear, enervation and the systematisation of disorder: challenges to reforming the DHA," in Daniel J et al (eds) *NSAR1: 2010: Development or decline?* (Wits University Press Johannesburg 2010) 205-217.
- 140 Ellis S & Segatti A "The role of skilled labour," in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 67-79; OECD/ILO *How immigrants contribute to South Africa's Economy* (OECD Publ. Paris 2018). <http://dx.doi.org/10.1787/9789264085398-en> (Date of use: 14 April 2022); Prothero R "Foreign migrant labour for South Africa" 1974 *The IMR*, vol. 8(3) International migration in tropical Africa 383-394; Crush J et al *Harnessing migration for inclusive growth and development in Southern Africa - Special Report* (SAMP Waterloo 2017); DHET *Skills supply and demand in South Africa* (DHET Pretoria 2019).
- 141 Fenwick C, Kalula E & Landau I "Labour law: a Southern African perspective," in Teklè (ed) *Labour law and worker protection in developing countries* (Hart Publishing Oxford 2010) 175; Collier et al *Labour law in South Africa: contexts and principles* (OUP Southern Africa Cape Town 2018); Cabrelli D "Examining the labour law & social dimension of human rights: the UK & South Africa," in Reid E & Visser D (eds) *Private law and human rights: bringing rights home in Scotland and South Africa* (Edinburgh University Press Edinburgh 2013) 391-417.
- 142 Khan F (ed) *Immigration law in South Africa* (Juta Claremont 2018); Aglotsson E & Klaaren J "Policing migration: Immigration enforcement and human rights in South Africa," *Migration Policy Brief No. 14* (SAMP Cape Town 2003); Peberdy S "Imagining immigration: inclusive identities and exclusive policies in Post-1994 South Africa," 2001 *Africa Today* vol. 48 (3) Evaluating South African Immigration Policy after apartheid 15-32; Tati G "The Immigration issues in the post-apartheid South Africa: discourses, policies and social repercussions". *Géopolitique et populations*: 3 (2008) 423-440; Segatti A "Reforming South African immigration policy in the post-apartheid period (1990-2010)," in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 31-66; Campbell E "Irregular migration within and to the Republic of South Africa and from the African Continent to the European Union: tapping latent energy of the youth," in Adepoju A (ed) *Migration within, to and from Africa in a globalised world* (Sub-Saharan Publishers Legon-Accra 2010) 169-207; Crush J & McDonald D "Introduction to special issue: evaluating South African immigration policy after apartheid," 2001 *Africa Today* 48 (3) 1-13; Landau L "Protection

South African Government's response to emigration has been limited,¹⁴⁴ the question of emigration from South Africa has been dealt with in a number of scholarly works.¹⁴⁵

In addition, there is some substantial scholarly work discussing migrants' experiences within the South African labour market,¹⁴⁶ with a particular focus on the policies and practices of documentation of migrants.¹⁴⁷ There also exists a

and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy," 2006 *JRS* 19(3) 308-327.

- 143 Khan F & Schreier T (eds) *Refugee law in South Africa* (Juta Cape Town 2014); Handmaker J, De la Hunt L & Klaaren J (eds) *Advancing refugee protection in South Africa* (Berghahn Books New York 2008) 136-166; Peberdy S & Crush J "Rooted in racism: the origins of the Aliens Control Act," in Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998) 18-36; Belvedere M "Insiders but outsiders: the struggle for the inclusion of asylum seekers and refugees in South Africa" 2007 *Refuge* 24 (1) 57-70; Johnson C & Carciotto S "State of the asylum system in South Africa," in O'Sullivan M & Steven D (eds) *States, the law and access to refugee protection: fortresses and fairness* (Hart Publishing Oxford 2017) 167-190; Feltes T, Musker S, & Scholz P "Regional governance of migration in the SADC: migration regimes and their implications for the experience of refugees and migrants in South Africa," in Kury H & Redo S (eds) *Refugees and migrants in law and policy: challenges and opportunities for global civic education* (Springer Cham 2018) 555-575; Olowu D "Refugees, asylum-seekers and the legal obligations of States for their protection: critical reflections on the South African approach," 2006 *ISILYBIHRL* (No. 6) 233-250; Crush J, Skinner C & Stulgaitis M "Rendering South Africa undesirable: a critique of refugee and informal sector policy," in Crush J (ed) *SAMP Migration Policy Series No. 79* (SAMP Waterloo 2017); Landau 2006 *JRS* 19 (3) 308-327.
- 144 Marks J "South Africa: evolving diaspora, promising initiatives," in Kuznetsov Y (ed) *Diaspora networks and the international migration of skills: how countries can draw on their talent abroad* (The World Bank Washington DC 2006) 171; Ellis South Africa and international migration 67; Crush J & Dodson B "Another lost decade: the failures of South Africa's post-apartheid migration policy" 2007 *Tijdschrift voor Economische en Sociale Geografie* vol. 98(4) 440; Oucho J "Migration in Southern Africa: migration management initiatives for SADC member states," 2007 *ISS Occasional Paper* 157 at 7.
- 145 Crush J & Williams V "Counting brains: measuring emigration from South Africa," 2001 *Migration Policy Brief*, No. 5, SAMP; Crush J & Chikanda A "Staunching the flow: the brain drain and health professional retention strategies in South Africa," in Czaika M (ed) *High-skilled migration: drivers and policies* (OUP Oxford 2018) 337-359; Mattes R & Mniki N "Restless minds: South African students and the brain drain," in Crush J & Frayne B (eds) *Surviving on the move: migration, poverty and development in Southern Africa* (SAMP Cape Town 2010) 25-49; Arnold P, Howarth B, & Khera A, *A Unique migration: South African doctors fleeing to Australia* (CreateSpace Seattle 2011).
- 146 Gallo-Mosala S (ed) *Migrants' experiences within the South African labour market* (Scalabrini Centre Cape Town 2009); Nshimbi C & Moyo I "Informal immigrant traders in Johannesburg: the scorned cornerstone in the SADC integration project," in Adeniran A & Ikuteyijo L (eds) *Africa now! emerging issues and alternative perspectives* (Palgrave Macmillan New York 2018) 387-413.
- 147 Crush & Dodson 2007 *TESG* vol. 98(4) 436-454; Prothero R "Le recrutement des travailleurs étrangers par l'Afrique du Sud," [South Africa's recruitment of foreign workers] 1977 *Revue Tiers Monde* vol. 18(69) Migrations et développement 101-113; Landau L, Polzer T & Segatti A "The mobile nation: how migration continues to shape South Africa," in Daniel J et al (eds) *NSAR 1: 2010: Development or decline?* (Wits University Press Johannesburg 2010) 218-235.

substantial number of scholarly works focusing on South Africa's position in the Southern African region with regard to migration governance¹⁴⁸ and migration rights.¹⁴⁹ In this particular regard, some substantial scholarly works have put a lot of emphasis on the protection of human rights of migrants not only in South Africa,¹⁵⁰ but also in the Southern African region.¹⁵¹ Moreover, as it is widely acknowledged nowadays, the movements of people affect every part of the globe, which Castles and others refer to as the "globalisation of migration".¹⁵² Therefore, it

148 Oucho 2007 *ISS Occasional Paper* 157; Dodson B & Crush J *Migration governance and migrant rights in the SADC: attempts at harmonisation in a disharmonious region - Research Paper 2015-3* (UNRISD Geneva October 2015); Butts K & Thomas P *The geopolitics of Southern Africa: South Africa as regional superpower* (Routledge London 2019); Nshimbi C & Fioramonti L "The will to integrate: South Africa's responses to regional migration from the SADC Region," *AfDR, African Development Bank*, vol. 26 (S1) 52-63, November 2014 ; DHA White Paper on Home Affairs (DHA Pretoria 14 January 2019).

149 Olivier M "Political and regulatory dimensions of access, portability and exclusion: social security for migrants, with an emphasis on migrants in Southern Africa," in Sabates-Wheeler R & Feldman R (eds) *Migration and social protection: claiming social rights beyond borders* (Palgrave London 2011) 117-139; Adepoju A "Internal and international migration within Africa," in Kok P et al (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 26-45; Jacobsen K "Migration within Africa: the view from South Africa" 2007 *FFWA* 31(1) 203-214.

150 Langalanga A "A tale of two continents: comparing migration experiences in South Africa & Germany", 2019 *SAIIA Occasional Paper* 296; Le Roux W & Hungwe S "In search of alternatives to pre-emptive immigration detention (or not): a review of recent South African case law" 2011 *CILSA* vol. 44 (2) 139-167; Jandl M (ed) *Innovative concepts for alternative migration policies: ten innovative approaches to the challenges of migration in the 21st Century - IMISCOE Reports* (Amsterdam University Press Amsterdam 2007); Kaplan I et al "Area handbook for the Republic of South Africa," *Report Volume 550, Issue 93* (US GPO Washington DC 1971) 827; DHA *White Paper on Home Affairs*; Makgetla N "The international economic crisis and employment in South Africa," in Daniel J et al (eds) *NSAR 1: 2010: Development or decline?* (Wits University Press Johannesburg 2010) 65-86; Panofsky H "Migratory labour in Africa-A bibliographical note," 1963 *JMAS*, vol. 1 (No. 4) 521-529; Kihato C *Migrant women of Johannesburg everyday life in an in-between city* (Palgrave Macmillan New York 2013); Department of Health Policy (ed) *Recruitment and employment of foreign health professionals in the Republic of South Africa* (National Department of Health Pretoria 2006).

151 Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998) 1-17; Campbell E "International migration and human rights in Sub-Saharan Africa," in Oucho J (ed) *Migration in the service of African development: essays in honour of Professor Aderanti Adepoju* (Safari Books Ibadan 2011) 207-255; Segatti A "Migration to South Africa: regional challenges versus national instruments and interests" in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 9-29; Kok P, Gelderblom D & Van Zyl J "Introduction", in Kok P et al (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 1-24; Segatti A & Landau L "Appendix B - How many are they? Migration data collection issues," in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 149.

152 Castles S, de Haas H & Miller M "Introduction," in Castles S, de Haas H & Miller M *The age of migration: international population movements in the modern world - 5th ed* (Palgrave MacMillan London 2014) 5; Triandafyllidou A "Globalisation and migration: an introduction," in Triandafyllidou A (ed) *Handbook of globalisation and migration* (Edward Elgar Cheltenham 2018) 6.

is worth relying upon scholarly works dealing with globalisation and migrant labour in South Africa.¹⁵³

Given that the concepts of nationality, citizenship and identity are closely linked to labour migration,¹⁵⁴ this study relies on extensive scholarly work and publications discussing citizenship, the 'State nationalism and migrant identity in post-apartheid South Africa'.¹⁵⁵ Under South African law, the concept of nationality 'includes practices associated with xenophobia'¹⁵⁶ and other adverse assumptions of a discriminatory nature'.¹⁵⁷ It is, therefore, worth discussing the question of xenophobia and other discriminatory assumptions, which have been dealt with extensively in the literature focused principally on migration, particularly in South Africa.¹⁵⁸

153 Trimikliniotis N, Gordon S & Zondo B "Globalisation and migrant labour in a 'Rainbow Nation': a fortress South Africa?" 2008 *TWQ*, Vol. 29(7) Globalisation and migration: new issues, new politics? 1323-1339.

154 In this regard, a combination of migration research and studies of nation-building and nationalism is advised for explaining the persistence of preferential treatment for immigrants and for evaluating it. See Bauböck R "Citizenship and migration – concepts and controversies," in Bauböck R *Migration and citizenship: legal status, rights and political participation* (Amsterdam University Press Amsterdam 2006) 18; see also Bauböck R "Introduction," in Bauböck R *Migration and citizenship: legal status, rights and political participation* (Amsterdam University Press Amsterdam 2006) 9.

155 Neocosmos M "Strangers at the cattle post: state nationalism and migrant identity in Post-apartheid South Africa", in Palmberg M (ed) *National identity and democracy in Africa* (HSRC & Mayibuye Centre Cape Town 1999) 287-326; Klaaren J "Constitutional citizenship in South Africa" 2010 *IJCL*, vol. 8(1) 94-110; Manby B *Citizenship law in Africa: a comparative study - 3rd edition* (OSF New York & African Minds Cape Town 2016); Landau L & Pampalone T *I want to go home forever: stories of becoming and belonging in South Africa's Great Metropolis* (Wits University Press Johannesburg 2018).

156 The term "xenophobia", which refers to an unreasonable fear or hatred of foreigners or strangers, is often embodied in discriminatory attitudes and behaviour aimed at immigrants, and often culminates in violence, abuses of all types, and exhibitions of hatred. Eweka O "Hostile political communication: triadic examples from Africa," in Olukotun A & Omotoso S (eds) *Political communication in Africa* (Springer Cham 2017) 114; De la Vega C *Dictionary of international human rights law* (Edward Elgar Cheltenham /Northampton 2013) 174.

157 See s 1(1)(xvii) of *Equality Act (Act No. 4 of 2000)*.

158 Tafira H "Is xenophobia racism?" in Tafira H *Xenophobia in South Africa - a history: African histories and modernities* (Palgrave Macmillan Cham 2018) 15–33; Farmbry K "South Africa: aspiration meets human condition," in Farmbry K *Migration and xenophobia: a three country exploration* (Lexington Books Lanham) 43-63; Crush J, Tawodzera G, Chikanda A & Tevera D "Living with xenophobia: Zimbabwean informal enterprise in South Africa," *SAMP Migration Policy Series No. 77* (SAMP Waterloo 2017); Landau L "Introducing the demons," in Landau L (ed) *Exorcising the demons within: xenophobia, violence and statecraft in contemporary South Africa* (Wits University Press Johannesburg 2012) 1-25; Adam H & Moodley K "Youth voices: views from a township," in Adam H & Moodley K *Imagined liberation: xenophobia, citizenship and identity in South Africa, Germany and Canada* (Sun Press & STIAS Stellenbosch 2013) 51-74; Crymble L "'Xenophobia is an African sickness; a greater African disease': contesting dominant migrant discourse through opposing metaphors," in Dedačić M (ed) *Singing, speaking and writing politics:*

As regards the implementation and practical enforcement of labour migration laws and policies in South Africa, great attention has been paid to the issue in the academic literature on constitutional and administrative law. Such literature includes scholarly works focusing respectively on the introduction to and the principles of South African law,¹⁵⁹ the interpretation of statutes and discussing South Africa's mixed legal system.¹⁶⁰ Another valuable resource for this research study is the DHA White Paper on International Migration for South Africa No. 41009¹⁶¹ as published in Government Gazette of 28 July 2017.

1.10 Research methodology

This research is qualitative in nature as it involves a descriptive study of the norms, principles and rules of labour migration law. As stated before, the literature relating to labour migration and the protection of domestic labour force against foreign competition is inconsistent and not growing, at least as far as the DRC is concerned. The primary task involves, therefore, undertaking extensive research of existing literature, as well as the collection of relevant data and information. This study has a closer link with and is an extension of existing publications on labour and employment law, mining law, constitutional law, administrative law, and even human rights law. These areas of law are important and relevant for this study because they are involved in the regulation and management of labour migration.¹⁶²

South African political discourses (John Benjamins Amsterdam 2015) 113-146; Kamwimbi TK et al "Violation of human rights of disadvantaged and vulnerable refugees – victims of xenophobic attacks in South Africa," 2010 *OIDA IJSD* Vol. 01 (05) 67-83; Moyo I "Historical perspectives on migration and the xenophobia discourse," in Moyo I *African immigrant traders in Inner City Johannesburg: Deconstructing the threatening 'other'* (Palgrave Macmillan New York 2017) 73-95; Banda C "Xenophobic Experiences of Malawian Migrants in South Africa during the Contemporary Migration Period," in Banda C *Perspectives of labour migration from Mzimba District, Malawi, to South Africa* (RPCIG Mankon, Bamenda 2017) 73-88; Peberdy S Not quite white?: not quite black? not quite South African? constructions of race, nation and immigration in South Africa (University of the Witwatersrand, IASR Johannesburg 1996).

159 Du Plessis L & Du Plessis A *An Introduction to law* (Juta Cape Town 1992); Joubert & Faris *The law of South Africa*; du Bois Wille's *principles*; Du Plessis L *The interpretation of statutes* (Butterworths Durban 1986).

160 Zimmermann R & Visser D (eds) *Southern cross: civil law and common law in South Africa* (Clarendon Press Oxford 1996).

161 DHA White Paper.

162 Howe & Owens *The regulatory challenges* 33.

This research study involves, on the one hand, understanding the concept of 'protection of national labour force against foreign competition' and on the other hand, conducting a critical review of the DRC's and South Africa's laws, rules and regulations pertaining to labour migration. To this effect, applicable statutory and regulatory provisions and other relevant legally binding authority are thoroughly analysed and reviewed, to determine whether they should have been adopted and then whether they should be retained.¹⁶³ Therefore, in terms of research methodology, this study combines an analytical or descriptive assessment of the existing statutory and regulatory provisions and a normative criticism of the practice, which is necessarily interpretative, as clearly suggested by West.¹⁶⁴

In addition, this research study uses a comparative method to explore the way labour migration is governed and regulated in the DRC and South Africa, respectively. More importantly, the comparative study assesses how well these two jurisdictions have addressed the issues around the enforcement of legislative and regulatory acts relating to labour migration. It is, indeed, argued that comparative constitutional methodology approaches 'seek to look at the way in which a variety of jurisdictions engage in the same constitutional issue, in order to improve [the fairness or efficiency of the law of the comparatist's own country]'.¹⁶⁵

Furthermore, the study employs 'the method that seeks to realise the objectives and purpose of a treaty, [namely] a teleological method of interpretation of the relevant substantive articles [on human rights]'.¹⁶⁶ Moreover, the applicable case law is analysed, and practical application of the relevant legally binding authority is explored in the light of the above-mentioned research questions. To answer the research questions outlined above and fulfil the aims and objectives, this research study uses the library-based study, desktop research, and theoretical analysis.

163 Lee R, Johnson R & Joyce P *Public budgeting systems - 8th edition* (Jones & Bartlett Publishers Sudbury MA 2008) 344.

164 West R "Adjudication is not interpretation," in West R *Narrative, authority, and law* (University of Michigan Press Ann Arbor MI 2004) 94; West R "Adjudication is not interpretation: some reservations about the LawAsLiterature Movement," 1987 *TLR* (vol 54) at 208.

165 O'Connell P *Vindicating socio-economic rights: international standards and comparative experiences* (Routledge New York 2012) 27; Siems M *Comparative law* (CUP Cambridge 2014) 28; Hirschl R *Comparative matters: the renaissance of comparative constitutional law* (OUP Oxford 2014) 280.

166 Eriksson M *Reproductive freedom in the context of international human rights and humanitarian law* (Martinus Nijhoff Publishers The Hague 2000) 13.

The primary tasks involve undertaking extensive literature research and the collection of relevant data and information. It is argued that gathering information, particularly from the reported case law, governmental and nongovernmental organisations' reports and academic publications amounts to employing traditional library-based legal research method.¹⁶⁷ This library-based study needs to start with a literature review, which outlines the state of knowledge and arguments in the area of labour migration.

Further to the purely legal texts, literature on international relations or international cooperation is analysed to give a picture of how the issue of labour migration is dealt with at the interstate level. Some resource material linked to the study is found and several internet sites explored. The chief material comprises books and articles related to labour law, administrative law, constitutional law, refugee, and immigration law, as well as human rights law, considering the intersections between these areas of law, as discussed above. It is envisaged that the thesis, with its examination of existing data and pertinent literature, moreover, lays the groundwork for further research study.

1.11 Assumptions and expected findings

This research study seeks to find the similarities and differences that the DRC and South Africa share in terms of laws and policies they have put in place to protect domestic labour against foreign competition. A particular focus is put on primary legislation or Acts of Parliament, which, as this study assumes, are, in both countries, of an exorbitant character as compared to all other regulatory acts and local custom, with the exception of the Constitution.¹⁶⁸ Furthermore, the study assumes that the most important difference is based on the relevant legal instruments regulating the subject matter of the research, in particular primary

167 Danov M & Becker F "Research methodology," in Danov M, Becker F & Beaumont P (eds) *Cross-border EU competition law actions* (Hart Publishing Oxford 2013) 29.

168 See Arts. 153 (2) & (4); 155(1); & 207 (2) of the *DRC Constitution of 2006 as revised to date*; Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 236 para. 388; 257 para. 422.1; Vedel G & Delvolve P *Droit administratif, t. 1, 12e ed.* [*Administrative law, vol 1, 12th ed.*] (P.U.F Paris 1992) 637-646, cited in Te Pemako *Traité de droit administratif* 307, fn 359 ; Du Plessis & Du Plessis *An introduction to law* 72; du Bois F "Introduction: history, system and sources," in Van der Merwe C, & Du Plessis J (eds) *Introduction to the law of South Africa* (Kluwer Law International The Hague 2004) 38.

legislation being the governing instrument in South Africa and delegated legislation in the DRC.

Bearing in mind the above-mentioned statements, this study assumes that the South African regime seems to be more adequate and quite robust in protecting domestic labour force by virtue of primary legislation, which are Acts of Parliament, or Statutes. Moreover, it is safe to assume that the DRC's regime, as it stands at present, and the modernity of which is somewhat questionable and problematic,¹⁶⁹ is likely to be exposed to greater legal challenges. This is mainly because such an important matter related to labour law, namely the employment of foreigners, which, in theory, falls within the scope of the law or Act of Parliament,¹⁷⁰ is being governed by delegated or subordinate legislation, including regulations issued by executive authorities. This amounts to an interference with the sphere assigned to lawmakers by the regulatory authority, which can only be dealt with by virtue of protective legal mechanisms provided for by the constitution.¹⁷¹ In addition, this study provides clear evidence of whether any legislative authority and power have been delegated by parliament to these subordinate executive officials with a view to issuing binding legal orders.

This research study, consequently, assumes that these DRC's regulatory texts are clearly unconstitutional and should be repealed on the grounds of unlawfulness and replaced by a new law.¹⁷² It would, therefore, be advisable for the DRC's lawmakers gathered in parliament to pass a new legislation aimed at protecting domestic labour force against foreign competition, in compliance with the rule of law and following the due process of law-making. It is worth noting that parliament may unilaterally repeal these regulatory texts without being obliged to first seek the opinion of the Constitutional Court.¹⁷³

169 The relevant regulatory instruments are dated, respectively, 6 June 1974; 26 November 1975; 12 September 1983; 31 March 1986; 21 January 1987; and 13 August 1987.

170 See Art. 122 of the DRC *Constitution of 2006 as revised to date*.

171 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 252-254 para 415-416; Te Pemako *Traité de droit administratif* 315.

172 See Arts 5(1); 100; 122; 123; & 202 of the DRC *Constitution of 2006 as revised to date*.

173 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 254 para. 416; Te Pemako *Traité de droit administratif* 317.

It is hoped that the study paves the way for future academic research in this field of labour migration in the two countries. The study also demonstrates the potential value of immigration and emigration policies to researchers, academics, and professionals in the area of employment and labour law. This is a potentially innovative dimension to discussions about labour migration in the DRC and South Africa.

1.12 Structure of the thesis and chapter synopsis

The thesis is divided into eleven important chapters, including the bibliography.

Chapter One – General Introduction

This chapter outlines the subject matter of the study, the research questions and feasibility, the introduction to the study, the aims, importance, justification for the study, the problem statement, the research focus, the preliminary literature review, the research methodology, assumptions and expected findings, expected original contribution to knowledge, as well as the structure of this thesis and chapter synopsis. Furthermore, this chapter provides an important background information on the protection of the national labour force against foreign competition in the DRC and South Africa.

Chapter Two – Labour migration: a theoretical framework

This chapter provides some important background information and context that are needed to develop a much more comprehensive appreciation of the subject matter of this study. It is, indeed, important to explain and contextualise the subject matter through a brief theoretical framework on labour migration, while reviewing relevant theories, literature and scholarly research conducted on the subject. This chapter provides the definition of labour migration, the scope of this definition, and will make a few terminological observations. This chapter further explores the interplay between labour migration and other forms of migration, and the interaction between immigration, refugee law, employment and labour law as well as labour

market regulation, which includes access to and mobility within the DRC's and South Africa's labour markets.

Chapter Three – State's authority and responsibility for regulating and controlling labour migration

This chapter provides a brief analysis of the State's authority and responsibility for regulating and controlling labour migration, focusing on the DRC and South Africa. The focus lies on state institutions tasked with regulating and controlling labour migration and the protection of irregular immigrants' labour rights. Moreover, the chapter provides the legal and judicial consideration of irregular migrants' employment contracts.

Chapter Four – The Statutory foundation of contemporary DRC's and South Africa's labour migration policies

This chapter seeks to briefly explore the statutory foundation of the DRC's and South Africa's labour migration laws and policies, with a focus on the different historical key steps of the implementation process. This chapter further describes how the relevant laws and policies have been enforced by regulatory authorities throughout the history of the nation. The focus also lies on the basic legal framework pertaining to labour migration in contemporary DRC and South Africa, as well as on key principles of the national legal framework regulating labour migration in the two countries.

Chapter Five – Protection of the national labour force against foreign competition in the DRC and South Africa

This chapter introduces, in depth, the notions of the national labour force, which provides the distinctions, the broad and narrow definition of the labour force, and the limitations of the definition. The chapter further discusses the notions of skills shortage and the remedies for skills shortages, including skills training and the recruitment of foreign skills. The purpose is to provide a general background and

examine key motivations of the protection of national labour force against foreign competition from the DRC and South Africa's perspective.

Chapter Six – Basic principles governing the protection of national labour force against foreign competition in the DRC and South Africa

This chapter discusses, in depth, basic principles governing labour migration policy in the DRC and South Africa, with a focus on free mobility for foreign workers within the country, as well as protection of national labour force against foreign competition. The chapter is particularly important because it covers what forms a core component of the overall research project, and focuses on a subject that remains relatively unexplored, but of great value and importance. The focus lies on the objectives of the principles (notably on tackling foreign competition in the national labour market and on workforce nationalisation), the contents of the principles (employment priority for local employees and requirement to hold a work permit and/ or visa), and the scope of application of the principles.

Chapter Seven – Implementing measures of basic principles governing the protection of the national labour force in the DRC and South Africa

This chapter discusses in depth implementing measures of basic principles governing the protection of the national labour force against foreign competition in the DRC and South Africa respectively. The focus lies on some key measures provided for by relevant laws and regulations, and that help to limit the use of foreign labour. This chapter is important because it provides an important insight into some practical mechanisms put in place by the two countries to ensure that local workers are effectively protected against foreign competition. This discussion is worthwhile because it fills the gap of existing literature concerning labour migration and provides a theoretical foundation for future comparative studies. This chapter is important because it offers a timely assessment of the DRC and South Africa's labour migration policies and its effectiveness. In so doing, it provides precious insights into adjusting and improving the two countries' current and future policies.

Chapter Eight – Critical review of regulatory compliance and effectiveness of legislation protecting the national labour force in the DRC and South Africa

This chapter critically reviews regulatory compliance and effectiveness of legislation protecting the national labour force in the DRC and South Africa. On the one hand, this chapter seeks to draw a general picture of the DRC's and South Africa's efforts to implement and enforce labour migration legal and regulatory policies with a view to achieving the fullest measure of protection of national labour force. The chapter is important because it describes the lawmakers' efforts to regulate labour migration in the two countries and provides valuable insight for assessing their respective policies. This discussion provides a legal opinion upon which both countries can rely when they embark on initiating policies and setting up institutions to establish a labour market friendly environment.

Chapter Nine – The implementation of labour migration statutory and regulatory policies in the DRC and South Africa: Challenges and possible remedies

This chapter critically assesses regulatory challenges and problems faced by the DRC and South Africa in the implementation of labour migration legal and regulatory policies. The focus lies on the substantial impairment of existing legislation by regulatory authorities, the interference with the sphere assigned to lawmakers by the regulatory authority, as well as the legislative inertia and statutory obsolescence. Lastly, the chapter discusses the remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies in the DRC and South Africa. The chapter is particularly important and relevant to the study because it provides a greater understanding of the legal challenges posed by the subject matter of this study. More specifically, this discussion clearly establishes that the main difference between the DRC and South Africa as regards labour migration is, in fact, based on the spheres of law-making competence.

Chapter Ten – Conclusions and Recommendations

This chapter embodies the summary and conclusions of the study while providing final comments to arguments made, which will convince the intended readers on the relevance of the subject. While summarising all the arguments, this final chapter raises the most important point of the thesis and presents a set of recommendations based on conclusions drawn from this chapter. These recommendations are aimed at recapturing the DRC and South African lawmakers' attention to the discrepancy and incoherence, which constitutes a technical flaw of the DRC's and South African labour migration law and policy. This chapter is important because it contains important findings and recommendations to lawmakers and law enforcers for successful reform of the existing labour migration laws and policies in the two countries under study.

Chapter Eleven – Bibliography

This chapter provides the bibliography of the thesis, including primary sources (case law, legislation) and secondary sources (books, reports, papers, essays or chapters in edited collections, journal articles, lecture material, newspaper reports, and internet sources).

1.13 Conclusion

This chapter has provided an introduction and general background to the subject matter of the study and lays the ground for a more thorough analysis of the protection of the national labour force against foreign competition in the DRC and South Africa. The next chapter provides a theoretical framework of labour migration and reviews relevant theories, literature and scholarly research conducted on the subject matter of this study.

CHAPTER TWO

LABOUR MIGRATION: A THEORETICAL FRAMEWORK

2.1 Introduction

This chapter provides some important background information and context that are needed to develop a much more comprehensive appreciation of the subject matter of this study. It is, indeed, important to explain and contextualise the subject matter through a brief theoretical framework on labour migration. It is worth reviewing relevant theories, literature and scholarly research conducted on the subject, while putting this chapter into the context of the overall research questions outlined in the previous chapter.

This chapter is critical in establishing a central basis and link to all the following chapters as a reference point. As such, the chapter allows the readers to get a rather complete understanding of the notion of labour migration, which is closely and directly related to the subject-matter of the study. It is, indeed, argued that labour migration and labour market have long been highly controversial issues in many countries,¹⁷⁴ including the DRC and South Africa. There is a conflict-laden connection between promoting employer interests through admitting foreign workers and protecting the national labour force against foreign competition.¹⁷⁵

On the one hand, most employers encourage more labour immigration by calling for better access to foreign workers, or ‘good access to the “best workers”, regardless of [their country of origin], [in order] to compete successfully in the

174 Bade K “Migration in nineteenth- and early twentieth-century Europe,” in Bade K *Migration in European history* (Blackwell Publishing Oxford 2003) 164; Bauder H “How migration regulates labour markets: a framework,” in Bauder H *Labour movement: how migration regulates labour markets* (OUP Oxford 2006) 15.

175 Bade Migration 164; Müller T “Migration, dual labour markets and social welfare in a small open economy,” in Faini R, de Melo J, & Zimmermann Klau (eds) *Migration: the controversies and the evidence* (CUP Cambridge 1999) 160.

global economy'.¹⁷⁶ These employers' calls for more foreign workers, which have become a key feature of labour markets particularly in high-income countries, are basically expressed in terms of "labour and skills needs" that cannot be met from within the domestic labour force.¹⁷⁷ For most employers, importing foreign labour is advantageous because it helps alleviate labour and skills shortages.¹⁷⁸

In addition, many employers prefer to hire foreign workers because the latter are willing to work for lower pay and are prepared to perform the jobs that local workers allegedly cannot or would not take up.¹⁷⁹ Practical experience shows that natives in many countries are reluctant to accept jobs that are at the bottom of the occupational status hierarchy, in spite of relatively favourable wages.¹⁸⁰ At the same time, foreign-born workers find themselves in a situation where they have to accept jobs they would have considered inappropriate in their home countries, particularly as regards the wages.¹⁸¹

For instance, in the GCC countries foreign workers are mostly hired in low-skilled jobs, such as construction and service work that the locals are not willing to perform.¹⁸² Moreover, foreign workers are needed in high-skilled positions, including financial advisors, consultants, top level executives, teachers and university professors, that the locals are not yet ready to take up.¹⁸³

176 Ruhs Labour market protectionism 60; Ruhs M & Anderson B "Who needs them? A framework for the analysis of shortages, immigration, and public policy," in Ruhs M & Anderson B (eds) *Who needs migrant workers? - Labour shortages, immigration, and public policy* (OUP Oxford 2010) 15.

177 Ruhs & Anderson Migrant workers 15.

178 Ruhs Labour market protectionism 60 ; Böhning W *Employing foreign workers: a manual on policies and procedures of special interest to middle and low-income countries* (ILO Geneva 1996) 14 ; Anderson B & Ruhs M "Responding to employers: skills, shortages and sensible immigration policy," in Brochmann G & Jurado E (eds) *Europe's immigration challenge: reconciling work, welfare and mobility* (I.B.Tauris & Co Ltd London 2013) 95 ; Ruhs M & Anderson B "Introduction," in Ruhs M & Anderson B (eds) *Who needs migrant workers? - Labour shortages, immigration, and public policy* (OUP Oxford 2010) 2.

179 Ruhs Labour market protectionism 60; Böhning *Employing foreign workers* 14; Anderson & Ruhs *Responding to employers* 95; Ruhs & Anderson *Introduction* 2; Naufal G "The Economics of migration in the Gulf Cooperation Council Countries," in Chiswick B & Miller P (eds) *Handbook of the economics of international migration, Volume 1A - 1st edition* (Elsevier Oxford 2015) 1634.

180 Bartram D, Poros M & Monforte P "Labour migration," in Bartram D, Poros M & Monforte P *Key concepts in migration* (SAGE London 2014) 91

181 Bartram, Poros & Monforte *Labour migration* 91.

182 Naufal *The Economics of migration* 1635.

183 Naufal *The Economics of migration* 1635.

There are, however, conflicting opinions, particularly from ‘some trade unions, [which] argue that in many cases these [employers’] claims simply reflect [their] preference for recruiting cheap and exploitable migrant workers over improving wages and employment conditions’.¹⁸⁴ Furthermore, while some argue that in the case of a rise in unemployment, ‘the [national] economy’s need for [foreign labour] declines, others [consider] that there is, [rather], a highly segmented labour market and a differentiated economy’.¹⁸⁵ This suggests that foreign workers are needed, even during an economic recession, and in some jobs, they may be critical for helping the economy recover.¹⁸⁶

On the other hand, most destination countries enact restrictive immigration laws and regulations designed to protect local workers from unfettered foreign competition.¹⁸⁷ The rationale behind these restrictive immigration policies aimed mostly at low-skilled migrants whose ‘skills are perceived as being less valuable or in ready supply among natives’,¹⁸⁸ ‘arguably implies the need for at least some labour market protectionism’.¹⁸⁹ This logic obviously contrasts with the employers’ demands for more foreign labour as well as globalisation forces, which ‘discourage restrictions on international labour flows’.¹⁹⁰ It is argued that restrictive immigration policies have the potential to reduce immigrant inflows or change their composition.¹⁹¹

However, many migrants, particularly economic migrants always find ways to bypass existing immigration restrictions and enter the destination country, including illegally.¹⁹² As Epstein¹⁹³ argues, the number of migrants admitted into a

184 Ruhs Labour market protectionism 60; Ruhs Migrant workers 57; Anderson & Ruhs Responding to employers 95; Ruhs & Anderson Introduction 2.

185 Anderson & Ruhs Responding to employers 95; Ruhs Migrant workers 57; Finch T et al *Shall we stay or shall we go? Re-migration trends among Britain’s immigrants* (IPPR London 2009), cited in Ruhs & Anderson Introduction 2.

186 Anderson & Ruhs Responding to employers 95; Ruhs Migrant workers 57; Finch Re-migration trends, cited in Ruhs & Anderson Introduction 2.

187 Orrenius P & Zavodny M “Undocumented immigration and human trafficking,” in Chiswick B & Miller P (eds) *Handbook of the economics of international migration, Vol 1A - 1st ed* (Elsevier Oxford 2015) 661; Ruhs Labour market protectionism 77.

188 Orrenius & Zavodny Undocumented immigration 661.

189 Ruhs Labour market protectionism 77.

190 Ruhs Labour market protectionism 77.

191 Orrenius & Zavodny Undocumented immigration 661.

192 Orrenius & Zavodny Undocumented immigration 661.

country emerges from a political lobbying process between those advocating a rise in the number of migrants,¹⁹⁴ and those calling for a decrease in the number of migrants entering the labour market.¹⁹⁵

Since the central issue of this study concerns the state's labour migration policy aimed at protecting local labour force against foreign competition, it is worth developing a better understanding of the issue of competition between foreign and local workers. It is, therefore, worth providing a brief overview of the most relevant concepts as a general background upon which the following chapters build.

This chapter, therefore, defines the concept of labour migration and since this concept cannot be discussed without including other categories of migration,¹⁹⁶ the chapter introduces the variants of labour migration, such as labour mobility.¹⁹⁷ The chapter further introduces the concepts of brain drain, brain gain, and brain circulation.¹⁹⁸ To this end, this chapter is subdivided into five main sections, including the conclusion, and each section is subdivided into subsections. The first section sets out definitions of key concepts employed in this study, notably the notion of labour migration and the terms "foreigner" and "foreign national".

The second section explores the interaction between migration law and labour law. The third section discusses labour migration as a component of the "brain drain" and "brain circulation" processes, and brain gain. The fourth section focuses on the DRC's and South Africa's solution to the skills shortages. The last section presents conclusions to chapter Two of this thesis by summarising the research findings of this stage of the research focusing on theoretical framework on labour migration.

193 Epstein G "Frontier issues of the political economy of migration," in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham 2013) 420.

194 Those advocating a rise in the number of migrants include capital owners. See Epstein Frontier issues 420.

195 Those calling for a decrease in the number of migrants entering into the labour market include the workers' union. See Epstein Frontier issues 420.

196 Schrover M "Labour migration," in Hofmeester K & van der Linden M (eds) *Handbook global history of work* (Walter de Gruyter GmbH Berlin 2018) 437.

197 Panizzon M, Zürcher G, & Fornalé E "Introduction: conceptualising a pluralist framework for labour migration" in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave New York 2015) 13.

198 Schrover Labour migration 437.

2.2 Definitions of key concepts

As regards the definitions of key concepts, the focus lies on the notion of labour migration (1), the scope of the definition of labour migration (2), as well as the definition of the terms “foreigner” and “foreign national” (3).

2.2.1 Notion of labour migration

The relevant existing theoretical literature provides a standard or widely accepted definition of the term “labour migration”, which, in the context of this research study, may also be referred to as “economic migration”, “work-related migration” or “market-driven migration”.¹⁹⁹ Most of the available literature on migration defines labour migration conventionally as the ‘movement of persons from their country to another country, or within their own country of residence, for the purpose of employment’.²⁰⁰

In international migration studies, labour migration is defined as one form of international migration focusing on movements of people across nation-state borders or international boundaries²⁰¹ for the purpose of work.²⁰² In simple terms,

199 For further comment on these terms, see Greve B “Labour migration and labour market integration: causes and challenges,” in Carmel E, Cerami A & Papadopoulos T (eds) *Migration and welfare in the new Europe: social protection and the challenges of integration* (Policy Press Bristol UK 2011) 86 ; Bouckaert S & D’Hondt S “The Growing impact of human rights standards on the socio-economic status of undocumented migrants in Belgium: a few illustrations,” in van der Auweraert P et al (eds) *Social, economic and cultural rights - an appraisal of current european and international developments* (Maklu Apeldoorn/Antwerpen 2002) 293; Olwig K & Sørensen N “Mobile livelihoods: making a living in the world,” in Sørensen N & Olwig K (eds) *Work and migration: life and livelihoods in a globalising world* (Routledge London 2003) 4; Shuto M “Labour migration and human security in East and Southeast Asia,” in Kleinschmidt H (ed) *Migration, regional integration and human security: the formation and maintenance of transnational spaces* (Routledge London 2006) 205; Bartram, Poros & Monforte Labour migration 91.

200 Ushakov D & Rubinskaya E “Reforming of the State immigration policy in the context of globalisation: on the example of Russia,” in IRMA (ed) *Immigration and the current social, political, and economic climate: breakthroughs in research and practice* (IGI Global Hershey 2019) 642; Ushakov D & Rubinskaya E “Reforming of the State immigration policy in the context of globalisation: on the example of Russia,” in Ushakov D *Economic reforms for global competitiveness* (IGI Global Hershey 2017) 247; Ionesco D, Mokhnacheva D, & Gemenne F *The Atlas of environmental migration* (Routledge London 2017); IOM “Migration terminology,” in IOM *World migration 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008) 495; IOM *World migration - 2005 costs and benefits of international migration* (IOM Geneva 2005) 460.

201 Bartram D, Poros M & Monforte P “Migration,” in Bartram D, Poros M & Monforte P *Key concepts in migration* (SAGE London 2014) 4 & 7.

'labour migration [...] is the cross-border [mobility] of people [for] employment or income-[generating] activities (e.g., entrepreneurship)'.²⁰³ In this sense, labour migration is equivalent to the term "migration for employment", which is used in international labour law, in particular in *ILO Migration for Employment Convention (Revised), 1949 (No. 97)*.²⁰⁴

Contrary to other types of migration, 'labour migration [concerns] immigration for employment in the destination country as the primary purpose'.²⁰⁵ As such the term presupposes a particular relationship between the migrant and the labour market or economic system.²⁰⁶ Labour migration refers to movement of workers, particularly from low- and middle-income countries to high-income countries.²⁰⁷ As mentioned previously, in most cases, migrant workers mainly perform low-skilled, low-wage jobs that citizens in high-income countries are reluctant to accept.²⁰⁸

In other words, labour migration refers to a movement through which people leave their country of residence for socio-economic reasons, which basically involves a permanent change of residence.²⁰⁹ This follows the definition of the term "migration" provided in the Oxford Dictionary of English as the 'movement of people to a new area or country in order to find work or better living conditions'.²¹⁰ The term "migration" usually refers to 'a movement of an often permanent nature,'

202 Stasilius D "Revisiting the permanent-temporary labour migration dichotomy," in Gabriel C & Pellerin H (eds) *Governing international labour migration: current issues, challenges and dilemmas* (Routledge London 2008) 96; Pena A & Shulman S "Economics of migration," in Free R *21st Century economics: a reference handbook* (SAGE London 2010) 697.

203 Oso L, Kaczmarczyk P, & Salamońska J "Labour migration," in Scholten P (ed) *Introduction to migration studies: an interactive guide to the literatures on migration and diversity* (Springer Cham 2022) 117.

204 Under Article 11 of ILO Convention No. 97, the term 'migration for employment' means [migration of] a person from one country to another with a view to being employed otherwise than on his own account and includes [migration of] any person regularly admitted as a migrant for employment'.

205 OECD/ILO "Immigrants' contribution to developing countries' economies: Overview and policy recommendations," in OECD/ILO *How immigrants contribute to developing countries' economies* (OECD Paris 2018) 24.

206 OECD/ILO Immigrants' contribution 24; Guild E & Mantu S "Introduction", in Guild E & Mantu S (eds) *Constructing and imagining labour migration: perspectives of control from five continents* (Routledge London 2016) 3.

207 OECD/ILO Immigrants' contribution 24.

208 Bartram, Poros & Monforte Labour migration 91.

209 Pichelmann K "EU enlargement, migration and the labour market: a tentative assessment," in Addison J & Welfens P (eds) *Labour markets and social security: issues and policy options in the US and Europe – 2nd ed* (Springer New York 2003) 51.

210 Stevenson A (ed) *Oxford Dictionary of English* (OUP Oxford 2010).

[unlike] the term “mobility”, [which focuses] on ‘today’s reality of a mobile workforce and on the blurriness of the limits between permanent and temporary types of work’.²¹¹

It is obvious that, in contrast to “migration”, ‘the term ‘mobility’ encompasses a wider scope of activities’.²¹² It is, therefore, important to make a distinction between “labour migration”, as defined above and ‘labour mobility’. The term ‘labour mobility’ ‘refers to the movement of individuals who are seeking employment’²¹³ and are given access to the labour market of the host country and are therefore employed in such country.²¹⁴ In simple terms, “labour mobility” is defined as ‘the movement of labour between different employment opportunities’.²¹⁵

Although the concept of labour migration seems to be reasonably straightforward, at least in comparison to some other migration concepts,²¹⁶ defining “labour migration” is not an easy or straightforward matter.²¹⁷ Therefore, given the complexities that arise when searching for a more comprehensive definition of labour migration, it is worth taking a moment to examine the scope of this definition.

211 Jacobsson J “GATS Mode 4 and labour mobility: the significance of employment market access,” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave New York 2015) 64.

212 Jacobsson Labour mobility 63 & 64.

213 Morris F “Introduction of free movement of people in the Caribbean,” in Nita S et al (eds) *Migration, free movement and regional integration* (UNESCO – UNU-CRIS Paris Brugge 2017) 268.

214 Jacobsson Labour mobility 63.

215 Jefferys M “The problems of labour mobility,” in Jefferys M *Mobility in the labour market: employment changes in Battersea and Dagenham* (Routledge New York 2013) 1.

216 Taylor J “Aboriginal labour migration for employment: the evidence,” in Altman J (ed) *Aboriginal employment equity by the year 2000 - Research Monograph No. 2* (Australian National University Canberra 1991) 67; Bartram, Poros & Monforte Labour migration 91; Jalilian H & Reyes G “Migrants of the Mekong: wins and losses,” in Jalilian H (ed) *Costs and benefits of cross-country labour migration in the GMS* (ISEAS Panjang Singapore 2012) 6.

217 OECD/ILO Immigrants’ contribution 23; Howe & Owens The regulatory challenges 7.

2.2.2 Scope of the definition of labour migration

To gain a deeper understanding of the meaning of “labour migration”, a brief review of the theoretical approaches developed in the literature would be necessary, which will, at the same time, help identify the theoretical foundation for the research. Many migration scholars, researchers and academics agree that defining “labour migration” is a much more complex matter than it appears to be at first sight.²¹⁸ The main reason for this is that the definition of labour migration involves multiple theoretical approaches, which have dominated the field. These theoretical approaches follow several disciplines, including law, economics, political science, and sociology.²¹⁹ It is in this sense that labour migration is said to be ‘about the economic, social and political practices that regulate work, constitute labour markets and connect sending and receiving countries’.²²⁰ This research study argues that the scope of the definition of labour migration is either broad or narrow.

It is assumed that the analytical distinction or contrast between the narrow and broader definitions is important and relevant for two main reasons, which are worth describing, even briefly. In fact, such a distinction serves as the starting point for understanding the prospective nature of labour migration, on the one hand, and the interplay between labour migration and other migration patterns, on the other hand.²²¹

218 See Broeck J “Introduction: the economics of labour migration – a process of survival,” in Broeck J (ed) *The economics of labour migration* (Edward Elgar Cheltenham UK 1996) 4; Kok P et al “Literature review,” in Kok P et al *Post-apartheid patterns of internal migration in South Africa* (HSRC Cape Town 2003) 8 & 9; Taylor Aboriginal labour migration 67.

219 Howe & Owens The regulatory challenges 6; Friberg J “New patterns of labour migration from Central and Eastern Europe and its impact on labour markets and institutions in Norway: reviewing the evidence,” in Dølvik E & Eldring L (eds) *Labour mobility in the enlarged single European market* (Emerald Limited Bingley 2017) 22; Keskin T “Beyond two identities: Turkish immigrants in Germany,” in Blau J & Frezzo M (eds) *Sociology and human rights: a bill of rights for the twenty-first century* (SAGE London 2012) 188.

220 Gabriel & Pellerin Introduction 1.

221 Guild & Mantu Introduction 3; Chetail V “Migrant workers,” in Chetail V *International migration law* (OUP Oxford 2019) 201.

2.2.2.1 The narrow approach to the definition of labour migration

The narrow approach focuses specifically on the recruitment of foreign workers, whether high-skilled or seasonal, by higher-level authorities, such as governments or employers.²²² There are, indeed, a few countries, including Cameroon, Croatia, Lithuania, Venezuela, and Luxembourg, where public authorities have the sole prerogative of carrying out the recruitment of foreign workers.²²³ In some other countries, such as Slovenia,²²⁴ the power to undertake recruitment of workers for employment abroad is exclusively vested in public employment services.²²⁵ These services are also the only recruitment bodies empowered to deal with any form of migration for employment purposes, in countries such as the Czech Republic.²²⁶ In most cases, countries recruit foreign workers for jobs that cannot be filled by local workers through at least three regimes,²²⁷ which are worth analysing in some detail.

Firstly, some countries, including SADC states,²²⁸ more specifically South Africa²²⁹ and the DRC,²³⁰ recruit or have recruited foreign workers by using bilateral agreements with other countries. South Africa has dominated bilateral agreements in the SADC region being ‘the principal migrant receiving country in the region,

222 King R “Migration in a world historical perspective,” in van den Broeck J (ed) *The economics of labour migration* (Edward Elgar Cheltenham 1996) 8.

223 ILO Migrant workers, vol 1 (2) –III (1B) (ILO Geneva 1999) 123 para. 326.

224 See *Act on Protection of Workers Temporarily Employed Abroad* (1980) specifically prohibits private recruitment agencies from recruiting Slovene citizens for employment abroad. See ILO “The migration process,” in ILO *Migrant workers: Report III(1B) Volume 1, Part 2* (ILC 87th session Geneva June 1999) 63 fn 33.

225 ILO The migration process 63 note 164.

226 ILO The migration process 63 note 164.

227 These means include bilateral agreements, private sector entities, also known as third party entities or operators, and points-based system. See SOPEMI “Main trends in international migration,” in SOPEMI *Trends in international migration - annual report 2003 edition* (OECD Paris 2003) 73; Theodore N “Temporary worker programmes,” in Gans J et al (eds) *Debates on U.S. immigration* (Sage Publications Los Angeles 2012) 287.

228 Kitimbo A “Is it time for open borders in Southern Africa? The case for free labour movement in SADC,” in McNamee T, Pearson M & Boer W (eds) *Africans investing in Africa: understanding business and trade, sector by sector* (Palgrave London 2015) 88-89.

229 Stephenson S & Hufbauer G “Labour mobility,” in Chauffour J & Maur J (eds) *Preferential trade agreement policies for development: a handbook* (World Bank Washington DC 2011) 289; Mkwanzani F “Contextualising youth migration and education,” in Mkwanzani F *Higher education, youth and migration in contexts of disadvantage: understanding aspirations and capabilities* (Palgrave Cham 2019) 11; DHA White Paper on International Migration 57.

230 See Art. 3 of *Ordinance No. 74-098 of 6 June 1974*; see also para. 2 of *Circular Letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983 on the protection of the national labour force*; Katansi Protection 211-217; Wa-Dondo La législation 41.

and due to its historical migrant labour system in core sectors of its economy'.²³¹ South Africa has 'concluded state-to-state agreements to recruit labour from [several SADC countries]'.²³² South Africa has also 'signed Memoranda of Understanding (MoUs) with Zimbabwe, Cuba, and Tunisia to meet labour demands in critical sectors or for certain skills'.²³³

This raises the issue of contract labour migration that may be defined as 'temporary international movements of workers, which are organised and regulated by governments of sending or receiving countries, by employers, by special agencies - or by combinations of these'.²³⁴ Basically, bilateral agreements, which take the form either of MoUs, Agreement, or of Cooperation, refer to international agreements entered into on a bilateral basis between two participating governments.²³⁵

In most cases, countries recruit foreign workers under negotiated bilateral agreements with other countries through official "government-to-government" channels.²³⁶ For instance, the South African Government signed bilateral agreements with the Governments of Botswana, Lesotho, Malawi, Mozambique, and Swaziland, which focused on recruiting temporary labour from these

231 SADC, *SADC Labour Migration Policy* (SADC/ELSJTSCM/1/2013/9) (December 2013) 3. https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/meetingdocument/wcms_239821.pdf (Date of use: 01 October 2022).

232 SADC Labour Migration Policy 3.

233 SADC Labour Migration Policy 3.

234 Castles S "Contract labour migration," in Castles S *Ethnicity and globalisation: from migrant worker to transnational citizen* (SAGE London 2000) 95; Castles S "Contract labour migration," in Cohen R (ed) *The Cambridge survey of world migration* (CUP Cambridge 1995) 510.

235 Yeates N & Pillinger J "Bilateral agreements: a resurgent feature of global policy," in Yeates N & Pillinger J *International health worker migration and recruitment: global governance, politics and policy* (Routledge London 2019) 142; ILO *Addressing governance challenges in a changing labour migration landscape - ILC 106th Session Report IV Fourth item on the agenda* (ILO Geneva 2017) 32 para 68.

236 See Böhning *Employing foreign workers* 23 ; Martin P "Guest worker policies: an international survey," in Bernstein A & Weiner M (eds) *Migration and refugee policies: an overview* (Continuum New York 2001) 73; Kaur A "Order (and disorder) at the border: mobility, international labour migration and border controls in Southeast Asia," in Kaur A & Metcalfe I (eds) *Mobility, labour migration and border controls in Asia* (Palgrave New York 2006) 47; ILO Official Bulletin, Volume 42 (ILO Geneva 1959) 68; Ducanes G & Baruah N "Policies and legislation on recruitment fees and costs in the Asia and Pacific Region," in ADBI, ILO, & OECD *Innovative approaches for the management of labour migration in Asia* (ADBI, ILO, OECD Tokyo Paris 2020) 47.

neighbouring countries to work on legal contracts in the mines and farms of South Africa.²³⁷

Similarly, in September 2007 the DRC Government signed a bilateral agreement with its Chinese counterpart under which China undertakes to supply the DRC with Chinese manpower for building infrastructures.²³⁸ However, as practical experience has shown, in some cases, particularly in the context of war or armed rebellion against the governmental authorities, the recruitment of foreign labour may take place out of official “government-to-government” channels. This is the case in the DRC where external rebel groups operating in the eastern part of the country have brought manpower from their own countries, including Rwanda, for digging mineral ores, such as cassiterite, coltan, and gold.²³⁹

Secondly, some countries, including South Africa and the UK, select, recruit, or transport foreign workers from sending countries to be employed by domestic employers using private sector entities, also known as private agents, third party entities or operators.²⁴⁰ In practice, receiving countries allocate a determined

237 Crush J & Tshitereke C “Contesting migrancy: the foreign labour debate in post-1994 South Africa” 2001 *Africa Today* vol 48(3) 53 & 54; Musoni F “Apartheid, African liberation struggles, and the securitisation of Cross-Limpopo mobility,” in Musoni F *Border jumping and migration control in Southern Africa* (IUP Bloomington IN 2020) 109; Kitimbo Open borders in Southern Africa 88-89.

238 Mualaba C « La troisième République », in Mualaba C *République Démocratique du Congo, tout est à refaire: À qui la faute? [“The Third Republic,” in Democratic Republic of Congo, everything needs to be rebuilt: Whose fault is it?]* (Publibook Paris 2008) 424; Marysse S & Geenen S “Win-win or unequal exchange? The case of the Sino-Congolese cooperation agreements” 2009 *Journal of Modern African Studies* 47(3) at 375; Jansson The Sicomines Agreement 5.

239 See UN Security Council, *Report of the panel of experts on the illegal exploitation of natural resources and other forms of wealth of the DRC* [UN Doc. S/2001/357 (12 April 2001)] 12 para. 60. <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202001%20357.pdf> (Date of use: 18 April 2022).

240 Böhning W “The first steps to be taken to formulate a policy,” in Böhning *Employing foreign workers: a manual on policies and procedures of special interest to middle- and low-income countries* (ILO Geneva 1996) 22; Abella M & Abrera-Mangahas M “The first steps to be taken to formulate a foreign employment policy,” in Abella M & Abrera-Mangahas M *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 2000) 35 ; Abella M & Abrera-Mangahas M “Organising a specialised foreign employment office,” in Abella M & Abrera-Mangahas M *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 2000) 40.

number of work permits to third party entities or operators so that the latter may independently recruit foreign workers from abroad to work in various sectors.²⁴¹

It is suggested that these third party entities serve both as the initial contact point for job seekers and a link between employers based in the receiving countries and foreign workers.²⁴² To be efficient, third party entities need to be regulated by the government, so that they may, for instance, not be involved in the exploitative use of workers by asking them for money in exchange for job placement.²⁴³ However, practical experience has shown, in South Africa and Canada, for instance, that poor service at government departments in charge of immigration has hindered third party entities' efforts to recruit skilled foreign applicants.²⁴⁴

Thirdly, some countries, including Canada,²⁴⁵ the UK,²⁴⁶ and South Africa,²⁴⁷ have established points-based systems in their national legislation to manage labour

241 Stana R (ed) *Foreign workers: information on selected countries' experiences - Report to the Chairman, Committee on the Judiciary, House of Representatives* (GAO Washington DC 2006) 23.

242 Harris B "Xenophobia: a new pathology for a new South Africa?" in Hook D & Eagle G (eds) *Psychopathology and social prejudice* (UCT Press Cape Town 2002) 169-84; Mulenga C & van Lill B "Recruitment and selection of foreign professionals in the South African job market: procedures and processes," 2007 *SAJHRM* vol 5 (3) at 30; Stana *Foreign workers* 23.

243 Stana *Foreign workers* 23.

244 Boyle B "Sorry state of affairs" 2006 *The Sunday Times* 39; Centre for Development and Enterprise "The South African skills crisis: a report from the corporate coalface" 2007 *CDE Focus* (No. 12) 13; Esses V et al *Race Prejudice and the evaluation of immigrant skills* (University of Western Ontario 2003), cited in Mulenga & van Lill 2007 *SAJHRM* vol 5 (3) at 35.

245 Jones T "Race, place, and social mobility of Jamaicans in Toronto," in Frazier J, Darden J & Henry N (eds) *African Diaspora in the US and Canada at the dawn of the 21st century* (State University of New York Press Albany 2010) 82 ; OECD "Permanent labour migration," in OECD *Recruiting immigrant workers: Canada 2019, recruiting immigrant workers* (OECD Publ. Paris 2019) 66; Immigration & Naturalisation Institute Annual Immigration and Naturalisation Institute - vol 41 (Practising Law Institute New York 2008) 472.

246 Great Britain: *National Audit Office Immigration: the points-based system - work routes, Home Office: UK Border Agency* (The Stationery Office London 2011) 4 ; Great Britain: Home Office *A Points-based system: making migration work for Britain* (The Stationery Office London 2006) 6 ; Trémolières M "A few questions for the FCO - interview with the FCO," in Trémolières M (ed) *Regional challenges of West African migration: African and European perspectives* (OECD Paris 2009) 227 ; Ruhs Labour market protectionism 71-72 ; Barou J, Aigner P & Mbenga B "African migration in its national and global context," in Attias-Donfut C et al (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 26; Ruhs M "Who needs migrant workers? The potential role of an independent expert commission in future EU labour immigration policy," in Karlsson J & Pelling L (eds) *Moving beyond demographics. perspectives for a common European migration policy* (Global Utmaning Stockholm 2011) 62.

247 See DHA White Paper 46.

immigration, attract and recruit skilled foreign workers.²⁴⁸ The points-based system is defined as a way of attracting or selecting high-skilled labour migrants based on a number of market characteristics or parameters.²⁴⁹ These parameters include educational qualifications, younger age, language proficiency, work experience and occupation.²⁵⁰ In fact, this immigration regime requires that preference be given to those migrants who possess more of the said desirable labour market characteristics.²⁵¹

The narrow approach to the definition of labour migration ‘might also focus on the individual migrant’s desire to find work abroad’,²⁵² which raises the problem of emigration for employment purposes. The role played by migrant networks²⁵³ in providing information and assistance to potential migrants towards their decisions to migrate with a view to finding work.²⁵⁴ There are also those who migrate temporarily for non-labour market related reasons but make a vital contribution to

248 Rinne U “The evaluation of immigration policies,” in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham 2013) 534; OECD International migration outlook 2011 (OECD Paris 2011) 108.

249 Patel K, Savchenko Y & Vella F “Occupational sorting of ethnic groups,” in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham 2013) 228; DHA White Paper 46.

250 OECD & SOPEMI “Migration policy development in OECD Countries,” in OECD & SOPEMI *International migration outlook 2010* (OECD Paris 2011) 59; World Bank “Overview,” in World Bank *Moving for prosperity: global migration and labour markets - Policy Research Report* (World Bank Washington DC 2018) 32 & 33; Dunn J “How South Africans stand to benefit from Britain’s new points-based immigration system” 2020 Sable International <https://www.sableinternational.com/blog/benefit-from-britain-s-new-points-based-immigration-system> (Date of use: 18 April 2022) ; World Bank “High-skilled migration,” in World Bank *Moving for prosperity: global migration and labour markets - Policy Research Report* (World Bank Washington DC 2018) 267 ; Brothwell R “South Africans with matric certificates will be able to move to the UK under the new points-system” 2020 *Business Tech* <https://businesstech.co.za/news/lifestyle/378241/south-africans-with-matric-certificates-will-be-able-to-move-to-the-uk-under-the-new-points-system/> (Date of use: 18 April 2022).

251 World Bank Overview 32; World Bank High-skilled migration 267.

252 King Migration 8.

253 Migrant networks are commonly defined as ‘sets of interpersonal ties that connect migrants, former migrants, and non-migrants in areas of origin and destination through bonds of kinship, friendship and shared community origin’. See Massey D et al *Worlds in motion: understanding international migration at the end of the millennium* (Clarendon Press Oxford 2005) 42; Massey D et al “Theories of international migration: a review and appraisal” 1993 *PDR* vol. 19(3) at 448; Massey D “Economic development and international migration in comparative perspective” 1988 *PDR* 14 at 396.

254 School J “Determinants of international migration: theoretical approaches and implications for survey research,” in Van der Erf R & Heering L (eds) *Causes of international migration: proceedings of a workshop Luxembourg, 14-16 Dec. 1994* (Eurostat Brussels 1995) 5.

the host country's economy with their skills and talents.²⁵⁵ These categories of migrants fall under the broader definition of labour migration, which is discussed in the following subsection.

2.2.2.2 The broader approach to the definition of labour migration

The broader approach focuses on several other patterns of migration²⁵⁶ that involve 'people who soon or later will be seeking work and will, therefore, have impacts on the labour market'.²⁵⁷ This broader approach covers the 'people who may have migrated on a temporary basis for other [non-work] purposes'.²⁵⁸ This category of temporary migrants encompasses those who enter or have entered the country via non-labour related channels.²⁵⁹ The most notable examples in this category are holidaymakers, tourists, trafficked workers, the providers of international services, students, refugees, asylum seekers, family members, or accompanying families of temporary labour migrants.²⁶⁰

255 Theobald H "Migrant carers in elder care provision: interaction of policy fields," in Pfau-Effinger B & Rostgaard T (eds) *Care between work and welfare in European societies: work and welfare in Europe* (Palgrave London 2011) 167; Whittaker D *Asylum seekers and refugees in the contemporary world* (Routledge London 2006) 107; Bevelander P & Nielsen H "Declining employment assimilation of immigrants in Sweden: observed or unobserved characteristics?", *Discussion Paper No. 2132* (CEPR London 1999) 9.

256 Other patterns of migration include family migration (family reunification and family formation migration), forced migration, skilled migration or brain drain migration, return migration, chain migration, asylum or ethnic migration, refugee migration, lifestyle migration, marriage migration, permanent settlement, to name but a few.

257 King Migration 8; Cohen R *Global diasporas: an introduction – 2nd edition* (Routledge London 2008) XIV; Wickramasekara P "Globalisation, international labour migration and the rights of migrant workers" 2008 *TWQ*, vol. 29(7) Globalisation and migration: new issues, new politics? 1255.

258 Brock G "Temporary labour migration," in Brock G *Justice for people on the move: migration in challenging times* (Cambridge University Press Cambridge UK 2020) 141.

259 Many more temporary migrants not usually classified as labour migrants take part in the labour market or work-related activities during the temporary period of their stay in either a country of transit or of destination. See OECD "Capturing the ephemeral: How much labour do temporary migrants contribute in OECD countries?" in OECD *International Migration Outlook 2019* (OECD Paris 2019) 118.

260 Reilly A "Review: the price of rights" 2014 *ALR* (35) 189, cited in Howe & Owens *The regulatory challenges* 7 fn 13; Howe J & Reilly A "Meeting Australia's labour needs: the case for a low skill work visa" (2015) *FLR* 43(2) at 259, cited in Howe & Owens *The regulatory challenges* 7 fn 14; OECD *Capturing the ephemeral* 118; Colombo F et al "Help wanted?: Providing and paying for long-term care," in OECD *Health Policy Studies* (OECD Publ. Paris 2011) 177.

In both countries under study, immigration laws and policies specifically prohibit holders of a visitor's visa (in South Africa),²⁶¹ and of a tourist, visit or family visa (in the DRC)²⁶² from conducting full-time work in the country. However, in both countries, refugees are respectively entitled to seek employment (in South Africa),²⁶³ and to a special work permit for exercising a professional activity, which involves all paid jobs under an employment contract (in the DRC).²⁶⁴

Similarly, the laws and regulations applicable in both countries allow foreign nationals holding a business visa to conduct work, despite minor differences in terminology. While South African law²⁶⁵ refers explicitly to a business visa to be held by foreign nationals, DRC regulations²⁶⁶ refer to a valid work permit to be held by expatriates. It is worth specifying that under the DRC *Mining Regulations*, such a valid work permit is required for carrying out the profession of buyer of licensed buying offices for minerals in the small-scale and artisanal mining sector.²⁶⁷ Such a work permit is meant for foreigners or foreign nationals and these terms are worth defining.

2.2.3 Defining the terms “foreigner” and “foreign national”

The term “foreigner” or “foreign national” is defined differently in the two countries under study depending on the legislation concerned. Under South African law, the term “foreigner” means ‘an individual who is not a citizen’.²⁶⁸ The term “illegal

261 See s11(2) as substituted by s 4(b) of *Immigration Amendment Act, 2007 (Act 3 of 2007)*.

262 See Art 2(2)) of *Departmental Order No. 87/005 of 21 January 1987 determining terms & conditions for hiring expatriates*.

263 See s 27(f) of *Refugees Act, 1998 (Act No. 130)*, as amended to date.

264 See Art. 32 of DRC's *Refugees Act (No. 021-2002 of 16 October 2002)*; Art. 8 of DRC's *Ordinance No. 74-098 of 6 June 1974 protecting the national labour force against foreign competition as revised to date*.

265 See s 15 (2) of South Africa's *Immigration Act (Act 13 of 2002)*, as amended to date.

266 See Art. 260 of *Decree No. 038/2003 of 26 March 2003 pertaining to the Mining Regulations as amended and supplemented by Decree No. 18/024 of 8 June 2018*.

267 See Art. 261 of *Mining Regulations (Decree No. 038/2003 of 26 March 2003)*, as amended and supplemented to date.

268 See s 1(1)(xvii) of *Immigration Act, 2002 (No. 13 of 2002)* as amended by *Immigration Amendment Act (Act No. 19 of 2004)*; s 1(1)(i) of *South African Citizenship Amendment Act (Act No. 17 of 2010)*; and s 1 of *Employment Services Act (Act No. 4 of 2014)*.

foreigner” is defined, under the *Immigration Act*, as ‘a foreigner who is in [South Africa] in contravention of [the Immigration] Act’.²⁶⁹

Under DRC domestic legislation, the term “foreigner” refers to ‘an individual who does not hold Congolese nationality, either because he/she holds a foreign nationality or because he/she does not hold a nationality’.²⁷⁰ The term “foreigner” also refers to ‘any person who does not have Congolese nationality of origin, whether acquired through naturalisation, option, adoption, marriage or birth and residency in the DRC’.²⁷¹

These definitions are in general use nowadays and correspond perfectly to the legal definition of the term “foreigner,” or “foreign national,” which ‘refers to persons who do not hold the country’s nationality’.²⁷² It is important to emphasise that the terms “foreigner,” “foreign national,” “foreign citizen,” “non-national” and “alien,” have been used in an interchangeable manner to mean the same thing. The terms such as “foreign worker”, “guest worker”, “foreign employee” or “migrant worker” are also used interchangeably, bearing in mind that a migrant worker is a ‘person who migrate from one country to another with a view to being employed otherwise than on his [or her] own account’.²⁷³

Many scholars and researchers prefer the term “migrant worker” over the term “foreign worker” as the first humanizes workers as agents undertaking migration, while the latter emphasizes their excluded status as not local.²⁷⁴ Similarly, the

269 See s 1(1)(xviii) of *Immigration Act, 2002 (No. 13 of 2002) as amended by Immigration Amendment Act (Act No. 19 of 2004)*.

270 See Art. 1 of *Legislative Order No. 83-033 of 12 September 1983 governing immigration controls*. See also Art. 1(a) of *Legislative Order No. 66-260 of 21 April 1966 subjecting the registration of foreigners, foreign companies, and certain Congolese companies in the Trade Register to financial securities*.

271 Art. 1 of *Act No. 04/024 of 12 November 2004 regulating the DRC citizenship*.

272 Kashiwazaki C “The foreigner category for Koreans in Japan: opportunities and constraints,” in Ryang S & Lie J (eds) *Diaspora without homeland: being Korean in Japan* (University of California Press Berkeley LA 2009) 125.

273 de Beijl R “Introduction,” in de Beijl R (ed) *Documenting discrimination against migrant workers in the labour market: A comparative study of four European countries* (ILO Geneva 2000) 9.

274 Ong F & Yeoh B “The place of migrant workers in Singapore: between State multiracialism and everyday (un)cosmopolitanisms,” in Eng L, Collins F, & Yeoh B (eds) *Migration and diversity in Asian contexts* (ISEAS Singapore 2013) 101 fn 5.

terms “national” and “citizen” are frequently used interchangeably.²⁷⁵ These terms are mainly used in fields of study that deal with migration and work, notably migration law and labour law, which interact, as discussed below.

2.3 A brief discussion of the intersection and interaction between migration law and labour law

The DRC and South Africa have both developed the necessary legal and regulatory structures, which bring together interacting elements of labour law and migration law. It is suggested that the intersection between these two bodies of law, which have the same value, shall give rise to a distinctive intermediate new body referred to as “labour migration law” or the “law of labour migration”.²⁷⁶ This discipline is regarded as the emerging sub-discipline of labour law or an integral part of labour law.²⁷⁷ As such, this discipline represents very well the collaborative nexus between labour law and migration law, which is required for preventing the illegal migration, for instance.²⁷⁸

A thorough overview of the above-mentioned legal and regulatory framework reveals that the laws, regulations, and policies governing migration and labour in the DRC and South Africa have meshed together. This confirms the interactions between migration law and labour law, or between immigration law, the immigration process and labour market structures, which have been extensively discussed in the literature.²⁷⁹ A new concept referred to as ‘triangle between labour

275 Don Nanjira D *The Status of Aliens in East Africa: Asians and Europeans in Tanzania, Uganda, and Kenya* (Praeger London 1976) 15; Bammens N *The principle of non-discrimination in international and European tax law* (IBFD Amsterdam 2012) 33 fn 32.

276 Freedland & Costello Division of labour law 1.

277 Freedland M “Reinforcing the philosophical foundations of social inclusion: the isolated worker in the isolated state,” in Collins H, Lester G, & Mantouvalou V (eds) *Philosophical foundations of labour law* (OUP Oxford 2018) 328 & 331.

278 Yenisey K “Safeguarding the rights of migrant workers: another challenge for labour law?” in Casale G & Treu T (eds) *Transformations of work: challenges for the institutions and social actors* (Wolters Kluwer Alphen aan den Rijn 2019).

279 Costello C “Migrants and forced labour: a labour law response,” in A Bogg et al (eds) *The autonomy of labour law* (Hart Publishing Oxford 2015) 207; Freedland & Costello Division of labour law 7; Engblom S, Kountouris N & Ekman Å “Temporary labour migration and the trade in services: European and global perspectives in an age of economic integration,” in J Howe & R Owens (eds) *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publishing Oxford 2016) 67; Crock M “Contract or compact: skilled migration and the dictates of politics and ideology,” in Crock M & Lyons K (eds) *Nation skilling: immigration, labour and the law in*

law, migration law and human rights law' comes into play when considering human rights protections that migrant workers, refugees, and asylum seekers. are entitled to at the same level as nationals.²⁸⁰

While migration law, labour law and human rights form the triangle referred to above, there are many other fields²⁸¹ that intersect when it comes to regulating labour migration and protecting migrant workers at the national level. It is argued that the interaction between these different branches of domestic law certainly affects the use of migrant labour, as each of them, with its principles, goals, concepts, and techniques, does not always operate in harmony.²⁸²

Despite the complexity of analysing the intersections between these fields of regulation, it is essential to assess them in order to understand the construction of labour markets, 'the nature of work relationships and the ways in which' they are shaped by legal, political, social, economic and cultural contexts.²⁸³ While these fields of regulation, in particular immigration law, refugee law, and nationality law overlap, many legal scholars choose to disaggregate them in pursuit of their own scholarly agendas.²⁸⁴

Although there is a qualitative difference between willing migrants and refugees, as described above, refugee law has been incorporated into the broader immigration system in some countries, including the Republic of the Congo (Congo Brazzaville),²⁸⁵ the US, Australia, Germany, Japan, and Philippines.²⁸⁶ As

Australia, Canada, New Zealand and the United States (Desert Pea Press Sydney 2002) 50.

280 Cholewinski R "Labour migration management and the rights of migrant workers," in Edwards A & Ferstman C (eds) *Human security and non-citizens: law, policy and international affairs* (2010) 273.

281 Such regulatory fields include trade law, development law, refugee and asylum law, criminal law, nationality law and national security law, to name but a few. See Howe & Owens *The regulatory challenges* 33.

282 Yenisey The rights of migrant workers; Chetail V "Sources of international migration law," in Opeskin B, Perruchoud R, & Redpath-Cross J (eds) *Foundations of international migration law* (CUP Cambridge 2012) 61.

283 Howe & Owens *The regulatory challenges* 33-34.

284 Lim J "Immigration, asylum, and citizenship: a more holistic approach" 2013 *CLR* Vol. 101 (4) at 1015.

285 See Arts 31 & 32 of *Act No. 29-2017 of 7 August 2017 amending and supplementing certain provisions of Act No. 23-96 of 6 June 1996 laying down the conditions for the entry, stay and exit of foreigners in the Republic of the Congo.*

Noll points out, to understand the relationship of migration, asylum, and labour market, two simple legal rules need to be considered.

First, the sovereign right of the state to regulate immigration; and second, the limitation of the application of this right primarily by the prohibition against returning foreigners to countries where they risk persecution.²⁸⁷ These rules form part of the states' authority and responsibility for managing, enforcing, and implementing immigration and refugee laws and policies.²⁸⁸ Labour migration is regarded as a component of the "brain drain" and "brain circulation" processes, and brain gain, as discussed in the next subsection.

2.4 Labour migration as a component of the "brain drain" and "brain circulation" processes, and brain gain

It is widely recognised in relevant literature that labour migration is one component of both the "brain drain" and "brain circulation" processes,²⁸⁹ which are worth discussing in some detail.

2.4.1 Brain drain

Brain drain is commonly understood as 'de-skilling of emigrants in their country of destination', while their country of origin suffers from the continuing outflow of

286 In these countries, refugee-related provisions are incorporated into the general immigration law in order to reduce the cost of legislation and improve its efficiency. See Liu G "The experience of building the international refugee legal system and China's refugee legislation," in Liu G *Chinese refugee law* (Brill Leiden 2020) 473; Gansallo A & Bernstein-Baker J "Asylum and other related humanitarian relief," in A Gansallo & J Bernstein-Baker *Understanding immigration law and practice* (Wolters Kluwer New York 2020) 179 ; Baker T & Bones K "Children and refugee law in Australia and the United States," in Crock M & Benson L (eds) *Protecting migrant children: in search of best practice* (Edward Elgar Cheltenham 2018) 278; Lim 2013 *CLR* vol. 101 (4) at 1015.

287 Noll G "The asylum system, migrant networks and the Informal labour market," in Bull T & Cramér P (eds) *Swedish studies in European Law – vol. 2, 2007* (Hart Pub Oxford 2008) 3.

288 Kivisto P & Faist T "The State and immigration control," in Kivisto P & Faist T *Beyond a border: The causes and consequences of contemporary immigration* (Pine Forge Press London 2010) 195.

289 Simanovsky S, Strepetova M, & Naido G *Brain drain from Russia: problems, prospects, and ways of regulation* (Nova Science Publishers Commack NY 1996) x; Simanovsky S, Strepetova M & Naido Y "Brain drain" global problem of the present-day world" 1996 *Current Politics and Economics of Russia* vol. 6 (1) at 51; Commission of the European Communities Library Biblio East (ECLAS Brussels 1993) 30.

highly skilled labour force.²⁹⁰ In other words, brain drain denotes the loss of highly skilled people through emigration, predominantly from developing countries. In contrast, brain gain describes the gain or immigration of highly skilled people to developed countries originating from developing countries.²⁹¹

As one aspect of international migration, brain drain is commonly defined as the international movement and transfer of significant numbers of highly qualified individuals mostly from developing to developed countries.²⁹² In this context, the term “brain” refers to ‘any skill, competency, or attribute that is a prospective asset’.²⁹³ And the term “drain” refers to ‘the intensity with which the most talented people leave their country of origin at a substantial rate to pursue their careers elsewhere’.²⁹⁴ In fact, brain drain involves the emigration or out-migration of the most talented people, highly skilled and well-educated professionals, such as accountants, medical doctors, nurses, engineers, business managers, and university teachers from developing to developed countries.²⁹⁵ It is further argued that term “drain” implies that this rate of exit is at a greater level than “normal” or than what might be desired’.²⁹⁶

290 Banya K & Zajda J “Globalisation, the brain drain, and poverty reduction in Sub-Saharan Africa,” in Zajda J (ed) *Second international handbook on globalisation, education and policy research* (Springer London 2015) 278.

291 Bartram D, Poros M & Monforte P “Brain drain/gain/circulation,” in Bartram D, Poros M, & Monforte P *Key concepts in migration* (SAGE London 2014) 23.

292 Ukpokodu O “Diaspora migrations: brain drain or symbioses,” in Abidogun J & Falola T (eds) *The Palgrave Handbook of African education and indigenous knowledge* (Palgrave Cham 2020) 762 & 763; Beine M, Docquier F & Rapoport H “Brain drain and human capital formation in developing countries: winners and losers” 2008 *EJ* Vol. 118 (528) at 631.

293 Heck R & Mu X “Economics of globalisation in higher education: current issues in recruiting and serving international students,” in Papa R & English F (eds) *Educational leaders without borders: rising to global challenges to educate all* (Springer Cham 2016) 150 ; Farrell L & Fenwick T (eds) *World yearbook of education 2007: educating the global workforce: knowledge, knowledge work and knowledge workers* (Routledge London 2007) 228; Rizvi F “Brain drain and the potential of professional diasporic networks,” in Giannoccolo P *The brain drain: a survey of the literature, working paper No. 2006-03-02* (Università degli Studi di Milano-Bicocca, Department of Statistics 2006) 3.

294 Heck & Mu Economics of globalisation 150; Farrell & Fenwick World yearbook of education 228; Rizvi Brain drain 3.

295 Dowling J & Valenzuela R *Economic development in Asia* (Thomson Singapore 2004) 245 ; Lillie N et al “Migration and human resource management,” in Lucio M (ed) *International human resource management: an employment relations perspective* (SAGE Publications London 2013) 227 ; Anderson R, Kotzé L, & Morse S “Immigrants and refugees,” in Anderson R, Kotzé L, & Morse S (eds) *Berkshire encyclopedia of sustainability 9/10: Afro-Eurasia: assessing sustainability* (Berkshire Great Barrington MA 2012) 161.

296 Elveren A “Brain drain: causes and consequences,” in Elveren A *Brain drain and gender inequality in Turkey* (Springer Cham 2018) 11.

In terms of the DRC's stance on the brain drain, the Ministry of Labour's reluctance to grant authorisation to export DRC labour²⁹⁷ has failed to stop or discourage Congolese nationals from emigrating in large numbers specifically for work purposes. South Africa's stance on citizens emigrating for seeking employment abroad has always been negative for many years. In fact, state authorities, most notably former President Nelson Mandela sometimes regarded South Africans who chose to emigrate elsewhere as being 'either unpatriotic or unwilling to accept the post-apartheid [political] dispensation' introduced in 1994.²⁹⁸

The brain drain is often viewed negatively as a kind of spoliation or 'predation through which rich countries extract the most valuable human resources from the poor countries, has no empirical justification at an aggregate level'.²⁹⁹ In the African context, the phenomenon is referred to as the "poaching" of African brains', most notably health professionals, including medical doctors, nurses, as well as teachers, and IT workers.³⁰⁰ This exodus of highly skilled personnel from sub-Saharan African countries to Europe and to North America has damaging consequences for the countries they leave behind.³⁰¹

However, the brain drain is sometimes viewed positively mainly in two case scenarios. Firstly, in the case of high levels of unemployment at home, emigration can be viewed positively as it reduces competition for limited jobs.³⁰² For this

297 See *Departmental Order No. 067/81 of 5 November 1981 regulating the transfer of [Congolese] labour abroad, which revises Departmental Order No. 78/0036 of 17 June 1978 regulating the export of Congolese labour.*

298 Ellis & Segatti *The role of skilled labour* 67; Crush & Dodson 2007 *TESG* vol. 98(4) at 440.

299 Beine M, Docquier F, & Rapoport H *Brain drain and human capital formation in developing countries: winners and losers* (UCL Louvain 2006) 28; OECD "Knowledge diffusion and impacts of international mobility," in OECD *The global competition for talent: mobility of the highly skilled* (OECD Publishing Paris 2008) 46; Docquier F & Rapoport H "Quantifying the impact of highly-skilled emigration on developing countries," in Boeri T et al (eds) *Brain drain and brain gain: the global competition to attract high-skilled migrants* (OUP Oxford 2012) 233.

300 Kane A & Leedy H "Introduction - African patterns of migration in a global era new perspectives," in Kane A & Leedy H (eds) *African migrations: patterns and perspectives* (IUP Bloomington 2013) 6.

301 Brown P, Lauder H, & Ashton D "The war for talent," in Brown P, Lauder H, & Ashton D *The global auction: the broken promises of education, jobs and incomes* (OUP Oxford 2011) 92.

302 Koser K "Migration and development," in Koser K *International migration: a very short introduction - second edition* (OUP Oxford 2016) 46.

reason, some governments, such as the government of Philippines, positively encourage emigration.³⁰³

Secondly, the other reason is that the money migrants send home, commonly referred to as “migrant remittances,” is regarded as ‘the major positive gain from Africa’s brain drain [that] is insufficient to offset the costs of emigration of skilled migrants’.³⁰⁴ It is noteworthy that most countries in Sub-Saharan Africa, except Lesotho and to some extent Mozambique, have not yet organised ways of managing migrant remittances, notably through their central banks.³⁰⁵

2.4.2 Brain circulation

Contrary to the traditional view of the brain drain having a negative impact on the development of the sending countries, the most recent view describes the brain drain as brain circulation. According to this view, many skilled migrants return to their home country at one point in life, with a lot of experience from abroad.³⁰⁶ For instance, most of the Congolese migrants who had returned voluntarily from Europe, specifically from Belgium, France, and the United Kingdom are much more highly educated than non-migrants living in the DRC. For this reason, these return migrants, especially those who are better educated, tend to be selected for intermediate or high-level occupations.³⁰⁷ Some other Congolese migrants return from African countries, between which circulation ‘is much easier, [thanks to] geographical proximity and administrative facilities’.³⁰⁸

In South Africa, the Green Paper proposes the establishment of a diaspora institution for, inter alia, ‘providing ways in which emigrants can transfer skills back in [the country], such as visiting lectureships and public and private sector partnerships’.³⁰⁹ Such a policy has the potential to reduce the recruitment of skilled

303 Koser Migration 46.

304 Akokpari J “Globalisation, migration, and the challenges of development in Africa,” in Patterson R (ed) *African brain circulation: beyond the drain-gain debate* (Brill Leiden 2007) 79; Koser Migration 46.

305 Akokpari Globalisation 79.

306 Beine, Docquier & Rapoport 2008 EJ vol. 118 (528) at 631.

307 Schoumaker et al Congolese migrants’ economic trajectories 233-235.

308 Schoumaker, Flahaux, & Mangalu Congolese migration 197.

309 DHA Green Paper 50; Crush et al Harnessing migration 35.

individuals from abroad, which ‘would involve encouraging South African citizens with the relevant skills, who are either working or resident abroad, to return home for employment in [various] sector[s]’.³¹⁰

Most skilled migrants who initially left their home countries for better professional and economic opportunities abroad are now increasingly reversing the brain drain, transforming it into “brain circulation”.³¹¹ In fact, most of them return ‘home’ to establish business relationships or start new companies while maintaining their social and professional ties to their host country.³¹² Basically, highly skilled professionals and entrepreneurs return to their countries of origin to conduct transnational business across two or more countries.³¹³

These skilled migrants are, therefore, making the brain circulation ‘become one of the most important factors that influences the economic development and competitiveness’.³¹⁴ The reason for this is that the development of a country depends on a few factors, including learning, research, innovation creation and collaboration with other countries.³¹⁵ It is argued that all African states are amending their policies with a view to setting up the migration-development model with strategic brain circulation.³¹⁶

Therefore, brain circulation is referred to as ‘the possibility for developing countries to draw on the skills, know-how and other forms of experience gained by their

310 Ndletanya M & Muzondidya M ‘Reviewing municipal capacity in the context of local government reform: 1994–2009,’ in Jackson P et al (eds) *South African governance in review: anti-corruption, local government, traditional leadership* (HSRC Press Cape Town 2009) 31.

311 Saxenian A “Cluster dynamics and regional networks: New Argonauts, Silicon Valley, and Route 128,” in Oqubay A & Lin J (eds) *The Oxford handbook of industrial hubs and economic development* (OUP Oxford 2020) 208.

312 Saxenian Cluster dynamics 208.

313 Bartram, Poros, & Monforte Brain drain 24.

314 Schiff M “Brain gain: claims about its size and impact on welfare and growth are greatly exaggerated” 2005 *Discussion Paper No. 1599* (IZA Bonn May) 1.

315 Oosterik S “From brain drain to brain circulation: attracting high skilled migrants back: The improvement of human capital from brain circulation” *Master’s dissertation in Science* (University of Twente, Enschede The Netherlands 2016) 25. https://essay.utwente.nl/69931/1/Oosterik_MA_EuropeanStudies.pdf (Date of use: 04 July 2022).

316 Patterson R “Historic changes underway in African migration policies: From muddling through to organised brain circulation,” in Kane A & Leedy H (eds) *African migrations: patterns and perspectives* (IUP Bloomington 2013) 81.

migrants - whether they have returned to their country of origin or not - and members of their diaspora'.³¹⁷ Since some authors, including Hewitt,³¹⁸ 'construe brain circulation as automatic brain gain',³¹⁹ it, therefore, becomes relevant to also focus, even briefly, on the issue of "brain gain".

2.4.3 Brain gain

The term "brain gain" is regarded from the host country's perspective as the opposite of "brain drain", which is itself considered from the home country's perspective as "brain loss".³²⁰ In other words, many trained immigrants bring with them foreign work experience, and other work-related skills and talents that add to the national wealth of their new country.³²¹ This is indisputably a gain for host countries and a loss or at least "an economic cost" for their home countries.³²² Host countries usually 'take advantage of immigrants' skills and experience so that they contribute to the economic base within a nation and contribute to the nation's ability to compete successfully in the global economy'.³²³

When considered from the home country's perspective, "brain gain" may refer to the situation in which highly skilled migrants tend to return to their home country, bringing with them the knowledge, skills, entrepreneurial know-how and income they have acquired while abroad.³²⁴ There is a general assumption that migrants

317 European Commission *Migration and Home Affairs* (EU Brussels 2021). https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/brain-circulation_en (Date of use: 10 July 2022).

318 Hewitt C "Pan-African brain circulation," in Patterson R (ed) *African brain circulation: beyond the drain-gain debate* (Brill Leiden 2007) 15-39.

319 Patterson R "Introduction," in Patterson R (ed) *African brain circulation: beyond the drain-gain debate* (Brill Leiden 2007) 5.

320 Baofu P "The others and their twin faces," in Baofu P *The future of post-human migration: a preface to a new theory of sameness, otherness, and identity* (Cambridge Scholars Publishing Cambridge UK 2012) 241.

321 Esses V, Dietz J, & Bhardwaj A "The role of prejudice in the discounting of immigrant skills," in Mahalingam R (ed) *Cultural psychology of immigrants* (Routledge London 2013) 127.

322 Baofu The others 241.

323 Esses, Dietz, & Bhardwaj *The role of prejudice* 114.

324 Castagnone E et al "Understanding Afro-European economic integration between origin and destination countries," in Beauchemin C (eds) *Migration between Africa and Europe* (Springer Cham 2018) 137; Köser-Akçapar S "Do Brains really going down the drain? Highly skilled Turkish Migrants in the USA and the «brain drain» debate in Turkey" 2006 *REMI* 22(3) at 81; Lemaître G "Labour migration: achieving a fairer deal for origin countries," in Stiftung B (ed) *A fair deal on talent – fostering just migration governance lessons from around the globe* (VBS Gütersloh 2015) 25.

returning from developed nations³²⁵ have inevitably acquired useful skills, experiences and social connections that benefit their home country's economy, even though they had been exposed to racism and discrimination in the labour markets of the host societies.³²⁶ For instance, many Congolese returnees contribute skills to their various activities and employments in the DRC with the competencies and skills they have probably gained while living abroad.³²⁷ It is further argued that like in Senegal and Ghana, in the DRC 'the overall integration of returnees in the labour market shows better outcomes than for individuals who never migrated'.³²⁸

Similarly, in South Africa returning migrants bring back with them additional managerial and technical skills, as well as contacts and are playing an active and productive role in the country's development.³²⁹ For instance, as the World Health Organisation (WHO) points out, '[when] health workers return, they bring significant skills and expertise back to their home countries,' including South Africa.³³⁰ As a result, the South African government has recently shifted its stance vis-à-vis emigration by recognising 'the benefits that [...] a benevolent diaspora can bring'.³³¹

The Green Paper on International Migration in South Africa of 21 June 2016 clearly recognises 'the positive [role] that emigration and citizens working abroad for extended periods [can play] in growing [the country's] knowledge base and creating business opportunities in a highly competitive knowledge-based, global economy'.³³² In fact, as previously mentioned, South Africa has always regarded

325 These developed nations include most notably countries of Western Europe, North America, Australia, New Zealand, and Japan, to name just a few.

326 Åkesson L & Baaz M "Introduction," in Åkesson L & Baaz M (eds) *Africa's return migrants: the new developers?* (Zed Books London 2015) 7.

327 Baaz M "Successive flops and occasional feats: Development contributions and thorny social navigation among Congolese return migrants," in Åkesson L & Baaz M (eds) *Africa's return migrants: the new developers?* (Zed Books London 2015) 30.

328 Castagnone et al Afro-European economic integration 137.

329 Kropiwnicki Z "Obligations and agency in post-apartheid South Africa," in Kropiwnicki Z *Exile identity, agency and belonging in South Africa: the Masupatsela Generation* (Palgrave Macmillan Cham 2017) 272.

330 WHO "From the workforce," in WHO *Working together for health* (WHO Geneva 2006) 101.

331 Butler A "A rainbow nation?" in Butler A *Contemporary South Africa - 3rd edition* (Palgrave Macmillan London 2017) 49.

332 DHA Green Paper 48.

emigrants as merely a 'brain drain' rather than a resource, which is probably one of the reasons why no 'immigration or emigration strategy has been designed to minimise the economic harm caused by skills loss or to maximise the benefits [of immigration]'.³³³

In many African countries, including the DRC and South Africa "brain drain" or "brain loss" or the "continued outflow of professionals",³³⁴ as well as 'immigration restrictions on high-skilled foreigners and failings in the education system'³³⁵ cause skills shortages. Both countries have put in place strategies for tackling the skills shortages, as discussed below.

2.5 DRC and South Africa's solution to the skills shortages

Like many countries in Southern Africa, the DRC and South Africa are facing significant skills shortages, most notably, 'where the scarcity of particularly high-skilled workers' is reported in sectors that are critical to 'the country's long-term economic growth', including engineering, medicine, and senior management.³³⁶ To address the skills shortages and support the development of emerging sectors, most countries develop strategies that are worth discussing even briefly focusing on the DRC and South Africa.

2.5.1 DRC's solution to the skills shortages

In the DRC, a series of policy initiatives have been put in place to fill the skills gaps, namely national employment, and vocational training policy (1), the use of the skills and experience of the diaspora (2), and the transfer of skills (training) and knowledge to the local workforce (3).

333 Butler A rainbow nation? 49.

334 El-Khawas M & Ndumbe J "Africa's brain drain: The critical role of human resources," in Wusu O (ed) *Politics and economics of Africa – vol 6* (Nova Science Publ. New York 2006) 95.

335 Kitimbo Open borders in Southern Africa 85; Kitimbo A "Is it time for open borders in Southern Africa? : the case for free labour movement in SADC" 2014 *Brenthurst Discussion Paper 4/2014* (August) at 4.

336 Kitimbo Open borders in Southern Africa 85; Kitimbo 2014 *Brenthurst Discussion Paper 4/2014* at 4; Mumengi D *L'avenir à bras le corps: prospective pour le développement de la République démocratique du Congo* (Ed. Universitaires Africaines Kinshasa 2001) 274; Tshiyembe M (ed) *La transition en République démocratique du Congo: bilan, enjeux et perspectives* (L'Harmattan Paris 2005) 151.

2.5.1.1 National employment and vocational training policy

The DRC has set up the National Employment and Vocational Training Policy, abbreviated as PNEFP, which was adopted by the National Labour Council at its 31st ordinary session held from 25 to 29 August 2015.³³⁷ The general objective of the PNEFP is to achieve full employment in the DRC,³³⁸ and to improve the employability of the target populations by offering diversified and quality vocational training.³³⁹ One of its key specific objectives is to ensure the protection of the national workforce and the optimal use of human resources in the employment sector.³⁴⁰ The expected outcomes of the PNEFP include, among others, training of a qualified national workforce.³⁴¹

Under DRC regulations, vocational training aims, inter alia, at improving or enhancing or adapting the knowledge already acquired by workers in employment.³⁴² In organising vocational training, the first objective to be achieved by employers is the preparation of national professionals to manage companies. To this end, in their plans, priority is accorded to the perfection of existing national personnel and to the training of future national personnel. The aim is to enable the latter in the near future to take an effective part in the management of the companies in which they provide their services and in the training of the workers under their authority.³⁴³

Vocational training, adaptation or rehabilitation of job applicants and young people graduating from the education system organised by the national education authorities are provided, inter alia, by the Ministry of Labour and Social Welfare, which will call on the INPP³⁴⁴ to organise vocational training courses.³⁴⁵ It is,

337 See Art. 1 of Decree No. 18/040 of 24 November 2018 approving the national employment and vocational training policy, abbreviated as PNEFP.

338 See s 4.2 A) of Appendix to Decree No. 18/040 of 24 November 2018 approving the PNEFP.

339 See s 3.1.2 of Appendix to Decree No. 18/040 of 24 November 2018.

340 See s 4.2 B g) of Appendix to Decree No. 18/040 of 24 November 2018.

341 See s 3.1.2(1) of Appendix to Decree No. 18/040 of 24 November 2018.

342 Art 2(e) of Ordinance No. 71-055 of 26 March 1971 organising vocational training.

343 Art 18 of Ordinance No. 71-055 of 26 March 1971 organising vocational training.

344 The National Institute for Vocational Training, abbreviated as "INPP" was created by virtue of Legislative Order No. 206 of 29 June 1964, as amended and supplemented to date (see Art. 1).

345 Art. 6 of Ordinance No. 71-055 of 26 March 1971 organising vocational training.

therefore, under the supervision of the INPP that, at the end of the apprenticeship, fast-track training or advanced training, vocational aptitude tests are organised under the conditions laid down by virtue of an order issued by the minister of labour and social welfare, after consulting the National Labour Council.³⁴⁶ The INPP is responsible, among other things, for ensuring the improvement of skills, employability and professional promotion for adult workers and apprentices in employment, the vocational preparation for beneficiaries of a basic general culture, the vocational adaptation of those who have received technical or vocational training of the school type.³⁴⁷

There is, indeed, a growing recognition that vocational training must meet the skill needs of the economy, so that those trained in vocational training programmes can easily become productive contributors by bridging existing skill gaps.³⁴⁸ It is further argued that ‘there is [...] a very strong argument for practically oriented technical and vocational education and training (TVET) aimed at specific skill shortages’.³⁴⁹

2.5.1.2 The use of the skills and experience of the diaspora

The DRC government has called for the ‘use [of] the skills and experience of the diaspora to fill knowledge and skills gaps in [the] country [...]’,³⁵⁰ particularly in key sectors, such as higher education, agriculture, and health.³⁵¹ Former president Joseph Kabila declared in his speech on 26 January 2003:

346 Art. 30 of *Ordinance No. 71-055 of 26 March 1971*.

347 Art. 4(2) 2 of *Decree No. 09/55 of 3 December 2009 establishing the statutes of a public institution called the INPP*; Art. 12 of 2002 *Labour Code as amended and supplemented to date by Act No. 16/010 of 15 July 2016*.

348 Yamauchi F et al “Can German vocational training combat skill shortages in developing countries? Evidence from dual training system in the Philippines,” 2018 *IFPRI Discussion Paper 1744* (IFPRI Washington DC) 2.

349 Jayaram S & Engmann M “Diagnosing the skill gap,” in Jayaram S et al (eds) *Bridging the skills gap: innovations in Africa and Asia* (Springer Cham 2017) 7.

350 Agunias D & Newland K ‘From “return of talent” to “brain circulation” to “virtual return”: evolving ideas on the transfer of human capital,’ in Agunias D & Newland K *Developing a road map for engaging diasporas in development: a handbook for policymakers and practitioners in home and host countries* (IOM / MPI Geneva/ Washington DC 2012) 159.

351 Tshiyembe *La transition en République démocratique du Congo* 151.

*‘Since we must rely on everyone’s efforts to move forward, from now on, Congolese in the diaspora will be called upon to make a greater contribution to national reconstruction’.*³⁵²

The use of the skills of the diaspora is regarded as an absolute necessity and remains an important part of the hoped-for reversal of the exploitation of migrants' human capital.³⁵³ In recent years, the DRC has been using the trained skills and knowledge of ‘return migrants [or] returnees [who] are [...] much more highly educated than non-migrants’.³⁵⁴ Given that migration has slightly increased their ‘chances of [...] having a good-quality job’, these return migrants, especially the better educated ‘are more likely than non-migrants to be in intermediate or high-level occupation’.³⁵⁵

2.5.1.3 Transfer of skills (training) and knowledge to the local workforce

Under DRC law, companies or employers are required to carry out training programmes for the purpose of helping the local workers in maintaining and improving their skills level. The *2002 Investment Code* imposes an obligation on companies to train and upgrade the skills of nationals up to managerial competences in accordance with the accredited programme.³⁵⁶ Similarly, *Departmental Order No. 87/005 of 21 January 1987 determining terms and conditions for hiring expatriates* requires employers, in the event of a work permit being granted, to train local workers during the period of validity of the said work

352 Presidency of the Republic, Speech by the Head of State marking the second anniversary of his accession to the supreme magistracy (Lubumbashi 26 January 2003) 9. <https://repositories.lib.utexas.edu/bitstream/handle/2152/5299/2595.pdf?sequence=1&isAllowed=y> (Date of use: 15 July 2022).

353 Tshiyembe *La transition en République démocratique du Congo* 151 & 152 ; Kating P « RDC : Est-ce la diaspora qui sauvera le Congo ou l'inverse ? » (DRC: Will the diaspora save the Congo or the other way round?) 2016 *Jeune Afrique* 18 January. <https://www.jeuneafrique.com/294671/societe/rdc-diaspora-sauvera-congo-linverse/> (Date of use: 05 August 2022).

354 Schoumaker et al *Congolese migrants' economic trajectories* 234 ; Malu-Malu A & Malu-Malu M « RDC : Les ambitions de la diaspora congolaise, » (DRC: The Congolese diaspora's ambitions) 2019 *Jeune Afrique* 12 November. <https://www.jeuneafrique.com/mag/832229/economie/rdc-les-ambitions-de-la-diaspora-congolaise/> (Date of use: 05 August 2022).

355 Schoumaker et al *Congolese migrants' economic trajectories* 235.

356 Art. 31 of the *2002 Investment Code*.

permit.³⁵⁷ The transfer of skills to local citizens has been included by various legislations in developing countries as a condition for granting expatriate quotas and work visas to companies. This condition is regarded as one of the most popular methods of protecting the domestic work force, especially in African countries.³⁵⁸

2.5.2 South Africa's solution to the skills shortages

To overcome the skills shortage, South Africa has decided to follow a two-pronged approach, which amounts to pursuing long-term and short-term goals.³⁵⁹ In terms of the long-term goals, the government has taken steps to undertake an aggressive and radical drive to educate and skill South Africans through various tertiary institutions (1). The short-term goals require the state to source skills from other countries through immigration strategies (2),³⁶⁰ free regional labour movement (3), and bilateral agreements (4).

2.5.2.1 Training and transfer of skills to the local workforce

The South African Government has passed a series of laws,³⁶¹ which provide for the development of the skills of the South African workforce, with a view to addressing the skills gap. Under the *Skills Development Act, 1998* as amended to date, South Africa is committed 'to develop the skills of the South African workforce³⁶² [...] to encourage employers to provide employees with the

357 Art. 6 of *Departmental Order No. 87/005 of 21 January 1987 determining terms and conditions for hiring expatriates*.

358 Ezenagu A & Eze-Ajoku C "Upgrade of local suppliers in the global production network: the success or otherwise of local content regimes," in D Olawuyi (ed) *Local content and sustainable development in global energy markets* (CUP Cambridge 2021) 87.

359 Popphiwa N & Ntombela N "Green economy readiness in South Africa: a review of skills and the immigration regime," in Nhamo G & Mjimba V (eds) *Sustainability, climate change and the green economy* (Africa Institute of South Africa Pretoria 2016) 58.

360 Popphiwa & Ntombela *Green economy readiness* 58.

361 These laws include the *National Qualifications Framework Act, 2008 (Act No. 67 of 2008)*, which repeals the *South African Qualifications Authority Act, 1995 (Act No. 58 of 1995)*. This Act is followed by the *Skills Development Act, 1998 (Act No. 97 of 1998)* as amended successively by the *Skills Development Levies Act 9 of 1999* [with effect from 1 September 1999], the *Skills Development Amendment Act 31 of 2003* [with effect from 14 November 2003], the *Skills Development Amendment Act 37 of 2008* [with effect from 6 April 2009], and the *Higher Education Laws Amendment Act 26 of 2010* [with effect from 7 December 2010].

362 See s 2(1)(a).

opportunities to acquire new skills,³⁶³ [and] to provide opportunities for new entrants to the labour market to gain work experience'.³⁶⁴ South Africa is further committed not only 'to encourage workers to participate in learning programmes',³⁶⁵ but also 'to improve the employment prospects-of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education'.³⁶⁶

These purposes may be achieved through an institutional framework comprising, inter alia, the National Skills Authority,³⁶⁷ and skills development institutes.³⁶⁸ To further achieve these purposes, 'the law provides for [the encouragement of] partnerships between the public and private sectors of the economy to provide learning in and for the workplace,³⁶⁹ and [the co-operation] with the South African Qualifications Authority'.³⁷⁰

In practice, the labour and education departments launched in 2001 the "learnership programme" as part of the government's human resource development strategy and 'a critical intervention intended to address the existing skills shortage and youth unemployment'.³⁷¹ In March 2006, the South African Government launched the Joint Initiative on Priority Skills Acquisition (JIPSA) as the skills empowerment arm of the Accelerated and Shared Growth Initiative for South Africa (AsgiSA), which was developed in 2006.³⁷² The aim of the JIPSA was

363 See s 2(1)(c)(ii).

364 See s 2(1)(c)(iii).

365 See s 2(1)(d).

366 See s 2(1)(e).

367 See s 2(2)(a)(i).

368 See s 2(2)(a)(viii),

369 See s 2(2)(b).

370 See s 2(2)(c).

371 BusinessMap SA "SA country risk rating: June 2001" 2001 *BusinessMap SA* at 21; Louw I "South Africa: challenge to train the unemployed," 2001 *Business Day*, 27 June; Kraak A "HRD and the skills crisis," in Kraak A *An overview of South African human resources development* (HSRC Press Cape Town 2004) 80.

372 The Presidency "Mlambo-Ngcuka: Launch of Joint Initiative for Priority Skills Acquisition," Address delivered by the Deputy President, Phumzile Mlambo-Ngcuka, at the launch of the Joint Initiative for Priority Skills Acquisition (JIPSA), Presidential Guest House, Pretoria 27 March 2006. <https://www.gov.za/p-mlambo-ngcuka-launch-joint-initiative-priority-skills-acquisition> (Date of use: 19 July 2022); Sihlongonyane M "The economic drivers of urban change in the Gauteng City-Region: Past, present, and future," in Cheruiyot K (ed) *The changing space economy of city-regions: the Gauteng city-region, South Africa* (Springer Cham 2018) 39.

to 'address the shortage of skills across numerous professional categories as this was identified as a constraining factor to economic growth'.³⁷³

As regards the transfer of skills to the local workforce, the *2002 Immigration Act* encourages employers to train citizens and residents in order 'to reduce employers' dependence on foreigners' labour and promote the transfer of skills from foreigners to citizens and residents'.³⁷⁴ Similarly, the *2014 Employment Services Act* seeks 'to facilitate the employment of foreign nationals in a manner that [promotes the training of South African citizens and permanent residents]'.³⁷⁵ In this regard, Government can make regulations, which may provide for 'preparation of a skills transfer plan by employers in respect of any position in which a foreign national is employed'.³⁷⁶

It is clear from reading these two pieces of legislation that 'skilled immigrants [are] required to engage in a mandatory transfer of skills to local workers'.³⁷⁷ This is also indicative of the fact that 'South Africa [has] placed skilled immigration on the national agenda, as part of a package of responses to address skills shortages in the country,' as previously recommended by many experts.³⁷⁸

2.5.2.2 Skilled immigration strategies

As migration experts have largely pointed out, one way 'to address labour shortages in the highly skilled category' is through increased labour migration or recruitment through immigration channels of skilled and talented individuals educated and trained abroad.³⁷⁹ The South African government has introduced

373 Gumede V 'Economic development,' in Gumede V *Political economy of post-apartheid South Africa* (CODESRIA Dakar 2015) 44; Roux A "Economic challenges in South Africa," in Roux A *Everyone's guide to the South African Economy 12th edition* (Zebra Press Cape Town 2017).

374 See s 2(1)(j)(ii) of *Immigration Act (Act 13 of 2002)*.

375 See s 2(1)(h)(iii) of *Employment Services Act (Act No. 4 of 2014)*.

376 See s 8(2)(c) of *Employment Services Act (Act No. 4 of 2014)*.

377 Rasool F & Botha C J "Developing a competitive skills immigration policy for South Africa," 2014 *The Social Science Journal* 39(2) at 234; Pophiwa & Ntombela *Green economy readiness* 59.

378 Rasool & Botha 2014 *The Social Science Journal* 39(2) at 234; Pophiwa & Ntombela *Green economy readiness* 59.

379 Kuczera M "Delivering high level training in a changing world – post-secondary vocational education and training in context," in Puukka J (ed) *Post-secondary vocational education and training: pathways and partnerships, higher education in regional and city development*

immigration and labour strategies aimed at attracting foreign-based highly skilled and talented professionals, in particular from SADC partner states.³⁸⁰ South Africa has ‘adopted a policy to raise immigration levels of highly skilled workers’ through creation of special visas designed to attract this category of workers.³⁸¹

Through the amendment of the Immigration legislation, the DHA introduced in 2014 the Critical Skills Work Visa (CSWV), which emanates from the merger of the former Exceptional Skills and Quota Work visas.³⁸² In terms of sections 19(4) and 27(a)(ii) of the *Immigration Act, 2002 (Act No. 13 of 2002)*, the Minister of Home Affairs determines the ‘skills or qualifications to be critical for South Africa in relation to an application for a critical skills visa or permanent residence permit’.³⁸³

The critical skills list in accordance with which the CSWV is issued ‘was developed in conjunction with the occupations in high demand and the scarce skills lists of the Department of higher Education and Training (DHET)’.³⁸⁴ The CSWV serves to enable the government to accomplish the achievements of the National Infrastructure Project, the Strategic infrastructure Projects, and key National Strategic Projects, in support of the Department of Trade and Industry.³⁸⁵

This skilled immigration strategy has the advantage of helping South Africa to be competitive and benefit from skilled and talented individuals working in various

(OECD Paris 2012) 51; Kitimbo Open borders in Southern Africa 85; Kitimbo 2014 *Brenthurst Discussion Paper 4/2014* at 3.

380 Jaki P “Brain gain from emigrant academics at higher institutions of learning constitutes moral. Restitution,” in Ndofirepi A & Gwaravanda E (eds) *Mediating learning in higher education in Africa: from critical thinking to social justice pedagogies* (Brill Leiden 2021) 47.

381 UNCTAD “Contemporary labour migration,” in *Economic development in Africa report 2018: migration for structural transformation* (UN New York 2018) 79. https://unctad.org/system/files/official-document/edar2018_ch3_en.pdf (Date of use: 19 July 2022).

382 DHA Critical skills visa (DHA Pretoria 2021). <http://www.dha.gov.za/index.php/immigration-services/scarce-skills-work-permits> (Date of use: 19 July 2022).

383 See *Immigration Act, 2002 [Act No. 13 of 2002] [s 19(4)*, read with *Regulation 19(5)*].

384 Teferra D “International academics in Africa: the South African Experience,” in Yudkevich M, Altbach P, & Rumbley L (eds) *International faculty in higher education: comparative perspectives on recruitment, integration, and impact* (Routledge London 2017) 250.

385 Teferra International academics in Africa 250; DHA Critical skills visa.

sectors of the economy, who are likely to 'not only bring brain gain, but also develop brain gain'.³⁸⁶

2.5.2.3 Free regional labour movement

Skills shortages can possibly be addressed by free labour mobility within the region,³⁸⁷ in particular, the SADC region, which South Africa is part of. It is, indeed, argued that the 'free movement of people [...] within the SADC region' has the potential to curb the considerable impact of the "brain drain" that the region continues to face.³⁸⁸ Despite the substantial 'economic value of remittances, the regulated movement of people [within] the region [has the potential to] reduce the unavailability of skilled labour [at a time when] the region [is struggling with] high unemployment'.³⁸⁹

Free labour mobility also seeks to reduce the number of undocumented migrants and to enhance mutual trade and economic cooperation among member states.³⁹⁰ It is argued that 'a managed regional labour migration system [has the potential to] allow [...] for the free movement of workers with particular skills, [such as] high-skilled workers'.³⁹¹

According to the SADC, permitting a freer movement of labour and people across national borders within the region is essential to adequately supply skilled and semi-skilled personnel.³⁹² The SADC further argues that regional labour mobility benefits both exporting and importing countries. On the one hand, migrants contribute to the importing country's growth, through increased productivity and output.³⁹³ On the other hand, although they lose scarce human talent, particularly

386 Jaki Brain gain from emigrant academics 47; Rasool & Botha 2014 *The Social Science Journal* 39(2) at 234; Pophiwa & Ntombela Green economy readiness 59.

387 Kitimbo Open borders in Southern Africa 96-97.

388 Amadi V & Lenaghan P "Advancing regional integration through the free movement of persons in the SADC" 2020 *Speculum Juris* 34(1) at 63.

389 Amadi & Lenaghan 2020 *Speculum Juris* 34(1) at 63.

390 Kitimbo Open borders in Southern Africa 96-97.

391 Kitimbo Open borders in Southern Africa 97.

392 SADC *Southern Africa: A framework and strategy for building the community* (SADC Harare 1994) 45.

393 SADC *Southern Africa* 45; Shempe H & SADC (eds) *23rd SADC Summit, 25-26 August 2003, Dar Es Salaam, United Republic of Tanzania* (SADC Secretariat Dar Es Salaam 2003) 35.

during periods of economic downturn, labour exporting countries benefit from workers' remittances.³⁹⁴

Cross border remittances are, in fact, regarded as 'both the most frequent type of economic contribution to the home country and the ones that increase most clearly with time'.³⁹⁵ South Africa is not considered a net receiver of remittances, but as the largest remittance send-market or an important "source country" for remittances in Africa, mainly to SADC countries.³⁹⁶ For most of these countries, cross border 'remittances are an important source of income for migrant households',³⁹⁷ as well as a crucial source of foreign exchange.³⁹⁸

For instance, under the DRC's deteriorating economic conditions, remittances from the Congolese professional diaspora in South Africa and elsewhere, form 'an important way of helping families back [home] with their [basic needs and consumption]'.³⁹⁹ To a large degree, these remittances serve for daily living expenses, health care, education expenses, and particular family events, such as marriages, funerals, and baptisms.⁴⁰⁰ To a lesser extent, these remittances are

394 SADC Southern Africa 45.

395 See Schoumaker et al *Congolese migrants' economic trajectories* 230.

396 Nicoli M, Kachingwe N, Kaput E (eds) *The market for remittance services in Southern Africa* (World Bank Group Washington DC 2018) 4; Truen S & Chrisandza S *The South Africa-SADC remittance channel* (DNA Economics Pretoria 2012) 26; Pendleton W et al "Migration, remittances and development in Southern Africa" 2006 *Migration Policy Series No. 44* (SAMP Cape Town) 12.

397 Datta A "Changing patterns of migration, remittances, and sources of Income in Rural Bihar," in Datta A *Migration and development in India: the Bihar experience* (1st ed.) (Routledge London 2022) 86; Grigorian D & Kryshko M *Deposit insurance, remittances, and dollarization: survey-based evidence from a top remittance-receiving country - working Paper No. 2017/132* (IMF Washington DC 2019) 7; World Bank *East Asia and Pacific in the Time of COVID-19* (World Bank Washington DC 2020) 65.

398 Nicoli, Kachingwe, & Kaput *The market for remittance services* 4; Segatti A "Explaining the impasse of circular migration in Southern Africa: From the migrant labour system to deregulation," in Solé C et al (eds) *Impact of circular migration on human, political and civil rights: A global perspective* (Springer Switzerland 2016) 91.

399 Bukasa P "Transnational family ties, remittance motives, and social death among Congolese migrants: A socio-anthropological analysis" 2010 *JCFS* vol. 41(2) at 230; Schoumaker et al *Congolese migrants' economic trajectories* 231.

400 Schoumaker et al *Congolese migrants' economic trajectories* 221; Sumata C & Cohen J "The Congolese diaspora and the politics of remittances," 2018 *Remittances Review* 3(2) at 100; De Bruyn T & Wets J "Remittances in the Great Lakes Region" 2006 *IOM Migration Research Series, No. 25* at 16-17.

used for specific economic investments, such as buying land, property, constructing a house, and business development.⁴⁰¹

In the SADC region, a number of instruments have been adopted with a view to regulating the movement of people, including the *Protocol on Facilitation of the Movement of Persons of 2005*,⁴⁰² the *SADC Treaty of 2015*,⁴⁰³ the *Protocol on Trade in Services (PTIS) of 2012*,⁴⁰⁴ *Charter of the Fundamental Social Rights in SADC of 2003*,⁴⁰⁵ and the *SADC Protocol on Employment and Labour of 2014*.⁴⁰⁶ By virtue of these instruments, SADC Member States 'seek to facilitate free movement of persons amongst [them]',⁴⁰⁷ including labour through relaxation of visa and other requirements, together with a policy of giving priority to SADC nationals.⁴⁰⁸

In January 2021, 'the SADC adopted a new Labour Migration Action Plan (2020-2025) as part of efforts to promote skills transfer and match labour supply and demand for regional development and integration'. This 'action plan, [which is] adopted through the Employment and Labour Sector in the Region, is in line with Article 19 of the *SADC Protocol on Employment and Labour*'.⁴⁰⁹ Under this provision, the *Protocol* 'seeks to protect and safeguard the rights and welfare of migrant workers, to give them better opportunities to contribute to countries of origin and destination'.⁴¹⁰

401 De Bruyn & Wets 2006 *IOM Migration Research Series*, No. 25 at 7-8, 17; Bazenguissa-Ganga R *Democratic Republic of Congo (Congo-DRC) and Republic of Congo (Congo) country study: a part of the report on informal remittance systems in Africa, Caribbean and Pacific (ACP) countries* (COMPAS Oxford 2005) 10-12.

402 See Art. 3 of *Protocol on Facilitation of the Movement of Persons of 2005*.

403 See Art. 5 of *SADC Treaty of 2015*.

404 See Art. 17 of *SADC Protocol on Trade in Services (PTIS) of 2012*.

405 Art. 2(1) c) of *Charter of the Fundamental Social Rights in SADC of 2003*.

406 See Art. 19 of *SADC Protocol on Employment and Labour 2014*.

407 Govindjee A "Access to social security for refugees and asylum seekers in South Africa: an analysis of recent developments," in Olivier M, Mpedi L, & Kalula E (eds) *Liber amicorum - essays in honour of Professor Edwell Kaseke and Dr Mathias Nyenti* (African Sun Media & SUN PReSS Stellenbosch 2020) 77.

408 Amadi & Lenaghan 2020 *Speculum Juris* 34(1) at 64; SADC Southern Africa 45.

409 SADC "SADC adopts new Labour Migration Action Plan to promote skills transfer and match labour supply and demand for regional integration," 2021 *SADC News* (11 January). <https://www.sadc.int/news-events/news/sadc-adopts-new-labour-migration-action-plan-promote-skills-transfer-and-match-labour-supply-and-demand-regional-integration/> (Date of use: 21 July 2022).

410 See Art. 19(c) of the *SADC Protocol on Employment and Labour*.

Despite the fact that numerous instruments had already been adopted, the SADC has failed to implement the migration policy on regional free movement of people due in particular ‘to a lack of commitment and political will to embrace policies on labour movement’.⁴¹¹ The SADC is considered as ‘the only African Regional Economic Community (REC) that has failed to fully support, ratify, and implement a policy framework for free movement of persons’.⁴¹²

2.5.2.4 Bilateral agreements

The provision of essential skills to some countries may occur through the signing of bilateral agreements,⁴¹³ which are regarded as ‘the major instruments that facilitate cross-border labour migration for at least skilled, unskilled, expert, and professional labour’.⁴¹⁴ South Africa has decided to embark on bilateral engagements at two levels, notably at subregional, regional, and international levels with a view to enabling ‘facilitation of movement of persons.’⁴¹⁵

At subregional level, South Africa has, for many years, reached bilateral agreements and treaties with its neighbours, notably Lesotho,⁴¹⁶ Swaziland in 1986, Botswana in 1973, and Mozambique in 1964 and 2003 to recruit labour, especially in its mines and farms.⁴¹⁷ It is argued that some of these ‘bilateral agreements or treaties continue to [govern] South Africa’s minerals-energy

411 Nshimbi C & Fioramonti L “A region without borders? Policy frameworks for regional labour migration towards South Africa” (2013) *MiWORC Report No.1* at 3; Kitimbo Open borders in Southern Africa 93; Akokpari J, Price C & Thompson K “The ‘northern problem’: is pan-Africanism or regionalism the answer?” in Ndlovu-Gatsheni S & Mhlanga B *Bondage of boundaries and identity politics in postcolonial Africa: the ‘Northern problem’ and ethno-futures* (AISA Pretoria 2013) 322.

412 Parshotam A *Migration trends in Southern Africa: Southern Africa’s attitude towards migration* (SAIIA Johannesburg 2018) 6; Oucho J & Crush J “Contra free movement: South Africa and the SADC migration protocols” 2001 *Africa Today* vol 48(3) 139–58; Langalanga 2019 *SAIIA Occasional Paper* 296 at 5.

413 Kuptsch C & Pang E “Introduction,” in Kuptsch C & Pang E (eds) *Competing for global talent* (ILO & International Institute for Labour Studies Geneva 2006) 7.

414 Nshimbi & Fioramonti *MiWORC Report No.1* at 4.

415 DEL *Draft national labour migration policy for South Africa* (DEL Pretoria February 2022) 32.

416 Allen V *The history of Black mineworkers in South Africa – vol. 2* (Moor Press Keighley 2003) 356.

417 Segatti Migration to South Africa 25; Nshimbi & Fioramonti *MiWORC Report No.1* at 4; Segatti A “The SADC: a walk away from the free movement of persons?” in Nita S et al (eds) *Migration, free movement and regional integration* (UNESCO & UNU-CRIS Paris 2017) 61; Gammage C “Regionalism in Southern Africa,” in Gammage C *North-South regional trade agreements as legal regimes: a critical assessment of the EU-SADC economic partnership agreement* (Edward Elgar Pub. Northampton MA 2017) 200-230.

complex [to this day]'.⁴¹⁸ These bilateral agreements also allow SADC 'countries in general, and South Africa in particular,'⁴¹⁹ 'to fill some of the gaps in the health service with doctors, and nursers from countries, which have an excess'.⁴²⁰

At regional level, South Africa has concluded bilateral agreements with individual AU Member States on visa exemption. The DHA has, in consultation with relevant Forums of South African Directors-General (FOSAD) Clusters, developed a Draft Position on the AU Free Movement Protocol and the Draft Position to be presented to Government during the 2021/2022 Financial Year.⁴²¹ Furthermore, South Africa continues to engage with the African Union Commission regarding 'several provisions in the AU Draft Protocol, which present a challenge for not only South Africa but also other AU Member States'.⁴²²

At international level, South Africa has decided to address 'skills shortages and the brain drain [by entering] into bilateral agreements with other countries outside the [African continent] for the supply of skilled workers'.⁴²³ On 24 October 2003 South Africa reached an agreement with the UK 'involving codes of practice for recruitment and [employment of South African] health [personnel], exchange programmes for training and development and the provision of health professionals from [the UK]'.⁴²⁴ As South Africa's former Minister of Health pointed out in her speech, the strategy sought to reduce the brain drain from South Africa

418 Segatti Explaining the impasse 93.

419 Habiyaemye A "Regional integration and knowledge flows: effect on manufacturing productivity in Southern Africa," in Oloruntoba S & Muchie M (eds) *Innovation, regional integration, and development in Africa: rethinking theories, institutions, and policies* (Springer Cham 2018) 214.

420 Crush J & Williams V "Labour migration trends and policies in Southern Africa" 2010 *SAMP Policy Brief No. 23* at 45.

421 International Relations and Cooperation of the Republic of South Africa National Assembly question for written reply (25 February 2021) 1-2. https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/50c9a631-3697-4bd8-9aea-07294f9b92dc.pdf (Date of use: 26 July 2022).

422 DHA *South African position on the implementation of the African Union (AU) Agenda 2063 as it relates to migration, regional integration and Africa passport* (DHA Pretoria November 2017) 7; International Relations and Cooperation National Assembly question.

423 Crush & Williams 2010 *SAMP Policy Brief No. 23* at 58.

424 Tshabalala-Msimang M *Speech, signing of the memorandum of understanding between South Africa and the UK* (Department of Health Pretoria 2003) <https://www.polity.org.za/article/tshabalalamsimang-signing-of-agreement-between-sa-amp-uk-24102003-2003-10-24> (Date of use: 04 August 2022); Crush & Williams 2010 *SAMP Policy Brief No. 23* at 45 & 58.

and 'ensure that South African health professionals have an opportunity to get international exposure'.⁴²⁵

However, in order to tackle the skills shortage in the health care sector, in 1997 President Nelson Mandela officially urged developed countries, in particular Canada and the UK⁴²⁶ to cease "poaching" doctors and nurses from South Africa.⁴²⁷ In addition, in April 2001, the government sent the head of the South African Medical Research Council, Dr Malegapuru William Makgoba to Canada as an emissary for protesting against the organised poaching of South African health professionals by Canadian provincial governments.⁴²⁸ In the same vein, former South Africa's High Commissioner to Canada, Andre Jaquet also 'asked each of Canada's 10 provinces to refrain from recruiting South African doctors, nurses, pharmacists, and other trained medical professionals'.⁴²⁹

Having taken due note of South Africa's protest and request, the two countries responded quite differently. On the one hand, 'the UK Department of Health introduced [in 2001] an ethical Code of Recruitment [as updated in 2004, which required National Health Service (NHS) employers to] no longer recruit nurses and other health professionals from South Africa (and 153 other developing countries)',⁴³⁰ 'unless there is an explicit government-to-government

425 Tshabalala-Msimang Speech ; Rogerson C & Crush J "The recruiting of South African health care professionals," in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 220.

426 The most critical research findings show that as a whole, four countries—the UK, New Zealand, Australia and Canada—account for 86% of all recruitment advertising for South African medical personnel. Rogerson & Crush South African health care professionals 207.

427 Kingma M "Welcome to globalisation," in Kingma M *Nurses on the move: Migration and the global health care economy* (Cornell University Press Ithaca NY 2018) 6; Kingma M "Vested interests, inconsistencies, double standards," in Kingma M *Nurses on the move: Migration and the global health care economy* (Cornell University Press Ithaca NY 2018) 121 & 132; Ehman A & Sullivan P "South Africa appeals to Canada to stop recruiting its MDs" 2001 *CMAJ* 164 at 387-388, cited in Arnold & Lewinsohn 2010 *Med J Aust* 192 (5) at 288 fn 9.

428 Crush 2002 *JIA* vol. 56(1) at 148; Sapa "Canada 'looting' SA doctors" 2001 *Sapa* Ottawa 14 February <https://www.news24.com/news24/canada-looting-sa-doctors-20010214> (Date of use: 08 August 2022).

429 Sapa 2001 *Sapa* Ottawa.

430 McNeil-Walsh C "Migrant nurses and the experience of skill: South African nurses in the UK health care sector," in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 143.

agreement'.⁴³¹ In addition, the government of UK agreed in 2008 to slow the migration of South African doctors to the UK.⁴³²

On the other hand, Canadian provincial governments replied to South Africa that they were basically 'responding pro-actively to the dynamics of the international marketplace for skilled talent and more particularly the 'global conveyor belt'.⁴³³ Moreover, only one of the 10 provinces, Nova Scotia, made a firm commitment to comply with South Africa's request.⁴³⁴ In an indirect endorsement of South Africa's concerns, the Canadian Medical Association Journal reported that roughly one in five physicians practising in Saskatchewan obtained their initial medical degree in South Africa.⁴³⁵

South Africa has also adopted 'a strategy of importing Cuban doctors on temporary assignments to work in hospitals [located in rural areas]'.⁴³⁶ In exchange, the Cuban government has agreed 'to allow South African medical students to be trained in Cuba', having been granted 'full scholarships with an expectation of return[ing] to practice in the public sector in South Africa for the amount of time spent in training in Cuba (5 to 6 years)'.⁴³⁷

In 2007, the South African government '[signed] a new bilateral agreement with its Tunisian [counterpart, which] allowed for up to 1,000 doctors to be recruited from

431 Buchan J "New opportunities: United Kingdom recruitment of Filipino nurses," in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 52.

432 Sidley P "South Africa and Britain reach agreement to curb poaching of healthcare staff" 2004 *BMJ* 329: 532, cited in Arnold & Lewinsohn 2010 *Med J Aust* 192 (5) 288 fn 10.

433 Rogerson & Crush South African health care professionals 219.

434 Sapa 2001 Sapa Ottawa.

435 Sapa 2001 Sapa Ottawa; Sullivan P "Canada a prime destination as MDs flee South Africa" 1999 *CMAJ* 160(11) 1615-6; Ehman & Sullivan 2001 *CMAJ* 164 (3) at 387-388.

436 Hammett D "Physician migration in the global south between Cuba and South Africa" 2014 *International Migration* 52(4) 41-52; Bertucci G et al "Socio-economic challenges facing HRM," in Bertucci G et al *Unlocking the human potential for public sector performance: world public sector report 2005* (UN New York 2005) 45.

437 Reed G & Torres J "Training and retaining more rural doctors for South Africa" 2008 *MEDICC Rev.* 10:1; Labonté R et al "Health worker migration from South Africa: causes, consequences and policy responses" 2015 *Hum Resour Health* 13, at 92. <https://human-resources-health.biomedcentral.com/articles/10.1186/s12960-015-0093-4#citeas> (Date of use: 26 July 2022).

Tunisia to work in South Africa on short-term contracts'.⁴³⁸ This agreement followed the Agreement on Co-operation in the field of Health entered into in 1999 by and between the two countries through their respective national departments of health.⁴³⁹

The South African government decided to recruit foreign health care workers in the sub-region, especially from the DRC, Zimbabwe, and outside Africa, in particular from Cuba.⁴⁴⁰ This shows that emigration of highly skilled professionals is no longer taking place from Africa to developed countries, but rather within Africa, and other regions of the South.⁴⁴¹ It is argued that many African 'professionals and middle-class [people] have left their countries [of origin] for "greener pastures", not only beyond the continent, but also in other parts of Africa.⁴⁴² This is referred to as gradual transformation of or conversion from brain drain into brain circulation.⁴⁴³

2.6 Conclusion

This chapter introduced the general framework for the study of labour migration, which is referred to as 'the movement of persons across borders for the purpose of working or seeking employment'.⁴⁴⁴ While defining the concept of labour migration, the chapter provides some insight into the interplay between labour migration and other types of migration, which is relevant as it overlaps with family reunification or forced migration, for example.⁴⁴⁵ The chapter further reviewed and discussed key concepts or terms relevant to the study of migration, particularly to international migration, including concepts of nationality, citizenship, foreigner, foreign national, alien, xenophobia, "Afrophobia,"⁴⁴⁶ and "negrophobia".⁴⁴⁷

438 Department of Health *Recruitment of foreign professionals in the South African health sector as approved by the National Health Council on 5 February 2010* (Department of Health Pretoria 2010); Segatti Explaining the impasse 89 & 100.

439 Department of Health "Health on cooperation between South Africa and Tunisia" (3 January 2007). <https://www.gov.za/health-cooperation-between-south-africa-and-tunisia> (Date of use: 26 July 2022).

440 Adepoju A "Highly skilled migration: balancing interests and responsibilities and tackling," 2007 *GFMD* at 5.

441 Adepoju 2007 *GFMD* at 5.

442 Akokpari Globalisation 70.

443 Adepoju Intercontinental migration 235.

444 Guild & Mantu Introduction 2.

445 Guild & Mantu Introduction 3.

446 Afrophobia is regarded as a distinct form of xenophobia whose target of discrimination is black foreigners from Africa, or non-South Africans of African origin. See Hungwe J & Divala J

Lastly, the chapter outlined some theoretical considerations concerning the interaction between immigration law, refugee law, nationality law, social security law, labour law and labour market regulation. This study finds that all these fields of regulation overlap in highly complicated ways.⁴⁴⁸ The chapter further discusses the issues of “brain drain” and “brain circulation”, and “brain gain,” which form part of labour migration. Emphasis has been put on the negative effects of “brain drain” or the exodus of critical skills on the social and economic development of many developing countries, in particular the DRC and South Africa.

At the same time, the loss of skills or human capital by source countries is not permanent and necessarily negative on two main grounds. On the one hand, there is promotion of “brain circulation” as skilled workers move between wealthy nations or return to their homeland after migrating to another country bringing with them knowledge and skills gained abroad.⁴⁴⁹ On the other hand, the out-migration of skilled professionals ensures regular migrant remittance inflows from abroad,

“Afrophobia in the South African higher education system: a threat to internalisation and global citizenship,” in Waghid Y & Davids N (eds) *African democratic citizenship education revisited* (Palgrave Macmillan Cham 2018) 68; Nhemachena A & Mabale D “Conjugating materialities and symbols in Contemporary Africa? The case of the statue of King Ngunghunyani, South Africa,” in Nhemachena A, Kangira J & Mlambo N (eds) *Decolonisation of materialities or materialisation of (re-)colonisation: symbolisms, languages, ecocriticism and (non)representationalism in 21st Century Africa* (Langaa RPCIG Bamenda 2018) 123; Ukah A “Re-imagining the religious field: the rhetoric of Nigerian Pentecostal pastors in South Africa,” in Echtler M & Ukah A *Bourdieu in Africa: exploring the dynamics of religious fields* (Koninklijke Brill NV Leiden 2016) 70-95.

447 The term “Negrophobia” is defined as “the denial of the humanity of black people” or the “fear and dislike or contempt of black people and their culture”. It is also referred to as “xenophobia toward black people or people of African descent, or “the xenophobia of colour, a phobia toward people of dark pigmentation”. See Gill B & Danns G “Xenophobia in Africa, Latin America, and the Caribbean: definitions, theories, and experiences,” in Abidde S & Gill B *Africans and the exiled life: migration, culture, and globalisation* (Lexington Books Lanham) 147; Fanon F *Black skin, white masks* (Grove Press New York 1967); Chinweizu I *On negrophobia: psychoneurotic obstacles to black autonomy* (Sundoor Publications Lagos 2005); Gqola P “Echoes, negrophobia, masculinist violence,” in Hassim S, Kupe Y, & Worby E (eds) *Go home or die here: violence, xenophobia and the reinvention of difference in South Africa* (Wits University Press Johannesburg 2008) 209–224, cited in Tafira Xenophobia racism 17; Tafira H “Is xenophobia racism?,” 2011 *Anthropology Southern Africa* 34(3 & 4) 115.

448 Redclift V “Spatial formations of exclusion,” in Redclift V *Statelessness and citizenship: camps and the creation of political space* (Routledge London 2013) 35.

449 Spring J “A Global workforce: migration and the talent auction,” in Spring J *Globalisation of education: an introduction - second edition* (Routledge London 2015) 195; De Haas, Castles & Miller Introduction 1; Abella M “Global competition for skilled workers and consequences,” in Kuptsch C & Fong P (eds) *Competing for global talent* (ILO Geneva 2006) 28.

even if most money sent to African countries by those living abroad goes through informal circuits of transfer.⁴⁵⁰

As the foregoing discussion suggests, the sense of serious loss that the “brain drain” issue conveys is countered by the “brain gain” as high-skilled migration is likely to generate welfare gains for source countries and the people left behind.⁴⁵¹ This chapter argues that the brain gain can take place through return migration, which involves the return of highly skilled migrants to their homeland, bringing with them new skills and knowledge. Many countries, including South Africa and the DRC have been active in involving the diasporas, who are now viewed as a valuable resource for the country’s economic development, rather than as ‘traitors’ abandoning their homeland.⁴⁵²

The next chapter focuses on the states’ authority and responsibility for regulating and controlling labour migration. This involves the states’ sovereign power to deal with people who enter the country with or without legal permission to do so.

450 Wickramasekara P “Globalisation, international labour migration and the rights of migrant workers,” in Munck R (ed) *Globalisation and migration: new issues, new politics* (Routledge London 2013) 29-30; Kane & Leedy African patterns of migration 6.

451 World Bank High-skilled migration 255.

452 Khadria B “South Asian migration,” in Inglis C, Li W, & Khadria B (eds) *The SAGE handbook of international migration* (SAGE Reference London 2020) 273.

CHAPTER THREE

STATE'S AUTHORITY AND RESPONSIBILITY FOR REGULATING AND CONTROLLING LABOUR MIGRATION

3.1 Introduction

This chapter outlines the theory of state sovereignty 'to regulate and control migration in general, and labour migration, in particular'.⁴⁵³ The relevance of the discussion in the context of this study is undeniable given the identification of the protection of the national labour market as one of the underlying reasons driving migration control.⁴⁵⁴ In order to present a detailed and structured analysis of this subject, this chapter is divided into four sections, each divided into several sub-sections.

The first section provides a brief introduction to the concept of state's authority and responsibility for regulating and controlling labour migration. The second section discusses state institutions tasked with regulating and controlling migration, focusing on the DRC and South Africa. The third section provides an analysis of the protection of irregular immigrants' labour rights, as well as the legal and judicial consideration of irregular migrant's employment contracts with a focus on South Africa and the DRC. And the fourth section presents conclusions drawn from chapter three by providing a summary of the key research findings of this stage of the study.

453 Atong K, Mayah E, & Odigie A *Africa labour migration to the GCC States: the case of Ghana, Kenya, Nigeria and Uganda - an African trade union overview* (ITUC-Africa Lomé 2018) 56. https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf (Date of use: 15 October 2022).

454 Friðriksdóttir B "Theories and discourses on migration management," in Friðriksdóttir B *What happened to equality?: The construction of the right to equal treatment of third-country nationals in European Union law on labour migration* (Brill Leiden 2017) 13 & 17.

3.2 A brief introduction to the concept of the state's authority and responsibility for regulating and controlling labour migration

3.2.1 Introduction

Most countries around the world experience or have experienced international migration,⁴⁵⁵ which implies immigration⁴⁵⁶ and emigration⁴⁵⁷ of people for a wide range of reasons.⁴⁵⁸ Some other countries experience or have experienced “transit migration,”⁴⁵⁹ which is regarded as the situation between emigration and settlement that is characterised by indefinite migrant stay and possible further migration.⁴⁶⁰ At the same time, these movements of people into and out of the country, and within the country, to some extent, bring challenges and risks for the states.

455 International migration involves people crossing the boundary of a state and entering the geographical space of another country for a certain period of time. See Khan F “Identifying migrants and the rights to which they are entitled,” in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 4; Bedford R “Contemporary patterns of international migration,” in Opeskin B, Perruchoud R & Redpath-Cross J (eds) *Foundations of international migration law* (CUP Cambridge 2012) 18.

456 Immigration refers to people physically moving from one country or region to another for a period of time beyond just a short-term visit. Kleyn T “History, demography, and terminology,” in Kleyn T *Immigration: the ultimate teen guide* (Scarecrow Press Lanham MA 2011) 3.

457 Emigration refers to individuals moving out of their country or region to settle in another. See Baofu P “The same and its two poles,” in Baofu P *The future of post-human migration: a preface to a new theory of sameness, otherness, and identity* (Cambridge Scholars Publishing Cambridge 2012) 186; Makochekanwa A & Kambarami P (eds) “Zimbabwe skilled migrants in Botswana: what are the impacts?” in Bariagaber A (ed) *International migration and development in Eastern and Southern Africa* (OSSREA Addis Ababa 2014) 20.

458 Halm D & Sezgin Z “Introduction: interplay between migrant organisations and their environment - conceptual & theoretical framework”, in Halm D & Sezgin Z (eds) *Migration and organised civil society: Rethinking national policy* (Routledge New York 2013) 1; Boon K, Huq A & Lovelace D *U.S. approaches to global security challenges- terrorism: commentary on security documents* (OUP Oxford 2012) 71; Castles S, de Haas H & Miller M “Introduction,” in Castles S, de Haas H, & Miller M *The age of migration: international population movements in the modern world* (Palgrave London 2014) 13-14.

459 Transit migration refers to ‘certain forms of supposedly temporary migration and to migrants who move from their country of origin to another country (or countries), either because it was intended from the outset or in response to changing conditions, rising pressures, or new incentives, and with the hope of moving on to another country’. Bakuri A “Roads to prosperity: social zones of transit,” in Akinyoade A & Gewald J (eds) *African roads to prosperity: people en route to socio-cultural and economic transformations* (Brill Leiden 2015) 23.

460 Papadopoulou-Kourkoula A “Introduction,” in Papadopoulou-Kourkoula A *Transit migration: the missing link between emigration & settlement* (Palgrave Basingstoke 2008) 4.

Migration may, indeed, cause threats to or affect 'State control and security,⁴⁶¹ protection of national interests, such as the domestic labour market, the national community and the welfare State'.⁴⁶² As a result, 'states [decide] to exercise their sovereign right to [manage] and control migration into their territory and thereby protect essential national security interests'.⁴⁶³ It is, indeed, argued that 'protection of national security [being] the fundamental responsibility of every state, [...] the state can, therefore, prevent people from immigrating if they pose a threat to national security'.⁴⁶⁴

According to one opinion, it is reasonable for states to deny admission to people perceived to be threats to national security, such as terrorists, smugglers, or enemy agents.⁴⁶⁵ However, another opinion considers that 'a blanket endorsement of exclusion for reasons of national security' may be problematic as the category of the persons excluded is so easily abused.⁴⁶⁶ For the purposes of this study, the main focus is put on the protection of the national labour market, which is discussed in further detail in the next sub-section.

3.2.2 The protection of the domestic labour market: an underlying factor for migration control

In order to prevent competition between citizen and foreign workers, '[most countries], even the most liberal states, seek to regulate' labour markets, [which] is

461 For instance, the State's inability to exercise control of its borders would pose a serious threat to its legitimacy, as well as the stability of society and its political regime. See Friðriksdóttir Migration management 10; Mabee B "Global migration, security and citizenship," in Mabee B *The globalisation of security: state power, security provision and legitimacy* (Palgrave Basingstoke 2009) 126.

462 Friðriksdóttir Migration management 13.

463 Friðriksdóttir Migration management 13.

464 Carens J "Ordinary admissions," in Carens J *The ethics of immigration* (OUP Oxford 2013) 175.

465 Carens *Ordinary admissions* 175; Barnett R & Blackman J "The executive power," in Barnett R & Blackman J *Constitutional law: cases in context, 2021 supplement* (Wolters Kluwer New York 2021) 74; Huskey K "The US "material support" bar to refugee protection: an expansive approach through a narrow lens," in Akram S & Syring T (eds) *Still waiting for tomorrow: the law and politics of unresolved refugee crises* (Cambridge Scholars Publishing Newcastle upon Tyne 2014) 228; Ross J "State crime," in Ross J *An introduction to political crime* (The Policy Press Bristol 2012) 82; Giroux H "The US university under siege: confronting academic unfreedom," in Rowe J (ed) *A concise companion to American studies* (Wiley-Blackwell West Sussex 2010) 415.

466 Carens *Ordinary admissions* 175.

the practical effect of policies designed to control immigration'.⁴⁶⁷ Immigration control involves the state's legal right to regulate the entry of foreign nationals into its territory.⁴⁶⁸ Immigration regulation further involves 'the control that a sovereign state exercises over the entry of foreign citizens and their access to residence and employment'.⁴⁶⁹ While all states exercise their right of control, many extend their sovereignty to include control over exit as well as entry.⁴⁷⁰

Labour migration, which 'is [linked] to the need to protect the domestic labour market',⁴⁷¹ involves at least three actors. First, the state, which means the state of destination (the host state) and the state of origin (the home state); second, the employer; and third, the individual, both individually and as part of a network / family structure and strategy.⁴⁷² Moreover, the vast majority of countries across the globe have put in place the labour migration process involving three actors. These are namely the consular authorities responsible for visa issuance; the authority responsible for issuing residence permits; and the authorities responsible for labour issues.⁴⁷³ This is part of immigration law involving the state's responsibility to grant the right of entry, right to work and right to remain permanently. This further implies the state's power to expel, which has been solidly within the sphere of national sovereignty,⁴⁷⁴ as discussed in the next sub-section.

467 Hollifield J "Regulating immigration in the liberal polity," in Hollifield J *Immigrants, markets, and states: the political economy of postwar Europe* (Harvard University Press Cambridge Mass 1992) 7.

468 Friðriksdóttir Migration management 10.

469 Hammar T "Immigration regulation and aliens control," Hammar T (ed) *European immigration policy: a comparative study* (CUP Cambridge 1985) 249.

470 Friðriksdóttir Migration management 10.

471 Ruhs Labour market protectionism 60.

472 Guild E "Who is entitled to work and who is in charge? Understanding the legal framework of European labour migration," in Bigo D & Guild E (eds) *Controlling frontiers: free movement into and within Europe* (Ashgate Hants England 2005) 100.

473 OECD "Key issue in the legal and administrative framework," in OECD *Recruiting immigrant workers: Germany* (OECD Publishing Paris 2013) 82.

474 Weigel M "South African immigration law: an international perspective," in Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998) 92.

3.2.3 The states' sovereign prerogatives over migration

Under international law, every state has sovereign prerogative to regulate and control international migration patterns or movements of persons across borders, including for employment purposes. More specifically, states retain powers enabling them to 'determine which non-nationals may enter and take up employment in their territory'.⁴⁷⁵ This is done chiefly by way of adopted laws, regulations, and policies.⁴⁷⁶ In most cases, these legal, regulatory and policy instruments also govern both labour immigration⁴⁷⁷ and labour emigration⁴⁷⁸ in any country.⁴⁷⁹

The whole question of immigration is based on the assumption 'that each country has the right to control its [own] borders' and 'the right to control immigration' is believed to derive largely from state sovereignty.⁴⁸⁰ This right has now become 'part of customary international law' and it is expressed 'in a large number of treaty instruments, in case law,⁴⁸¹ and in doctrine'.⁴⁸² It is argued that the state 'right to

475 Cholewinski R "International labour migration," in Opeskin B, Perruchoud R & Redpath-Cross J (eds) *Foundations of international migration law* (CUP Cambridge 2012) 283; Cholewinski Migration for employment 27.

476 See *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (C) 1043.J para. 22; cited in Currie I & De Waal J "Freedom of movement and residence," in Currie I & De Waal J *The Bill of Rights Handbook – sixth edition* (Juta Cape Town 2013) 17.

477 Labour immigration refers to the movement of people into the country for employment-related purposes.

478 Labour emigration refers to the movement of people out of the country for employment-related purposes.

479 Pol L & Thomas R "International and internal migration," in Pol L & Thomas R *The demography of health and health care* (Plenum Press New York 1992) 221; Hammar T "Introduction to European immigration policy: a comparative study," in Martiniello M & Rath J (eds) *Selected studies in international migration and immigrant incorporation* (Amsterdam University Press Amsterdam 2010) 56.

480 Song S "Why does the State have the right to control immigration?", in Knight J (ed) *Immigration, emigration, and migration* (New York University Press New York 2017) 3.

481 The US Supreme Court held in 1892: 'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe'. See *Nishimura Ekiu v United States* [1892] 142 US 651, Gray J, 659. See US Supreme Court "Cases argued and determined in the US Supreme Court - October term 1891," in *The Supreme Court Reporter – Vol. 12* (West Publishing St. Paul 1892) 338; Chetail *The transnational movement* 38 fn 154; Chetail *History* 33 fn 97; Wilsher D "International law and immigration detention: between territorial sovereignty and emerging human rights norms," in Wilsher D *Immigration detention: law, history, politics* (CUP Cambridge 2012) 120 fn 4.

482 Noll G "International law and extraterritorial protection," in Noll G *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection* (Martinus Nijhoff The Hague 2000) 354.

control immigration' gives rise to 'the [state] right to return non-nationals to their country of origin'.⁴⁸³ This latter right is part of customary law and set out in several bi- and multilateral readmission agreements.⁴⁸⁴ In other words, under 'the human rights regime, states [have] no duty to admit voluntary migrants, and their sovereign right to control voluntary migration remains intact'.⁴⁸⁵

However, the right of the states to return non-nationals to their country of origin is not applicable in the case of refugees and asylum seekers pursuant to the refugee conventions, in which the principle of non-refoulement is enshrined.⁴⁸⁶ Despite this principle, states have the right to determine and decide which individuals meet the criteria to be defined as refugees.⁴⁸⁷ Furthermore, the right of the states to control their borders and to decide who may legally enter their territory limits the right to liberty of movement set out in Article 12 of the ICCPR.

In fact, the states' willingness to allow immigration and emigration limits individuals' right to freedom of movement, which does not imply that states are obligated to accept individuals who wish to immigrate to their countries.⁴⁸⁸ Just like any other country in the world, the DRC and South Africa have the right to control immigration and emigration, but this right is tempered by 'their obligations to respect the [fundamental] human rights of all persons'.⁴⁸⁹ The two countries have taken steps to exercise their power and authority concerning the right to control immigration and emigration vested in them by national sovereignty.⁴⁹⁰ Both

483 Noll International law 354 fn 1028.

484 See, for instance, the preamble of the 1992 German-Romanian readmission agreement, which reaffirms the international obligation to readmit nationals. See Noll International law 354 fn 1028.

485 Friðriksdóttir Migration management 25.

486 Refugee Conventions prohibit expulsion or return ("refoulement") of recognised refugees to their country of origin, save on grounds of national security or public order (see Art. 32 & 33 of 1951 *Refugee Convention* and Art 2(3) of 1969 *OAU Refugee Convention*); Friðriksdóttir Migration management 25.

487 DeLaet Domestic politics 16.

488 DeLaet Domestic politics 16.

489 US Congress, Senate Committee on the Judiciary Reviewing America's commitment to the Refugee Convention: The Refugee Protection Act of 2010 (US GPO Washington DC 2010) 36. <https://www.govinfo.gov/content/pkg/CHRG-111shrg58223/pdf/CHRG-111shrg58223.pdf> (Date of use: 10 April 2022).

490 Wong T "Conclusion: migrants, agency, and the future of immigration control," in Wong T *Rights, deportation, and detention in the age of immigration control* (Stanford University Press Stanford Cal. 2015) 167.

countries have delegated a wide range of tasks to relevant institutions and agencies, as discussed in the following section.

3.3 State institutions tasked with regulating and controlling labour migration

3.3.1 Introduction

Most receiving countries across the globe are 'predominantly responsible for regulating temporary labour migration'.⁴⁹¹ This involves the management and regulation of foreign workers, the control of access to the labour market, particularly through work permits.⁴⁹² In fact, there is a range of governmental departments and agencies that are responsible for regulating and controlling migration in general, and labour migration in particular.

Since 'there is no [existing] global system [that] regulat[es] international labour migration',⁴⁹³ countries choose their own strategies for admitting foreign nationals coming 'to their territory in order to seek employment'.⁴⁹⁴ On the one hand, many countries choose to separate labour and employment law⁴⁹⁵ from migration law.⁴⁹⁶ Those supporting this approach argue that it is 'the only sure way to deal with the problem of forced labour'.⁴⁹⁷ Most of the states⁴⁹⁸ involve exclusively the ministry

491 Howe & Owens The regulatory challenges 6.

492 OECD Trends in international migration 168; Howe & Owens The regulatory challenges 6.

493 Cholewinski Migration for employment 28; Cholewinski International labour migration 283.

494 Cholewinski R "International standards and processes for the protection of migrant rights," in Ness I (ed) *The encyclopedia of global human migration* (Wiley-Blackwell Hoboken NJ 2013); Oğuz G "The European policy approach to the labour migration problem," in Oğuz G *Labour migration in the European Union: the policy-making process* (Palgrave Macmillan Cham 2020) 52.

495 Labour law approach tends to focus on the protection of workers. Howe & Owens The regulatory challenges 9.

496 Migration law approach tends to focus on the efficacy of the visa process and the reduction of regulatory burdens on business. Howe & Owens The regulatory challenges 9.

497 Costello Migrants and forced labour, cited in Howe & Owens The regulatory challenges 34 fn 138.

498 For instance, in Singapore and Thailand, it is the Ministry of Labour (also known as the Ministry of Manpower in Singapore), with its agencies, that has exclusive charge of the overall management and regulation of foreign workers. See Testaverde M "Migration policy in receiving countries," in Testaverde M et al *Migrating to opportunity: overcoming barriers to labour mobility in Southeast Asia* (World Bank Washington DC 2017) 176; IBP *Nepal labour laws and regulations handbook: Strategic information and basic laws* (IBP Washington DC 2016) 52; DoFE Labour migration for employment: a status report for Nepal, 2013-2014 (Government of Nepal, Ministry of Labour and Employment, Department of Foreign Employment Kathmandu 2014) 14; Isaku E & Afram G *The Qatar-Nepal remittance corridor: enhancing the impact and integrity of remittance flows by reducing inefficiencies in the migration process* (World Bank Washington DC 2011) 6.

or department responsible for employment, labour or social related matters to take charge of foreign workers' employment. In fact, 'the Ministry [or Department] of Labour/Employment/Social Affairs [is regarded] as the line department operating in the labour market and employment field [and] the best suited to overseeing and implementing the country's labour-import policy'.⁴⁹⁹

On the other hand, some countries combine labour and employment law with migration law to manage employment of foreign workers. In those countries⁵⁰⁰ following this approach, two ministries or departments, namely the Ministry of the Interior / Department of Home Affairs and the Ministry / Department of Labour share responsibility for managing foreign workers' employment.⁵⁰¹

In most cases, foreign workers' affairs are regulated by the two departments or ministries through their relevant agencies involved in immigration (which issues work permits) and human resources (which oversees labour laws).⁵⁰² This point is better illustrated in the DRC where former Prime Minister Adolphe Muzito specifically urged both the Minister of Employment, Labour, and Social Welfare and the Minister of the Interior and Security to instruct their respective departments to ensure strict compliance with the DRC legislation governing the employment of foreigners and immigration control.⁵⁰³

499 Böhning Employing foreign workers 15 & 17.

500 For instance, France, Australia, Canada, the US, Malaysia, the DRC, South Africa, to name just a few. See Segatti Explaining the impasse 90 fn 6; Winters L et al "Current policies and proposals on temporary movement," in Winters L et al *Liberalising labour mobility under the GATS* (Commonwealth Secretariat London 2002) 41; IBP Malaysia labour laws and regulations handbook - strategic information and basic laws (IBP Washington DC 2013) 46; Abella M et al *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 1997) 5.

501 Testaverde Migration policy 176; Drori I "The evolution of government policies and the migrant labour employment system," in Drori I *Foreign workers in Israel: global perspectives* (State University of New York Press Albany 2009) 52.

502 Kaur A "Migration and the refugee regime in Malaysia: implications for a regional solution," in Francis A & Maguire R (eds) *Protection of refugees and displaced persons in the Asia Pacific Region* (Routledge London 2016) 106.

503 See *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010 concerning the treatment to be granted to nationals of neighbouring countries and refugees in respect of employment.*

In terms of the relevant departments, the Prime Minister referred, in particular, to the Permanent Secretary of Labour, on the one hand, and the General Directorate of Migration, on the other hand.⁵⁰⁴

In addition, other state's agencies, departments, or ministries take active part in the management of foreign labour. These include the 'country's security system, which is usually incorporated in the Ministry [or Department] of the Interior or of Defence',⁵⁰⁵ the Ministry/ Department of Health,⁵⁰⁶ the Ministry/ Department of Foreign Affairs,⁵⁰⁷ the Ministry/ Department of Education,⁵⁰⁸ the Ministry/ Department of Economics or the Ministry/ Department of Finance or the Central Bank,⁵⁰⁹ the Ministry/ Department of Mines⁵¹⁰ and the Ministry/ Department of Transport,⁵¹¹ to name just a few. Any conflicts in state agencies' authority and overlapping of their responsibilities would complicate foreign workers' applications and undermine the states' ability to determine the number of migrant workers that should be admitted.⁵¹²

504 See para. 5 of *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010*.

505 For instance, in Argentine the Ministry of the Interior, in particular its subordinate Direction National de Migraciones has the primary responsibilities for the formulation and execution of immigration policies (*Act No. 22,520 of 1981*). Other examples are the Dominican Republic's Direction National de Migraciones and Gabon's Ministère de la défense nationale, de la sécurité et de l'immigration. See Böhning *Employing foreign workers* 16.

506 The Ministry of Health would be involved if medical examinations had to be undertaken before or after the foreigners' entry. See Böhning *Employing foreign workers* 17; Testaverde *Migration policy* 176; Kaur A "Migration and the refugee regime in Malaysia 106.

507 The Ministry of Foreign Affairs may be involved with immigration matters to establish links with one or several foreign governments, and may also handle the issuing of entry visas, unless that is the task of the Ministry of the Interior. Böhning *Employing foreign workers* 17; Taran P et al *Economic migration, social cohesion and development: towards an integrated approach* (Council of Europe Strasbourg 2009) 138.

508 The Ministry of Education might be involved for handling questions related to more skilled or highly qualified workers, about testing their skills or ascertaining the equivalence of foreign education or of migrants' diplomas, and certificates. Böhning *Employing foreign workers* 17.

509 The Ministry of Economics or the Ministry of Finance or the Central Bank may be involved should there be general limits on exporting earnings or savings (remittances of migrant workers). See Böhning *Employing foreign workers* 17.

510 In the DRC, for instance, the Department of Mines intervenes in the area of labour migration when permitting foreign workers to carry out the profession of buyer of licensed buying offices for minerals in the small-scale and artisanal mining sector, which requires a valid work permit. See Art. 26 (3) (b) of the 2002 *Mining Code*, as amended to date & Art. 261 of the 2003 *Mining Regulations*, as amended to date.

511 The Ministry of Transport may also be involved in the management of foreign workers' employment as is the case in New Zealand. See OECD *Recruiting immigrant workers: New Zealand 2014* (OECD Publishing Paris 2014) 43; Böhning *Employing foreign workers* 17.

512 Testaverde *Migration policy* 176.

This research focuses on how receiving states, particularly the DRC and South Africa manage labour migration, which involves regulating foreign workers' entry, stay, exit, temporary and fixed-term employment and social integration policy.⁵¹³ For this purpose, the next sub-section specifically identifies the agencies and institutions involved in and controlling and regulating migration in the two countries.

3.3.2 State institutions tasked with regulating and controlling labour migration in the DRC

In the DRC, immigration, emigration, as well as the issuance of passports and visas are identified by the *2006 Constitution* as revised to date as exclusive competencies of central government.⁵¹⁴ More specifically, the Ministry of Interior, Security and Customary Affairs is tasked with dealing with matters relating to migration and border control, as well as immigration and border policing in the DRC.⁵¹⁵ From a technical perspective, the General Directorate for Migration (DGM)⁵¹⁶ is responsible for matters relating to the implementation of the government's immigration and emigration policy. The DGM is also responsible for the enforcement, on Congolese soil, of immigration and emigration laws and regulations.⁵¹⁷

For instance, the DGM was instructed by President Felix Tshisekedi upon his coming to power to ensure that all native Congolese who have acquired a foreign nationality (having thus lost Congolese nationality) are able to return freely to the

513 Garcés-Mascareñas B *Labour migration in Malaysia and Spain: Markets, citizenship and rights* (Amsterdam University Press Amsterdam (2012) 36; Horinuki K "International labour migration and the Arab Gulf states: trends, institutions, and relations," in Ishii M et al (eds) *Asian migrant workers in the Arab Gulf states: the growing foreign population and their lives* (Brill Leiden 2019) 36.

514 Art. 202 (1) (4).

515 See Art. 1(B) (1) of *Ordinance No. 20/017 of 27 March 2020 laying down the powers of the ministries*.

516 The Directorate General for Migration (Direction générale de migration, in French), abbreviated as "DGM", is a governmental (public) entity responsible for matters related, in particular, to the implementation of the Government's immigration and emigration laws, regulations and policies; immigration and border control; issuing of visas to foreign nationals outside the DRC. See Art. 1 & 3 of *Legislative Decree No. 002-2003 of 11 January 2003 establishing and organising the Directorate General for Migration*.

517 See Art. 3 of *Legislative Decree No. 002-2003 of 11 January 2003*; see also Nlandu T "Mapping police services in the Democratic Republic of Congo: institutional interactions at central, provincial and local levels" 2012 *IDS Research Report Research* vol. (71) at 41.

DRC and obtain visas at border posts.⁵¹⁸ Further to the president's instruction, the Director-General of the DGM issued a decision authorising any foreigner of Congolese origin with a valid passport to obtain an entry visa at the DRC's borders and border posts.⁵¹⁹

In August 2019, the DGM required Rwandan workers, including domestic workers, construction workers, small and large traders working in neighbouring DRC, to obtain a residence visa beforehand.⁵²⁰ Therefore, these workers from Rwanda can no longer enter the DRC via the Great or Small Gate with tokens that were previously issued free of charge. The DGM took this step as a reciprocal measure towards Rwanda that already implemented a similar measure towards Congolese citizens living in Rwanda and those who travel daily to Gisenyi, Rwanda.⁵²¹

In May 2019, the DGM undertook to ensure that foreigners in an irregular situation comply with the law within two months, failing which they would be prosecuted in accordance with current DRC legislation. The DGM was also involved in protecting jobs reserved for nationals, and has, in recent months, deported Asian nationals found in an irregular situation.⁵²²

Although it is commonly assumed that the DGM falls under the technical authority of the Ministry of the Interior,⁵²³ there is no specific legislative or regulatory instrument substantiating this assumption. In fact, the president of the republic is responsible for determining, by way of decree, the ministry under the authority of which the DGM shall carry out its activities.⁵²⁴ However, to my knowledge, no

518 Presidency of the Republic, State of the Nation Address by the Head of State before Parliament gathered in Congress (Presidency of the Republic Kinshasa - 13 Dec 2019) 11.

519 See Art. 1 of *Decision No. 06/DGM/064/019 of 16 February 2019 granting an entry visa to foreigners of Congolese origin (DGM)*.

520 Radio Okapi "RDC-Rwanda: The DGM imposes a residence visa on Rwandan workers" 2019 *Radio Okapi*, 15 August. <https://www.radiookapi.net/2019/08/15/actualite/societe/rdc-rwanda-la-dgm-impose-un-visa-de-sejour-aux-travailleurs-rwandais> (Date of use: 15 August 2022).

521 Radio Okapi 2019 *Radio Okapi* 15 August.

522 RFI "DRC: DGM launches a control operation on foreigners" 2019 *RFI*, 25 May. www.rfi.fr/afrique/20190525-rdc-migrations-operation-contrôle-étrangers-roland-kashwantale-chihoza (Date of use: 15 August 2022).

523 DRC General Directorate for Migration 2; Nlandu 2012 IDS Research Report Research vol (71) at 41.

524 See Art. 2 of *Legislative Order No. 002/2003 establishing and organising the DGM*.

presidential decree has been issued to date in this regard. It would, therefore, be advisable for the President of the Republic to take the necessary steps with a view to filling this regulatory gap. Nevertheless, the president of the republic appoints the provincial directors and deputy provincial directors within the DGM following a proposal by the Minister of the Interior and Security.⁵²⁵

Moreover, in the DRC, any matter related to migration to and out of the country for employment purposes falls within the areas of immigration⁵²⁶ and emigration law,⁵²⁷ nationality law,⁵²⁸ and most importantly labour or employment law⁵²⁹ and, to some extent, refugee law.⁵³⁰

In terms of labour-related matters, DRC laws and regulations set up a committee referred to as the “National Committee for Employment of Foreign Workers” (NCEFW), which is established under the Ministry of Labour and Social Security.⁵³¹ The NCEFW is mainly tasked with approving the issuance of work permits for foreign workers.⁵³² To this effect, the NCEFW is required to adjudicate foreign workers’ applications for employment authorisation and renewal of work

525 See Preamble of *Ordinance No. 15/051 of 14 July 2015 appointing provincial directors and deputy provincial directors within the DGM.*

526 See *Legislative Order No. 83-033 of 12 September 1983 concerning immigration control; Ordinance No. 87-281 of 13 Aug. 1987 laying down implementing measures of Legislative Order No. 83-033 of 12 Sept. 1983 concerning immigration control; Legislative Decree No. 002-2003 of 11 Jan. 2003; Act No. 08/001 of 26 March 2008 repealing Act No. 86/007 of 27 December 1986 organising the stay and movement of foreigners in mining areas.*

527 See *Departmental Order No. 067/81 of 5 November 1981.*

528 *Act No. 04/024 of 12 November 2004 regulating Congolese citizenship; Decree No. 06/096 of 24 May 2006 laying down implementing measures for Act No. 04/024 of 12 November 2004 regulating Congolese citizenship; Ministerial Order No. 261/CAB/MIN/J/2006 of 4 July 2006 laying down implementing measures for Act No. 04/024 of 12 November 2004 regulating Congolese citizenship.*

529 *Labour Code of 2002 as amended to date; Departmental Order No. 87/005 of 21 Jan 1987; Interministerial Order No. 032 of 10 March 1994 setting out tax on work permits for foreigners; Ordinance No. 74-098 of 6 June 1974; Ministerial Order No. 12/CAB.MIN/ETPS/080/2008 of 19 September 2008; Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005.*

530 See *DRC Refugees Act of 2002 (more specifically Art. 32(2)); Decree No. 03/014 of 5 August 2003 governing the organisation and functioning of the National Committee for Refugees and Appeal Board; Ministerial Order No. 25/CAB/MININTERSEDAC/025/2012 of 7 August 2012 pertaining to the internal rules of procedure of the Appeals Board; Ordinance No. 74-098 of 6 June 1974 (more specifically Art 8 (2)).*

531 See Art. 208 of 2002 Labour Code.

532 *Art. 209(1) of Labour Code & Art. 1(1) of Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014 laying down the NCEFW's operating procedures.*

permits.⁵³³ In addition, the NCEFW is required to advise the Minister of Labour and Social Welfare on the steps to be taken to improve the legislation protecting the national labour force against foreign competition.⁵³⁴

The *Labour Code*⁵³⁵ grants the Minister of Labour and Social Welfare power and authority to determine, by way of an Order⁵³⁶ adopted after consulting the National Labour Board, the NCEFW's operating procedures. The NCEFW is chaired by the Minister of Labour and Social Welfare. In case the Minister is prevented from carrying out his/her duties, the permanent secretary responsible for employment and labour shall chair the NCEFW. In the absence of the permanent secretary, the director of employment shall carry out this duty.⁵³⁷

However, there appears to be some discrepancy between this provision and another similar regulatory provision,⁵³⁸ which contains some significant variation with respect to the body empowered to chair the NCEFW. In fact, although it also gives the Minister of Labour and Social Welfare power to chair the NCEFW, *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03* specifies, to the contrary, that in case of the Minister's absence or inability to act, the Deputy Minister of Labour and Social Welfare shall do so.⁵³⁹ In case both the Minister and the Deputy Minister are not available, the permanent secretary responsible for employment and labour shall chair the NCEFW.⁵⁴⁰ Considering the variation described above, it would be appropriate for the relevant state regulatory authorities to intervene and address the discrepancy and inconsistency between the two regulatory instruments.

533 Art. 209(2) of *Labour Code* & Art. 1(2) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

534 Art. 209(2) of *Labour Code* & Art. 1(2) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

535 See Art. 210.

536 See, in this instance, *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

537 Art. 5 of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

538 See Art. 2(1) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03 of 27 June 2003 amending Departmental Order No. 78/001 of 12 Jan. 1978 pertaining to the composition of the NCEFW*.

539 Art 2(1).

540 Art. 2(2) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03 of 27 June 2003*.

In terms of composition, the NCEFW is made up of regular and substitute members of a three-party nature, representing several relevant ministries⁵⁴¹ and state agencies.⁵⁴² Another regulatory instrument⁵⁴³ contains additional information concerning the relevant ministries⁵⁴⁴ and state agencies.⁵⁴⁵ It would, therefore, be advisable for the DRC regulatory agencies, lawmakers, or policymakers to merge the two lists together into a unified regulatory instrument. This would help clarify roles and responsibilities of each member in bringing the NCEFW closer to companies or businesses, but also to data capturing centres for the biometric work permit for foreigners.⁵⁴⁶ Such role is part of the overall responsibility to regulate labour migration vested by international law in each state, including South Africa.

541 The relevant ministries include the Ministry of Employment, Labour and Social Welfare; the Ministry of Mines; the Ministry of Higher & University Education; the Ministry of the Economy (see Art 2(1-4) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*).

542 The relevant state agencies include the National Employment Office – ONEM (see Art. 2(5) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014* & Art. 3 j) of *Decree No. 012/003 of 19 January 2012 laying down the Charter of a state-owned entity known as “National Employment Agency,” abbreviated as “Onem”*; the DGM (see Art. 2(6) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*); two representatives of the most representative employers’ organisations (see Art. 2(7) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*); two representatives of the most representative workers’ organisations (see Art. 2(8) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*); the *General Directorate of Administrative and State Revenue - DGRAD* (Art. 2(9) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*); and the National Social Security Institute – INSS (see Art. 2(10) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*). It is worth pointing out that the INSS has now become the National Social Security Fund (CNSS), pursuant to the provisions of *Decree No. 18/027 of 14 July 2018 governing the creation, organisation and functioning of a state-owned institution known as the “CNSS”*.

543 *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03 of 27 June 2003*.

544 Additional relevant ministries include the Ministry of Labour and Social Welfare, more specifically the permanent Secretary responsible for Labour and the permanent Secretary responsible for Employment, the Ministry of Planning. (See Art. 1(1) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03*).

545 Additional relevant state agencies include the National Association of Portfolio Enterprises “ANEP” (see Art. 1(8) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03*); the Federation of Congolese Enterprises “FEC” (see Art. 1(9) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03*); the National Union of Congolese Workers “UNTC” (see Art. 1(10) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03*); the Confederation of Trade Unions of Congo “CSC” (see Art. 1(10) of *Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03*).

546 See *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014* (Preamble para. 15).

3.3.3 State institutions tasked with regulating and controlling labour migration in South Africa

In South Africa, the power to regulate migration lies within the competence of national Government, specifically the DHA,⁵⁴⁷ which has exclusive power on matters related to migration at the national level. In fact, the DHA's mandate is to have sole authority for managing, inter alia, international migration (immigration, emigration, and transit migration), asylum seekers and refugees.⁵⁴⁸ The Director-General of the DHA⁵⁴⁹ or officers delegated by him/ her,⁵⁵⁰ including consular officers abroad, have the exclusive authority to issue or refuse visas⁵⁵¹ to foreign nationals.

The Minister of Home Affairs has the power to decide whether to 'grant an exemption from the requirement of residence in respect of certain residents' or class of residents,⁵⁵² and to withdraw, for good cause, such an exemption.⁵⁵³ Furthermore, the Minister has 'the power to grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist'.⁵⁵⁴ The minister is also vested with the power to 'exclude one or more identified foreigners from such categories'⁵⁵⁵ and to 'withdraw, for good cause, the rights of permanent residence from a foreigner or a category of foreigners'.⁵⁵⁶ Lastly, the minister has the power to, for good cause, withdraw and declare null and void a visa.⁵⁵⁷ Therefore, any decision by either the

547 The DHA is the Government agency responsible for regulating immigration and managing refugees and asylum seekers in South Africa. See online at <http://www.dha.gov.za/index.php/about-us/organisational-structure> (Date of use: 14 April 2022).

548 DHA White Paper 11; Langalanga 2019 *SAIIA Occasional Paper* 296 at 14.

549 See s10(1) of *Immigration Act 13 of 2002* as amended to date).

550 See s3(2) of *Immigration Act 13 of 2002* as amended to date).

551 The term "visa" means the authority to temporarily sojourn in South Africa for specific purposes, including transit, study, business, working, medical treatment, staying with a relative, retirement, exchange programme, or asylum, depending on the circumstances. See s1(1) of *Immigration Act 13 of 2002*, as amended to date.

552 See s 28(d)(iii) of *Immigration Act 13 of 2002*, as amended to date.

553 See s 31(2)(d) of *Immigration Act 13 of 2002*, as amended to date.

554 See s 31(2)(b) of *Immigration Act 13 of 2002*, as amended to date.

555 See s 31(2)(b)(i) of *Immigration Act 13 of 2002*, as amended to date.

556 See s 31(2)(b)(ii) of *Immigration Act 13 of 2002*, as amended to date.

557 See s10A(3)(c) of *Immigration Act 13 of 2002*, as amended to date

Minister of Home Affairs or persons in her office, or by the president,⁵⁵⁸ to deny the Dalai Lama⁵⁵⁹ a visa would amount to an abuse of policy and violation of provisions of the *Immigration Act and Regulations*.⁵⁶⁰

Immigration is dealt with in a more comprehensive manner under the current South African law,⁵⁶¹ which 'provides for the regulation of admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith'.⁵⁶² However, the law has failed to specifically address emigration to such an extent that there has been much criticism of this piece of legislation. This gap in the legislation has made some people think that South African citizens emigrating abroad are required to reimburse the state for their education.⁵⁶³ In fact, many of those emigrating, including doctors and nurses, were trained at government expense with a view to serving two years in rural areas before receiving their license to practice.⁵⁶⁴

The law in force does not prohibit any skilled or unskilled South African from emigrating for seeking employment abroad. But, as pointed out previously, for many years state authorities regarded South Africans who chose to emigrate

558 See Du Plessis M "Shooting Bambi - Reflections on the Dalai Lama saga and the casualty of the rule of law," in Kidd M & Hoorst S (eds) *Stella Luris: celebrating 100 years of teaching law in Pietermaritzburg* (Juta Cape Town 2010) 256.

559 The Dalai Lama is the Tibetan spiritual leader and Nobel Peace Prize laureate who has been refused entry to South Africa for third time in five years. Wong E "Dalai Lama said to be denied South African visa" 2014 *New York Times* 5 Sept.

560 See Du Plessis The Dalai Lama saga 260 ; see also *Buthelezi & another v Minister of Home Affairs & others* (242/12) [2012] ZASCA 174 (29 November 2012) para 20.

561 *Immigration Act (Act 13 of 2002)* as amended to date.

562 See Preamble of *Immigration Act (Act 13 of 2002)*.

563 Anderson B "Migration in South Africa 101; Adepoju A "Migration to, within and from Africa: that's where we belong," in Knauf D & Morena B (eds) *Leaving home: migration yesterday and today* (Edition Temmen Bremen 2010) 257.

564 The South African Government complained that it spent \$1 billion educating health workers who emigrated in the 1990s, the equivalent of a third of all development aid it received from 1994 to 2000. As a result, the country had to import health workers from other poorer African nations. See Dugger C "In Africa, an exodus of nurses" 2004 *New York Times* 12 July; Martin P, Abella M & Kuptsch C "Global migration patterns and issues," in Martin P, Abella M & Kuptsch C *Managing labour migration in the twenty-first century* (Yale University Press New Haven 2006) 45; Martin S, Martin P & Weil P "Migration and economic development: The 3 R's," in Martin S, Martin P, & Weil P *Managing migration: the promise of cooperation* (Lexington Books Lanham 2006) 29; Landau L & Segatti A "The Southern crossroads: human mobility, governance and development in South Africa," in Cortina J & Ochoa-Reza E (eds) *New perspectives on international migration and development* (Columbia University Press New York 2013) 330; Shelley T "Impacts," in Shelley T *Exploited: migrant labour in the new global economy* (Zed Books London 2007) 135.

elsewhere as being 'either unpatriotic or unwilling to accept the post-apartheid [political] dispensation' introduced in 1994.⁵⁶⁵

While the government's response to emigration has been limited, some kind of support has, instead, been provided to homecoming projects aimed at encouraging South African citizens living abroad to come back and work at home.⁵⁶⁶ This probably explains 'the absence of administrative measures to record departures in the *Immigration Act of 2002* and its regulations'.⁵⁶⁷ This interferes with the DHA's efforts to measure emigration through collecting passenger data at ports of exit.⁵⁶⁸ As a result, estimates of emigration are based on data collected by authorities in the recipient countries, including census responses on place of birth and employment data.⁵⁶⁹ Practical experience shows that there may be some discrepancies between official South African emigration figures that are highly misleading⁵⁷⁰ and 'destination country statistics of immigrant arrivals from South Africa', which seem to have been rather accurate.⁵⁷¹

As for labour-related matters, the South African state regulates migration of foreign nationals into the country in general and for employment purposes, in particular, primarily by way of immigration law,⁵⁷² and nationality law⁵⁷³ provisions. In addition, labour law⁵⁷⁴ and refugee law⁵⁷⁵ provisions, to some extent, regulate migration and the employment of foreign nationals in South Africa. These laws, regulations, and policies put together govern the entry, residence, and

565 Ellis & Segatti The role of skilled labour 67; Crush & Dodson 2007 *TESG* vol. 98(4) at 440.

566 Marks South Africa: evolving diaspora 171.

567 Segatti A & Landau L "Annexes," in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD Paris 2008) 219.

568 Johnston A "Nation-building 20 years on," in Johnston A South Africa: inventing the Nation (Bloomsbury London 2014) 306; Segatti & Landau Migration data collection issues 149.

569 Johnston Nation-building 20 years on 306.

570 Official South African emigration statistics rely heavily on self-declaration at the point of departure, and the data do not capture those emigrants who do not declare emigration as their motive for leaving, and those who leave for another reason and do not return. See Crush 2002 *Journal of International Affairs* Vol. 56(1) at 169.

571 Mattes R, Crush J, & Richmond W "The brain gain: legal immigration to post-apartheid South Africa," in McDonald D & Crush J (eds) *Destinations unknown: perspectives on the brain drain in Southern Africa* (AISA SAMP Pretoria 2002) 113-137; Crush J & Williams V *International migration and development: dynamics and challenges in South and Southern Africa* (UN New York 2005) 7; Crush 2002 *JIA* vol. 56(1) at 151.

572 See for instance s 38 of *Immigration Act (Act 13 of 2002)*.

573 See *South African Citizenship Amendment Act (Act 17 of 2010)*.

574 See s 8 of *Employment Services Act (Act 4 of 2014)*.

575 See s 27 (f) of *Refugees Act (Act 130 of 1998)*.

'employment of foreign nationals, including refugees and asylum seekers' in the country.⁵⁷⁶ Based on section 22 of the *South African Bill of Rights* and the *Watchenuka case*,⁵⁷⁷ asylum seekers are permitted to undertake employment in the country 'pending the outcome of their application for asylum'.⁵⁷⁸ Furthermore, the Minister of Employment and Labour is vested with power and authority to make regulations, after consulting the Employment Services Board, for facilitating the employment of foreign nationals.⁵⁷⁹

It is obvious that in both the DRC and South Africa, the State is vested with a large power of discretion in the areas of migration and labour law. It is, therefore, safe to argue that in both countries the relationships between migration law and labour law are tense given the complexity of migration issue and the legal framework.⁵⁸⁰ As described earlier, the relationship between migration law and labour law is conceptualised by the state. This is done in a way that determines the said state's approach to the issue related to the protection of irregular immigrants' labour rights,⁵⁸¹ which is worth a thorough analysis.

3.4 The protection of irregular immigrants' labour rights

3.4.1 Introduction

Migration scholars widely agree that restrictive immigration laws and policies in general, and refugee laws and policies in particular are the main factor that creates irregular, illegal or undocumented immigrants in a country.⁵⁸² Such illegal

576 Heiss M *Self-reliance and the right to work for refugees: lessons from the case studies of South Africa and Germany for the implementation of the global compact on refugees by the European Union* (LLM dissertation University of Cape Town 2021) 38.

577 See the *Watchenuka case* para. 39.

578 See the *Watchenuka case* para. 98.

579 See s 8(2) of *Employment Services Act (Act 4 of 2014)*.

580 Yenisey The rights of migrant workers.

581 Dewhurst E "The right of irregular immigrants to back pay: the spectrum of protection in international, regional and national legal systems," in Costello & Freedland *Migrants at work* 216.

582 Bertossi 2008 *Politique étrangère* at 194; De Haas H & Fokkema T "Transnational return and pendulum migration strategies of Moroccan migrants: intra-household power inequalities, tensions and conflicts of interest," in Oso L & Ribas-Mateos N (eds) *The international handbook on gender, migration and transnationalism: global and development perspectives* (Edward Elgar Cheltenham 2013) 208; Boeri T & van Ours J "Migration policies," in Boeri T & van Ours J *The economics of imperfect labour markets: second edition* (Princeton University Press Princeton NJ 2013) 245; Minderhoud P "Regulation of migration: introduction," in Böcker A et al (eds) *Regulation of migration: international*

entrance of migrants has an adverse impact on the labour market performance of migrants.⁵⁸³ Before engaging in the examination of the approaches to the protection of irregular immigrants' labour rights, it is worth providing an agreed definition of the key terms that we are concerned with: irregular (or illegal/undocumented) immigrant and undocumented migrant worker.

3.4.2 Defining irregular/ illegal/undocumented immigrant and migrant worker

The IOM has provided a universally accepted definition of the term "irregular migrant," which has also been widely used in the literature. According to the IOM, an "irregular migrant" shall be regarded as 'a person who, owing to unauthorised entry, breach of a condition of entry, or the expiry of his or her visa, lacks legal status in a transit or host country.'⁵⁸⁴ The IOM, further, considers that this particular definition covers, among others, any individuals having 'entered a transit or host country lawfully, but have overstayed the period of authorised residence or have subsequently taken up unauthorised employment'.⁵⁸⁵ Such individuals are also referred to as clandestine/ undocumented migrants or migrants in an irregular situation.⁵⁸⁶

experiences (Het Spinhuis Publishers Amsterdam 1998) 16; Eylemer S & Şemşit S "Migration-security nexus in the Euro-Mediterranean relations" 2007 *Perceptions: JIA* vol. 12 (2-3) at 59; Orrenius & Zavadny Undocumented immigration 661; Molodikova I "Eurasian migration towards Russia: regional dynamics in the era of globalisation," in Triandafyllidou A (ed) *Handbook of globalisation and migration* (Edward Elgar Cheltenham 2018) 355; Sonia M, Markova E & Paraskevopoulou A "Controlling undocumented migration at EU level," in Sonia M, Markova E, & Paraskevopoulou A *Undocumented Workers' transitions: legal status, migration, and work in Europe* (Routledge London 2011) 60; Staring R "Smuggling aliens toward the Netherlands: the role of human smugglers and transnational networks," in Siegel D, Bunt H & Zaitch D (eds) *Global organised crime: trends and developments* (Springer Dordrecht 2012) 115.

583 Rossi N "Managed diversity," in Giddens A (ed) *The progressive manifesto: new ideas for the centre-left* (Polity Cambridge 2003) 120.

584 Perruchoud R & Redpath-Cross J (eds) *Glossary on migration - international migration law series No. 25* (IOM Geneva (2011) 54; IOM Migration terminology 495.

585 Feldman M et al *Measuring international labour mobility* (UN New York 2018) 7 para. 38 ; Davies A "International migration, the health of migrants, and global health governance," in Cooper A et al (eds) *Africa's health challenges: sovereignty, mobility of people and healthcare governance* (Routledge London 2013) 95 ; Ramli R "Transnational advocacy networks: the examples of APWLD and NCWO: comment on the Indian case study from a Malayan perspective," in B Schwarzer et al (eds) *Transnational social work and social welfare challenges for the social work profession* (Routledge London 2016) 204 ; Ridge T & Smith G *Confronting the global forced migration crisis: a report of the CSIS task* (Rowman & Littlefield London 2018) 82.

586 Feldman et al *International labour mobility* 7 para. 38; Davies *International migration* 95; Ramli *Transnational advocacy networks* 204; Ridge & Smith *The global forced migration crisis* 82.

However, the IOM advises that it is preferable to use the term “irregular” rather than “illegal” given that ‘the latter carries a criminal connotation and is seen as denying migrants’ humanity’.⁵⁸⁷ In addition, most migration scholars and researchers prefer to use the term “irregular migrant” ‘instead of “illegal”, “undocumented” or “unauthorised” migrant to underscore that no person is illegal as such’.⁵⁸⁸

As for the term “undocumented migrant workers” or “migrant workers in an irregular situation”, the IOM considers that it refers to ‘migrant workers or members of their families, who are not authorised to enter, to stay or to engage employment in a State’.⁵⁸⁹ In addition, the *Migrant Workers Convention* provides a similar definition of the term “irregular migrant worker”.⁵⁹⁰

Furthermore, the concept of “illegal migrant” is regarded as covering a few different issues, including the following three definitions.⁵⁹¹ First, an illegal migrant is considered as any foreign national arriving clandestinely onto the territory of a state.⁵⁹² Secondly, it refers to a foreign national ‘staying beyond his or her permitted period of entry and residence’.⁵⁹³ And lastly, it means a foreign national ‘working when not permitted to do so or in a manner inconsistent with his or her immigration status’.⁵⁹⁴

587 Perruchoud & Redpath-Cross Glossary on migration 54; IOM Migration terminology 495.

588 Brander P et al *Compass: manual for human rights education with young people* (Council of Europe Strasbourg 2012) 623.

589 Perruchoud & Redpath-Cross Glossary on migration 102; IOM Migration terminology 500.

590 The terms “undocumented migrant workers” or “migrant workers in an irregular situation” refer to migrant workers and members of their families who are not authorised to enter, to stay and to engage in a remunerated activity in the State of employment, pursuant to the law of that State and to international agreements to which that State is a party. (See Art. 5 of *Migrant Workers Convention of 1990*).

591 Guild E “Who is an irregular migrant?”, in Bogusz B et al (eds) *Irregular migration and human rights: theoretical, European and international perspectives* (Martinus Leiden 2004) 3.

592 Guild An irregular migrant 3; Gansallo A & Bernstein-Bake J “Immigration court practice and relief from removal,” in Gansallo A & Bernstein-Baker J *Understanding immigration law and practice* (Wolters Kluwer 2020) 582 fn 7.

593 Guild An irregular migrant 3; Da Lomba S “The ECHR, health care and irregular migrants,” in M Freeman, S Hawkes, & B Bennett (eds) *Law and global health: current legal issues volume 16* (OUP Oxford 2014) 149; Bonifazi C & Strozza S “Conceptual framework and data collection in international migration,” in Caselli G, Vallin J, & Wunsch G (eds) *Demography: analysis and synthesis, four volume set: a treatise in population* (Academic Press London 2006) 545.

594 Guild An irregular migrant 3; Universiteit van Amsterdam et al *Workshop proceeding: now you see them, now you don't: defining irregular migrants in Europe and Asia and the*

The concept of “irregular migrant worker” is also contemplated in both the DRC and South African legal and regulatory framework on labour migration. In the DRC, irregular/undocumented migrants are not permitted to work as the law requires foreign workers to hold a valid work permit⁵⁹⁵ ‘in order to take up employment in the country’.⁵⁹⁶ Failure to comply with this regulatory provision would expose the offender to penal sanctions,⁵⁹⁷ which is discussed in the following subsection. In South Africa, both immigration law⁵⁹⁸ and labour law⁵⁹⁹ prohibit employment of illegal foreigners under the penalty of penal sanctions,⁶⁰⁰ which is also discussed in greater detail in the following subsection.

3.4.3 Discussing approaches to the protection of irregular immigrants’ labour rights

The question whether irregular immigrants should be entitled to the protection of the State’s labour laws gives rise to three key approaches. The first approach, which is referred to as the “non-protection approach,” considers ‘that irregular immigrants are not entitled to the protection of labour laws’.⁶⁰¹ As a matter of immigration law, in most countries, including the US, the DRC, and South Africa, irregular or illegal immigrants are not allowed to be present in the country at all.⁶⁰²

However, being regarded as employees who perform work, irregular immigrants are entitled to workplace protections that are provided to them simultaneously by labour law. Such workplace protections relate in particular to ‘wages, health and safety, collective action with their co-workers, and employment discrimination

immigration measures applied to them, 7-9th January 2008 (Institute of Occidental Studies, Universiti Kebangsaan Malaysia 2008) 87.

595 The requirement for foreign workers to hold a valid work permit or visa will be discussed extensively in the Chapter Five devoted to the basic principles governing the protection of national labour force against foreign competition.

596 See Art. 5 of *Ordinance No. 74-098 of 6 June 1974*.

597 See Art. 323 (e) of the *Labour Code*; Art. 29 of *Ordinance No. 74-098 of 6 June 1974*; Art. 6 of *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*.

598 See s 38(1) of *Immigration Act (Act 13 of 2002)*.

599 See s 8(1) of *Employment Services Act (Act 4 of 2014)*.

600 See s 49(3) & (6) of *Immigration Act (Act 13 of 2002)* as amended to date; see also s50(4) & (5) of *Employment Services Act (Act 4 of 2014)*.

601 Dewhurst *The right of irregular immigrants* 217.

602 Griffith K “Undocumented workers: crossing the borders of immigration and workplace law,” (2012) *JLPP*, vol. 21(3) Art. 4 at 611.

based on race, colour, religion, sex, ethnicity, and national origin'.⁶⁰³ In this way, illegal workers are an example of a new legal trend, which challenges long-standing notions of the separation between immigration law and labour law.⁶⁰⁴ In fact, in this approach's view, 'immigration law and labour law have different concerns and are fundamentally disconnected from one another'.⁶⁰⁵ As a result, this approach 'has the effect of reducing human rights protection for irregular immigrants'.⁶⁰⁶

As such, this approach has the potential to expos[e] vulnerable [irregular immigrants] to exploitative employment conditions, increase the availability of employment for them with unscrupulous employers, and increase the level of both irregular employers, and irregular immigration in a state'.⁶⁰⁷ When applied in any particular legal system, the "non-protection approach" would not allow irregular immigrants 'to claim the protection of labour laws to enforce their rights, including their right to back pay'.⁶⁰⁸ For this reason, the domestic law would not give irregular immigrants the right to work in the country,⁶⁰⁹ as is the case in both the DRC and South Africa where illegal foreigners are strictly banned from employment under the immigration law.⁶¹⁰ Based on this approach, any claim filed in court by an irregular immigrant to recognise a labour relationship with an employer will be dismissed.⁶¹¹ Consequently, the non-protection principle makes

603 Griffith 2012 *JLPP*, vol. 21(3) at 611-612.

604 Griffith 2012 *JLPP*, vol. 21(3) at 612; Cook M "Is incorporation of unauthorised immigrants possible? inclusion and contingency for nonstatus migrants and legal immigrants," in Hochschild J et al (eds) *Outsiders no more? models of immigrant political incorporation* (OUP Oxford 2013) 54.

605 Dewhurst The right of irregular immigrants 216; Garcia R "Ghost workers in an interconnected world: going beyond the dichotomies of domestic immigration and labour laws," 2003 *U. Mich. J. L. Reform* vol. 36 at 740.

606 Dewhurst The right of irregular immigrants 216; Carens J "Irregular migrants," in Carens J *The ethics of immigration* (OUP Oxford 2013) 134.

607 Dewhurst The right of irregular immigrants 216 & 217; Fontana B *The state of migration research in South Africa* (Foundation for Global Dialogue Johannesburg 1997) 12; OHCHR *The economic, social and cultural rights of migrants in an irregular situation* (UN New York 2014) 15.

608 Dewhurst The right of irregular immigrants 217; Zou Migrant precarity 172.

609 Dewhurst The right of irregular immigrants 216 & 217.

610 For the DRC, see Art. 5 & 6 of *Ordinance No. 74-098 of 6 June 1974*. For South Africa, see s 38(1) of Immigration Act of 2002 & s 8(1) of *Employment Services Act of 2014*.

611 Zou Migrant precarity 172.

irregular immigrants particularly vulnerable to poor and exploitative working conditions, and unfair treatment.⁶¹²

The second approach, which is referred to as the “protection with consequences approach,” considers ‘that irregular immigrants are entitled to the protection of the [state’s] labour laws’.⁶¹³ But these ‘irregular immigrants are not entitled to the [state’s protection] from the consequences of their irregularity’.⁶¹⁴ Such consequences include ‘detection, detention, and/or deportation, which might arise when the irregular immigrant attempts to enforce labour law protections’.⁶¹⁵

In other words, this ‘approach provides very little temporal protection for irregular immigrants [as far as] employment [is concerned], leaving them in a vulnerable position’.⁶¹⁶ In this approach’s view, ‘immigration law and labour law [have] some common objectives’, and states operating this approach recognise the connection between two areas of law.⁶¹⁷ However, this approach ‘ultimately protects the immigration law objectives at the expense of labour law objectives’.⁶¹⁸ In addition,

612 Zou Migrant precarity 172; Urzi D “Global citizenship: The need for dignity and respect for migrants,” in Craig G et al (eds) *Vulnerability, exploitation and migrants: Insecure work in a globalised economy* (Palgrave Macmillan London 2015) 224; Bell M “Invisible actors? Irregular migrants and discrimination,” in Bogusz B et al (eds) *Irregular migration and human rights: theoretical, European and international perspectives* (Martinus Leiden 2004) 358.

613 Dewhurst The right of irregular immigrants 216; Friðriksdóttir B “EU Law on labour migration – the compatibility of a sectoral approach to migration management and the right to equal treatment of third-country nationals,” in Friðriksdóttir B *What happened to equality?: the construction of the right to equal treatment of third-country nationals in European Union law on labour migration* (Brill Leiden 2017) 332.

614 Dewhurst The right of irregular immigrants 216; Friðriksdóttir EU law on labour migration 332.

615 Dewhurst The right of irregular immigrants 216; Desmond A “Regularisation in the European Union and the United States: the frequent use of an exceptional measure,” in Arcarazo D & Wiesbrock A (eds) *Global migration: old assumptions, new dynamics [3 volumes]* (ABC-CLIO Santa Barbara, CA 2015) 83.

616 Dewhurst The right of irregular immigrants 216; 217 & 220; Mantouvalou V “Legal construction of structures of exploitation,” in Collins H, Lester G, & Mantouvalou V (eds) *Philosophical foundations of labour law* (OUP Oxford 2018) 199; Barnard-Wills D “Subjectivity and subject positions in discourses of surveillance,” in Barnard-Wills D *Surveillance and identity: discourse, subjectivity and the state* (Ashgate Farnham 2012) 141.

617 Dewhurst The right of irregular immigrants 216; Du Toit D “Constructing an integrated model for the regulation and enforcement of domestic workers’ rights,” in du Toit D (ed) *Exploited, undervalued - and essential: domestic workers and the realisation of their rights* (PULP Pretoria 2013) 349.

618 Dewhurst The right of irregular immigrants 216.

states imposing this approach consider that ‘the strict imposition of immigration law [is] essential to the deterrence and prevention of irregular immigration’.⁶¹⁹

In South Africa, for instance, the *Immigration Act of 2002* as amended to date ‘aims at setting in place a new system of immigration control, which ensures strict measures concerning illegal immigration.’⁶²⁰ The first measure involves efficient and effective enforcement of immigration laws through ‘deploying [...] significant administrative capacity of the DHA [with a view to] reducing the pull factors of illegal immigration’.⁶²¹ In this regard, ‘[t]he Minister [of Home Affairs is granted the power], after consultation with the Board, [to] make regulations relating to the steps to be taken to prevent the entry of illegal foreigners into [South Africa] and to facilitate the tracing and identification of illegal foreigners in, and their removal from, the [country]’.⁶²²

Furthermore, DHA immigration officers are granted the power to arrest and deport illegal foreigners without the need for a warrant or to cause them to be arrested and deported, and to detain them or cause them to be detained, pending their deportation.⁶²³ In support of this policy, President Ramaphosa has pointed out that the ‘government has prioritised border control and security to deter illegal immigration’.⁶²⁴ The second measure involves addressing ‘push factors of illegal immigration in cooperation with other departments and the foreign states concerned’.⁶²⁵

619 Dewhurst The right of irregular immigrants 216; 217 & 220; Cyrus N & Kovacheva V “Undocumented migration in Germany - many figures, little comprehension,” in Triandafyllidou A (ed) *Irregular migration in Europe: myths and realities* (Routledge London 2016) 139.

620 See Preamble (g) of *Immigration Act (Act 13 of 2002)*, as amended to date.

621 See Preamble (g) of *Immigration Act (Act 13 of 2002)*, as amended to date.

622 See s 7(1) of *Immigration Act (Act 13 of 2002)*, as amended to date.

623 See s 34 of *Immigration Act (Act 13 of 2002)*, as amended to date.

624 SAnews “Government dealing with illegal immigration” 2019 SAnews, 19 September <https://www.sanews.gov.za/south-africa/government-dealing-illegal-immigration> (Date of use: 12 August 2022).

625 See Preamble (k) of *Immigration Act (Act 13 of 2002)*, as amended to date.

The third approach, which is referred to as the “full protection approach,”⁶²⁶ considers that irregular immigrants are ‘entitled to [claim] their labour rights,⁶²⁷ [through] a practical enforcement method available to mitigate any fear of potential detection of irregularity, possible detention, and/or deportation’.⁶²⁸ This ‘approach provides full protection of all labour rights, including the right to back pay, for irregular immigrants’ who are also entitled to ‘the same minimum wage and working standards as workers with legal status and permission to work’.⁶²⁹ In states operating this approach, such as the Netherlands, labour law rights are enforceable not only theoretically, but also practically in such a way that irregular immigrants are not exposed to the consequences of their irregularity.⁶³⁰ This approach’s view is that ‘immigration law and labour law [are] fundamentally connected and as [such have] mutually compatible goals’.⁶³¹

As regards the choice of the best approach among the three, a few factors need to be considered. These factors include ‘the effort [...] to fully embrace the concept of the fundamental connection between immigration and labour law, [and] to develop practical ways of ensuring the successful implementation the [relevant] approach’.⁶³² Considering these factors at an international, regional, and national level, the “full protection approach” is regarded as the most desirable avenue.⁶³³

626 Dewhurst *The right of irregular immigrants* 216; Carens J “Immigration, political realities, and philosophy,” in Hoesch M & Mooren N (eds) *Joseph Carens: between aliens and citizens* (Springer Cham 2020) 22.

627 Costello C “EU migration and asylum law: A labour law perspective,” in Bogg A, Costello C, & Davies A (eds) *Research handbook on EU labour law* (Edward Elgar Pub Cheltenham 2016) 329.

628 Dewhurst *The right of irregular immigrants* 216 & 217; Dewhurst E “Models of protection of the right of irregular immigrants to back pay: the impact of the interconnection between immigration law and labour law” 2014 *CLLPJ* 35(2) May 1 at 217.

629 Berntsen L & De Lange T “Employer sanctions: Instrument of labour market regulation, migration control, and worker protection?” in Rijken C & De Lange T (eds) *Towards a decent labour market for low waged migrant workers* (Amsterdam University Press Amsterdam 2018) 227.

630 Dewhurst *The right of irregular immigrants* 220; Berntsen & De Lange *Employer sanctions* at 227.

631 Dewhurst *The right of irregular immigrants* 216 & 217; Cohen S, Humphries B, & Mynott E “Introduction: locating the debate,” in Cohen S, Humphries B, & Mynott E (eds) *From immigration controls to welfare controls* (Routledge London 2014) 3.

632 Dewhurst *The right of irregular immigrants* 217.

633 Dewhurst *The right of irregular immigrants* 216 & 217; Omelaniuk I “Introduction: making the connections between migration and development,” in Omelaniuk I (ed) *Global perspectives on migration and development: GFMD Puerto Vallarta and beyond* (Springer London 2012) 15; Castles S et al “Irregular migration: causes, patterns, and strategies,” in Omelaniuk I (ed) *Global perspectives on migration and development: GFMD Puerto Vallarta and beyond* (Springer London 2012) 117.

However, the “protection with consequences approach” is regarded as ‘the most common approach’ as it currently prevails at a regional level.⁶³⁴

However, in the SADC Region, ‘the extensive list of rights for migrants’ provided by the *2014 SADC Regional Labour Migration Policy Framework* applies primarily to migrant workers in formal employment and not to undocumented, irregular or unregulated migrant workers.⁶³⁵ In addition, while this regional instrument is of a non-binding character, ‘member states are unlikely to be able to implement several rights, including those related to equal access and opportunity with nationals.’⁶³⁶

The *SADC Social Security Code* of 2008 provides that ‘illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country’.⁶³⁷ But the *SADC Social Security Code* (and all of the SADC instruments for that matter) ‘does not provide any meaningful social protection to irregular migrants or their families’.⁶³⁸ Furthermore, the *SADC Protocol on the Facilitation of Movement of Persons of 1995* ‘does not make specific reference to irregular migrant workers or to social protection in general, but encourages member states to conclude bilateral agreements to facilitate the movement of persons’.⁶³⁹

In terms of official policy and provision ‘in several SADC countries, irregular migrants have very limited access to labour law and social protection’.⁶⁴⁰ Such is the case of South Africa, for instance, ‘as far as the social security and, at least until recently’,⁶⁴¹ labour law status of undocumented foreigners is concerned.⁶⁴² Therefore, irregular immigrants find themselves in a precarious position with

634 Dewhurst *The right of irregular immigrants* 217.

635 Crush et al *Harnessing migration* 29.

636 Crush et al *Harnessing migration* 29.

637 See Art. 17(3).

638 Van Eck B & Snyman F “Social protection afforded to irregular migrant workers: thoughts on the SADC (with Emphasis on Botswana and South Africa)” 2015 *JAL* 59(2) at 305.

639 See Arts. 13–14; Van Eck & Snyman (2015) *JAL* 59(2) at 306.

640 Olivier M “Regional overview of social protection for non-citizens in the SADC” *SP Discussion Paper No. 0908* (World Bank Washington DC 2009) 17.

641 In the *Discovery Health* case, the South African Labour Court ruled that even with an expired work permit, a foreigner still has a valid employment contract and is entitled to the protection provided for in the Labour Relations Act, 66 of 1995, notably the unfair dismissal protection.

642 Oliver *Social protection for non-citizens* 17.

regard to 'claiming rights and benefits,⁶⁴³ as they may be refused the right to do so, or may not lodge such claims, for fear of being subjected to the operation of restrictive immigration laws and policies'.⁶⁴⁴ At a national level, the "non-protection approach" prevails in a number of jurisdictions firmly, while 'a move towards the "full protection approach" is discernible at an international level'.⁶⁴⁵

To sum up, the "protection with consequences approach" is regarded as the middle ground between the "full protection approach" and the "non-protection approach." This middle ground is also regarded as a response to the question that arises whether irregular migrants should be entitled to the protection of labour laws available in a state. It is also a response to the question about the extent to which these irregular migrants are protected by labour laws which varies from state to state.⁶⁴⁶ It is, therefore, worth discussing this question from both the DRC and South African perspectives. This amounts to analysing the fate of unauthorised/ illegal/ irregular/ undocumented immigrants' employment contracts in both countries.

3.4.4 A brief review of the legal and judicial consideration of irregular migrants' employment contracts

Both South Africa and the DRC, like many other countries around the world, have put in place policies and legislative frameworks that prohibit the employment of illegal/irregular/undocumented migrants. However, this does not necessarily mean that these unauthorised migrants are not entitled to other work-related legal rights, such as earnings and working conditions, should they find work in the country.⁶⁴⁷ This raises the issue of the validity of irregular migrants' employment contracts, bearing in mind that these migrants are not authorised to work in the first place.

643 Bystrom K "Seeing Johannesburg anew: conviviality and opacity in Khalo Matabane's," in Hemer O, Frykman M, & Ristilammi P (eds) *Conviviality at the crossroads: the poetics and politics of everyday encounters* (Palgrave Macmillan Cham 2020) 272.

644 Oliver SP Discussion Paper No. 0908 at 17.

645 Dewhurst The right of irregular immigrants 216 & 217.

646 Dewhurst The right of irregular immigrants 220; Costello Migrants and forced labour 212.

647 Carens J "Irregular migrants," in Carens J *The Ethics of Immigration* (OUP Oxford 2013) 140 & 142; Olivier Dimensions of access 122.

3.4.4.1 Legal and judicial consideration of irregular migrants' employment contracts in South Africa

In South Africa, a court decision has addressed the issue of the validity of irregular migrants' employment contracts in a more direct and thorough manner. In the case of *Discovery Health Ltd v CCMA & others*,⁶⁴⁸ the Labour Court 'raises a complex and controversial question whether a foreign national working for another person without a work permit issued under *Immigration Act* is an "employee" as defined by the *Labour Relations Act*.⁶⁴⁹ The court concluded, on the one hand, that the contract of employment entered into by and between a South African employer and a foreign 'employee was not invalid, despite the fact that the said employee did not have a valid work permit to work for the employer'.⁶⁵⁰

On the other hand, the court considered that 'even if the said contract was invalid only because the employer was not legally permitted to employ [him/ her]',⁶⁵¹ the employee was nonetheless an "employee" as defined by law.⁶⁵² This is because such legal 'definition is not dependent on a valid and enforceable contract of employment'.⁶⁵³ Therefore, as the irregular migrants' employment contract is not void, it is safe to argue that the absence of a work permit does not affect the validity of such a contract in South Africa. This is similar to the German law, which does not prohibit the signing of employment contracts under civil law, but rather prohibit employment under public law. In Germany, employment is regarded as prohibited if a work permit is not applied for, shall not be applied for, or has already expired.⁶⁵⁴

However, this research study is of the opinion that if the court were required to rule solely on the validity of the work permit at the time of employment, the outcome would have been different on the grounds that such employment was based on an

648 (2008) 29 IJL 1480 (LC); [2008] 7 BLLR 633 (LC).

649 See s 213 of *Labour Relations Act (Act 66 of 1995)*.

650 The *Discovery Health* case par. 54(a).

651 Under s 38(1) of the *Immigration Act (Act 13 of 2002)*.

652 See s 213 of the *Labour Relations Act (Act 66 of 1995)*.

653 The *Discovery Health* case para. 54(b).

654 Kluth W "The legal situation of irregular migrants in Germany and their access to social rights," in Zanfrini L & Kluth W *Policies on irregular migrants-vol I: Italy and Germany* (Council of Europe Strasbourg 2008) 94.

invalid work permit. *Immigration Act of 2002* prohibits, under section 38, employment of any person that is regarded as illegal foreigner,⁶⁵⁵ including a prohibited person,⁶⁵⁶ or any ‘foreigner whose status does not authorise him or her to be employed’.⁶⁵⁷ Under the current legislation, employers are also prohibited from hiring any ‘foreigner whose status does not authorise him or her to be employed’.⁶⁵⁸ Penal sanctions, in particular, imprisonment and / or a fine, shall even be imposed on ‘anyone who knowingly employs an illegal foreigner or a foreigner in violation of the *Immigration Act*’.⁶⁵⁹

Nevertheless, the Labour Appeal Court held that the *Immigration Act* cannot be used to allow an employer who employs an illegal foreigner to escape its obligations in terms of the employment contract, such as paying the employee’s wages.⁶⁶⁰ The law, further, requires any illegal foreigners to depart, except where they are ‘authorised by the Director-General of the DHA to remain in the country pending their application for a status’;⁶⁶¹ otherwise, such illegal foreigners should face deportation,⁶⁶² pursuant to section 32(2) of *Immigration Act of 2002* as amended to date.

655 Under s 1(1)(xviii) & (xxx) of *Immigration Act (Act 13 of 2002)* as amended to date, an “illegal foreigner” is defined as a foreigner who is in South Africa in contravention of *Immigration Act*.

656 Under s 1(1)(xxx) and s 29 of *Immigration Act (Act 13 of 2002)*, as amended to date, a “prohibited person” is defined as a foreigner who does not qualify for a temporary or a permanent residence permit on the following grounds: being infected with or carrying infectious, communicable or other diseases or viruses; being the subject of an outstanding warrant or a conviction for genocide, terrorism, murder, torture, drug-related charges, money laundering or kidnapping in South Africa or a foreign country; having been previously deported and not rehabilitated by the Director-General of Home Affairs; being a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and being or having been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and being found in possession of a fraudulent residence permit, passport or identification document.

657 See s 38 of *Immigration Act (Act 13 of 2002)*.

658 See s 38(1) of *Immigration Act of 2002* & s 8(1) of *Employment Services Act of 2014*.

659 See s 49(3) of the *Immigration Act of 2002* as amended to date, as well as s 50(4) & (5) of *Employment Services Act, 2014 (Act No. 4 of 2014)*.

660 *Dunwell Property Services CC v. Sibande and Others* [2012] 2 BLLR 131 (LAC), cited in McGregor M et al “Exclusive protection for employees in terms of legislation,” in McGregor M et al *Labour law rules! second edition* (Siber Ink Cape Town 2014) 32 fn 32.

661 See s 32 of *Immigration Act (Act 13 of 2002)*.

662 The term “deportation” is defined as ‘the action or procedure aimed at causing an illegal foreigner to leave South Africa in terms of the Act. See s 1(1) xii of *Immigration Act, 2002 (No. 13 of 2002)* as amended by *Immigration Amendment Act (Act No. 19 of 2004)*.

3.4.4.2 Legal and judicial consideration of irregular migrants' employment contracts in the DRC

In the DRC, the current legislation provides that no foreign national may hold a job under an employment contract if s/he has not obtained a valid work permit in advance.⁶⁶³ Employers are, therefore, prohibited from hiring or keeping foreign workers under an employment contract when they have not applied for and obtained beforehand a work permit for and on behalf of the said workers.⁶⁶⁴ In addition, employers are required to seek revalidation of a work permit for and on behalf of their workers upon expiration of the period of validity of such permit.⁶⁶⁵

In case of refusal of such revalidation or in the case of withdrawal of the work permit, the employer shall immediately terminate the employment contract.⁶⁶⁶ A work permit may be withdrawn on the following grounds: failure to enforce provisions of the *Labour Code*;⁶⁶⁷ performance of different job;⁶⁶⁸ engaging in activities harmful to state security;⁶⁶⁹ exceeding overall limitation.⁶⁷⁰ Furthermore, notwithstanding the provisions of the DRC's *Penal Law*, any breach of the provisions of *Ordinance No. 74-098 of 6 June 1974* shall be punished in accordance with the provisions of the *Labour Code* and *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*.⁶⁷¹

Unlike South Africa's case law as per the *Discovery Health* case, the DRC's Supreme Court⁶⁷² held that 'any employment contract entered into by and between

663 Art. 5 of *Ordinance No. 74-098 of 6 June 1974*.

664 Art. 6 of *Ordinance No. 74-098 of 6 June 1974*.

665 Art. 21(1) of *Ordinance No. 74-098 of 6 June 1974*.

666 Art. 28(1) of *Ordinance No. 74-098 of 6 June 1974*.

667 Art. 11 of *Departmental order No. 87/005 of 21 Jan. 1987*.

668 Art. 11 of *Departmental order No. 87/005 of 21 Jan. 1987*.

669 Art. 23 of *Ordinance No. 74-098 of 6 June 1974*.

670 Exceeding overall limitation also results in refusal to issue or revalidate work permit, unless waived by the Employment Committee responsible for processing foreign workers' applications for employment. See Art. 24 of *Ordinance No. 74-098 of 6 Jun 1974*.

671 Art. 323 (e) of the *Labour Code* sets out a maximum prison sentence of one (1) month and/or a fine that shall not exceed 25,000 Congolese Francs (CF) for anyone who violates regulations governing the protection of the national labour force. In case of recidivism, the fine shall be doubled, which means 50,000 CF. (See Art. 6 of *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*).

672 It is worth emphasising that under Point 3 of the Preamble and Article 149, the *Constitution of 18 February 2006 as revised to date* has brought about the break-up of the Supreme Court

a Congolese employer and a foreign [employee] who does not have a valid work permit shall be [legally] null and void'.⁶⁷³ The Supreme Court, further, concluded that such an employment contract is tantamount to an act of convenience that cannot produce any legal effects under DRC labour law.⁶⁷⁴ In fact, any employer executing such an employment contract would breach public policy. And, if a party breaches or even terminates such a contract, even unlawfully, then the other party would not be allowed by competent courts to file a complaint on both past effects produced by the aforementioned contract and on future effects resulting from termination thereof.⁶⁷⁵

The reason brought forward by the Supreme Court in this regard is that such a contract is entered into in breach of the requirement of public order imposed on both the foreign employee and the employer. In fact, the foreign employee is required to obtain a valid work permit before commencing any employment, while the employer is required to provide his / her foreign workers with a valid work permit.⁶⁷⁶ This legal requirement is in line with the DRC's *2006 Constitution* as revised to date, which requires all DRC citizens, without distinction or discrimination, to comply with and abide by the *Constitution* and the laws of the Republic.⁶⁷⁷ All foreign nationals living within the DRC national territory are also covered by this constitutional provision, which is directed at all persons, without distinction of nationality or origin.⁶⁷⁸

Moreover, according to the Supreme Court's case law, any court hearing an individual labour dispute between a foreign worker and his/ her employer is required by law to first consider the validity of the worker's work permit.⁶⁷⁹ The

into three separate courts: the Constitutional Court (Cour Constitutionnelle), the Court of Cassation (Cour de Cassation), and the Council of State (Conseil d'Etat).

673 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished, cited in Musubao *La jurisprudence congolaise* 89.

674 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished.

675 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished.

676 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished, cited in Musubao *La jurisprudence congolaise* 89.

677 See Art. 62 (2) of the Constitution of 18 February 2006 as revised to date.

678 Mpala M *Juridictions de droit commun siégeant en matière du travail: composition, compétence et saisine irrégulières (Ordinary courts sitting as labour courts: unlawful composition, jurisdiction and referral)* (Ed Nata Kinshasa 2008) 50.

679 C.S.J., R.C. 2023, December 4, 1998, *Case of Carlos Nunes v. Hôtel Excelsior*, R.C.D.T.S.S (no. 09/1999) 6-8.

reason brought forward by the Supreme Court is that such labour and employment related matter is regarded as a matter of public policy and any breach of the laws governing it would result in the absolute nullity of the contract binding the parties.⁶⁸⁰

However, doctrinal writings bring forward a different opinion as regards the fate of the employment contract entered into in the absence of a foreigner's work permit. It is, indeed, argued that Article 6 of *Ordinance No. 74-098 of 6 June 1994* does not specify the penalty applicable in the case of an employment contract entered into in breach of the provisions of this *Ordinance*. Doctrinal writings consider that such a contract shall not be considered null and void, because there is no nullity without a legal text.⁶⁸¹

Indeed, like all legislation inspired by Roman law, the DRC follows the principle "no nullity without a text,"⁶⁸² which means that a procedural act cannot be declared void for formal irregularity if annulment is not expressly provided for by legislation.⁶⁸³ The doctrinal writings maintain, in fact, that this approach is the one to be equally admitted with regard to the provision of Article 47 of the *Labour Code*.⁶⁸⁴ Such contract shall, therefore, be valid, and not null and void, but it must be terminated for the future as soon as the National Labour Board refuses to grant its approval.⁶⁸⁵

It is, further, argued that the validity of 'a contract of employment entered into with a foreign national who does not possess a valid work permit'⁶⁸⁶ is questionable.

680 *The Case of Carlos Nunes v. Hôtel Excelsior*, 6-8, cited in Kabu Cour suprême de Justice 759.

681 Nghenda Zairianisation 237.

682 Worded in French as "pas de nullité sans texte," this principle commonly translated "no nullity without a text," means, literally, that "no nullities can occur without a legal basis in the Code." See Van Orshoven P "The Belgian judicial code (1967)," in van Rhee C (ed) *European traditions in civil procedure* (Intersentia Antwerpen 2005) 98.

683 Kohl A "Romanist legal systems," in Cappelletti M et al (eds) *International encyclopedia of comparative law - vol XVI (Civil Procedure) Ch. 6: ordinary proceedings in first instance: under the auspices of the International Association of Legal Science* (JCB Mohr Paul Siebeck Tübingen Martinus Nijhoff Publ. The Hague 1986) 67.

684 Art. 47 of the Labour Code provides that "[T]he employer is required to submit all written contracts to the National Labour Board for approval [...] An employment contract shall be terminated, ipso jure, if the National Labour Board refuses to approve'.

685 Nghenda Zairianisation 237 fn 1.

686 See the *Discovery Health* case para. 13 & 30.

However, such a contract is legally ineffective. In fact, if one of the parties were to breach or terminate such a contract, the other party would be unable to approach the competent court to seek a remedy.⁶⁸⁷ Such would, indeed, be the case on the grounds that such other party would take advantage of his/ her own baseness in that s/he has been a party to the signing of a contract in breach of the law. Thus, without being null and void, the said contract shall have legal effects, which the parties thereto do not know how to enforce. The said contract shall, therefore, be ineffective.⁶⁸⁸

3.5 Conclusion

This chapter provided an in-depth discussion on the state's sovereign authority and responsibility for regulating and administering labour migration. A focus was put on state institutions tasked with regulating and controlling labour immigration and emigration policies in the DRC and South Africa. In both countries, the power to regulate migration to and out of the country for employment purposes is vested in national government, specifically the DHA in South Africa and the ministry of the interior, notably the DGM.

Since the government has the right to control immigration, it is therefore assumed that states are morally entitled to detect, detain, and deport irregular migrants if they apprehend them. At the same time, pursuant to the constitutions of the two countries, irregular migrants are entitled to most of the civil, economic, and social rights on the same footing as other workers. This discussion focuses on the protection of irregular immigrants' labour rights, as well as the legal and judicial consideration of their employment contracts. The next chapter looks at the statutory foundation of the two countries' labour migration policies. This involves discussing the historical background of their national laws, regulations and policies governing the admission and stay of foreign workers in their territories.

687 Nghenda Zaïrianisation 238.

688 Nghenda Zaïrianisation 238.

CHAPTER FOUR

HISTORICAL AND STATUTORY FOUNDATION OF DRC AND SOUTH AFRICA'S LABOUR MIGRATION POLICIES

4.1 Introduction

This chapter seeks to briefly explore the historical background of the DRC's and South Africa's labour migration laws and policies, with a focus on the different key steps of the implementation process. For this purpose, the chapter is divided into four sections, which comprise subsections, in addition to this introduction.

The first section provides a brief historical introduction to labour migration policy with a timeline outlining the key events in the DRC and South Africa. The second section provides an overview of the basic legal framework pertaining to labour migration in contemporary DRC and South Africa. The third section provides an overview of the main findings and conclusions drawn from the discussions presented earlier in this chapter.

4.2 The statutory foundation of South Africa's and DRC's labour migration policies

The DRC and South Africa 'have a long history of receiving [migrant workers] from other African countries, dating back as far as [the precolonial era]'.⁶⁸⁹ It is important to identify how these movements of people from labour sending countries to work temporarily in labour receiving countries were organised and regulated. This identification exercise can only be carried out in the light of historical developments of policies that have influenced the design of their current

689 Attias-Donfut C, Cook J, & Hoffman J "Understanding African migration: intergenerational relations, citizenship and belonging in a comparative context," in Attias-Donfut C et al (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 166.

policies.⁶⁹⁰ This section, therefore, discusses the history of South Africa and the DRC's labour migration policy focusing on both the differences and similarities in the starting points of their rules governing migrant workers' status.

4.2.1 The statutory foundation of South Africa's labour migration policies

Labour migration, which involves the movement of foreign workers from neighbouring countries to South Africa for work purposes, has a long history of state policies aimed at steering the migrant flows.⁶⁹¹ These government policies refer to laws and regulations governing the domestic labour market. Like many other countries, South Africa's migration history is characterised by a twofold policy: first, the policy aimed at providing the labour market with foreign workers on a strictly temporary basis; and second, the policy aimed at bringing in foreign workers as a response to shortages in the labour market.⁶⁹² For further clarification, this subsection provides some historical developments of South Africa's labour migration policy in pre-colonial, colonial, and post-colonial periods.

4.2.1.1 Pre-colonial labour migration policy

South Africa had a long history of labour migration well before the country had endured more than 300 years of colonialism (1652-1961) and nearly 50 years of apartheid (1948-95).⁶⁹³ Prior to European penetration, migration took place amongst the earliest indigenous peoples who occupied the southern African region, namely the Khoi-San (Hottentots and Bushmen) people and Negroid peoples ("Bantu-speakers").⁶⁹⁴ In this region, the phenomenon of migration has

690 Guild E & Mantu S "The appearance of control: examining labour migration regimes with high control claims," in Mantu S & Guild E (eds) *Constructing and imagining labour migration: perspectives of control from five continents* (Routledge London 2016) 135.

691 Henama U & Sifolo P "International migration through the tourism industry: implications, challenges, and contradictions in South Africa," in Ushakov D (ed) *Urbanisation and migration as factors affecting global economic development* (IGI Global Hershey, Penn 2019) 116.

692 Brody B "Theories of labour migration and immigrant integration," Brody B *Opening the doors: immigration, ethnicity, and globalisation in Japan* (Routledge London 2012) 15; Goldberg A & Mourinho D "The occurrence of discrimination in Germany," in de Beijl R (ed) *Documenting discrimination against migrant workers in the labour market: a comparative study of four European countries* (ILO Geneva 2000) 53.

693 Gray M "Theories of social work practice," in Nicholas L, Rautenbach J, & Maistry M (eds) *Introduction to social work* (Juta Cape Town 2010) 94.

694 Maisel P & Greenbaum L "History of South African law," in Maisel P & Greenbaum L *Foundations of South African law: critical issues for law students* (Butterworths Durban

been regarded as ‘an intrinsic component of the developmental process, [which is] marked by a history of labour migration since the nineteenth century.’⁶⁹⁵

Like in most precolonial African societies, the movements of people in traditional southern African societies were governed and regulated by indigenous customary norms, rules and practices, which form African customary law.⁶⁹⁶ Although very little is known about indigenous law in precolonial African societies, most historians agree that the interaction of members of those societies were regulated by a set of rules, norms, practices and values of immemorial antiquity that have been preserved for centuries.⁶⁹⁷ The ‘non-codified tradition, practices, beliefs and verbal communications’ that governed traditional African societies before colonisation had been handed from one generation to the next.⁶⁹⁸

The precolonial African societies were organised into well-structured and homogenous ethnic nationalities, villages and communities in which all members were required to obey customary practices and cultural norms, which determined the way they lived.⁶⁹⁹ The power to make rules and enforce them was usually vested in monarchs with the council of elders and traditional rulers who were the custodians of the customary laws.⁷⁰⁰

As regards migration, in general and labour migration in particular, precolonial African societies were guided by three key normative principles: the principle of

2002) 6; Ballard S “How to go,” in Ballard S *South Africa handbook* (Footprint Handbooks London 1999) 52.

695 Khalema N, Magidimisha H, & Chipungu L “Regeneration and integration in Southern Africa: concluding comments on contemporary challenges and possibilities,” in Magidimisha H et al *Crisis, identity and migration in post-colonial Southern Africa* (Springer Cham 2018) 225.

696 Chanda K “Continuing legal pluralism with gradual juridical integration: the way forward for post-colonial Africa,” in Hinz M & Patemann H (eds) *The shade of new leaves: governance in traditional authority: a Southern African perspective* (Lit Verlag Berlin 2006) 49.

697 Maisel & Greenbaum *History of South African law* 6; Chanda *Legal pluralism* 49.

698 Abioye F “The rule of law in English speaking African countries: the case of Nigeria and South Africa” (LLD thesis University of Pretoria 2011) 23; Olivier M “The emergence of a right to democracy—an African perspective,” in Panara C & Wilson G (eds) *The Arab spring: new patterns for democracy and international law* (Martinus Nijhoff Leiden 2013) 34.

699 Takawira M “Incorporating customary law and Indigenous knowledge in forest management: the case of Kabompo forest in the north-western province of Zambia,” in Machena C & Banda G (eds) *Community, farmers’ and breeders’ rights in southern Africa: towards a framework for a sui generis policy and legislation* (IUCN-ROSA Harare 2002) 4.

700 Madubuike S “Law, traditional,” in Stanton A (ed) *Cultural sociology of the Middle East, Asia, and Africa: an encyclopedia* (SAGE London 2012) 165; Akpotor A “Introductory,” in Akpotor A *Politics and law: African perspectives* (Cigodson Benin City, Nigeria 2001) 1.

multiplicity; the principle of circulation and mobility; and the principle of composition in Africa, which encompasses the African conceptions of humanity, such as Ubuntu.⁷⁰¹ Concerning the principle of multiplicity, most aspects of social life, including marriage (polygamy),⁷⁰² family (extended families),⁷⁰³ large households,⁷⁰⁴ religion (polytheistic system),⁷⁰⁵ currencies (in particular metallic currencies, such as gold, silver coins, cowrie shells, copper, brass, and iron rods),⁷⁰⁶ always came under the sign of the multiple.⁷⁰⁷ In precolonial African societies, particularly in the Southern African region, the principle of multiplicity made communities ‘to be historically well equipped to embrace and absorb migrants’, or to be welcoming towards migrants.⁷⁰⁸

701 Ndlovu-Gatsheni S “Decolonising borders, decriminalising migration and rethinking citizenship,” in Magidimisha H et al *Crisis, identity and migration in post-colonial Southern Africa* (Springer Cham 2018) 33.

702 See Khunou S “The origin and nature of traditional leadership in South Africa: a precolonial perspective,” in Collier G (ed) *African cultures and literatures: a miscellany* (Rodopi Amsterdam 2013) 309; Falola T & Aderinto S “Social history,” in Falola T & Aderinto S *Nigeria, nationalism, and writing history* (URP Rochester NY 2010) 80.

703 Johnson L & Staples R “The challenges of parenting,” in Johnson L & Staples R *Black families at the crossroads: challenges and prospects* (Jossey-Bass San Francisco 2005) 246.

704 See Falola & Aderinto Social history 80.

705 Okafor N African theology (WZA Nkpor 2003) 11 ; Greer J & Moberg D (eds) *Research in the social scientific study of religion: vol. 11* (JAI Press Stamford CT 2000) 53 ; Omeje K & Kwaja C “Exploring the conflicts between traditionalism and modernity in postcolonial Africa,” in Omeje K (ed) *The crises of postcoloniality in Africa* (CODESRIA Dakar 2017) 91; Khunou Traditional leadership 309 ; Chiorazzi A “The spirituality of Africa” 2015 The Harvard Gazette. <https://news.harvard.edu/gazette/story/2015/10/the-spirituality-of-africa/> (Date of use: 25 April 2022).

706 See Adebayo A “Kòse-é-máni: Idealism and Contradiction in the Yorùbá View of Money,” in Stiansen E & Guyer J (eds) *Credit, currencies and culture African financial institutions in historical perspective* (NAI Stockholm 1999) 153; Falola T *African cultures and societies before 1885* (Carolina Academic Press Durham NC 2000) 185; Ifill M *The African diaspora: a drama of human exploitation* (Economic & Business Research Port-of-Spain 1986) 85 ; Moky J *The Oxford Encyclopedia of economic history - volume 5* (OUP Oxford 2003) 30 ; Sundström L *The exchange economy of pre-colonial tropical Africa* (Hurst London 1974) 84; Wehrs D “The ordeal of cognitive imperialism in Tutuola’s early fiction,” in Wehrs D *Pre-colonial Africa in colonial African narratives: from Ethiopia unbound to things fall apart, 1911–1958* (Ashgate Hampshire 2008) 104 ; Ngwane G & Nyamndi G “Strategies for African Union,” in Ngwane G & Nyamndi G *Way forward for Africa* (DPHL Ngwane 2004) 74.

707 Blaser T “Africa and the future: an interview with Achille Mbembe, including on the consequences of global capitalism on the continent” 2013 Swissfuture March. <https://africasacountry.com/2013/11/africa-and-the-future-an-interview-with-achille-mbembe> (Date of use: 15 May 2022).

708 Ndlovu-Gatsheni Decolonising borders 33; Landau P *Popular politics in the history of South Africa, 1400–1948* (CUP Cambridge 2010) xi; Ndlovu-Gatsheni S “Subjection and subjectivity in South Africa,” in Ndlovu-Gatsheni S *Empire, global coloniality and African subjectivity* (Berghahn Books New York 2013) 145; Ashcroft B, Griffiths G, & Tiffin H *Post-colonial studies: the key concepts – third edition* (Routledge London 2013) 211; Ashcroft B, Griffiths G, & Tiffin H *Key concepts in post-colonial studies* (Routledge London 2001) 194; Englebert P “Pre-colonial institutions, post-colonial states, and economic development in tropical Africa” 2000 *PRQ* vol. 53 (1) 13.

The second principle, which is that of circulation and mobility implies that almost everything in precolonial Africa was always on the move and open, including the various communities. It is worth specifying that ‘the circulation [and mobility] of the so-called Bantu peoples from Western-Central Africa towards the South, [which resulted] in creations of new socio-political formations’.⁷⁰⁹

The last principle, which is that of composition ‘highlights the African [concept] of self-creation, designing institutions and formulation of ideas in the context of [togetherness or] working with others’.⁷¹⁰ Furthermore, this principle ‘highlights community-making beginning with the very idea of [humanity] (ubuntu), which focuses on “the other is not outside of myself”’.⁷¹¹ This African conception of humanity ‘offer[s] possibilities out of the cul-de-sac of rigid nation-states and notions of bounded citizenship, which result in criminalisation of migration creating the challenge of mobility in postcolonial Africa’.⁷¹² If taken seriously, these three principles offer ‘an opportunity to [reconsider] the purpose of borders, nation, state, citizenship and belonging’.⁷¹³ The reason for this is that they conflict with ‘the principles of multiplicity, mobility and composition as [part] of Africanity’.⁷¹⁴

In addition, these principles are in line with the three important social values that characterised the precolonial traditional African societies, namely humanity, solidarity, and interdependence. These values had a decisive influence on the conception of law, justice, and human rights.⁷¹⁵ It is worth mentioning that traditional African laws, including labour migration laws are oral laws, transmitted by word of mouth from generation to generation,⁷¹⁶ just like in the colonial era.

709 Ndlovu-Gatsheni Decolonising borders 34; Blaser 2013 Swissfuture.

710 Ndlovu-Gatsheni Decolonising borders 33.

711 Gržinić M “Europe’s colonialism, decoloniality, and racism,” in Broeck S & Junker C (eds) *Postcoloniality - decoloniality - black critique: joints and fissures* (Campus Verlag Frankfurt 2014) 141.

712 Ndlovu-Gatsheni Decolonising borders 34.

713 Ndlovu-Gatsheni Decolonising borders 34.

714 Ndlovu-Gatsheni Decolonising borders 34.

715 Mubiala M “International humanitarian law in the African context,” in Juma M & Suhrke A (eds) *Eroding local capacity: international humanitarian action in Africa* (NAI Uppsala 2002) 35.

716 Mubiala International humanitarian law 35.

4.2.1.2 Labour migration policy in colonial times

During the colonial period, which lasted from 1652 to 1961, the Dutch-Afrikaners and the British imposed restrictive immigration policies governing the movement of non-white people, particularly for work-related purposes, in the different colonies.⁷¹⁷ In the Cape Colony, before ‘the formation of the Union of South Africa in 1910’,⁷¹⁸ the British colonial administration established different legal regimes governing the movement of Africans in the different colonies. While it may be difficult to unify these laws, the system they put in place was intended to control the movement of black labour in “white” areas.⁷¹⁹ This system allowed the African labour force to enter urban areas only on a temporary basis in accordance with the policy of preventing the settlement of African people in those areas.⁷²⁰ This restrictive policy was enshrined in a number of laws and regulations enacted by the British colonial authority.

For instance, *Ordinance No. 49 of 14 July 1828* was passed for the admission into the Colony of the Cape of Good Hope, under certain restrictions, of the persons belonging to the tribes beyond the frontiers thereof and for regulating their employment.⁷²¹ This ordinance provided for the employment of ‘native

717 Daniels R “The growth of restrictive immigration policy in the colonies of settlement,” in Cohen R (ed) *The Cambridge survey of world migration* (CUP Cambridge 1995) 39; Chanock M “South Africa, 1841–1924: race, contract, and coercion,” in Hay D & Craven P (eds) *Masters, servants, and magistrates in Britain and the Empire, 1562-1955* (UNC Press Chapel Hill 2004) 340.

718 The Union of South Africa was created from the British colonies of the Cape of Good Hope, Natal, Orange River Colony, and Transvaal, hereinafter called the Colonies, pursuant to the South Africa Act 1909, referred to as the “Union Constitution” and enacted by the British Parliament. See British Parliament South Africa *Act of 1909* (Amazon Digital Services LLC - KDP Print US Seattle WA 2019); South Africa, *South Africa Act, 1909: an Act to Constitute the Union of South Africa* (Government Print and Stationery Office Pretoria 1910); De Waal J “Constitutional law,” in Van der Merwe C, & Du Plessis J (eds) *Introduction to the law of South Africa* (Kluwer The Hague 2004) 57.

719 Rautenbach C “The contribution of the courts in the integration of Muslim law into the mixed fabric of South African law,” in Palmer V, Mattar M & Koppel A (eds) *Mixed legal systems, East and West* (Ashgate Surrey 2015) 225; Chanock South Africa 340.

720 Ström G “Labour and migrant labour in destabilised and future Southern Africa,” in Odén B & Othman H (eds) *Regional cooperation in Southern Africa: a post-apartheid perspective* (SIAS Uppsala 1989) 65; Wentzel M & Tlabela K “Historical background to South African migration,” in Kok P et al (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 78.

721 See Great Britain Parliament, *House of Commons Parliamentary Papers - volume 36* (W Clowes & Sons London 1849) 26-28.

foreigners⁷²² on a contractual basis, which attracted more Xhosa people than other ethnic groups due to the terms of the contracts involving basically one cow or its equivalent for a year's labour.⁷²³ This ordinance remained in force for 19 years until it was amended by 'ordinance enacted by the governor of the colony, with the advice and consent of the Legislative Council thereof' dated 27 July 1847.⁷²⁴

Furthermore, the great influx of Fingoes⁷²⁵ or "foreigners" in the Eastern districts prompted the adoption by the Cape legislature on 29 June 1857 of two major Pass Laws of the Colony,⁷²⁶ which came on top of the *1856 Masters and Servants Act* in chaining workers to their masters.⁷²⁷ First, the so-called *Kaffir Pass Act No. 23 of 1857*⁷²⁸ enshrined the prohibition on "Kaffirs"⁷²⁹ or Xhosa and "other native

722 Under s VI, *Native Pass and Contract Law Amendment Act No. 22 of 16 August 1867* defines the term "Native Foreigner" as 'any member of any tribe, other than a Fingo, of which the principal chief shall live beyond the borders of the Colony'. See Cape of Good Hope (South Africa) *Select Committee on the Pass Laws of the Colony, Report of the Select Committee on the Pass Laws of the Colony: ordered by the House of Assembly* (W.A. Richards & Sons Cape Town 1883) 324.

723 Peires J "Exchanges and innovations," in Peires J *The house of Phalo: a history of the Xhosa people in the days of their independence* (UC Press Berkeley 1982) 105.

724 Great Britain Parliament Parliamentary Papers 26-28; Elphick R & Malherbe V "The Khoisan to 1828," in Elphick R & Giliomee H (eds) *The shaping of South African society, 1652-1840* (WU Press Middletown 2014) 47.

725 "Fingoes" refer to an Indigenous group in colonial times who is now known as the Mfengu (or amaFengu) and were closely related to the Zulus although they were assimilated into the Xhosa kingdom. The Fengu people (in the Xhosa language Mfengu and plural "amaMfengu") refers to a variety of ethnic groups that fled from the Mfecane to enter into the land of amaXhosa. The Fengu people are often considered to have assimilated by the Xhosa people whose language they now speak. See Peires J "From Ngqika's peace to Maqoma's war (1820-1835)," in Peires J *The house of Phalo: a history of the Xhosa people in the days of their independence* (UCP Berkeley 1982) 87; Botma G "Race talk in the white colonial press during British rule," in Botma G *Race talk in the South African media* (African Sun Media Stellenbosch 2020) 29; Mtumane Z "The practice of Ubuntu with regard to amaMfengu among amaXhosa as depicted in S.E.K. Mqhayi's *Ityala Lamawele*" 2017 *IJARS* vol 12(2) at 71.

726 The two laws are the *Kaffir Pass Act No. 23* and the *Kaffir Employment Act No. 27*. Both Acts 'helped establish South Africa's modern migrant labour system'. See Crais C "Empire and the ancestors," in Crais C *White supremacy and Black resistance in pre-industrial South Africa: the making of the colonial order in the Eastern Cape, 1770-1865* (CUP Cambridge 1992) 212-213; Spillman D "Realism and realia in colonial Southern Africa," in Spillman D *British colonial realism in Africa: inalienable objects, contested domains* (Palgrave London 2012) 143.

727 Stapleton T "The Expansion of a pseudo-ethnicity in the Eastern Cape: reconsidering the Fingo "Exodus" of 1865" 1996 *IJAHS* vol. 29 (2) 241.

728 See Government Gazette, 30 June 1857.

729 The term "Kaffir" (also kafir, caffir, caffre, kaffer), which comes from the Arabic word for unbeliever, was initially used from 1792 to the end of the 19th century in a non-derogatory manner to describe 'a member of a group of South African peoples belonging to the Nguni subdivision of the Bantu family, including the Xhosa (and sometimes the Zulu) peoples'.

foreigners”⁷³⁰ entering the colony, except to work.⁷³¹ Being essentially motivated by the large number of Xhosa seeking employment on their own initiative once inside the colony, this Pass Act effectively prevented them from doing so and forced them to submit to the slave-like contract imposed in British Kaffraria.⁷³² This Act forbade them from entering the colony without passes and imposed up to twelve months imprisonment with hard labour as the penalty for contravening this regulation.⁷³³

Secondly, the *Kaffir Employment Act (No. 24)* of 1857⁷³⁴ prevented “Colonial Fingoes” from being mistaken for other Africans without passes and provided them with certificates of citizenship.⁷³⁵ These certificates served to officialise the status of Fingoes ‘settled and domiciled in this colony’ as permanent residents, and to guarantee them the right to own land. Under this Act, Xhosa-speaking Africans

Later in history, the term was used to refer to ‘any of the people commonly called native foreigner, and resident in, or entering the Colony from or through British Kaffraria or Kafirland’. The term has been commonly used in reference to Black people and has carried so much derogatory connotations that today it is viciously insulting and offensive to use it. See *Act No. 23 of 1857*, cited in Stapleton 1996 *IJAHS* vol. 29 (2) at 241; Butterfield J (ed) *Fowler’s dictionary of modern English usage* (OUP Oxford 2015) 453; Ong J “Primitivist modernism, anti-imperialism and the story of an African farm,” in Ong J *Olive Schreiner and African modernism: allegory, empire and postcolonial writing* (Routledge London 2018); Steyn C “Millenarian tragedies in South Africa: the Xhosa cattle-killing movement and the Bulhoek massacre,” in Wessinger C (ed) *Millennialism, persecution, and violence: historical cases* (SUP Syracuse NY 2000) 187 fn 2; Davis G & Senior M (eds) *South Africa, the privileged and the dispossessed: students’ book, Volume 1* (F Schöningh Paderborn 1983) 66.

730 The words “other native foreigner” refer to ‘any Basuto, Barolong, Mantatee, or other native, resident in any territory adjacent to Kafirland, and commonly regarded and spoken of as belonging to the Kafir family’. See *Act No. 23 of 1857*, cited in Stapleton 1996 *IJAHS* vol. 29 (2) at 241.

731 Spillman Realism 142-143; Peires J “Sir George Grey versus the Kaffir Relief Committee” 1984 *JSAS* vol.10 (2) at 152; Crais Empire 212.

732 Peires J “Kaffir Relief,” Peires J *The dead will arise: Nongqawuse and the Great Xhosa Cattle-Killing Movement of 1856-7* (Jonathan Ball Johannesburg & Cape Town 2003) 271.

733 Stapleton 1996 *IJAHS* vol. 29 (2) at 241; Spillman Realism 142-143; South Africa Archives Department *Argief-Jaarboek vir Suid-Afrikaanse Geskiedenis: Archives year book for South African History* (Perskor, Doornfontein Johannesburg 1954) 255; Cape of Good Hope (South Africa) *Statutes of the Cape of Good Hope: passed by the Third Parliament, during the sessions 1864-1868* (Saul Solomon & Co. Cape Town 1868) Appendix vii ; Dubow S “Graaff Reinet and the colonial state,” in Dubow S *Land, labour and merchant capital in the pre-industrial rural economy of the Cape: the experience of the Graaff-Reinet District (1852-72)* (UCT Cape Town 1982) 35 ; Wenzel J “The promise of failure: memory, prophecy, and temporal disjunctures of the South African twentieth century,” in Wenzel J *Bulletproof: afterlives of anticolonial prophecy in South Africa and beyond* (UCP Chicago 2010) 134-135 fn 49.

734 *Act No. 24 of 1857* was repealed by *Act No. 17 of 1864 of 26 July 1864*. See Cape of Good Hope Statutes 80.

735 Stapleton 1996 *IJAHS* vol. 29 (2) at 241; Peires 1984 *JSAS* vol. 10 (2) at 152.

who were prepared to live under colonial rule could arrive at any Fingo location, claim to be a Fingo and receive a certificate of citizenship from a European official.⁷³⁶

The other important law is the *Kaffir Employment Act (No. 27)* of 1857, which was passed by the Cape Legislative Assembly to regulate the terms of employment for “Natives of Kaffirland⁷³⁷ and other Native Foreigners” in the Colony. More specifically, this act authorised the distribution of Africans among farmers as labourers under contract and provided for the registration of contracts between employer and Xhosa.⁷³⁸ The local resident magistrate or a functionary had to attest these contracts, the validity of which was limited to a minimum of one and a maximum of five years. This Act further provided for ‘certificates of citizenship’ to be issued to ‘native foreigners’ who had been in constant employment for 5 years and who had not been imprisoned for more than three months.⁷³⁹ In addition, this Act provided for the registration of contracts between employer and Xhosa and allowed the black Africans fourteen days in ‘the colony to find new [job] after the expiration of a contract [of employment]’.⁷⁴⁰

Both the *Kaffir Pass Act (No. 27) of 1857* and the *Kaffir Employment Act (No. 23) of 1857* were presumably amended or replaced by the *Vagrancy Act (No. 23) of 1879*.⁷⁴¹ According to historians, the *Vagrancy Act* were used to effectively control the influx of those Africans who had migrated to the urban areas either innocently,

736 Stapleton 1996 *IJAHS* vol. 29 (2) at 241.

737 The terms “Kaffirland” or “Kaffraria”, which initially referred to “the tract of country lying between the Quathlamba Mountains and the Indian Ocean, and between the Cape Colony and Natal” are today used in a negative sense to describe rural tribal areas. See Davis & Senior *South Africa* 66; Theal G “South African history and geography,” in Theal G *Compendium of South African history and geography – third edition* (Lovedale South Africa / Edward Stanford London 1878) 199.

738 Peires 1984 *JSAS* vol. 10 (2) at 152; Setai B *The making of poverty in South Africa* (SAPES Books Harare 1998) 6; Mermelstein D *The Anti-apartheid reader: the struggle against white racist rule in South Africa* (Grove Press New York 1987) 52; South Africa Archives Department *Archives Year book* 255.

739 Dubow Graaff *Reinet* 35.

740 Spillman *Realism* 142-43; Crais *Empire* 212; Peires 1984 *JSAS* vol. 10 (2) at 152.

741 See NMCM *Kaffir Pass Act No. 23* (NMCM Houghton) <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01673.htm> (Date of use: 13 May 2022); NMCM *Kaffir Employment Act No. 27* (NMCM Houghton) <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01674.htm> (Date of use: 13 May 2022).

not knowing that a pass was required, or hoping to obtain employment.⁷⁴² Furthermore, the *Vagrancy Act* had a major impact on freedom of movement and strengthened the “practice” of Africans carrying passes from their employer, or the owner of the land on which they lived.⁷⁴³

All these colonial racially discriminatory policies were prompted by the European settlers’ fears of competition from black Africans and the growth of black class consciousness.⁷⁴⁴ Like elsewhere in Africa, the white ‘settlers established and maintained [these] policies [in South Africa] in order to consolidate and maintain their position of superiority [and] racial hierarchies were thus enforced through labour, [inter alia]’.⁷⁴⁵ South Africa is regarded as ‘an extreme and durable model of a colonial state where racist labour policies and migrancy laws interlocked in an economically powerful and extremely oppressive political system’.⁷⁴⁶

Although the Black Africans fought these policies for many years, ‘there has been a significant degree of continuity between pre-colonial, colonial and post-colonial migration patterns’ in the whole Southern African region.⁷⁴⁷ The next subsection discusses South Africa’s post-colonial labour migration policy in some detail.

4.2.1.3 Post-colonial labour migration policy

South Africa’s post-colonial labour migration policy is divided into two main periods: labour migration policy under apartheid (1); and post-apartheid labour migration policy (2).

742 See UCT SALDRU *Conference papers - Issue 157* (SALDRU UCT Cape Town 1984) 6; UCT SALDRU *Carnegie Conference Paper, Issues 154-165* (SALDRU/ UCT School of Economics Cape Town 1984) 6.

743 Chanock South Africa 340.

744 Beckman R “Southern Africa,” in Beckman R (ed) *Colonial and postcolonial Africa* (Britannica Educational Pub. New York 2017).

745 Chacha B, Chiuri W, & Nyangena K “Racial and ethnic mobilisation and classification in Kenya,” in Rocha, Z & Aspinall P (eds) *The Palgrave international handbook of mixed racial and ethnic classification* (Palgrave Cham 2020) 520.

746 Clayton A “Nationalism, postcolonialism, and the politics of representation: Laretta Ngcobo’s and they didn’t die,” in Clayton A *Postcolonial perspectives: English South African fiction under apartheid* (Vocamus Press Guelph, Ontario 2017) 120.

747 Kok, Gelderblom, & Van Zyl Introduction 14.

4.2.1.3.1 Labour migration policy under apartheid

Under apartheid, which lasted from 1948 to 1994, the demand for migrant labour increased continuously for the mining industry, which is regarded as the foundation of South Africa's wealth and its apartheid policies.⁷⁴⁸ The mining industry has, therefore, depended on mass recruitment of people, via labour recruitment firms, such as African Central Recruiting Organisation (ACRO), Amalgamated Recruiting Corporation (ARC), Natal Coal Owners Labour Organisation (NCOLA), Mine Labour Organisation (MLO) (Native Recruiting Corporation - NRC).⁷⁴⁹

In terms of migration policies, one goal of apartheid was to control physical borders, notably African mobility between rural and urban areas, as well as across rural areas that were differentially designated for either white commercial farming or black communal ownership.⁷⁵⁰ The term "migrant labour" as used under apartheid referred not only to South African Black workers, but also to foreign Black workers, who worked in the "prescribed areas" on a contract basis.⁷⁵¹

The apartheid regime established strict rules and regulations, which restricted and controlled the right of foreign black persons to seek employment and to be employed in South Africa.⁷⁵² The apartheid statutes and regulations also prohibited foreign black workers from bringing their families into South Africa as they were permitted to work in the country for only 'limited periods of time, after which they [had] to return to their countries of origin'.⁷⁵³ This idea of temporary entry of an African labour force into South Africa was in accordance with the apartheid

748 Ström Labour and migrant labour 72.

749 Ström G *Migration and development - dependence on South Africa: a study of Lesotho* (SIAS Uppsala 1986) 101.

750 Klotz A "Apartheid and the dilemma of African citizenship," in Klotz A *Migration and national identity in South Africa, 1860-2010* (CUP Cambridge 2013) 136.

751 Barclays National Bank *Doing business in South Africa* (BNB Johannesburg 1980) 65.

752 Chaskalson A "The right of black persons to seek employment and be employed in the Republic of South Africa," 1984 *Acta Juridica* 33 (1984) at 1; Chaskalson A "The right of black persons to seek employment and be employed in the Republic of South Africa," in Bennett T *Urban black law: being a series of articles* (Juta Cape Town 1985) 33.

753 Prothero 1974 *IMR* vol. 8(3) at 383; Crush, Peberdy & Williams 2006 *Migration Policy Brief No. 17* at 7.

government's policy aimed at preventing African people's settlement in urban areas.⁷⁵⁴

This principle was enshrined in a number of laws, including the *Native (Urban Areas) Act (Act 21 of 1923)* and the *Native (Urban Areas) Consolidation Act (Act 25 of 1945)*,⁷⁵⁵ under which foreign black workers did not qualify for permanent residence in any prescribed area.⁷⁵⁶ Foreign black workers were required to hold a passport,⁷⁵⁷ and prohibited from becoming tenants of homes in prescribed urban areas.⁷⁵⁸

However, 'consistent with the racist orientation of [South Africa's] immigration policy, the [apartheid] government [was welcoming and more accommodating towards] whites from neighbouring countries [...] who felt threatened by Black majority rule'.⁷⁵⁹ In fact, 'skilled and semi-skilled white migrants from Zambia, Kenya and Zimbabwe were [granted] citizenship between 1960 and 1980 to boost the local "white" population'.⁷⁶⁰

The authoritarian apartheid regime's restrictive migration policy, which was also applicable to refugees and asylum seekers, lasted until 1986 with the 'amendment to the *Aliens Control Act of 1937*, which enabled the influx of qualified yet cheap personnel from other African countries into the homelands'.⁷⁶¹ As a result, the number of African migrants increased gradually culminating in the massive 'influx of permanent and temporary African and Asian migrants in the early 1990s,

754 Wentzel & Tlabela Historical background 76.

755 Langa P "Legal visions – South Africa in the 21st century," in Anghie A & Sturgess G (eds) *Legal visions of the 21st century: essays in honour of Judge Christopher Weeramantry* (Kluwer The Hague 2004) 105.

756 See s 10 of *Act Natives (Urban Areas) Consolidation Act, 1945 (Act No. 25 of 1945)*. See also Breytenbach W *Migratory labour arrangements in Southern Africa* (AISA Pretoria 1979) 7.

757 See *Department of Bantu Administration & Development General Circular No. 32 of 1966*.

758 Breytenbach *Migratory labour arrangements* 7.

759 Crush J "The dark side of democracy: migration, xenophobia and human rights in South Africa" 2000 *International Migration* 38(6) 103–120; Kalule-Sabiti I et al "Country monographs: post-apartheid South Africa," in Attias-Donfut C et al (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave New York 2012) 139.

760 Peberdy S "Ignoring the history of undocumented migration is akin to ignoring those who have helped build South Africa" 1997 *The Sunday Independent* 22 June; Kalule-Sabiti I et al *Country monographs* 139.

761 Kalule-Sabiti I et al *Country monographs* 139.

especially after [the enactment of] *1991 Aliens Control Act*, nicknamed “apartheid’s last act”.⁷⁶²

While it removed the explicit racial exclusions of the original *1937 Act*, the *1991 Aliens Control Act*’s key requirement remained in place. In fact, this Act required that ‘to hire a foreign worker, employers had to sufficiently convince the DHA that there was no suitable South African available [for the relevant] job’.⁷⁶³ This key requirement and others set out by the *1991 Aliens Control Act* and the *Aliens Control Amendment Act of 1995* are reflected in the post-apartheid immigration regime, as discussed in the next subsection.⁷⁶⁴

4.2.1.3.2 Post-apartheid labour migration policy

Labour migration policy in post-apartheid South Africa - from 1994 onwards - remained substantially the same in the first few years following the end of formal apartheid.⁷⁶⁵ This period has been marked by the continuation of the ‘immigration policy and legislation, which took the form of a “two-gate” policy’ (one for white immigrants, another for black migrant workers).⁷⁶⁶ It is argued that ‘the resilience of [this policy] in post-apartheid South Africa ultimately rests upon a fundamental continuity from the apartheid to the post-apartheid eras in the hostility of South African policy-makers towards migrants from other African countries’.⁷⁶⁷ Since 1994, the new South African government has been openly anti-immigration, claiming mainly the threat to South African citizens’ jobs.⁷⁶⁸

762 Kalule-Sabiti I et al Country monographs 139-140; Crush J “Apartheid’s last Act?” 1996 *Democracy in Action* vol. 10(2) 12-13.

763 Johnson D “Migrancy and Thabo Mbeki’s African Renaissance,” in Gupta S & Omoniyi T (eds) *The cultures of economic migration: international perspectives* (Routledge London 2016) 132; Johnson D *Imagining the Cape Colony: History, literature, and the South African Nation* (EUP Edinburgh 2013) 190; Boynton E “Protectionism and national migration policy in South Africa” (Master’s dissertation University of Cape Town 2015) 32.

764 Moyo Historical perspectives 78.

765 Johnson Migrancy and Thabo Mbeki’s African Renaissance 133.

766 Crush & McDonald 2001 *Africa Today* vol. 48 (3) at 3; De Gruchy T “Every Tom, Dick & Harry’: understanding the changing role of the South African immigration industry,” in Lacroix T & Desille A (eds) *International migrations and local governance: a global perspective* (Springer Cham 2018) 153.

767 Johnson Thabo Mbeki’s African Renaissance 133.

768 Appleyard R, IOM & UN (eds) *The human rights of migrants* (IOM Geneva 2001) 108.

Contrary to the apartheid era when the regime relied mainly on foreign African labour, the entire post-apartheid period since 1994 has seen a major decline in the demand for foreign migrant labour.⁷⁶⁹ The current government's decision to reduce the dependency on foreign labour has been reflected in the enforcement of the restrictive policies on foreign labour recruitment adopted under the internationalisation policy.⁷⁷⁰ These policies explicitly or implicitly aim to reduce the employment of migrant labour in the hope of giving preference to South African nationals, thereby increasing employment opportunities for them.⁷⁷¹

Practical experience shows that the declining demand for foreign labour in South Africa is justified by the combination of two crucial factors, notably the relatively slow employment growth and rapid labour force growth, which has resulted in significant increases in the unemployment rate.⁷⁷² Firstly, the relatively slow employment growth is (at least partly) explained by the substantial increase of real wages since 1994.⁷⁷³

Secondly, South Africa's labour force has grown remarkably rapidly thanks to three possible factors: 'in-migration, rapid natural increase in the number of working-age people, and increased labour force participation'.⁷⁷⁴ While South

769 Tati G "Working on South African mines in a changing regional labour market: a reference to cross-border migrants from Swaziland," in Gallo-Mosala S (ed) *Migrants' experiences within the South African labour market* (Scalabrini Centre Cape Town 2009) 91; Davies R & Head J "The future of mine migrancy in the context of broader trends in migration in Southern Africa" 1995 *JSAS* vol. 21(3) at 448.

770 Tati Working on South African mines 92.

771 Davies & Head 1995 *JSAS* vol. 21(3) at 448; Writer S "South Africa to introduce new quotas around hiring foreign workers" 2020 *Business Tech* 08 May. <https://businesstech.co.za/news/business/396317/south-africa-to-introduce-new-quotas-around-hiring-foreign-workers/> (Date of use: 11 May 2022).

772 Borat H & Oosthuizen M "Evolution of the labour market: 1995–2002," in Borat H & Kanbur S (eds) *Poverty and policy in post-apartheid South Africa* (HSRC Press Cape Town 2006) 145.

773 Du Plessis S & Smit B "Accounting for South Africa's growth revival after 1994," in Aron J, Kahn B & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 48; Arora V "Economic growth in post-apartheid South Africa: a growth accounting analysis," in Nowak N & Ricci L (eds) *Post-apartheid South Africa: the first ten years* (IMF Washington DC 2005) 15; Aron J, Kahn B & Kingdon G "South African economic policy under democracy: overview and prospects," in Aron J, Kahn B & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 16.

774 Kingdon G & Knight J "Unemployment: South Africa's Achilles' Heel," in Aron J, Kahn B, & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 303.

Africa is revealed to be abundant in skilled labour relative to Africa, the country is abundant in unskilled labour relative to many developed economies.⁷⁷⁵

It is important to stress the difference between a country's move to import foreign labour and its move to attract migrant workers. As regards the first move, as mentioned previously, the apartheid regime decided to import foreign labour from neighbouring countries for use in the gold mines. Concerning the second move, given its prosperous economy and strong growth prospects, South Africa attracts both skilled and unskilled foreign workers.⁷⁷⁶ This move helps to ease the country's chronic shortage of skilled labour caused by the massive brain drain that has occurred as a result of emigration of many academics and skilled personnel.⁷⁷⁷ Due to the poor quality of official data collected by the DHA, it is, nevertheless, hard to assess accurately the number of skilled emigrants that leave the country permanently each year.⁷⁷⁸

In addition, many skilled and unskilled foreign nationals are pouring in from African, Middle East and Southeast Asian countries to seek asylum in South Africa, as well as economic migrants from poor countries who claim to be refugees but do not qualify for asylum based on a "well-founded" fear of persecution.⁷⁷⁹ In order to cope with these twin challenges, namely the massive brain drain and large inflows of unskilled immigrants into the labour market,⁷⁸⁰ South Africa has developed a new migration policy that is discussed elsewhere in this thesis.

775 Edwards L "Trade liberalisation and labour demand in South Africa during the 1990s," in Borat H & Kanbur S (eds) *Poverty and policy in post-apartheid South Africa* (HSRC Press Cape Town 2006) 254.

776 Ratuva S "'Black empowerment" policies: Dilemmas of affirmative action in South Africa," in Ratuva S *Politics of preferential development: trans-global study of affirmative action and ethnic conflict in Fiji, Malaysia and South Africa* (ANU E Press Canberra 2013) 237.

777 Zuberi T & Sibanda A "Migration and employment," in Zuberi T, Sibanda A & Udjo E (eds) *The demography of South Africa* (Routledge New York 2005) 268; Shizha E "Globalising education for globalised labour markets: brain drain or gain for Africa?" in Shizha E & Diallo L (eds) *Africa in the age of globalisation: perceptions, misperceptions and realities* (Ashgate Surrey 2015) 246; Akokpari *Globalisation* 78.

778 Janisch W et al *The national skills development handbook 2007/8* (RainbowSA Johannesburg 2008) 71.

779 Wöcke A & Klein S "The implications of South Africa's skills migration policy for country competitiveness" 2002 *Development Southern Africa* vol 19(4) at 442; Felton J "Aiding refugees: should the U.N. help more displaced people?" in CQ Researcher (ed) *Issues in peace and conflict studies: selections from CQ Researcher* (SAGE London 2011) 293.

780 Wöcke & Klein 2002 *Development Southern Africa* vol 19(4) at 442.

4.2.2 The statutory foundation of DRC's labour migration policies

The DRC labour migration policy has a very long history that can be divided into three distinctive periods: precolonial, colonial, and postcolonial. For the purposes of this study, these policies are referred to as precolonial labour migration policy (1), labour migration policy in colonial times (2), and postcolonial labour migration policy (3).⁷⁸¹

4.2.2.1 Precolonial labour migration policy

The origins of labour migration in the DRC can be traced back well into the pre-colonial period, specifically the sixteenth century 'with the Trans-Atlantic slave trade' in the old African states.⁷⁸² It is believed that as early as the sixteenth century, millions of slaves had to make long journeys from their places of origin to the ports of their embarkation. From there, they were forcibly transported to Europe, the US, Latin America, and the Middle East colonies for labour on coffee, banana, cotton, tobacco, and sugar plantations.⁷⁸³ The Congo was never an important supplier of slaves due to the complete disintegration it was experiencing in the eighteenth century.⁷⁸⁴

However, because of the slave trade the Congo Basin became an integral part of a process of worldwide economy that expanded in the sixteenth century.⁷⁸⁵ The Trans-Atlantic slave trade consisted in forcibly removing millions of people from the region and consolidating slave raiding kingdoms in the modern states of

781 Adepoju A "Migration in Africa," in Baker J & Aina T (eds) *The migration experience in Africa* (NAI Uppsala 1995) 89 & 91.

782 Malit F & Oliver T "Labour migration and deskilling in the United Arab Emirates impacts on Cameroonian labour migrants," in Gross Z (ed) *Migrants and comparative education: call to re/engagement* (Brill Leiden 2020) 127.

783 Malit & Oliver Labour migration 127; Fouberg E, Murphy & de Blij H "Migration," in Fouberg E, Murphy A & de Blij H A *Human geography: people, place, and culture* (Wiley Hoboken NJ 2020) 75; Waylen G "Imperialism," in Kramarae C & Spender D *Routledge international encyclopedia of women: global women's issues and knowledge – vol 2* (Routledge London 2000) 1127.

784 Ogot B "The struggle for international trade and its implications for Africa," in Ogot B (ed) *General history of Africa - V: Africa from the sixteenth to the eighteenth century* (UNESCO / New Africa Books Glosderry 2003) 10-11.

785 Kisangani E & Bobb F *Historical dictionary of the DRC - 3rd ed* (The Scarecrow Press Lanham 2010) lv.

Angola and the DRC. As a result, these kingdoms raided weaker states for slaves for export purposes and caused large scale population movements.⁷⁸⁶

In practice and legally, foreign nationals enjoyed a very generous regime. Under Article 5 of the *General Berlin Act of 26 February 1885*, they were entitled, without distinction, to the same rights and treatment as nationals, particularly as regards the protection of their person and property and the exercise of their professions.⁷⁸⁷ The same favourable regime was applicable to the refugees.⁷⁸⁸

As for the phenomenon of asylum-seeking, it became a living reality in pre-colonial Congo. Foreigners seeking asylum in a community were treated differently depending on whether they were aggressors, peace-loving people of a different race, members of a distant ethnic group, or members of a neighbouring clan. Those admitted as protected guests were treated gently as members of the community, where they felt completely safe and secure.⁷⁸⁹ As such, they were also required to contribute to social and economic growth of the community, which is why they are included in the labour migration debates. Although it was confined within the colonial empires, labour migration created other links in the region even into the colonial period.⁷⁹⁰

4.2.2.2 Labour migration policy in colonial times

During the colonial period,⁷⁹¹ across the African continent, most colonial states relied on African labour to build and to maintain infrastructure, including bridges,

786 Crush & Chikanda Forced migration 556.

787 See Art. 5(2) of the *General Berlin Act of 26 February 1885*.

788 Wa-Dondo La législation 32.

789 Wa-Dondo La législation 32.

790 Clarence-Smith W "Business empires in Equatorial Africa" 1983 *AEH* (12) at 4.

791 The colonial rule in the Congo was characterised by two different regimes that succeeded one another. First, the Congo Free State (Independent Congo State) ruled dictatorially by King Leopold II of the Belgians from February 1885 to 15 November 1908. Second, the Belgian Congo, which was under Belgian rule from 15 November 1908 until the Congo gained its independence on 30 June 1960. See Vansina J "Introduction," in Vansina J *Being colonised: the Kuba experience in rural Congo, 1880–1960* (University of Wisconsin Press Madison 2010) 9; Babalola A "Democratic Republic of the Congo," in Danver S (ed) *Native peoples of the world: an encyclopedia of groups, cultures, and contemporary issues - volume 1-3* (Routledge London 2015) 600.

roads, railways, telegraph lines, and state offices.⁷⁹² To this effect, these states had to mobilise labour thus giving rise to large-scale migrations, which subsequently led to *de facto* resettlement and urbanisation. In the Belgian Congo,⁷⁹³ massive labour supply was needed in portage, construction of railways and other public works as well as gold extraction and refining.⁷⁹⁴

In addition, during the colonial years, Congo attracted vast foreign investment in the mining sector, which required large numbers of unskilled migrant workers.⁷⁹⁵ Under the colonial regime, the employment of expatriates was governed by *Decree of 31 October 1931 regulating the employment contract of European workers*, as amended by the Decree of 1949. On the contrary, the working conditions of Africans were governed by the *Decree of 16 March 1922 relating to the contract of employment between civilised masters and Indigenous people*.⁷⁹⁶

After the First World War, the Belgian colonial government strongly encouraged the migration of large numbers of Rwandans to, inter alia, provide the necessary labour for agricultural plantations and mining centres the eastern part of the country.⁷⁹⁷ This promotion of migration of labour forces has not only intensified local competition for land, but has also created major identity problems. The colonial administration never succeeded in finding a sustainable resolution to these problems, which have seriously affected peace and stability in the Great Lakes Region of Africa to this day.⁷⁹⁸

792 Sharkey H "African colonial States," in Parker J & Reid R (eds) *The Oxford handbook of modern African history* (OUP Oxford 2013) 158.

793 Apart from South Africa, the Belgian Congo was the most industrialised and "developed" territory on the African continent. See Prunier G *From genocide to continental war: the 'Congolese' conflict and the crisis of contemporary Africa* (Hurst London 2009) 76.

794 Shelley African colonial States 159; Starr F "The Congo Free State & Congo Belge" 1911 *The Journal of Race Development* vol. 1(4) at 394-395.

795 Moky The Oxford Encyclopedia 364.

796 Mutshipangu *Relations de travail* 82; Bonyi *Droit du travail* 22-24; Lule *Droit du travail congolais* 39.

797 Vlassenroot K & Huggins C "Land, migration & conflict in eastern DRC" 2004 *Eco-Conflicts* vol 3(4) at 1 & 2; Vlassenroot K "Land & conflict: the case of Masisi," in Vlassenroot K et al (eds) *Conflict and social transformation in Eastern DR Congo* (Academia Press Gent 2004) 87 ; Vlassenroot K & Huggins C "Land, migration & conflict in eastern DRC," in Huggins C & Clover J (eds) *From the ground up: land rights, conflict & peace in Sub-Saharan Africa* (ISS Pretoria 2005) 138.

798 Vlassenroot & Huggins 2004 *Eco-Conflicts* Vol 3(4) at 1-4; Berwouts K "In search of root causes" in Berwouts K *Congo's violent peace: conflict & struggle since the Great African War* (Zed Books London 2017) 35; Gnamo A "The Role of the Interahamwe in the regional

As regards the refugees, they were treated in the same way as ordinary foreigners under the rule of King Leopold II.⁷⁹⁹ During the Belgian colonial period, the number of refugees increased significantly in the country. Most of these were refugees from non-African states, but also from African countries, especially neighbouring ones. Several thousand Angolan nationals had already been granted asylum and had settled mainly in the south-west part of the country.⁸⁰⁰ The influx of refugees increased further around 1960 when the DRC gained its independence,⁸⁰¹ which marks the end of the colonial period and the beginning of post-colonial era.

4.2.2.3 Post-colonial labour migration policy

Since 1960 when it gained its independence from Belgium, the DRC has experienced various waves of voluntary emigration and immigration for employment purposes as well as forced emigration and immigration. With its immense resources and the beginnings of industry following the independence, the country needed new capital and new skills to fully develop and use its potentialities.⁸⁰² But one of the most serious problems facing the DRC at that time was its acute shortage of skills and experience,⁸⁰³ with few Congolese ready and capable of running an independent economy and a government.⁸⁰⁴

It is, indeed, argued that a year before independence, there was not a single Congolese doctor, lawyer, engineer, army commissioned or warrant officer in the

conflict: the origins of unrest in Kivu, Zaire,” in Adelman H & Rao G (eds) *War and peace in Zaire-Congo: analysing and evaluating intervention, 1996-1997* (AWP Trenton NJ 2004) 99.

799 Wa-Dondo La législation 33.

800 Wa-Dondo La législation 33.

801 Wa-Dondo La législation 33.

802 US Congress *Congressional record: proceedings and debates of the 106th Congress, Second Session, Volume 146, Part 11* (US GPO Washington DC 2000) 15279-15280.

803 Before the DRC gained independence, internal and international migration policies were highly restricted by the Belgian government. See Inaka S “Congolese middle-class migrants labour market incorporation in Pretoria,” in Nshimbi C & Moyo I (eds) *Migration, cross-border trade and development in Africa: exploring the role on non-state actors in the SADC Region* (Palgrave Cham 2017) 66; Godin M “Moroccan and Congolese migrant organisations in Belgium,” in Portes A & Fernández-Kelly P (eds) *The State and the grassroots: immigrant transnational organisations in four continents* (Berghahn New York 2016) 191.

804 US Congress *Congressional record* 15280.

entire country.⁸⁰⁵ Moreover, at independence in 1960 there were only 16 to 20 university graduates in the whole country. This is ironic because the DRC became independent while it was almost fully dependent upon foreign skills.⁸⁰⁶

Like several other African countries,⁸⁰⁷ the DRC has, over the years, continued to experience this heavy reliance on expatriate skills, which has remained a feature of the post-independence era.⁸⁰⁸ Until the current Labour Code and its implementing measures were enacted, the employment of expatriates was governed by various labour related regulatory instruments, most notably *Legislative Decree of 1 February 1961 governing employment contracts*.⁸⁰⁹

During the last two decades, the liberalisation of the mining sector and the boom of foreign investments in the DRC have contributed to a revival in the market for foreign workers in the country.⁸¹⁰ In fact, the implementation of the *2002 Mining Code* from July 2002 to December 2016 has led to a significant increase in the number of mining companies and mining and quarrying rights, as well as an increase in mining production in the DRC.⁸¹¹

Although accurate figures are difficult to obtain, the DRC's mining boom has attracted foreign workers from Africa and beyond. In addition, many people migrate to the DRC and are active in small-scale trading and other activities, although their movements are poorly documented. There are also some transit migrants using the DRC to reach South Africa and to move to Europe.⁸¹² Most of

805 Good R "Africa's unfinished struggle for freedom: the real issues," in Moore C & Dunbar A (eds) *Africa yesterday and today* (Praeger New York 1969) 4; Reynolds Labour law and practice 20.

806 Good R *Africa's unfinished struggle for freedom: the real issues* (US GPO Washington DC 1962) 4; Jacobson H *America's foreign policy* (Random House New York 1965) 537.

807 Andreasson S "Botswana: paternalism and the developmental state," in Andreasson S *Africa's development impasse: rethinking the political economy of transformation* (Zed Books London 2013) 106.

808 Reynolds Labour law and practice 20.

809 See Art. 2 of *Legislative Decree of 1 February 1961 governing employment contracts*. See also Mutshipangu *Relations de travail* 32; Bonyi *Droit du travail* 25.

810 Rubbers B "Mining boom, labour market segmentation and social inequality in the Congolese Copperbelt" 2019 *Development and Change* at 11 & 12.

811 See 2018 *Mining Code* (para. 3 of the Preamble).

812 Ngoie & Lelu *Migration* 15.

these migrants seek employment or carry on business activities while they are waiting for their paperwork to be completed as in the case of South Africa.

4.3 The basic legal framework pertaining to labour migration in contemporary DRC and South Africa

This subsection analyses the legal and normative framework for internal and external labour migration, which refers to current migration and labour policies regulating the in- and outflow of migrant workers in the DRC and South Africa. In fact, 'the legal and normative framework on [labour] migration includes binding international law as well as non-legally binding best practices and principles'.⁸¹³ In this respect, focus lies on international legal framework (1), key principles of the national legal framework regulating labour migration (2), and access of foreign nationals to the DRC's and South African labour market (3).

4.3.1 International legal framework

International legal framework regarding labour migration in this study consists of multilateral agreements (1), regional agreements (2), and bilateral agreements (3) concerning the DRC and South Africa.

4.3.1.1 Multilateral Agreements

From a multilateral perspective, there is no global agreement or convention in place to manage labour migration flows, in contrast to refugee flows. However, 'a limited number of instruments cover specific aspects of cross-border mobility for employment purposes'.⁸¹⁴ These 'multilateral agreements for interstate cooperation on labour migration' include ILO⁸¹⁵ and UN Conventions,⁸¹⁶ 'the General Agreement on Trade in Services (GATS)',⁸¹⁷ and other binding

813 Martin S *The legal and normative framework of international migration* (GCIM Geneva 2005) 5.

814 Usher E & IOM (eds) *Essentials of migration management: developing migration policy* (IOM Geneva 2004) 23; IOM *Labour migration: trends, challenges and policy responses in countries of Origin* (IOM Geneva 2003) 87.

815 C97; C143; C181; R86; & R151.

816 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003.

817 The GATS is a treaty of the World Trade Organisation (WTO) that entered into force in 1995.

international instruments of relevance to labour migration, which can be divided into two broad categories'.⁸¹⁸

The DRC and South Africa have not ratified the above-mentioned major ILO conventions, which have had a direct impact on the entire process of labour migration. The two countries have also not signed and ratified the UN *Convention on the Protection of the Rights of All Migrant Workers and the Members of Their Families*. This is regarded as an important gap in labour migration regulations, as the Convention covers the whole migration continuum.⁸¹⁹ However, as members of the WTO,⁸²⁰ the DRC and South Africa are parties to the GATS and signatories to the GATS framework agreement.⁸²¹ As Battistella points out, many countries have shown signs of fatigue and loss of interest in the multilateral approach in recent years in favour of regional initiatives.⁸²²

4.3.1.2 Regional Agreements

For many years, African countries, including the DRC and South Africa, have put in place various treaty frameworks to facilitate 'the free movement of people [seeking employment] within their respective regions'.⁸²³

818 The first category includes human rights treaties protecting the fundamental rights of all migrant workers as human beings (the ICCPR and ICESCR, 1966), as women (CEDAW, 1979), as children (CRC, 1989) and as foreigners (Migrant Workers Convention, 1990). The second category includes the 2000 UN Convention against Transnational Organised Crime and its two protocols addressing trafficking in human beings and smuggling of migrants. See Appave G & Cholewinski R (eds) "Managing the labour migration and development equation," in Appave G & Cholewinski R *World migration 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008) 356 & 361.

819 Aghababayan P "Legal aspects of labour migration governance in the Republic of Armenia" 2012/03 *CARIM-East Research Report*, Migration Policy Centre at 1.

820 The DRC joined the WTO on 1 January 1997 and South Africa on 1 January 1995. See WTO Members and observers (WTO Geneva 2022). https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Date of use: 03 May 2022).

821 Roberts C & Heydon K "Trade in services," in Heydon K & Woolcock S *The Ashgate research companion to international trade policy* (Routledge London 2017) 180.

822 Battistella Labour migration in Asia 307 & 308.

823 Adeniran A "African demographic dividend, migration—development nexus and global economic reality," in Adeniran A *Migration crises in 21st century Africa: patterns, processes and projections* (Palgrave Macmillan Singapore 2020) 74 & 75.

On the sub-regional level, all these instruments were adopted through Regional Economic Communities, notably the ECCAS,⁸²⁴ the EAC,⁸²⁵ COMESA,⁸²⁶ and SADC.⁸²⁷

The SADC is ‘the only regional group in Africa that has refused to endorse the general idea of free movement of persons [and labour] within the community’.⁸²⁸ As the result of such ‘absence of a formal SADC framework to govern labour migration’,⁸²⁹ each SADC State seems to be preoccupied with their own ‘national interests as opposed to regional interests’.⁸³⁰ This is reflected in these countries’ immigration laws and regulations, which ‘protect [...] national interests while helping keep [illegal immigrants] out of the country’.⁸³¹ In fact, immigration laws of individual countries required foreign nationals from the SADC region, just like those from elsewhere, ‘to obtain a work permit before they can engage in work in [neighbouring SADC states]’.⁸³²

824 See the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted by the 30th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018 and signed by the DRC on 21 March 2018.

825 See Treaty for the Establishment of the East African Community (as amended on 14 December 2006 and 20 August 2007); the *East African Community Common Market Protocol (CMP)* concluded in 2009; the EAC’s Common Market Protocol (2010).

826 *Treaty establishing the Common Market for Eastern and Southern Africa (2009)*; COMESA’s *Protocol on the Free Movement of Persons, Labour, Services, Rights of Establishment and Residence (Free Movement Protocol)*, 2001.

827 See the *SADC Treaty (1992)*; the *Protocol on the Facilitation of Movement of Persons (2005)*; *Labour Migration Action Plan (2020-2025)*; SADC Common Regional Policy Framework on Refugees and Asylum Seekers (2019); *SADC Guidelines on Coordinated Border Management (2011)*; the *Regional Strategy to Combat Illegal Migration, Smuggling of Migrants and Trafficking in Persons (2016-2020)*; and the *SADC-United Nations High Commissioner for Refugees Action Plan (UNHCR) (2020-2024)*. See SADC “SADC develops Regional Migration Policy Framework” (SADC 22 Oct. 2020); Abebe 2017 Africa Report at 9.

828 Oucho & Crush 2001 *Africa Today* Vol. 48(3) at 142; Gumede V, Oloruntoba S, & Kamga S “Migration policies in Africa,” in Gumede V, Oloruntoba S, & Kamga S *Regional integration and migration in Africa: lessons from Southern and West Africa* (Brill Leiden 2020) 89; Amadi V “Understanding regional integration and the laws regulating the movement of persons,” in Amadi V *Trade, migration and law: free movement of persons in the Southern African Development Community* (Routledge London 2022) 1.

829 Gumede, Oloruntoba, & Kamga Migration policies in Africa 89.

830 Gumede, Oloruntoba, & Kamga Migration policies in Africa 90; Landsberg C “The Southern African Development Community’s decision-making architecture,” in Saunders C, Dzinesa G, & Nagar D (eds.) *Region-building in Southern Africa: progress, problems, and prospects* (Zed Books Wits University Press London; Johannesburg 2013) 72; Bischoff P “How much its own and to what end? SADC and the culture of security and regional organisation in Southern Africa”, in Aris S & Wenger A (eds) *Regional organisations and security: conceptions and practices* (Routledge London 2015) 68.

831 Gumede, Oloruntoba, & Kamga Migration policies in Africa 90.

832 Gumede, Oloruntoba, & Kamga Migration policies in Africa 91.

On the continental scale, the African heads of state adopted the *Free Movement Protocol* in 2018, which is regarded as the first treaty instrument governing cross-border movement.⁸³³ Practical migration experience shows ‘that regional agreements among developing countries, [in particular African states], have made little progress in easing constraints on labour migration, compared with the major agreements among industrial countries, notably the European Union’.⁸³⁴ In this context, ‘the bilateral approach has seen some resurgence, [with the signing of] an increasing number of bilateral agreements’.⁸³⁵

4.3.1.3 Bilateral Agreements

Bilateral labour migration agreements (BLMAs) ‘refer to cooperation frameworks between countries of origin and destination to ensure regulation of labour migration’ based on agreed principles and procedures.⁸³⁶ BLMAs ‘create legally binding rights and obligations governed by international law and describe in detail the specific responsibilities of, and [steps] to be taken by, each of the parties to [achieve] their goals’.⁸³⁷ BLMAs are among the most frequently used formats aimed at regulating migration ‘flows between sending and receiving countries’ in Africa.⁸³⁸ According to the ILO, a total of 23 BLMAs have been signed by several African countries, to address labour migration related issues, such as the admission of workers, combatting irregular migration, and regulating labour migration flows.⁸³⁹

833 Milej T “Legal framework for free movement of people within Africa – a view from the East African Community (EAC)” 2019 *ZaöRV* (79) at 935.

834 Martin P “Low-skilled labour migration and free trade agreements,” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave New York 2015) 223; Ratha D & Shaw W *South-south migration and remittances - World Bank working paper No. 102* (World Bank Washington DC 2007) 16 ; Handjiski B et al *Enhancing regional trade integration in Southeast Europe. World Bank working paper No. 185* (World Bank Washington DC 2010) 75.

835 Battistella Labour migration in Asia 308.

836 ILO & IOM *Bilateral labour migration agreements in African Union Member States: taking stock and the way forward* (ILO & IOM Geneva 2019) 2.

837 Yuzhanin V et al *Bilateral Labour Migration Agreements (BLMAs): rapid assessment of the Southern Corridor* (Ethiopia - Kenya - Tanzania - South Africa) (IOM/UN Migration Nairobi 2021) 21; ILO & IOM Bilateral labour migration agreements 2.

838 ILO & IOM Bilateral labour migration agreements 2.

839 AU & JLMP “Africa labour migration outlook in the post COVID-19 era” 2020 *Policy Brief*, November at 2.

In the SADC region, states have always entered and 'continue to enter into bilateral agreements with one another [in connection with,] inter alia, labour migration'.⁸⁴⁰ These BLMAs are dominated by South Africa, which is perceived to be a beneficial destination for migrant workers looking for greater economic opportunities and higher pay, and finding employment at the destination.⁸⁴¹ As a major migrant-receiving country in the SADC region and owing to its historical migrant labour regime in key sectors of its national economy, South Africa has entered into state-to-state agreements for recruiting labour force from other countries in the region.⁸⁴² As mentioned previously, these countries include Lesotho, Namibia, Tanzania, Zimbabwe, Mozambique, Eswatini, and Malawi (now expired).⁸⁴³ The DRC has signed a bilateral agreement with China but not with other SADC countries as South Africa has.

4.3.2 Key principles of the national legal framework regulating labour migration

This subsection focuses on two main principles of the national legal framework regulating labour migration, notably the principle of (or right to) freedom to choose an occupation (1) and the right to engage in work (2).

4.3.2.1 The right to freedom to choose an occupation

The right to choose freely one's occupation is regarded in many countries, including South Africa and the DRC as one of the fundamental constitutional rights. In South Africa, the right to freedom of occupation and profession is enshrined in the 1996 Constitution under section 22.⁸⁴⁴ This provision is drafted on the basis of the German *Berufsfreiheit* (or freedom of occupation) protected by Article 12(1) of the German Constitution or Basic Law (BL) of 1949.⁸⁴⁵ These

840 Gumede, Oloruntoba, & Kamga Migration policies in Africa 86.

841 Yuzhanin et al Bilateral Labour Migration Agreements 4.

842 Wickramasekara P & Ruhunage L *Good practices and provisions in multilateral and bilateral labour agreements and memoranda of understanding* (ILO Geneva 2018) 2.

843 Wickramasekara P *Bilateral agreements and memoranda of understanding on migration of low skilled workers: a review* (ILO Geneva 2015) 19 fn 8; SADC "SADC Labour Migration Policy" 2013 SADC/ELSJTSCM/1/2013/9 (December) 3.

844 Under s22, the *1996 Constitution of South Africa* provides: 'Every citizen has the right to choose their trade, occupation or profession freely'.

845 Art. 12(1) of the Basic Law (BL) provides: 'All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training'.

provisions indicate clearly that both the South African and German systems restrict the protective scope of the right to choose an occupation freely to nationals.⁸⁴⁶ This means that in both countries foreign nationals are not entitled to choose profession and employment type.⁸⁴⁷

Similarly, in the DRC the right to freedom to choose an occupation is enshrined in and guaranteed by the 2006 Constitution⁸⁴⁸ and the 2002 *Labour Code*.⁸⁴⁹ However, the freedom to choose an occupation is restricted by public policy legislation aimed, notably, at protecting the national workforce, in particular Article 185, paragraph 8 of the 2002 Labour Code,⁸⁵⁰ as well as other relevant regulatory instruments discussed extensively elsewhere in this thesis. In fact, pursuant to regulations governing the protection of the national workforce, foreign nationals are not entitled to enjoy the right to choose freely an occupation.⁸⁵¹ However, foreign nationals may enjoy the right to engage in work, which is guaranteed in both the DRC and South Africa.

4.3.2.2 The right to engage in work

As discussed elsewhere in this thesis, the right to engage in work is guaranteed in both the Constitution and labour laws applicable in the DRC and South Africa. Foreign nationals are only permitted to work in both countries, if they have the appropriate work visa/ permit, have refugee status or an asylum seeker permit endorsed with the right to work or if they are permitted to work according to an

846 Markesinis B & Fedtke J “A quick glance at seven jurisdictions,” in Markesinis B & Fedtke J *Judicial recourse to foreign law: a new source of inspiration?* (Routledge London 2012) 101; Markesinis B & Fedtke J “South Africa,” in Markesinis B & Fedtke J *Engaging with foreign law* (Hart Pub Oxford 2009) 147 & 148.

847 Ferreira E “Ban on foreigners practising law ‘is unconstitutional’” 2022 Mail & Guardian 3 March. <https://mg.co.za/top-six/2022-03-03-ban-on-foreigners-practising-law-is-unconstitutional/> (Date of use: 10 May 2022); Weiss N “The protection of minorities in a Federal State: the case of Germany,” in Tarr G, Williams R, & Marko J (eds) *Federalism, subnational constitutions, and minority rights* (Praeger London 2004) 82.

848 See Art. 36.

849 See Art. 2.

850 This provision prohibits all Congolese or foreign employers from hiring more than 15% of foreign workers in their workforce. See also *Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005*.

851 See Art. 5 & 6 of *Ordinance No. 74-098 of 6 June 1974* as revised to date; Art. 3 & 4(1); *Departmental Order No. 87/005 of 21 Jan 1987*; Art. 1 of *Ministerial Order No. 006/CAB/PVPM/ETPS/2010 of 01 April 2010 laying down the procedures for declaring a worker’s hiring and departure*.

international agreement.⁸⁵² Clearly, the work visa/ permit gives the holders access to the national labour market.

4.3.3 Access of foreign nationals to the DRC's and South African labour market

In most countries, including the DRC and South Africa, foreign nationals are allowed labour market access by the state, which enjoys a sovereign discretion in this regard. Such choices may be regarded in general international law as 'objective and reasonable' differentiations between citizens and non-citizens.⁸⁵³ Basically, 'states are [willing] to preserve scarce employment opportunities for their own nationals [and] may, where there are labour shortages, wish to select the most highly skilled or needed foreign workers rather than allowing open access'.⁸⁵⁴

4.4 Conclusion

In terms of the statutory foundation of South Africa's and the DRC's labour migration policies, there are some similarities and some differences, which are worth discussing. In both countries, labour migration policy is discussed based on three analytical approaches, notably the pre-colonial labour migration policy, the migration policy in colonial times, and the post-colonial labour migration policy. However, focus for the post-colonial labour migration policy in South Africa lies on labour migration policy under apartheid, and post-apartheid labour migration policy.

Like in any precolonial African societies, labour migration in both precolonial Congo and South were guided by three key normative principles, notably the principles of multiplicity, of circulation and mobility, that of composition encompassing the African conceptions of humanity, such as Ubuntu.

⁸⁵² In South Africa, see s12A (1) of *Employment Services Amendment Bill, 2021*. In the DRC, see Art. 5, 6 & 8 of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

⁸⁵³ Saul B, Kinley D, & Mowbray J "Article 6: The Right to Work," in Saul B, Kinley D, & Mowbray J *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials* (OUP Oxford 2014) 316.

⁸⁵⁴ Saul, Kinley, & Mowbray Article 6, 316; Hathaway J "Rights of refugees lawfully staying," in Hathaway J *The rights of refugees under international law - second edition* (CUP Cambridge UK 2021) 937.

Basically, in both countries the movements of labour for employment purposes during the precolonial period were governed and regulated by African customary law, which is made up of indigenous customary norms, rules, and practices. On the top of these, however, in the precolonial Congo Free State (1885 to 1908) labour migration was also governed by the *General Berlin Act of 26 February 1885*, which granted foreign nationals, including refugees the same rights and treatment as nationals.

The colonial period, which is the boom period in the extractive sector in both countries led to large-scale labour migration in the sense that 'foreign mining companies recruited thousands of workers from [neighbouring] territories and colonies'.⁸⁵⁵ Colonial powers in both countries imposed restrictive immigration policies governing the movement of people, particularly for work-related purposes.

During the post-colonial period, both countries' governments have decided to reduce the dependency on foreign labour, which has been reflected in the enforcement of the restrictive policies on foreign labour recruitment. Both countries have, in fact, introduced legislation, which gives hiring priority to national workers for any gainful employment, sets quotas for employment of foreign nationals, and prohibits employment of foreign workers without prior application for and obtaining of a work permit/ visa. These restrictive measures are in place while both countries are being governed by 'the legal and normative framework on [labour] migration, includ[ing] binding international law [and] non-legally binding best practices and principles,' which they are required to adhere to.⁸⁵⁶

855 Flahaux & Schoumaker Democratic Republic of the Congo.

856 Martin The legal and normative framework 5.

CHAPTER FIVE

PROTECTION OF THE NATIONAL LABOUR FORCE AGAINST FOREIGN COMPETITION IN THE DRC AND SOUTH AFRICA

5.1 Introduction

This chapter discusses, in depth, the general notions, motivations of, and basic principles governing the protection of national labour, with a focus on the DRC and South Africa. For this purpose, the chapter is divided into four sections, which comprise sub-sections, including a conclusion.

The first section provides a brief conceptual framework of the national labour force. The second section discusses the notions of labour or skills shortage. The third section deals with motivations of the protection of national labour force. The fourth section provides an overview of the main findings and conclusions drawn from the discussions presented in this chapter.

5.2 Notions of the national labour force

The notion of workforce, specifically national workforce, entails the specification of two concepts, notably work and employment, which are not synonyms.⁸⁵⁷ A thorough analysis of these two concepts, by way of the current legislation applicable in the DRC and South Africa, brings about two findings.

First, the analysis reveals a twofold distinction between self-employment and dependent employment, on the one hand, and between voluntary and compulsory employment, on the other hand.

857 Toulmin S "From feudal serfs to free agents: the future of 'employment'," in Holmer J & Karlsson J (eds) *Work: quo vadis? re-thinking the question of work* (Routledge London 2020) 15-28; Jackson P "Influences on commitments to employment and commitment to work," in Bryson A & McKay S (eds) *Is it worth working? factors affecting labour supply* (Policy Studies Institute London 1994); Gammarano R *Work and employment are not synonyms* (ILO Geneva 2019). <https://ilostat.ilo.org/work-and-employment-are-not-synonyms/> (Date of use: 01 February 2022).

Secondly, the analysis provides two different perspectives, extensive and restrictive, in the quest for a definition of the national workforce. Therefore, this sub-section focuses on the following three points: distinctions (1), definition (2), and limitations (3) of the concept of the national labour force.

5.2.1 Distinctions

It is basically through an analysis of the provisions of DRC and South African legislations that we can make two main distinctions, namely between self-employment and dependent employment, on the one hand, and between voluntary or free work and compulsory or forced work, on the other hand. The reference to these two distinctions will show, firstly, what the notion of national labour is all about, and secondly, the limits of this concept.

5.2.1.1 Self-employment and contingent employment

The labour markets in the civil law systems are characterised by the traditional distinction between independent or autonomous self-employment and dependent or subordinate employment,⁸⁵⁸ and the relationship in the latter is regulated through the contract of employment.⁸⁵⁹

This is clearly set out in both the DRC and South African legislation, which distinguish between an employment contract and the contract for works or the contract of an independent contractor.

In South Africa, the law does not expressly define the term “contract of employment”, but the definitions of the terms “employee”, “worker”, and “employers” are provided for by the key labour law statutes⁸⁶⁰ and statutes

858 Casale G & Perulli A *Towards the single employment contract: comparative reflections* (Hart Publishing Portland OR 2014) 13; Countouris N *Defining and regulating work relations for the future of work* (ILO Geneva 2019) 1.

859 Countouris *Defining and regulating work relations* 1.

860 The *LRA*, the *Basic Conditions of Employment Act (BCEA)*, and the *Employment Equity Act (EEA)*. See Levy A “An introduction to employment” in A Levy *Labour law in practice: a guide for South African employers* (Zebra Press Cape Town 2021) 12-18; Collier et al *Labour law in South Africa* 3-6.

complementing them.⁸⁶¹ An employee refers to ‘any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.’⁸⁶² The Supreme Court of Appeal agrees with Brassey⁸⁶³ that ‘an employee is a person who makes over his or her productive capacity to produce to another; an independent contractor, by contrast, is a person whose commitment is to the production of a given result by his or her labour.’⁸⁶⁴ The term “worker” refers to ‘any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind’.⁸⁶⁵

The term “employer” refers to ‘any person (including the state) who employs or provides work for any other person and who remunerates or expressly or tacitly undertakes to remunerate that other person, and who permits any other person in any manner to assist him in the carrying on or conducting of his business, including any person acting on behalf of or on the authority of such employer; or who, otherwise than in an educational institution, trains any minor in a designated trade.’⁸⁶⁶

The *Occupational Health and Safety Act (OHSA), 1993* defines an “employer” as ‘any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him but excludes a labour

861 The *Protected Disclosures Act (PDA)*; the *Occupational Health and Safety Act (OHSA)*; the *Compensation for Occupational Injuries and Diseases Act (COIDA)*; the *Occupational Diseases in Mines and Works Act (ODIMWA)*; the *Unemployment Insurance Act (UIA)*; and the *Unemployment Insurance Contributions Act (UICA)*; the *Skills Development Act (SDA)*; the *Skills Development Levies Act (SDLA)*; and *Employment Services Act (ESA)*. See Levy An introduction to employment 12-18; Collier et al Labour law in South Africa 3-6.

862 See s 213 of *LRA, 1995* [No. 66 of 1995]; s 1 of *BCEA, 1997* [Act No. 75 of 1997]; s 1 of *EEA, 1998* [No. 55 of 1998]; s 1 of *SDA, 1998* [Act No. 97 of 1998]; s 1 of *Manpower Training Act, 1981* [Act 56 of 1981]; s 1 (vi) of *Businesses Act, 1991* [No. 71 of 1991]; s 1(1) of *OHSA, 1993* [No. 85 of 1993]; s 1(1) of *UIA, 2001* [No. 63 of 2001]; s1 (xviii) of *COIDA, 1993* [No. 130 of 1993]; s1 (ii) of *PDA, 2000* [No. 26 of 2000].

863 Brassey M “The Nature of Employment” (1990) 11 *ILJ* at 899.

864 *The Supreme Court of Appeal in Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA), cited in *Pam Goldings Properties (Pty) Ltd v Erasmus and Others* (C455/07) [2009] ZALC 135; (2010) 31 *ILJ* 1460 (LC) (4 December 2009) para. 11.

865 See s1 of *NMWA*.

866 See s1 (iii) of *PDA*; s 1 of *MTA*; s 1 (vii) of *Businesses Act, 1991*; s 1(1) of *UIA*.

broker as defined in section 1(1) of the LRA.⁸⁶⁷ This provision, which remarkably excludes a labour broker from the definition of an employer, has been referred to by the Constitutional Court of South Africa.⁸⁶⁸

Concerning the status of labour brokers (now referred to as temporary employment services - TES), the LRA as amended to date deems them to be the employer of the workers rather than the client to whom the workers were provided.⁸⁶⁹ Furthermore, the LRA applies to workers who are placed to work with clients as employees, but their coverage by labour law or not depends on their relationship with the client.⁸⁷⁰

According to South African case law, 'an agency who places persons to work with a client subject to the control and supervision of the client is their employer of the persons'.⁸⁷¹ However, in the event of 'their relationship with the client [being] not that of an employee but one of an independent contractor, they are not an employee of either the client or the agency'.⁸⁷² In addition, under South African labour legislation, the term "employer" is defined as 'any person who is obliged to pay a worker for the work that that worker performs for that person'.⁸⁷³

In the light of these legal provisions, South African case law defines the "contract of employment" as 'a contract in terms of which the employment relationship between the parties has commenced, that is to say, the employee is working for the employer for remuneration or is assisting him in the carrying on or conducting of his business'.⁸⁷⁴

867 See s 1(1) of *OHS Act, 1993* [No. 85 of 1993].

868 See *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) (26 July 2018) para. 46 fn 25.

869 Budlender D *Private employment agencies in South Africa* (ILO Geneva 2013) 9.

870 Benjamin P *Law and practice of private employment agency work in South Africa* (ILO Geneva 2013) 9.

871 See *LAD Brokers v Mandla* (2001) 22ILJ 1813(LAC); cited in Benjamin *Private employment agency work* 9 fn 17.

872 Benjamin *Private employment agency work* 9.

873 See s 1 of *NMWA*.

874 *Wyeth SA (Pty) Ltd v Manqele and Others* (JA 50/03) [2005] ZALAC 1 (23 March 2005) para.43; *Commissioner Jammy in Herbst v Elmar Motors* (1999) 20 ILJ 2465 (CCMA) at 2468J 2469C.

In doctrinal writings, the “contract of employment” is defined as ‘a reciprocal contract in terms of which an employee places his services at the disposal of another person or organisation, as employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of the employee’s services.’⁸⁷⁵ It is argued that the LRA implicitly makes a clear distinction between a contract of employment and the contract of an independent contractor (the contract for letting and hiring of work).⁸⁷⁶

In the DRC, the labour legislation expressly defines the “contract of employment” as ‘any agreement, written or verbal, under which a person, the worker, undertakes to provide another person, the employer, manual or other type of work under direction and the direct or indirect authority of the employer in exchange for remuneration’.⁸⁷⁷

The contract for works or the contract of an independent contractor is defined by doctrinal writings as ‘the contract between the person who orders any work and the person who undertakes to perform such work, in exchange for a price agreed upon by the two parties’.⁸⁷⁸ Under the *Civil Code of Obligations, volume III*, there are three main types of contracts for work and services: the hiring out of labourers who undertake to provide a service to someone; the hiring of carriers, both by road and by sea, who undertake the transportation of people or goods; and the hiring of contractors for works pursuant to quotes or tenders.⁸⁷⁹

5.2.1.2 Voluntary and compulsory work

In the DRC and South Africa, the distinction between voluntary work or free choice of employment and forced or compulsory labour is based on the constitution and the labour legislation, as well as international human rights instruments. In terms

875 Du Plessis J & Fouché M *Practical guide to labour law - 9th ed* (LexisNexis Durban 2019) 9.

876 See the Niselow case; Gibson J *South African mercantile and company law* (Juta Cape Town 2008) 591.

877 Art. 7(3) of 2002 *Labour Code as amended and supplemented to date*.

878 Rendu A *Traité pratique de droit industriel, ou exposé de la législation et de la jurisprudence sur les établissements industriels, les brevets d'invention, la propriété industrielle, artistique et littéraire, les obligations particulières à l'industrie* (ILGJ Cosse, Paris 1855) 509.

879 Art. 427 of *Decree of 30 July 1888 as amended to date*.

of the Constitution, 'the right of every citizen to choose their occupation or profession freely' is guaranteed in both countries.⁸⁸⁰

In addition, international human rights instruments recognise the right of everyone to free choice of employment, which amounts to 'the right to freely choose or accept work'.⁸⁸¹ The current legislations of both countries specifically prohibit slavery, servitude or forced labour.⁸⁸² Furthermore, South Africa and the DRC have both signed and ratified most of the international instruments prohibiting slavery and forced or compulsory labour.⁸⁸³ In terms of their international obligations, both countries are under a positive duty to eradicate slavery and servitude.⁸⁸⁴

Nevertheless, international instruments recognise some exceptions to forced labour, including 'the performance of hard labour in pursuance of a sentence imposed by a competent court; (ii) any work or service normally required of a person who is under detention in consequence of a lawful order of a court, or of a person during conditional release from such detention; (iii) any service of a military character and, in countries where conscientious objection is recognised, any national service required of conscientious objectors by law; (iv) any service exacted in cases of emergency or calamity threatening the life or well-being of the community and; (v) any work or service which forms part of normal civil obligations'.⁸⁸⁵

In the DRC, these exceptions to forced labour were specifically recognised in the old *Labour Code*,⁸⁸⁶ which is now repealed and replaced by the current *Labour Code of 2002* as amended and supplemented to date. In South Africa, it is

880 See s22 of the *South African Constitution of 1996*; Art. 36 of the *DRC Constitution of 2006*.

881 *UDHR, 1948* (Art. 23(1)); *ICESCR, 1966* (Art. 6(1)). The DRC and South Africa duly ratified the *ICESCR* respectively on 1st November 1976 and on 12 January 2015.

882 See s13 of the *South African Constitution of 1996*; Art. 16(4) of the *DRC Constitution of 2006*; Art. 2 of 2002 *Labour Code*.

883 *ICCPR, 1966* (Art. 8); *ILO Convention (No. 29)* (Art. 1); *1926 Slavery Convention* and the *1956 Supplementary Convention*.

884 Currie I & De Waal J "Slavery, servitude and forced labour," in Currie I & De Waal J *The Bill of Rights handbook – sixth edition* (Juta Cape Town 2013) 290.

885 See Art. 8(3)(c) of *ICCPR*; Art. 2(2) of *ILO Convention (No. 29)*. Currie & De Waal Slavery 292.

886 *Labour Code (Legislative Ordinance No. 67/310 of 9 Aug. 1967)*, as amended on 31 Dec. 1996.

suggested that ‘these exceptions will be regarded as limitations of the section 13 right, and they will therefore have to be justified in terms of section 36 as rational and proportional to the objective sought to be achieved’.⁸⁸⁷

Those persons who perform the work outlined under the exceptions to forced labour are not bound by a contract of employment and do not get any remuneration for this work. From a legal point of view, these people cannot be regarded as workers and are not part of the (national) labour force,⁸⁸⁸ which is a concept that is worth defining.

5.2.2 Definition of labour force

To gain a better understanding of the concept of the labour force, it is worthwhile to first provide a broad (1) and a narrow (2) definition of it.

5.2.2.1 Broad definition of labour force

Broadly speaking, the term “labour force” is used interchangeably with ‘many terms like manpower, labour, [labour force, labour] supply, gainful workers, working population, economically active population, workforce, [active population, staff, or personnel, and refers to employment].⁸⁸⁹ These terms also refer to the available workers performing any work under the authority of others in a specific area, such as a city, state, country, or region of the world.⁸⁹⁰

Also shortened to ‘active population, the labour force or workforce or economically active population includes both employed (employees and self-employed) and unemployed people, but not the economically inactive, such as pre-school children, school children, students and pensioners’.⁸⁹¹ In South Africa, for instance,

887 Currie & De Waal Slavery 292.

888 Katansi Protection 202.

889 Azhar R *Female employment in India: growth and structure independent* (Publishing Company Delhi 2000) 13.

890 DeCenzo D, Robbins S, & Verhulst S “The dynamic environment of HRM 1,” in DeCenzo D, Robbins S, & Verhulst S *Fundamentals of human resource management, 12th Edition* (Wiley Hoboken NJ 2016) 9.

891 European Commission *Glossary: labour force statistics explained* (EU Brussels 2021).
https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Labour_force

the national 'workforce is composed of all the people who are either working or available to work and are actively seeking work; but not everyone of working age participates in the work force'.⁸⁹²

5.2.2.2 Narrow definition of labour force

The term "national labour force" in its narrow sense simply refers to the group of people who provide their services, or their workload, under a contract of employment and for remuneration, to other people under whose authority they obviously carry out a specific task.⁸⁹³ In other words, the national labour force refers, in a country, to the total number of "workers" as defined by the current labour legislation.⁸⁹⁴

5.2.3 Limitations to the definition

It appears that the definition provided above, in its dual scope, encounters certain limitations from a two-fold perspective: on the one hand, regarding people involved and, on the other hand, regarding the activities, or rather the work itself that must be carried out.⁸⁹⁵

5.2.3.1 Employers who are part of the national workforce

One case that illustrates the limits of the concept of national labour force involves senior civil servants, including members of the judiciary and the diplomatic corps, as well as individuals who are engaged in the liberal professions.⁸⁹⁶ The so-called liberal professions include people such as doctors, lawyers, architects, engineers, artists, chartered accountants and so on who render service contracts falling outside the area of labour law.⁸⁹⁷ These professionals provide their services for

(Date of use: 03 February 2022); Giampietro M, Mayumi K, Sorman A H *The metabolic pattern of societies: where economists fall short* (Routledge London 2012) 383.

892 Saunders I *The South African labour market: all the facts* (The Department of Labour Pretoria 2013). https://www.groundup.org.za/article/south-african-labour-market-all-facts_842/ (Date of use: 03 February 2022).

893 Katansi Protection 203.

894 See, for instance, Art. 1 of the DRC *Labour Code of 2002*.

895 Katansi Protection 203.

896 Katansi Protection 203.

897 Zimmermann R "Locatio conductio II," in Zimmermann R *The law of obligations: Roman foundations of the civilian tradition* (Juta Cape Town 1996) 393.

remuneration to others under a contract of employment, as is the case in the higher education sector.⁸⁹⁸ To be employers, these liberal professionals are included in the national labour force and are recorded as such in the official statistics.⁸⁹⁹

5.2.3.2 Non-labour-intensive occupational activities

In addition to work or professional activities, there are non-labour-intensive occupational activities, which refer to occupational activities that do not involve labour. Although they are not involved in the creation of the national labour force, these occupational activities help to reduce unemployment or, the demand for jobs in the labour market.⁹⁰⁰ Such occupational activities that have a positive impact on the labour market include those carried out by craftsmen and artists, as well as other informal activities, such as those of street vendors and shoeshine boys, who are in fact only “disguised” unemployed people.⁹⁰¹

5.2.3.3 Exporting the national workforce

The concept of national labour force may include occupational activities taking place abroad as long as these activities are carried out by nationals of the countries concerned. In the DRC, the current regulations require prior authorisation from the Ministry of Labour for any transfer of Congolese labour.⁹⁰² The rationale for this regulatory provision is to protect Congolese nationals working abroad from any form of exploitation, including wage discrimination or other forms of discrimination in the host countries.⁹⁰³

898 Katansi Protection 203; Humblet P & Plets I “Protection of working relationships in Belgium,” in Pennings F & Bosse C (eds) *The protection of working relationships: a comparative study* (Kluwer Law International Leiden 2011) 49.

899 Katansi Protection 204; Semenza R & Mori A “New self-employment as theoretical matter,” in Semenza R & Pichault F (eds) *The challenges of self-employment in Europe* (Edward Elgar Publishing Cheltenham UK 2019) 25.

900 Katansi Protection 204; Gamielien F & van Niekerk L “Street vending in South Africa: an entrepreneurial occupation” 2017 *SAJOT* 47(1) 24-29; Arias J *Informal vendors in Johannesburg, South Africa* (University of Pennsylvania Philadelphia PA 2019) 2.

901 Meier G & Rauch J *Leading issues in economic development* (OUP Oxford 1995) 151.

902 See Art. 1 of *Departmental Order No. 067/81 of 5 November 1981*.

903 See Preamble, para. 3 & Art. 4 of *Departmental Order No. 067/81*.

These Congolese workers are also required to transfer all or part of their earnings under their employer's responsibility, in accordance with the host country's provisions governing the transfer of funds.⁹⁰⁴ For these provisions to be enforceable in practice, it is assumed that the employer, a foreign national in this case, would necessarily have at least a registered office or a subsidiary in the DRC, which would hire Congolese workers for the purpose of working abroad.⁹⁰⁵

Unlike the DRC legislation, South African immigration law and policy do 'not deal with emigration, [which is] defined as the settlement of South Africans in other countries'.⁹⁰⁶ As discussed previously, South Africa does not encourage emigration because 'emigrants represent both a loss to the country as well as potential skills and resources, which could be harnessed creatively to advance the country's development'.⁹⁰⁷

Although there is no 'emigration strategy designed, [*inter alia*], to minimise the economic harm caused by skills loss' in South Africa, the Government has recently begun to recognise the advantages or benefits of emigration.⁹⁰⁸ In fact, the Government now recognises that returning migrants can be a source of development as they bring back with them skills, capital, and connections.⁹⁰⁹ At the same time, 'those leaving permanently often retain a profound interest in [the country] and have the potential to develop business relationships over the long term'.⁹¹⁰

5.3 Notions of labour or skills shortage

To get a better understanding of the concept of labour or skills shortage, it is worth providing a definition (1) of and remedies for skills shortages (2).

904 Art. 5 of *Departmental Order No. 067/81*.

905 Katansi Protection 205.

906 DHA *Green Paper* 13; DHA *White Paper* 5.

907 DHA *Green Paper* 13; DHA *White Paper* 5; Ellis & Segatti *The role of skilled labour* 67; Polonsky M J, Scott D R, & Suchard H T "A profile of emigrants from South Africa: the Australian case" 1989 *The IMR* Vol. 23(4) at 940.

908 Butler *A rainbow nation* 49.

909 DHA *Green Paper* 17; DHA *White Paper* 33; Butler *A rainbow nation* 49.

910 Butler *A rainbow nation* 49.

5.3.1 Definition of labour or skills shortage

There is no consensually agreed-upon definition of the term “labour shortage”, but in the literature the term either ‘refers to a shortfall in the total number of individuals in the labour force [or] denotes the possible mismatch between workers and jobs in the economy’.⁹¹¹ The term is also defined as ‘[a] sustained market disequilibrium between supply and demand in which the quantity of workers demanded exceeds the supply available and willing to work at a particular wage and working conditions at a particular place and point in time.’⁹¹²

These definitions concern the case where ‘the demand for labour exceeds supply at the prevailing wages and employment conditions, [which may result in] employers’ calls for migrants to help fill vacancies’.⁹¹³ This is one of the possible remedies at the disposal of employers to deal with skills shortages, and which are worth discussing even briefly.

5.3.2 Remedies for skills shortages

In theory, there are different ways in which employers may respond to perceived staff shortages, including, but not limited to, ‘raising wages, and improving employment conditions and relations’; skills training; and recruitment of foreign skills.⁹¹⁴ For the purpose of this study, the focus lies on vocational skills training (1), and the recruitment of foreign skills (2).

5.3.2.1 Vocational skills training

In theory, ‘employers and government [tend to] invest in training and up-skilling the domestic workforce [in the case of] staff shortages partly or primarily [resulting

911 OECD/EU *Matching economic migration with labour market needs* (OECD Paris 2014) 336; Barnow B, Trutko J, & Piatak J “Conceptual basis for identifying and measuring occupational labour shortages,” in Barnow B, Trutko J, & Piatak J *Occupational labour shortages concepts, causes, consequences, and cures* (W.E. Upjohn IER Kalamazoo, MI 2013) 3.

912 Barnow, Trutko, & Piatak *Occupational labour shortages* 3.

913 Ruhs & Anderson Introduction 3 & 4.

914 Ruhs M “The ethics of labour immigration policy,” in Ruhs M *The price of rights: regulating international labour migration* (Princeton University Press Princeton 2013) 180.

from] a lack of skills among the domestic [work force]'.⁹¹⁵ In South Africa, vocational skills training is provided for by the *Employment Services Act, 2014*.⁹¹⁶ In practice, vocational skills training programmes are organised for those who need to acquire employability skills.⁹¹⁷

In the DRC, the current legislation organises vocational training⁹¹⁸ and establishes the INPP,⁹¹⁹ which is in charge, *inter alia*, of the vocational qualification of the working population.⁹²⁰ The INPP run by the Government offers skills-based technical and scientific training for the unemployed, young graduates, vulnerable groups or people undergoing professional transition.⁹²¹

However, in practice the training provided 'does not produce the professional skills required for immediate employment'.⁹²² Practical experience shows that there is a lack of investment in the vocational skills training of local workforce by the government and the employers. A possible 'solution to employers' reluctance to invest in training their workforce in very specific skills' may, therefore, be immigration or recruitment of foreign skills.⁹²³

5.3.2.2 Recruitment of foreign skills

In many countries, including the DRC and South Africa, the recruitment of foreign skills is perceived positively (1) and negatively (2), and this negative perception creates adverse and undesirable consequences (3), which require lasting solutions (4).

915 Ruhs & Anderson Migrant workers 36.

916 See s2(1).

917 Mayombe C "Vocational skills training for youth in eThekweni municipality," in Mayombe C *Vocational education and training in Sub-Saharan Africa* (Palgrave Macmillan Cham 2021) 33.

918 Ordinance No. 71-055 of 26 March 1971 organising vocational training.

919 Legislative Ordinance No. 206 of 29 June 1964 establishing the INPP.

920 See Art. 4 of Decree No. 09/55 of 3 December 2009 establishing the statutes of a state-owned entity known as the INPP.

921 See the INPP's website at <https://www.inpp.cd/index.php/offres-de-formation> (Date of use: 08 February 2022).

922 Elela A "Vocational training in the DRC: a tool for peace and development" 2021 ID4D 17 June. <https://ideas4development.org/en/vocational-training-drc-tool-peace-development/> (Date of use: 08 February 2022).

923 Ruhs & Anderson Migrant workers 38.

5.3.2.2.1 Positive perception of the recruitment of foreign skills

Some labour-scarce countries rely on imported labour by continuously attracting a large influx of both skilled and low-skilled migrants to make contributions to their economic growth by augmenting labour supply and filling skill shortages.⁹²⁴ In fact, foreign workers have a threefold impact on the receiving country. First, the most important impact is the one connected with alleviating labour and skills shortages that can hinder economic growth and with filling gaps in dirty, dangerous and demanding (3D) tasks⁹²⁵ that local workers are not prepared to perform.⁹²⁶ Secondly, foreign workers serve as a labour reserve, as they help the receiving country to alleviate labour shortages during the down-cycle.⁹²⁷ Thirdly, foreign workers help the receiving country to stabilise its labour market for local labour and moderate wage growth.⁹²⁸

In countries, such as the DRC and South Africa, migrants make a great contribution to the nation's economic growth by creating jobs for locals, as revealed by studies conducted respectively by the OECD⁹²⁹ and the World Bank.⁹³⁰ Consequently, and as discussed elsewhere in this thesis, South Africa

924 Ratha D, Yi S & Yousefi S "Migration and development: the Asian experience," in Triandafyllidou A *Routledge handbook of immigration and refugee studies* (Routledge London 2016) 260.

925 The term "3D-jobs" (dirty, dangerous and demanding (or demeaning, difficult, dull, or drudgery)) is most widely used to describe the economic tasks or roles that "illegal immigrants" fulfil, which are shunned by the local workers. See Piller I "Linguistic diversity at work," in Piller I *Linguistic diversity and social justice: an introduction to applied sociolinguistics* (OUP Oxford 2016) 81; Durose C, Greasley S, & Richardson L "Conclusion," in Durose C, Greasley S, & Richardson L (eds) *Changing local governance, changing citizens* (Policy Press Bristol 2009) 216; Davies S "Introduction," in Davies S *Legitimising rejection: international refugee law in Southeast Asia* (Martinus Nijhoff Leiden 2008) 11; Sidun N "Traffickers: who are they?" in Walker L, Gaviria G, & Gopal K (eds) *Handbook of sex trafficking: feminist transnational perspectives* (Springer Cham 2018) 103.

926 Yue C "Demographic change and international labour mobility in Southeast Asia – issues, policies and implications for cooperation," in Hugo G & Young S (eds) *Labour mobility in the Asia-Pacific region: dynamics, issues and a new APEC agenda* (ISEAS Pasir Panjang 2008) 106.

927 Yue Demographic change 106.

928 Yue Demographic change 106; ILO *Labour and social trends in ASEAN, 2008: driving competitiveness and prosperity with decent work* (ILO Bangkok 2008) 6

929 Sall B "Migration, remittances and economic initiatives in Sub-Saharan Africa," in OECD *The development dimension: migration, remittances and development* (OECD Publishing Paris 2005) 274.

930 World Bank *New study finds immigrants in South Africa generate jobs for locals* (World Bank Pretoria, 08 February 2022) <https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals> (Date of use: 08 February 2022).

and the DRC have both enacted pieces of legislation encouraging the recruitment of foreign skilled workers.

5.3.2.2 Negative perception of the recruitment of foreign skills

There are so many other receiving countries where there is a growing public perception that immigration has got out of control, and where large sections of the public seem to have been inclined to view the effects of immigration negatively.⁹³¹

The major reasons these countries put forward for justifying such negative public perception are threefold. Firstly, '[im]migrants are perceived as taking jobs away from the [local] population'.⁹³² Secondly, receiving countries fear that immigrants may drive down wages by competing with natives for jobs.⁹³³ Thirdly, immigrants are viewed as constituting a heavy burden upon the country's social welfare system, especially in countries receiving large numbers of migrants.⁹³⁴ In fact, the presence of large numbers of international migrants⁹³⁵ in many countries has become a socially, economically, and politically sensitive issue.⁹³⁶

From a labour market perspective, large-scale immigration, especially illegal immigration presents serious concerns and challenges for the local labour force and the local economy in general.⁹³⁷

931 Omelaniuk I et al "Economic effects of international migration: A synoptic overview," in Omelaniuk I et al (eds) *World migration 2005: costs and benefits of international migration, volume 3 – IOM World Migration Report Series* (IOM Geneva 2005) 167.

932 Watanabe E "International migration: a development practitioner's perspective," in Kleinschmidt H (ed) *Migration, regional integration and human security: the formation and maintenance of transnational spaces* (Routledge London 2006) 21; Omelaniuk et al Economic effects 167.

933 Hamowy R "Immigration," in Hamowy R (ed) *The encyclopedia of libertarianism* (SAGE Los Angeles 2008) 236; Dural B & Ertekin M "Migration from Bulgaria and Romania to the EU-15," in Lordoğlu K, Demirel D & Şiriner I (eds) *Labour markets & employment – first edition* (IJOPEC Publication London 2012) 66; Omelaniuk et al Economic effects 167.

934 Rosenzweig M & Stark O "Introduction: Population and family economics," in Rosenzweig M & Stark O (eds) *Handbook of population and family economics - volume 1, part A* (Elsevier Oxford 1997) 11; Omelaniuk et al Economic effects 167.

935 International migrants include not only on documented and undocumented migrant workers and their family members, but also refugees, asylum seekers, and stateless persons, who are also participants in the host country's labour markets. See Howe & Owens *The regulatory challenges* 11.

936 Wöcke & Klein 2002 *Development Southern Africa* vol 19(4) at 444.

937 Battistella Labour migration in Asia 306; Naufal *The Economics of migration* 1634 & 1637; Egan M "Labour mobility and free movement of professionals," in Egan M *Single markets: economic integration in Europe and the US* (OUP Oxford 2015) 195; Desai M et al *The*

5.3.2.2.3 Consequences of the negative perception of the recruitment of foreign skills

Any dependence on increasing numbers of expatriates⁹³⁸ often creates some public discomfort, which more often triggers political and social unrest in the host country as local employees experience a reduction in their wages and as expatriate workers are given preference for jobs.⁹³⁹ In countries, such as South Africa,⁹⁴⁰ Kenya, Bangladesh, Botswana, and Zambia,⁹⁴¹ this kind of frustration has prompted adverse reactions and fuelled anti-foreigner sentiments, which have led to violent attacks on migrants,⁹⁴² also commonly referred to as xenophobic violence⁹⁴³ by criminal elements.⁹⁴⁴

In South Africa, the large influx of foreign migrants from sub-Saharan Africa since 1996 has resulted in competition between immigrants and natives for jobs, housing and social services, and has increased hostile anti-immigrant attitudes⁹⁴⁵ and xenophobic violence.⁹⁴⁶

Greenwood Encyclopedia of women's issues worldwide: the Middle East and North Africa (Greenwood Press Westport Conn 2003) 342; Mondesir S "Time-bomb in the Gulf," in *ARR: Arab report and record* (Economic Features London 1978) 612; Wöcke & Klein 2002 DSA vol 19(4) 444

938 OTA "Patterns in technology transfer: impacts and experiences," in *OTA Technology transfer to the Middle East* (US Congress Washington DC 1984) 418.

939 Crawley E, Swailes S & Walsh D "The dark side of international employment," in Crawley E, Swailes S & Walsh D *Introduction to international human resource management* (OUP Oxford 2013) 326; Kim Y "Foreign workers for Korea," 1991 *Korea News Review* vol. 20(35) 69; Encontre P *Why does the tourist Dollar matter? an introduction to the economics of tourism in the British Virgin Islands* (BVI Tourist Board Road Town 1989) 127.

940 South Africa's Government describes the country's socioeconomic situation as being largely characterised by the 'triple challenge of inequality, poverty and unemployment,' while the labour market remains characterised by shortage of job opportunities due to slow economic growth. DHET *Skills supply and demand in South Africa* (DHET Pretoria 2019) 2.

941 See Akinola A "The scourge of xenophobia: from Botswana to Zambia," in Akinola A (ed) *The political economy of xenophobia in Africa* (Springer Cham 2018) 26.

942 DIESA- *Population Division World Population Monitoring* (UN New York 1991) 171; WHO *Report on the world health situation* (WHO Geneva 1987) 27; Ferris E & Donato K *Refugees, migration and global governance: Negotiating the global compacts* (Routledge London 2019); Jacobsen K "Livelihoods and forced migration," in Fiddian-Qasmiyeh E et al (eds) *The Oxford handbook of refugee and forced migration studies* (OUP Oxford 2014) 99-111.

943 The concept of "xenophobia" has been the subject of some controversy in the literature, which is dealt with more thoroughly in this study. See Tafira 17; Landau *Introducing the demons* 17.

944 UN DESA - *Population Division World Population* 27; Ferris E & Donato *Refugees; Jacobsen Livelihoods* 99-111.

945 Dube G "Black South Africans' attitudes toward African Immigrants between 2008 and 2016" 2019 *NEP* vol 25(2) 191-210; Tshabalala S "Why black South Africans are attacking

More recently, persistent, and recurring attacks of non-nationals of African descent in the country have led to international diplomatic tension between South Africa and several African countries,⁹⁴⁷ as well as regional,⁹⁴⁸ and sub-regional institutions.⁹⁴⁹ Being a manifestation of human rights violation,⁹⁵⁰ such violence clearly brings into question the country's interest and commitment to human rights, despite the enactment of legislation that creates a more positive environment for foreign nationals who are in a "vulnerable position", as recognised in the South African case law.⁹⁵¹

5.3.2.2.4 Lasting solutions to social unrest

Without effectively and efficiently addressing socio-economic challenges through proper labour migration laws and policies, for instance, considering public opinion,

foreign Africans but not foreign whites," 2015 *Quartz Africa* 15 April. <https://qz.com/384041/why-black-south-africans-are-only-attacking-foreign-africans-but-not-foreign-whites/> (Date of use: 07 August 2022).

946 Kihato C "Invisible lives, inaudible voices? the social condition of migrant women in Johannesburg," in Gasa N (ed) *Women in South African history: Basus'iimbokodo, bawel'imilambo / they remove boulders and cross rivers* (HSRC Press Cape Town 2007) 404.

947 These include Nigeria, Zambia, Madagascar, and the DRC. See Krippahl C "Xenophobia in South Africa strains international relations," 2019 *Deutsche Welle* 03 September <https://www.dw.com/en/xenophobia-in-south-africa-strains-international-relations/a-50275526> (Date of use: 08 February 2022); Holmes C "What's behind South Africa's xenophobic violence last week? - Violence against immigrants has sparked a diplomatic crisis," 2019 *The Washington Post* 9 September <https://www.washingtonpost.com/politics/2019/09/09/whats-behind-south-africas-xenophobic-violence-last-week/> (Date of use: 08 February 2022); BBC News "South Africa closes embassy in Nigeria after xenophobic violence," *BBC News* (5 September 2019) <https://www.bbc.com/news/world-africa-49593030> (Date of use: 08 February 2022); Squazzin A "South Africa's epidemic of hate" 2019 *Bloomberg* 19 November. <https://www.bloomberg.com/news/articles/2019-11-19/south-africa-s-epidemic-of-hate-scapegoats-immigrants?srnd=economics-vp> (Date of use: 08 February 2022).

948 The AU, in particular. See Qin W "AU condemns xenophobic attacks in South Africa" 2019 *Xinhua* 03 September. http://www.xinhuanet.com/english/africa/2019-09/03/c_138362394.htm (Date of use: 08 February 2022).

949 The SADC, in particular. See Shumba P "SADC condemns xenophobic attacks and calls for lasting solutions" 2019 *The Chronicle* 05 September. <https://www.chronicle.co.zw/just-in-sadc-condemns-xenophobic-attacks-and-calls-for-lasting-solutions/> (Date of use: 08 February 2022).

950 See Art. 2 of the Braamfontein Statement on Xenophobia, SAHRC (15 October 1998). SAHRC "South African Human Rights Commission's Braamfontein Statement on racism and xenophobia" 1999 *SAJHR* vol. 15 (1) 131-136. See also *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23, 2007 (4) BCLR 339 (CC) (*Union of Refugee Women*) para. 143.

951 See the *Union of Refugee Women* case para. 31. See also Sarkin J "Implementation of human rights in South Africa: constitutional and Pan-African aspects," in Lanotte J, Sarkin J & Haec Y (eds) *The principle of equality: a South African and a Belgian perspective* (Maklu Publishers Antwerp-Apeldoorn 2001) 96.

as it should be in a democracy,⁹⁵² the country would fail to promote ‘a culture of respect for human rights’, to foster economic growth and social cohesion.⁹⁵³ Therefore, in consideration of such uneasiness, the host governments normally take necessary steps to rectify the situation, satisfy part of their public,⁹⁵⁴ and address these concerns, focusing at the same time on the question of how valid such concerns may be.

As the HSRC has found, ‘anti-immigrant sentiment in [South Africa] is fuelled by the implicit (and explicit) link that is made, in public discourse, between migration and social problems or jobs’.⁹⁵⁵ To tackle this endemic problem affecting not only the SADC region, but also the African continent as a whole, necessary steps need to be taken at the national, sub-regional, regional, continental and global levels, including the protection of national labour force.

5.4 Motivations of the protection of national labour force

Two categories of reasons may be identified as to why a state may wish to protect its workforce or regulate the work of foreign nationals on its territory. On the one hand, there are political or legal reasons (1), and, on the other, economic, or financial reasons (2), bearing in mind that the importance of each varies depending on the circumstances, in particular the economic situation of the country.⁹⁵⁶

5.4.1 The legal and political grounds for protecting the national workforce

The legal and political grounds for protecting the national workforce are twofold: work as a right and a duty for every citizen (1), and work as a vehicle for humanitarian or neighbourly ideals (2).

952 Kingston J “Demographic dilemmas, women and immigration,” in Kingston J (ed) *Critical issues in contemporary Japan* (Routledge London 2014) 197.

953 Ssenyonjo M “The domestic protection of economic, social and cultural rights,” in Ssenyonjo M *Economic, social and cultural rights in international law* (Hart Publishing Oxford 2009) 160 fn 62.

954 Libercier M, Schneider H, & OECD *Migrants: partners in development co-operation* (Development Centre, OECD Paris 1996) 1978.

955 Pillai M *HSRC and IPSOS look at drivers of anti-immigrant sentiment in South Africa* (HSRC Pretoria 2020). <http://www.hsrc.ac.za/en/media-briefs/dces/anti-immigrant-sentiment-sa> (Date of use: 08 February 2022).

956 Katansi Protection 195.

5.4.1.1 Work as a right and a duty for every citizen

The primary motivation for regulating the protection of the national labour force or the employment of foreign nationals is obviously of a legal nature.⁹⁵⁷ The South African *Constitution* guarantees the right to choose occupation or profession freely,⁹⁵⁸ and grants everyone the right to fair labour practices.⁹⁵⁹ It may be argued that these constitutional provisions make work a duty for every citizen, just like in the DRC.⁹⁶⁰

The DRC *Constitution* further makes the enjoyment of fundamental rights, except for political rights, conditional on reciprocity.⁹⁶¹ Unlike the old *Constitution*, as amended on 27 June 1988,⁹⁶² the 2006 *Constitution* obviously guarantees the protection and access to equal economic, social, and cultural rights of Congolese nationals and foreign nationals.⁹⁶³

5.4.1.2 Work as a vehicle for humanitarian or neighbourly ideals

In some cases, work appears to be a manifestation by the nation of a humanitarian ideal and a policy of good neighbourliness.⁹⁶⁴ In terms of a humanitarian ideal, the State concerned intervenes on a continent such as Africa where socio-political crises constantly give rise to the influx of refugees who later start looking for jobs in the host country.⁹⁶⁵ South Africa and the DRC have both taken steps to host significant numbers of refugees and asylum seekers and allow recognised refugees to work.⁹⁶⁶

957 Katansi Protection 205.

958 See s 22 of the *Constitution of South Africa, 1996*.

959 See s 23 (1).

960 See Art. 36 of the *2006 Constitution*. See also Art. 2(1) of the *2002 Labour Code*.

961 Art. 50(2) of the *2006 Constitution*.

962 The old *Constitution*, as amended on 27 June 1988 specifically prohibited foreign nationals from enjoying the rights reserved for then Zairean nationals. See Art. 31(2) of the *Constitution, as amended on 27 June 1988*.

963 Arts. 32(1) & 50(3) of the *2006 Constitution*.

964 Katansi Protection 196.

965 Katansi Protection 196; Baker J & Zetter R "From relief to development: Refugees as development resources: A macro-economic perspective," in Baker J & Zetter R *Refugee and labour movements in Sub-Saharan Africa: a review - shelter provision and settlement policies for refugees: a state of the art review* (NAI Uppsala 1995) 90.

966 For the DRC, see Art. 32(1) of *2002 Refugees Act* and Art. 8 of *Ordinance No. 74-098 of 6 June 1974*. For South Africa, see s 27(f) of *Refugees Act (Act 130 of 1998)*.

As regards good neighbourhood policy, South Africa and the DRC share their borders with six and nine different countries respectively, while they are, at the same time, members of some RECs⁹⁶⁷ and Sub-Regional Economic Communities (SECs)⁹⁶⁸ recognised by the AU. By joining these economic blocs, in particular the SADC, South Africa and the DRC undertake to fulfil the REC's objectives, including to reduce customs duties and other barriers to trade on imported products amongst member states,⁹⁶⁹ and 'to encourage [free] movement of persons in the region'.⁹⁷⁰

To fulfil this type of community obligation subject to reciprocity or humanitarian obligations, both countries are required to regulate the employment of foreign nationals. This will make it possible to determine how much the employment can reasonably be shared with foreign nationals, and these are obviously political motivations,⁹⁷¹ as opposed to economic and social motivations.

5.4.2 Economic and social grounds for protecting the national workforce

The legal and political grounds mentioned above, the protection of the national workforce the DRC and South Africa is based on social, financial, and economic reasons, namely the fight against unemployment (1), and concern for currency savings (2).⁹⁷²

5.4.2.1 The fight against unemployment

A primary motivation behind the state's obligation to regulate the employment of foreigners seems obvious: the fight against unemployment nationwide.⁹⁷³ In South Africa, for instance, the *Employment Services Act 4 of 2014* regulating 'the employment of foreigners has been introduced to, [*inter alia*], promote

967 In terms of the RECs, the DRC is member of ECCAS; COMESA; SADC; and South Africa is member of SADC.

968 In terms of SECs, the DRC is member of CEPGL (Great Lakes River Basin); and South Africa is member of SACU (Southern African Customs Union).

969 See *SADC Protocol on Trade (1996)*, as amended in 2010.

970 See *SADC Protocol on the Facilitation of Movement of Persons (2005)*.

971 Katansi Protection 196; De Waal T "Structural risks of integration requirements," in De Waal T *Integration requirements for immigrants in Europe: a legal-philosophical inquiry* (Hart Publishing New York 2021) 67.

972 Katansi Protection 196.

973 Katansi Protection 196.

employment, decrease levels of unemployment, encourage productivity, and provide training for unskilled workers'.⁹⁷⁴ The proposed 2021 *Employment Services Amendment Bill* has introduced 'further regulations around the hiring of foreign workers in South Africa'.⁹⁷⁵ The proposed Bill clearly acknowledges that 'the high rate of unemployed South Africans and the high representation of foreign nationals employed in lower occupation levels, particularly in the unskilled sector is a critical concern'.⁹⁷⁶

The proposed Bill then proposes that with due regard to the *2000 Equality Act*,⁹⁷⁷ 'there should be deliberate attempts by the State to control the increasing preference by certain sectors in the workforce to employ foreign nationals over South African citizens, without justification on the basis of skills'.⁹⁷⁸ As a result, the proposed bill makes it 'imperative to regulate the employment of foreign nationals in South Africa, in order to stem the narrative that the ratio of job opportunities between foreign nationals and South African citizens are skewed towards foreign nationals'.⁹⁷⁹

Similarly, at the provincial level, the *Gauteng Township Economic Development Bill*,⁹⁸⁰ which has been introduced in the Provincial Legislature of the Province of Gauteng as a Government Bill, plans to restrict jobs for foreign workers.⁹⁸¹ One of

974 Coetzer N & Bismilla S *What employers need to know about employing foreigners in South Africa* (Labour Guide Pretoria 2021). <https://www.labourguide.co.za/most-recent/2412-what-employers-need-to-know-about-employing-foreigners-in-south-africa> (Date of use: 04 February 2022).

975 Van der Merwe L "Notice of intention to introduce a Private Member's Bill and invitation for comment on the Draft Bill, namely the Employment Services Amendment Bill, 2021" *Government Gazette No. 43981* (11 December 2020) 201.

976 Van der Merwe Notice of intention 201; Sidimba L "Plan to bar foreigners from working in certain sectors" 2020 *IOL* 13 December. <https://www.iol.co.za/news/politics/plan-to-bar-foreigners-from-working-in-certain-sectors-0566276b-f1fa-4637-bcba-f00900d02ab0> (Date of use: 04 February 2022).

977 *Equality Act (No. 4 of 2000)*.

978 Van der Merwe Notice of intention 201; Staff Writer "New bill aims to limit the hiring of foreign workers in South Africa" 2020 *Business Tech* 11 December. <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (Date of use: 04 February 2022).

979 Van der Merwe L "Notice of intention 201; Writer S "New law to block foreigners from working in certain sectors in South Africa" 2019 *Business Tech* 26 September. <https://businesstech.co.za/news/business/343169/new-law-to-block-foreigners-from-working-in-certain-sectors-in-south-africa/> (Date of use: 11 October 2022)

980 Gauteng Township Economic Development Bill [B – 2020].

981 Staff Writer "Gauteng's plans to restrict jobs for foreign workers – what you need to know" 2020 *Business Tech* 28 September.

the key objects of the Bill is to 'designate business activities within the township areas that are reserved for the exclusive and sole use of citizens and persons who has permanent residency status in [South Africa]'.⁹⁸² The Bill specifies the 'business activities that [...] are, in a designated township, exclusively and solely reserved for ownership and operation by a citizen of, or a person who has permanent residency status in [South Africa]'.⁹⁸³

Furthermore, the DEL is developing a new Labour Migration Policy aimed at regulating foreign workers in South Africa, given worsening unemployment and a perception that foreigners impact labour market access.⁹⁸⁴ However, some analysts and economists advise against legislating to prevent foreign nationals from accessing some sectors of the economy in an effort to reduce the country's record-high unemployment rate, which now stands at 34.9%.⁹⁸⁵ According to these experts, any possible exclusion of foreign nationals from certain parts of the economy could diminish the general quality of jobs and exacerbate the shortage of skills in the country. They analysts have concluded and further warned that 'increased skills shortage will further undermine long-term economic growth and employment opportunities.'⁹⁸⁶

In the DRC, the State took steps in the 1970s 'to regulate the employment of foreign nationals', and the move was regarded as a way of tackling unemployment, which has long been considered as one of the "ten scourges"⁹⁸⁷

<https://businesstech.co.za/news/business/436219/gautengs-plans-to-restrict-jobs-for-foreign-workers-what-you-need-to-know/> (Date of use: 04 February 2022).

982 See s 3(b).

983 See s 7(2).

984 Staff Writer "New migrant worker rules planned for South Africa" 2021 *Business Tech* 30 November. <https://businesstech.co.za/news/business/542852/new-migrant-worker-rules-planned-for-south-africa/> (Date of use: 04 February 2022).

985 Ngcobo N "Barring foreign nationals from certain jobs in SA could diminish quality of jobs, exacerbate skills shortage: analysts" 2022 *SABC News* 7 February. <https://www.sabcnews.com/sabcnews/barring-foreign-nationals-from-certain-jobs-in-sa-could-diminish-quality-of-jobs-exacerbate-shortage-of-skills-analysts/> (Date of use: 09 February 2022).

986 Ngcobo 2022 *SABC News* 7 February.

987 The other scourges include widespread corruption, widespread poverty, hunger, no access to clean water, nutrition and healthcare, diseases, mismanagement of resources, weak governance, impunity, and violent conflicts. See Herderschee J, Kai-Alexander K, & Samba MD *Resilience of an African giant: boosting growth and development in the DRC* (World Bank Washington DC 2012) 24; Kamwimbi TK *Legal aspects of forced child labour: the case of the DRC* (Juta Cape Town 2021) 4; Oppong J, Woodruff T, & Gritzner C "Living in

affecting the Congolese people.⁹⁸⁸ As former President Mobutu pointed out in his speeches made respectively on 30 November 1973 and on 5 December 1984, the labour migration policy allows for the hiring of foreign nationals only when local nationals have been served or when the necessary skills are not available locally.⁹⁸⁹ He announced that no foreign national should be hired without prior authorisation from an employment committee, which he had decided to set up.⁹⁹⁰

President Mobutu's stance, which singled out the heavy reliance upon foreign labour resulted in the enactment of *Ordinance No. 74-098 of 6 June 1974*, which specifically refers to both the 1973 presidential speech and the *1967 Labour Code* in its Preamble. It is clearly with the intention of tackling unemployment that this Ordinance reserves the hiring priority for national workers in respect of any gainful employment.⁹⁹¹ President Mobutu further called upon the State not to heavily rely upon foreign labour to solve another major issue involving the financial bleeding caused by the reckless use of foreign labour.⁹⁹²

5.4.2.2 Concern for currency savings

Many African countries, including South Africa and the DRC, experience skill shortage, particularly in management, the engineering, Information and Communications Technology (ICT), and artisan fields.⁹⁹³ For this reason, South

the Congo today," in Oppong J, Woodruff T, Gritzner C *DRC* (Modern World Nations) (Chelsea House New York 2007) 75.

988 Katansi Protection 196.

989 Nghenda Zaïrianisation 234; Katansi Protection 194 & 196; Lule *Droit du travail zaïrois* 213.

990 Kassa J "President Mobutu Sese Seko's keynote speech to the National Legislative Council," in Kassa J *Analyse socio-économique du développement agricole et ses incidences sur la promotion des milieux ruraux dans les pays en voie de développement: le cas du Congo-Zaïre de 1885 à 1990* (ULB Brussels 1996) 2017.

991 See Art. 4.

992 Katansi Protection 197.

993 Erasmus J "Identification of scarce and critical skills in the South African labour market," in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 28; Mbabane L "Managers," in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 34; Du Toit R & Roodt J "Engineering," in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 88; Roodt J & Paterson A "ICT professionals," in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 193; Mukora J "Artisans," in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 221; Staff Writer "The skills and jobs that can't be filled in South Africa" 2021 *Business Tech* 7 March.

Africa⁹⁹⁴ and the DRC⁹⁹⁵ may have both to rely on expatriate labour or management, which ‘inevitably increases the cost incurred by the relevant industry compared to its equivalent in many other developing countries’.⁹⁹⁶ The World Bank data reveal that ‘management salaries paid to expatriates working in Africa are typically two to three times those paid to their counterparts in home countries’.⁹⁹⁷

In South Africa, skilled international workers, in particular doctors imported ‘on the basis of government-to-government agreements’ to deal with the rural shortages of medical practitioners, often require much higher salaries than South African doctors would demand.⁹⁹⁸ According to the outcomes of a survey carried out in the country in 2013, ‘one in three expatriates in executive positions, and one in five in other categories, received a salary that was three times higher than was paid to their local counterparts’.⁹⁹⁹

Similarly, ‘the DRC is experiencing both extremely high unemployment and [significant skill] shortages’ in many areas.¹⁰⁰⁰ As a result, many companies are often forced to recruit skilled foreign workers from the region but also from Australia, China, and New Zealand, who bring some real expertise, for instance ‘in sheet metalwork or to operate lifting equipment in mines’.¹⁰⁰¹ These ‘international

<https://businesstech.co.za/news/business/469582/the-skills-and-jobs-that-cant-be-filled-in-south-africa/> (Date of use: 04 February 2022).

994 Para. (h) of the Preamble of the *2002 Immigration Act*, as amended to date, clearly recognises that ‘the South African economy may have access at all times to the full measure of needed contributions by foreigners’.

995 The DRC government specifically acknowledged that the mining boom in the country and the use of high technology in this sector *require recruitment of foreign high-skilled workforce to maintain business productivity*. See *Circular Note No. 004/CAB/MINETAT/METPS/01/2020 of 22 July 2020 reminding regulatory instructions concerning the employment of foreign nationals in companies and businesses of all kinds*.

996 Chazan N et al “Political economy: Policy choices in a constraining environment,” in Chazan N et al *Politics and society in contemporary Africa* (Lynne Rienner Boulder 1992) 253.

997 Chazan et al *Political economy* 253.

998 Breier M “Doctors,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: Case studies of key professions* (HSRC Press Cape Town 2010) 121 & 122; Banhegyi S et al “The business environment,” in Banhegyi S et al *Business management: fresh perspectives* (Pearson Education South Africa Cape Town 2009) 95-136.

999 Staff Reporter “Expats lose out over scramble for local talent in Africa” 2014 *Mail & Guardian* 20 October. <https://mg.co.za/article/2014-10-20-expats-lose-out-over-scramble-for-local-talent-in-africa/> (Date of use: 04 February 2022).

1000 AFD *DRC* (AFD Paris 2021). <https://www.afd.fr/en/page-region-pays/democratic-republic-congo> (Date of use: 04 February 2022).

1001 Elela 2021 ID4D 17 June. <https://ideas4development.org/en/vocational-training-drc-tool-peace-development/> (Date of use: 04 February 2022); ICG “Mineral concessions: avoiding conflict in DR Congo’s mining heartland” 2020 *Africa Report* 290 (ICG Brussels 30 June).

assignments don't come cheap, [as] on average, expatriates cost two to three times what they would in an equivalent position [in their] home [country]'.¹⁰⁰²

For instance, a Human Rights NGO reported that in terms of wages, foreign workers from China and India earn 10 to 20 times more than their Congolese counterparts for the same work performed.¹⁰⁰³ Most foreign workers often send all or 'part of their earnings back to their home countries in the form of either cash or goods to support their families, and these transfers are known as workers' or migrant remittances'.¹⁰⁰⁴ This "massive repatriation" of work-related income has resulted in the financial bleeding, which has suffocated the national economy.¹⁰⁰⁵ The World Bank has, indeed, pointed out that Saharan Africa has always had the highest average cost (8.2 percent).¹⁰⁰⁶

With such high costs, 'remittances increase the consumption of non-tradable goods, raises their prices, appreciates the real exchange rate, and decreases exports, thus damaging the receiving country's competitiveness in world markets'.¹⁰⁰⁷ In practical terms, the DRC employers' association stressed that 'the cost of an expatriate employee is currently very high for the company and has an unfavourable impact on the price of products, making them less competitive. In addition to this, there is the very high cost of foreign currency transfers'.¹⁰⁰⁸

<https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/290-mineral-concessions-avoiding-conflict-dr-congos-mining-heartland> (Date of use: 04 February 2022).

1002 Black S & Gregersen H "The right way to manage expats" 1999 *International Business* March–April. <https://hbr.org/1999/03/the-right-way-to-manage-expats> (Date of use: 04 February 2022).

1003 MDR *Analyse des conditions de travail au sein des entreprises asiatiques: cas de CDM et de Golden African Resources* (MDR Lubumbashi 2016) 18 & 33. https://congominer.org/system/attachments/assets/000/001/230/original/MDR-publication_entreprises_asiatiques.pdf?1489058298 (Date of use: 04 February 2022).

1004 Feld S "Remittances to developing countries," in Feld S *International migration, remittances and brain drain: Impacts on development* (Springer Cham 2021) 77; Ratha D *Remittances: funds for the folks back home* (IMF Washington DC 2020). <https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm> (Date of use: 04 Feb. 2022).

1005 Katansi Protection 197.

1006 World Bank "Defying predictions, remittance flows remain strong during COVID-19 Crisis" *Press Release No: 2021/147/SPJ* (World Bank Washington DC 2021). <https://www.worldbank.org/en/news/press-release/2021/05/12/defying-predictions-remittance-flows-remain-strong-during-covid-19-crisis> (Date of use: 04 February 2022).

1007 Amuedo-Dorantes C "The good and the bad in remittance flows" *IZA World of Labour* (San Diego State University & IZA Germany 2014) 4. <https://wol.iza.org/uploads/articles/97/pdfs/good-and-bad-in-remittance-flows.pdf> (Date of use: 04 February 2022).

1008 Katansi Protection 197.

5.5 Conclusion

This chapter has discussed the concepts of national labour force and labour or skills shortage, which provide some background on the protection of domestic labour force against foreign competition. The philosophical and statutory foundations, as well as the limitations of the focal point of this thesis have been discussed to challenge the key argument of the moral justification of this policy.

The DRC and South Africa both seek to promote the nationalisation of the labour force while they must comply with the objective of matching migrants' skills with national labour market needs. This means that both countries experience the tension between the state's willingness to encourage skilled and highly skilled labour migration by, for instance, providing visa facilities and employment opportunities,¹⁰⁰⁹ and the protectionist approach towards labour migration.¹⁰¹⁰ In taking these steps, the two countries seek to combating unemployment and deal with the concern for currency savings.

To protect their domestic labour force against foreign competition, the two countries have put in place specific mechanisms, including the adoption of labour protective-legislation, and migration control policies. These 'measures have been taken to ensure the protection of their citizens' rights to preferential access to the national labour market when admitting migrant workers'.¹⁰¹¹ To this end, the governments decide to either prohibit foreigners from taking up employment in specific sectors of the national economy, or limit access to the practice of certain professions.¹⁰¹²

The two countries' legislation concerning the employment of foreign labour requires the employers or the employees to obtain a work permit and or/ visa. The legislation also provides for exemptions, including for diplomatic / consular personnel and representatives of international organisations, refugees, and

1009 Singh L "Rethinking development through dynamics of skilled human migration from India," in Sahoo S & Pattanaik B (eds) *Global diasporas and development: socioeconomic, cultural, and policy perspectives* (Springer London 2014) 158.

1010 Carciotto International migration and development 63.

1011 Ruhs Labour market protectionism 64.

1012 Joubert & Faris *The law of South Africa* 34.

nationals from neighbouring countries. While no major issues have been raised concerning the diplomats and the refugees, the regimes governing the nationals from neighbouring countries appear to raise some critical legal questions, which are dealt with in the next chapter, which analyses the way the DRC and South Africa implement the basic principles governing the protection of national labour force.

CHAPTER SIX

BASIC PRINCIPLES GOVERNING THE PROTECTION OF NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA

6.1 Introduction

This chapter aims to provide an overview of the basic principles governing the protection of national labour force. For this purpose, the chapter is subdivided into four sections, three of which are devoted respectively to an analysis of their objectives of the basic principles (1), a review of their contents (2), a description of their scope of application (3). The fourth section provides an overview of the main findings and conclusions drawn from the discussions presented in this chapter.

6.2 Objectives of the principles

Basically, the principles relating to the protection of national labour, as discussed below, have a dual purpose, as they pursue two different goals, which are complementary, to some extent.¹⁰¹³ In the DRC, these objectives are clearly set out in the current legislation protecting the national labour force against foreign competition, in particular *Ordinance No. 74-098 of 6 June 1974* as revised to date.¹⁰¹⁴ In South Africa, both the *Immigration Act*¹⁰¹⁵ and the *2014 Employment Services Act*¹⁰¹⁶ contain the principles relating to the protection of national labour.

1013 Katansi Protection 206.

1014 Under Article 1, the Ordinance provides that its purpose is 'to organise the protection of the national labour force against foreign competition, to regulate the employment of foreign nationals and to create an employment committee, which is responsible for adjudicating on applications for work authorisation by foreign workers, and to take all necessary steps to ensure the nationalisation of staff in local companies'.

1015 Under the *Immigration Amendment Act, 2011 (Act No. 13 of 2011)* – to date, the contribution of foreigners in the labour market shall not adversely impact on existing labour standards and the rights and expectations of South African workers. A policy connection shall also be maintained between foreigners working in the country and the training of South African nationals. (See paras. (i) & (j) of the Preamble).

1016 The purpose of the Act is 'to facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner that does not impact

By introducing the principles to be discussed in the following subsections, the Congolese and South African lawmakers intended to achieve two primary objectives — the fight against foreign competition in the national labour market (1), on the one hand, and the nationalisation of the workforce in companies established in the country (2), on the other hand.

6.2.1 Tackling foreign competition in the national labour market

In the matter of employment, all countries are, admittedly, some more than others, faced with either job demands from foreign nationals they are hosting or skills shortages, which require many employers to express the ‘need for good access to the ‘best workers’ regardless of where they come from’.¹⁰¹⁷ With high unemployment rate caused, *inter alia*, by poverty and slow economic growth in both South Africa¹⁰¹⁸ and the DRC,¹⁰¹⁹ the labour immigration policy in both countries seems to create ‘some kind of competition in the labour market between immigrants and local workers’.¹⁰²⁰

In most cases, local workers in low skilled occupations become frustrated and consider themselves inferior to the foreign-born workers in terms of their skills, which ‘often results in conflict, particularly when economic competition is mixed with cultural or racial differences’.¹⁰²¹ High levels of immigration could be a factor

adversely on existing labour standards or the rights and expectations of South African workers, [...] and that promotes the training of South African citizens and permanent residents’. See s 2(1)(h) (ii) & (iii) of *Employment Services Act, 2014* [Act No. 4 of 2014].

1017 Ruhs *Labour market protectionism* 60.

1018 With 34.9% unemployment rate, South Africa is now highest in the world on a global list of 82 countries monitored by Bloomberg. See Naidoo P “South Africa’s unemployment rate is now highest in the world” 2021 *Bloomberg* 24 August. <https://www.aljazeera.com/economy/2021/8/24/south-africas-unemployment-rate-is-now-the-worlds-highest> (Date of use: 07 February 2022); Vanek M “South Africa’s jobless rate rises to new high in third quarter” 2021 *Bloomberg* 30 November. <https://www.bloomberg.com/news/articles/2022-02-07/cooking-oils-surge-is-sign-food-inflation-can-go-even-higher> (Date of use: 07 February 2022).

1019 According to the World Bank report based on ILO estimate of 15 June 2021, the DRC has 4.5% unemployment rate. See World Bank Unemployment, total (% of total labour force) (modelled ILO estimate) (World Bank Washington DC 2021). <https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?view=chart> (Date of use: 07 February 2022).

1020 Ruhs *Labour market protectionism* 61.

1021 Ruhs *Labour market protectionism* 61; Blair J “Resources and commodity flows,” in Blair J *Local economic development: Analysis and practice* (SAGE Publ. London 2013) 205.

leading to conflicts over scarce resources.¹⁰²² This requires governments to implement immigration policies ‘through laws, regulations and measures [with a view to] managing the volume, origin, direction and composition of migration flows’.¹⁰²³ In terms of interstate relations, practical experience shows that high levels of immigration have also consistently generated economic, social, and cultural tensions, which have transformed immigration into a highly contentious political or diplomatic issue between States.¹⁰²⁴

To minimise labour market competition between local and migrant workers, countries take the necessary steps to regulate immigration.¹⁰²⁵ In South Africa, the admission of foreign nationals in the country is regulated to promote economic growth.¹⁰²⁶ The law further ‘facilitates the employment of foreign nationals in the South African economy, where their contribution is needed’.¹⁰²⁷ Similarly, and as discussed previously, the DRC legislation regulates the employment of foreign nationals.¹⁰²⁸

Lastly, foreign competition may, ironically, be caused by the host state itself, which, having no skilled workforce, as many developing countries still do, seeks out foreign labour. In such a case scenario, the legislation relating to the protection of the national workforce serves a different and complementary purpose to the one discussed below, that of promoting a larger skilled national workforce.

1022 Yıldırım A “‘The guest doesn’t like another guest, and the host likes neither’: Somali refugees forgotten in a satellite town,” in Bulut M & Şahin K (eds) *Anthropological perspectives on transnational encounters in Turkey: war, migration and experiences of coexistence* (Transnational Press London 2019) 57.

1023 See Faist T “Immigration, citizenship and nationalism: internal internationalisation in Germany and Europe,” in Roche M & Van Berkel R *European citizenship and social exclusion* (Routledge London 2018) 220; Faist T “Immigration, integration, and the welfare state: Germany and the USA in comparative perspective,” in Bauböck R, Heller A, & Zolberg A (eds) *The challenge of diversity: integration and pluralism in societies of immigration* (Avebury Aldershot UK 1996) 238; Bassarsky L et al (eds) *International migration policies: government views and priorities* (UN New York 2013) 29.

1024 Coates D, Smith K & Walldorf W “Immigration, domestic consequences of,” in Coates D, Smith K & Walldorf W (eds) *The Oxford companion to American politics - volume 2* (OUP Oxford 2012) 513.

1025 Biffl G & Skrivanek I “The distinction between temporary labour migration and posted work in Austria: labour law versus trade law,” in Howe J & Owens R (eds.) *Temporary labour migration in the global era: the regulatory challenges* (Hart Publishing Oxford 2016) 102.

1026 See para. (h) of the Preamble of the *Immigration Amendment Act, 2011* to date.

1027 See s2(1) & s5(1)(i) of the *Employment Services Act, 2014*.

1028 See Art. 1 of *Departmental Order No. 87/005 of 21 January 1987; Ordinance No. 87-281 of 13 August 1987*.

6.2.2 Workforce nationalisation

Workforce nationalisation (or localisation) is defined as a government strategic policy aimed at addressing an over-dependence on expatriate employment in a particular country.¹⁰²⁹ To reduce a country's dependency on an expatriate workforce and redress the national/expatriate workforce imbalance, this public policy priority involves native-born recruitment and employee development.¹⁰³⁰

This serves to encourage the employment of nationals in certain jobs or industry sectors,¹⁰³¹ through preparation of native-born citizens to take up jobs performed by expatriates.¹⁰³² This is precisely what the 1973 *Zaireanisation*¹⁰³³ policy required when imposing that the labour force in companies operating in former Zaire consist of a majority of nationals.¹⁰³⁴ In fact, the *Zaireanisation* or “localisation” or “Africanisation” policy gave rise to the protectionist approach towards labour migration. The policy involved some reforms passionately announced by former President Mobutu in his annual State of the Nation Address¹⁰³⁵ delivered on 30 November 1973 in which he specifically called for the country's total economic independence.¹⁰³⁶ It was in pursuance of the measures outlined in this Address that *Ordinance No. 74-098 of 6 June 1974 protecting the national labour force against foreign competition* was enacted.¹⁰³⁷ The current legislation further

1029 Ryan J “Old knowledge for new impacts: Equity theory and workforce nationalisation” 2016 *Journal of Business Research* Vol. 69(5) 1587; Suparamaniam-Kallerdah N *Nationalising a workforce* (Vysus Group Manchester 2021). <https://www.vysusgroup.com/articles/nationalising-a-workforce> (Date of use: 09 Feb. 2022).

1030 Ryan 2016 *Journal of Business Research* vol. 69(5) 1587.

1031 Bryan Cave LLP *Legal issues related to doing business in the UAE* (Bryan Cave Dubai 2004). <https://www.bclplaw.com/images/content/8/1/v2/814/MiddleEastArticle2-04.pdf> (Date of use: 09 Feb. 2022).

1032 Abdelkarim A *UAE labour market and problems of employment of nationals: an overview and policy agenda* (Tanmia Dubai 2001).

1033 This nationalisation policy is referred to, in the DRC, as “Africanisation” or “Zaireanisation” (this term was used when the country was still known as Zaire) of the labour force.

1034 See Art. 1 of *Ordinance No. 74-098 of 6 June 1974*; Katansi Protection 207.

1035 Mobutu Sese Seko J D *Discours présidentiel de la politique générale prononcé le 30 novembre 1973 (Presidential address on general policy delivered on November 30, 1973)* (Institut Makanda Kabobi Kinshasa 1973).

1036 Young C & Turner T “Zairianisation and radicalisation: Anatomy of a disaster,” in Young C & Turner T *The rise and decline of the Zairian State* (University of Wisconsin Press Madison Wisc. 1985) 326.

1037 See Nghenda *Zairianisation* 234; Katansi Protection 194; Lule *Droit du travail zaïrois* 213.

requires employers to train Congolese nationals while the work permit granted to foreign workers is still valid.¹⁰³⁸

In South Africa, a similar workforce nationalisation¹⁰³⁹ policy has also existed for many years. The origins of the current protectionist approach towards labour migration, as reflected by the policy of “South Africanisation” of the workplace dates back to 1987 with the African National Congress (ANC) strategy involving drastic reduction of the numbers of foreign mine labour migrants.¹⁰⁴⁰ This policy was later instituted by the post-apartheid Government as a ‘South Africa first’ employment policy, following significant political pressures put on the ruling party, ANC by its Youth League (ANCYL) and further to strong influence exercised by trade unions.¹⁰⁴¹

The current legislation contains similar provisions, which require employers ‘to prepare a skills transfer plan in respect of any employment position held by a foreign national’.¹⁰⁴² This policy aimed at reducing dependence on foreign labour is closely related to the basic principles governing the protection of national labour force the contents of which are discussed in the following subsection.

6.3 Contents of the principles

The DRC and South Africa have legally imposed the main protectionist measures by way of a fivefold policy. This amounts to discussing two basic principles governing the protection of national labour force: employment priority for local employees (1); and requirement to hold a work permit and/ or visa (2).

1038 Art. 6 of *Departmental Order No. 87/005 of 21 January 1987*.

1039 In South Africa, the nationalisation policy should be referred to as the “South Africanisation” of the workforce, which was later instituted as the “South Africa first employment policy”.

1040 See James W “The politics of normalisation: mine migrancy in a democratic South Africa,” in Crush J & James W (eds) *Crossing boundaries: mine migrancy in a democratic South Africa* (IDASA Cape Town / IDRC Ottawa 1995) 222.

1041 Ellis South Africa and international migration 129; Barou J, Aigner P & Mbenga B “African migration in its national and global context,” in Attias-Donfut C et al (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 34; Carciotto International migration and development 63.

1042 See s 8(2)(c) of *Employment Services Act, 2014*; see also para. (j) of the Preamble of the *Immigration Amendment Act, 2011* to date, which refers to the policy connection maintained between foreigners working in South Africa and the training of South African citizens.

6.3.1 Employment priority for local employees

The first principle is enshrined under the provisions protecting local workers' right to preferential access to the national labour market, which means that jobs should go in the first instance to suitably qualified citizens or permanent residents.¹⁰⁴³

In the DRC, the current legislation specifically provides that, 'for any gainful employment, priority is reserved for national workers'.¹⁰⁴⁴ The DRC's lawmakers have further enacted a range of laws and regulations, which protect national workforce by promoting employment priority for local employees. These include laws and regulations governing subcontracting companies,¹⁰⁴⁵ public-private partnership,¹⁰⁴⁶ oil and gas sector,¹⁰⁴⁷ archival activity and profession,¹⁰⁴⁸ to name just a few.

To safeguard this principle of employment priority, the National Committee for the employment of foreign workers, which is '[...] responsible for deciding on the issuance of work permits to foreign nationals',¹⁰⁴⁹ shall approve the hiring of a foreign worker only when the job in question requires special skills.¹⁰⁵⁰ Therefore, any job offers for the hiring of a foreign worker that do not find a national skill shall be referred to this Committee.¹⁰⁵¹

In South Africa, the current legislation contains similar provisions, which require '[t]he employers [to] satisfy themselves that there are no other persons in the

1043 Ellis S "South Africa and international migration: the role of skilled labour," in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD Paris 2008) 132; Nghenda Zaïrianisation 234; Katansi Protection 207; Lule Droit du travail congolais 215-216; Shutsha Six leçons 398-399 para. 676.

1044 See Art. 4 of *Ordinance No. 74-098 of 6 June 1974* as revised to date; Art. 7 of *Departmental order No. 87/005 of 21 January 1987*; Art. 31 of the *Investment Code (Act No. 004-2002 of 21 February 2002)*.

1045 See *Act No. 17/001 of 8 February 2017 establishing the rules applicable to subcontracting in the private sector* (Art. 1(2)).

1046 See *Act No. 18/016 of 9 July 2018 relating to public-private partnership* (Art. 12(1)).

1047 See *Act No 15/012 of 1 August 2015 pertaining to the general regime for oil and gas* (Art. 5(2) & Art. 6).

1048 See *Ministerial Order No. 003/CAB/MIN/CA/DIRA/SA/2016 of 11 February 2016 organising archival activity and profession in the DRC* (Art. 3).

1049 See Art. 209(1) of *2002 Labour Code*.

1050 Mutshipangu *Relations de travail* 120.

1051 See Art. 20 of *Ministerial Order No. 12/CAB.MIN.ETPS/044/2008 of 8 August 2008 laying down the terms and conditions for the placing of workers*.

[country] with suitable skills to fill a vacancy, before recruiting a foreign national'.¹⁰⁵² The law further requires prospective employers to satisfy the Director-General of the DHA that 'despite diligent search [they have] been unable to employ a person in the [country] with qualifications or skills and experience equivalent to those of the applicant'.¹⁰⁵³ Prospective employers are required to advertise the available job vacancies 'in the national printed media, which would afford South African citizens and permanent residents the opportunity to compete for the position'.¹⁰⁵⁴

These legal and regulatory provisions clearly contradict Carciotto's argument that '[t]he preferential system is not made explicit in any legislation or policy document'.¹⁰⁵⁵ In both the DRC and South Africa, these requirements must be satisfied by prospective employers prior to the issuance of work permits and/or visas to qualified foreigners, which is also required by law.

6.3.2 Requirement to hold a work permit and/ or visa

Like many other countries all over the globe, the DRC and South Africa have both enacted legislations that 'prohibit [...] employment of foreigners who do not [hold] work permits and penalise [...] [the employer for failing to obtain one on behalf of their employee]'.¹⁰⁵⁶ In the DRC, the law specifically prohibits foreigners from taking up employment under a contract of employment without obtaining a work permit in advance.¹⁰⁵⁷ The law further prohibits employers from hiring or keeping foreign workers without prior application for and obtaining of a work permit, which is referred to as 'Carte de travail d'étranger' (Work permit for foreigners), for and on behalf of said workers.¹⁰⁵⁸

1052 See s 8(2)(a) of *Employment Services Act, 2014*.

1053 See s 12(2)(a) of *Immigration Amendment Act, 2011* – to date.

1054 See *Immigration Regulations (DHA- Form 48)* in Regulation Gazette No. 37679, 22 May 2014, Vol 587 No. 10199, p. 266; see also *Sweyeli v Minister of Home Affairs and Others* (1479/16) [2016] ZAWCHC 177 (30 November 2016) para. 24.

1055 See Carciotto International migration and development 63.

1056 See Editor's summary of the *Discovery Health* case.

1057 See Art. 5 of *Ordinance No. 74-098 of 6 June 1974*.

1058 See Art. 6 of *Ordinance No. 74-098 of 6 June 1974*.

The Supreme Court held, in this regard, that any employment contract entered into between an employer and a foreign employee who does not have a valid work permit is deemed to be void and is tantamount to an act of convenience that cannot produce any legal effects under DRC labour law. Such a contract is entered into in breach of the requirement of public order imposed both on the foreign employee to obtain a work permit and on the employer to provide his/ her workers with such a permit.¹⁰⁵⁹ Under Article 29 of *Ordinance No. 74-098 of 6 June 1974* as revised to date, any infringement of the requirement to hold a work permit would be punishable by the penalties provided for under Article 96 of the *Labour Code*.¹⁰⁶⁰

In South Africa, the law prohibits employers from hiring foreign nationals within the country 'prior to such foreign nationals producing an applicable and valid work permit, issued in terms of the *Immigration Act*'.¹⁰⁶¹ Under section 50(4) of the *2014 Employment Services Act*, should any employer contravene this provision, they would 'be guilty of an offence and liable on conviction to a fine or imprisonment as contemplated in [the *Immigration Act*].¹⁰⁶²

The law further 'prohibits employers from requiring or permitting foreign nationals to perform any work, which such foreign nationals are not authorised to perform in terms of their work permit or to engage in work contrary to the terms of their work permit'.¹⁰⁶³ Regulation 18(9)(a) of the *Immigration Regulations* provides, in this regard, that 'in terms of section 19(5) of the [*Immigration Act of 2002*, as amended by section 12 of *Immigration Amendment Act, 2011*], the relevant employer shall ensure that a foreigner is only employed in a specific position for which the [work]

1059 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished, cited in Musubao *La jurisprudence congolaise* 89.

1060 Art. 323 e) of the 2002 Labour Code provides that 'notwithstanding the provisions of the *Penal Code*, anyone who breaches the regulations governing the protection of the national labour force shall be punished by one month's imprisonment and a fine not exceeding 25,000 CF (12,50 USD) or either of these sentences only'.

1061 See s 8(1) of the *2014 Employment Services Act*; s 38 of *Immigration Act, 2002*.

1062 Section 24(3) of *Immigration Amendment Act, 2011* provides that, '[A]nyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year: Provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding five years without the option of a fine'.

1063 See s 9 of the *2014 Employment Services Act*.

visa has been issued'.¹⁰⁶⁴ Pretoria's North Gauteng High Court specially referred to this provision in *Huijskens and Another v Minister of Home Affairs*.¹⁰⁶⁵ In this case, the Court interdicted the minister of home affairs (respondent) from 'declaring the applicants and their minor children [to be undesirable persons and/or to prosecute and/or to deport them] pending the finalisation of the appeal against the refusal of the waiver or exemption of the requirements of Regulation 18(3)(a) in respect of the First Applicant's general work visa'.¹⁰⁶⁶

Under section 50(5) of the *2014 Employment Services Act*, in the event the employers contravening this provision, they would 'be guilty of an offence and liable on conviction to a fine or imprisonment as contemplated in [the *Immigration Act*]'.¹⁰⁶⁷

The legislation concerning the employment of foreign labour has equated certain categories of foreign nationals with nationals, and this raises the issue of the scope of the principles that is discussed in the next subsection.

6.4 Scope of application of the principles

An in-depth analysis of the provisions relating to the protection of national labour in the DRC and South Africa reveals at least three categories of persons who provide services in the country, but to whom the principles discussed earlier do not apply. These categories include diplomatic and consular personnel and representatives of international organisations (1), refugees (2), and nationals from neighbouring countries (3).

¹⁰⁶⁴ See *Immigration Act (13/2002): Immigration Regulations [Government Gazette No. 37679 (22 May 2014)]*.

¹⁰⁶⁵ *Huijskens and Another v Minister of Home Affairs* (9745/2017) [2017] ZAGPPHC 180 (23 March 2017) para. 5.3.

¹⁰⁶⁶ See the *Huijskens* case, para. 9.

¹⁰⁶⁷ Section 24(6) of *Immigration Amendment Act, 2011* provides that, '[A]nyone failing to comply with one of the duties or obligations set out under 10 sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years'.

6.4.1 Diplomatic and consular personnel and representatives of international organisations

Foreign diplomatic and consular personnel, as well as representatives to, staff and experts of international organisations working in the country have a special status that is, in theory, set out by the rules of international law and treaties.¹⁰⁶⁸

Under the 1967 *Vienna Convention on Consular Relations*,¹⁰⁶⁹ ‘consular officers and consular employees and members of their families [enjoy] exemption from registration of aliens and residence permits [required by] the receiving state’.¹⁰⁷⁰ Regarding ‘the employment of foreign labour, members of the consular post [are exempted from holding] work permits imposed by the laws and regulations of the receiving state’.¹⁰⁷¹ This provision may arguably be applicable to the 1961 *Vienna Convention on Diplomatic Relations*,¹⁰⁷² which does not refer specifically to immigration requirements.¹⁰⁷³

The *UN Charter*¹⁰⁷⁴ provides that the ‘representatives of members of the UN and officials of the UN shall enjoy in any country such privileges and immunities as are necessary for the independent exercise of their functions’.¹⁰⁷⁵ Based on this *UN Charter’s* provision, the *General Convention on the Privileges and Immunities of the United Nations*¹⁰⁷⁶ provides that ‘representatives of members to the principal and subsidiary organs of the [UN] and to conferences convened by the UN shall enjoy privileges and immunities, while exercising their functions and during the

1068 Meloni A “Visas in international and municipal laws,” in Meloni A *Visa policy within the European Union structure* (Springer Heidelberg 2006) 9.

1069 *Vienna Convention on Consular Relations*, 596 U.N.T.S. 261, entered into force March 19, 1967

1070 Art. 46(1).

1071 Art. 47(1).

1072 *Vienna Convention on Diplomatic Relations*, 500 UNTS 95, 23 UST 3227, 55 AJIL 1064 (1961).

1073 Watts A “Diplomatic relations,” in Watts A (ed) *The International Law Commission 1949-1998: Volume I: The Treaties* (Clarendon Press 1999) 288

1074 *Charter of the United Nations*, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

1075 Art. 105.

1076 *General Convention on the Privileges and Immunities of the United Nations*, 1 U.N.T.S. 15, 13 February 1946, entered into force Sept. 17, 1946 (hereafter referred to as *General Convention*).

journey to and from the place of meeting'.¹⁰⁷⁷ These 'privileges and immunities [include exemption] in respect of [themselves], their spouses and relatives dependent on them, from immigration restrictions and alien registration'.¹⁰⁷⁸ The *Convention on the Privileges and Immunities of the Specialised Agencies*¹⁰⁷⁹ contains similar provisions with regard to UN specialised agencies.¹⁰⁸⁰

In South Africa, the *Immigration Amendment Act 13 of 2011* - to date¹⁰⁸¹ exempts, by virtue of the *Diplomatic Immunities and Privileges Act*,¹⁰⁸² foreign diplomatic and consular personnel, as well as officials of the UN, specialised agencies and other international organisations from the requirements to temporarily sojourn in the country to carry out their duties. The *General Convention* applies to the UN and its officials while the *Specialised Agencies Convention* applies to any specialised agency and its officials in South Africa.¹⁰⁸³

In the DRC, diplomatic and consular personnel regulated by the Ministry of Foreign Affairs and foreign personnel working under inter-state agreements are exempt from obligations in the matter of immigration and work permits.¹⁰⁸⁴ It is, therefore, clear that diplomats and diplomatic staff 'do not need to apply for a work permit to work'.¹⁰⁸⁵ They may, however, only perform work in the context of their diplomatic duties, which sometimes encourages them to 'work in the informal labour market'.¹⁰⁸⁶

1077 See s 11.

1078 See ss 11(d) & 18(d).

1079 *Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations*, done at New York, Nov. 21, 1947, entered into force Dec. 2, 1948, 33 U.N.T.S. 261 (hereafter referred to as Specialised Agencies Convention).

1080 See ss 13(d) & 19(c).

1081 See s31(3)(b).

1082 *Diplomatic Immunities and Privileges Act, 2001 (Act No. 37 of 2001)*, as amended by *Diplomatic Immunities and Privileges Amendment Act 35 of 2008*.

1083 See s5 (1) & (2) of *Diplomatic Immunities and Privileges Act* as amended to date.

1084 Art 1(1) & (2) of *Ordinance No. 74-098 of 6 June 1974*.

1085 The staff holding diplomatic rank and those coming under interstate cooperation agreements, as well as business owners and non-working partners are exempted from holding work permits. See Art. 4 of *Interministerial Order No. 032 of 10 March 1994*; See also Art. 1 of *Ordinance No. 74-098 of 6 June 1974*.

1086 Pauwels F "Female Filipino migrants in Belgium: A qualitative analysis of trends and practices," in Timmerman C et al. *New dynamics in female migration and integration* (Routledge New York 2015) 121.

The special status of diplomatic and consular personnel and representatives of international organisations is also set out in either bilateral or multilateral agreements, or in agreements entered into *intuitu personae* between a foreign national and the receiving State.¹⁰⁸⁷ The Agreement of 4 May 2000 between the UN and the DRC concerning the status of the UN Organisation Mission in the DRC (MONUC),¹⁰⁸⁸ which has now been replaced by MONUSCO.¹⁰⁸⁹ Under the Agreement, MONUSCO's Special Representative and members are exempted from immigration requirements, including passport and visa, immigration checks and restrictions on entry and exit.¹⁰⁹⁰

6.4.2 Refugees

The basic principles governing the protection of national labour force discussed above do not apply to refugees in South Africa and the DRC. Under South African refugee law, [recognised] refugees are entitled to the right to [remain and] seek employment [in the country]'.¹⁰⁹¹ In the DRC, recognised refugees are entitled to a special work permit for exercising a professional activity, which involves all gainful jobs under an employment contract.¹⁰⁹² As the Prime Minister has pointed out in his Circular Letter of 2010, refugees, nationals of neighbouring countries, are treated in the same way as DRC's nationals in terms of employment under the general job classification.¹⁰⁹³

Clearly, the DRC's¹⁰⁹⁴ and South African laws¹⁰⁹⁵ recognise the principle of equality between the refugees and nationals in compliance with the *1951 Refugee*

1087 See for, instance, s5(3) of *Diplomatic Immunities and Privileges Act* as amended to date.

1088 *Agreement of 4 May 2000 between the UN and the DRC regarding the status of the MONUC* [DRC Official Gazette, Part I - No. 11 (1 June 2002)].

1089 The *United Nations Organisation Stabilisation Mission in the DRC (MONUSCO)* took over from an earlier UN peacekeeping operation MONUC on 1 July 2010 in accordance with *Security Council resolution 1925 of 28 May 2010 [SC Res 1925, UN Doc S/RES/1925]*.

1090 Art. 35.

1091 See s 27(b) & (f) of *Refugees Act, 1998 [No. 130 of 1998]*, as amended to date.

1092 See Art. 32 of *Refugees Act, 2002 [No. 021/2002]*; Art. 8(2) of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

1093 See para. 4 of *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010*.

1094 The law accords to all recognised refugees the same treatment as is accorded to nationals with respect to social assistance, and access to health care, among others. (See Art. 32 of the *2002 Refugees Act*).

1095 The law affords recognised refugees all the constitutional and statutory rights, which are available to non-citizens. (See s 27(b) of the *1998 Refugees Act*).

Convention and its *1967 Protocol*, which both countries have signed and ratified.¹⁰⁹⁶

6.4.3 Nationals from neighbouring countries

Both South Africa and the DRC have established a special regime that allows nationals of neighbouring countries the entry, stay, and access to the labour market of the country.

6.4.3.1 South Africa's special regime for nationals from neighbouring countries

In South Africa, the Government launched the Dispensation of Zimbabweans Project (DZP) in 2009, which was successively replaced by the Zimbabwean Special Dispensation Permit (ZSP) in 2014, and by the current Zimbabwean Exemption Permit (ZEP) in 2017. The ZEP expired on 31 December 2021 but has been extended to the end of 2022 by virtue of the *Minister's Immigration Directive No. 1 of 2021*.¹⁰⁹⁷ In fact, the Government has implemented the decision to extend ZEPs granted in terms of immigration law.¹⁰⁹⁸ This exemption programme was implemented by the DHA in 2017 with the aim of regularising the stay of undocumented Zimbabweans in South Africa.¹⁰⁹⁹

The 12 months' extension serves to allow ZEP holders to apply for one or other of the visas provided for in the *Immigration Act* that they may qualify for until 31 December 2022. Under the directive, during the 12 months' period ZEP holders may not 'be arrested, ordered to depart, or be detained for purposes of deportation or deported for any reason related to them not having any valid exemption certificate in their passport'.¹¹⁰⁰ In addition, ZEP holders may not be regarded as prohibited persons, undesirable persons, and illegal foreigners as defined in terms

1096 See Arts. 20 to 24 of the *1951 Refugee Convention*.

1097 DHA "Minister's Immigration Directive No. 01 of 2021 - Extension of ZEP for a period of 12 months" (DHA Pretoria 2022). <http://www.dha.gov.za/index.php/notices/1506-minister-s-immigration-directive-no-01-of-2022-extension-of-zep-for-a-period-of-12-months> (Date of use: 10 February 2022).

1098 See s 31(2)(b), read with s 31(2)(d) of *Immigration Act 13 of 2002*.

1099 Carciotto S "The regularisation of Zimbabwean migrants: a case of permanent temporariness" 2018 *AHMR* Vol. 4(1) at 1106.

1100 See para. 1 of Minister's Immigration Directive No. 1 of 2021.

of sections 29, 30 and 32 of the Immigration Act.¹¹⁰¹ The ZEP allows the holders to seek and take up employment in South Africa. As mentioned earlier, the ZEP has been extended to the end of 2022.

During this period, ZEP holders may be allowed to enter or depart from South Africa in terms of immigration law,¹¹⁰² provided that they meet all other requirements for entry into and departure from the country, save for the reason of not having a valid permit indicated in their passport.¹¹⁰³ Lastly, ZEP holders are not 'required to produce a valid exemption certificate [and] an authorisation letter to remain in South Africa' contemplated in immigration law¹¹⁰⁴ when making an application for any category of the visas, including temporary residence visa.¹¹⁰⁵

Initially, 'the [South African] government [...] scrapped the ZEP, which expire[d] on 31 December 2021 after a year's grace period for Zimbabweans in South Africa to apply for alternative special permits'.¹¹⁰⁶ To prevent the government from implementing that decision by terminating over 180,000 ZEPs, an urgent interdict application was filed with the High Court in Pretoria by lobbyists and ZEP holders.¹¹⁰⁷ On 28 December 2021, the court ruled in favour of the DHA and removed the matter from the roll, hence refusing 'to compel the [DHA] to issue ZEP holders with visas, pending a court review of the minister's decision'.¹¹⁰⁸

1101 See para. 1 of Minister's *Immigration Directive No. 1 of 2021*.

1102 See s 9 of *Immigration Act 13 of 2002*, read together with the *Immigration Regulations, 2014*.

1103 See para. 2 of Minister's *Immigration Directive No. 1 of 2021*.

1104 See s 32(2) of *Immigration Act 13 of 2002*.

1105 See para. 3 of Minister's *Immigration Directive No. 1 of 2021*.

1106 Shuma P "Lawyers representing Zimbabweans in SA seek interdict to prevent government from terminating exemption permits" 2021 *SABC News* 14 December. <https://www.sabcnews.com/sabcnews/lawyers-representing-zimbabweans-in-sa-seek-interdict-to-prevent-government-from-terminating-over-180-000-permits/> (Date of use: 18 February 2022).

1107 Moodley P "Motsoaledi welcomes decision by court to strike the ZEP matter off the roll" 30 *SABC News* December 2021. <https://www.sabcnews.com/sabcnews/motsoaledi-welcomes-decision-by-court-to-strike-the-zep-matter-off-the-roll/> (Date of use: 18 February 2022).

1108 Gumede M "Court dismisses urgent application by permit holding Zimbabweans for visas" 2021 *Business Day* 30 December. <https://www.businesslive.co.za/bd/national/2021-12-30-high-court-dismisses-urgent-application-by-zep-holders-for-visas/#> (Date of use: 18 February 2022).

The ZEP dispensation, in particular, seeks to ‘assist greatly in advancing ‘the objectives of the National Development Plan, Vision 2030’ particularly in respect of the focus on the economy, attracting critical skills into the country and ensuring transfer of skills to [South African] citizens for better employment prospects’.¹¹⁰⁹ Having been issued to nearly 180,000 Zimbabweans since 2009, the permit has allowed the beneficiaries to be excluded from requirements of the Immigration and Refugee Acts.¹¹¹⁰

In addition, the DHA has initiated the Angolan Exemption Permit (AEP) and ‘is inviting qualifying Angolan nationals to apply for [this] permit, [in particular those] falling into the following categories’:

- a. ‘Angolans who were issued with the Angolan Cessation Permit (ACP) but did not apply for the Angolan Special permit (ASP)’.¹¹¹¹
- b. ‘Angolans who were issued with the ASP’.¹¹¹²
- c. ‘All Angolan refugees or asylum seekers who were issued with section 24 or section 22 permits before 31 August 2013, this being the date when the Tripartite Commission Agreement was signed marking the end of the Civil War in Angola’.¹¹¹³

The new AEP ‘will allow the [holders] to continue to live and work in South Africa, thus preventing them from losing their legal status in [the country]’, even if they ‘may not apply for permanent residence when the four years [of validity] expire’.¹¹¹⁴

1109 DHA “Statement by Minister Mkhize on the closure of the Zimbabwean Special Permit (ZSP) and the opening of the New Zimbabwean Exemption Permit (ZEP)” (DHA Pretoria 08 September 2017). <http://www.dha.gov.za/index.php/statements-speeches/1034-statement-by-minister-mkhize-on-the-closure-of-the-zimbabwean-special-permit-zsp-and-the-opening-of-the-new-zimbabwean-exemption-permit-zep> (Date of use: 10 February 2022).

1110 Singh O “Zimbabwean exemption permit extended to end-2022” 2022 Business Day 07 January. <https://www.businesslive.co.za/bd/national/2022-01-07-zimbabwean-exemption-permit-extended-to-end-2022/> (Date of use: 10 February 2022).

1111 DHA The Department of Home Affairs invites qualifying holders of Angolan Special Dispensation Permits to apply for the Angolan Exemption Permit (DHA Pretoria 05 August 2021). <http://www.dha.gov.za/index.php/statements-speeches/1467-the-department-of-home-affairs-invites-qualifying-holders-of-angolan-special-dispensation-permits-to-apply-for-the-angolan-exemption-permit> (Date of use: 26 February 2022).

1112 DHA Angolan Special Dispensation Permits.

1113 DHA Angolan Special Dispensation Permits.

1114 Ebrahim Z “Qualifying Angolan nationals will soon be able to apply for an exemption permit to live and work in South Africa” 2022 ENSafrica 26 February.

Similarly, the DHA has established the new Lesotho Exemption Permit (LEP) to document Lesotho nationals who were in South Africa illegally as a result of the socio-economic crisis in Lesotho.¹¹¹⁵ The LEP serves to ensure that ‘Lesotho nationals who are already in South Africa’ regularise their stay, ‘with correct documentation, a new 4-year special dispensation, [which] has been approved’.¹¹¹⁶

In fact, ‘[the LEP] allows Lesotho nationals to sojourn in [South Africa] with relaxed conditions, provide[s] them with work, study or business permits and suspend[s] their deportation’.¹¹¹⁷ Online applications for the LEP have been opened from 18 November 2019, ‘follow[ing] the Cabinet approval of a new dispensation for Lesotho nationals. The LEP replaces the [old] Lesotho Special Permit (LSP), which expire[d] on 31 December 2019. The new dispensation [is] only applicable to existing holders of the LSP [and] the total number of LSP permits issued is 90,314, [which] is the expected number of Lesotho nationals who will apply for the new LEP’.¹¹¹⁸

6.4.3.2 DRC’s special regime for nationals from neighbouring countries

The DRC also affords nationals of neighbouring countries who are lawfully staying in the country the same treatment as is afforded to its own citizens in respect of hiring for employment within the overall job classification.¹¹¹⁹ The Government’s stance may be problematic because this policy is not applicable to nationals of other neighbouring countries, particularly those from Burundi and Rwanda.

<https://www.ensafrica.com/news/detail/4621/qualifying-angolan-nationals-will-soon-be-abl>
(Date of use: 26 February 2022).

1115 DHA *Minister opens the application process for the New Lesotho Exemption Permit (LEP)* (DHA Pretoria 18 November 2019). [http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep#:~:text=The%20new%20Lesotho%20Exemption%20Permit%20\(LEP\)%20project%20will%20begin%20on.valid%20LSP%20permit%2Dholders%20only.&text=Cut%2Doff%20date%20for%20submission%20of%20applications%20is%2031%20March,of%20R1090%20will%20be%20charged](http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep#:~:text=The%20new%20Lesotho%20Exemption%20Permit%20(LEP)%20project%20will%20begin%20on.valid%20LSP%20permit%2Dholders%20only.&text=Cut%2Doff%20date%20for%20submission%20of%20applications%20is%2031%20March,of%20R1090%20will%20be%20charged) (Date of use: 26 February 2022).

1116 DHA *The New Lesotho Exemption Permit*.

1117 DHA *The New Lesotho Exemption Permit*.

1118 DHA *The New Lesotho Exemption Permit*.

1119 See para. 2 of *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010*.

In fact, nationals of these two countries are not authorised to work in the DRC, despite the fact that, under the existing agreement¹¹²⁰ signed by the CEPGL Member States, they reside legally in the country and are exempt from visa requirements.¹¹²¹ Under the Agreement, nationals of the CEPGL countries are issued with three types of documents required for free movement within the sub-region, namely the “ASC/CEPGL- Autorisation Spéciale de Circulation/ CEPGL,”¹¹²² a CEPGL special card,¹¹²³ and a guide for using travel documents.¹¹²⁴

In 2019, the DGM decided to impose a residence visa on Rwandan workers, including bricklayers, domestic workers, and other informal workers who previously needed a simple token free of charge before entering the DRC.¹¹²⁵ This appears to be a reciprocity measure given that Rwanda had already implemented a similar policy for Congolese living and working there.¹¹²⁶

Furthermore, under the DRC legislation natives of non-independent African countries are provisionally assimilated to Congolese workers and are, therefore,

1120 *The Agreement of 26 July 2011 amending the Agreement of 7 December 1980 between the Governments of Burundi, the DRC and Rwanda on the free movement of CEPGL nationals.*

1121 See Art. 2(1) of the *Agreement of 26 July 2011*.

1122 The “ASC/CEPGL” is a travel document that each CEPGL State shall issue to its nationals, public officials and businessmen, allowing them to travel to other CEPGL countries and in accordance with the existing agreements signed among such countries. See Art. 1(1) & 2(1) of the *Agreement of 26 July 2011*. See also Art. 2(18) & Art. 27 of *Act No. 57/2018 of 13 August 2018 on immigration and emigration in Rwanda*.

1123 The CEPGL special card is issued by the CEPGL Executive Secretary to officials of the Permanent Executive Secretariat and specialised bodies of the CEPGL for allowing free movement across the frontiers of the Member States. See Art. 1(2) & 2(2) of the *Agreement of 26 July 2011*. See also Legum C *Africa contemporary record: annual survey and documents - volume 21* (Africa Research Limited London 1992) B-282.

1124 Berwouts K “Libre circulation des personnes et des biens au sein de la CEPGL” – *Synthèse de l’actualité (Free movement of people and goods within the CEPGL - News Brief)* 2009 EURAC (56) at 2; Radio Okapi “CEPGL : trois documents pour circuler librement dans les pays membres,” (CEPGL: three documents required for free movement between Member States) 2015 *Radio Okapi* 07 August. <https://www.radiookapi.net/sans-categorie/2009/06/11/cep-gl-trois-documents-pour-circuler-librement-dans-les-pays-membres> (Date of use: 01 February 2022).

1125 Radio Okapi 2015 *Radio Okapi* 07 August; CKS/Yes “DRC imposes residence visa on Rwandans working in Goma” 2019 *Digital Congo* 17 August. <https://www.digitalcongo.net/article-en/5d57c6ff421f420004b5bd2c/> (Date of use: 12 February 2022); Staff Writer “DR Congo imposes visa restrictions on Rwandans” 2019 *The Chronicles* 16 August. <https://www.chronicles.rw/2019/08/16/dr-congo-imposes-visa-restrictions-on-rwandans/> (Date of use: 12 February 2022).

1126 Radio Okapi 2015 *Radio Okapi* 07 August.

not required to hold a work permit until their countries become independent.¹¹²⁷ The Minister of Labour referred to this provision when addressing the case of African migrants in general, and nationals of Congo-Brazzaville and Angola,¹¹²⁸ in particular, who work in or are employed by some DRC registered companies.¹¹²⁹

Yet, most of the foreign workers come from African countries that have now become independent and have friendly relations with the DRC, without any employment-related agreement. The key question is, therefore, whether these foreign workers are still required to hold a work permit or continue to be assimilated to Congolese workers in compliance with the current regulations. It also appears that these regulatory provisions do not fit the current constitutional and legislative “landscape” or “fabric,” and no longer reflect the current government structure, yet remain in force.¹¹³⁰ The question relating to statutory obsolescence may, therefore, be raised and discussed further in the next chapter focusing on the implementing measures of basic principles.

6.5 Conclusion

This chapter argued that the DRC and South Africa both seek to promote the nationalisation of the labour force while they must comply with the objective of matching migrants’ skills with national labour market needs. This means that both countries experience the tension between the state’s willingness to encourage skilled and highly skilled labour migration by, for instance, providing visa facilities and employment opportunities,¹¹³¹ and the protectionist approach towards labour migration.¹¹³² In taking these steps, the two countries seek to combatting unemployment and deal with the concern for currency savings.

1127 See Art. 2 of *Ordinance No. 74-098 of 6 June 1974 as revised to date*.

1128 Before Angola’s independence in 1975, Angolan nationals were assimilated to DRC nationals and were not subject to the requirement of obtaining a work permit as long as their country had not yet gained access to independence and national sovereignty. See Lule *Droit du travail congolais* 215 fn 376.

1129 *Circular letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983*.

1130 Ngoie & Lelu Migration 79; Brand J “Statutes,” in Brand J *Philosophy of law: introducing jurisprudence* (Bloomsbury London 2013) 217; Beschle D “Uniformity in constitutional interpretation and the background right to effective democratic governance,” 1988 *ILJ* vol. 63 (3) at 565.

1131 Singh Skilled human migration from India 158.

1132 Carciotto International migration and development 63.

To protect their domestic labour force against foreign competition, the two countries have put in place specific mechanisms, including the adoption of labour protective-legislation, and migration control policies. These 'measures have been taken to ensure [the protection of their] citizens' rights to preferential access to the national labour market when admitting migrant workers'.¹¹³³ To this end, the governments decide to either prohibit foreigners from taking up employment in specific sectors of the national economy, or limit access to the practice of certain professions.¹¹³⁴

The two countries' legislation concerning the employment of foreign labour requires the employers or the employees to obtain a work permit and or/ visa. The legislation also provides for exemptions, including for diplomatic / consular personnel and representatives of international organisations, refugees, and nationals from neighbouring countries. While no major issues have been raised concerning the diplomats and the refugees, the regimes governing the nationals from neighbouring countries appear to raise some critical legal questions, which are dealt with in the next chapter, which analyses the way the DRC and South Africa implement the basic principles governing the protection of national labour force.

1133 Ruhs Labour market protectionism 61.

1134 Joubert & Faris *The law of South Africa* 34.

CHAPTER SEVEN

MEASURES FOR IMPLEMENTING BASIC PRINCIPLES GOVERNING THE PROTECTION OF NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA

7.1 Introduction

This chapter examines the various appropriate measures for smooth implementation of the basic principles governing the protection of national labour set by the DRC's and South Africa's legislations. To this end, this chapter is subdivided into three major sections and related subsections, including a conclusion. The first section discusses the mechanisms put in place by the state for limiting the use of foreign labour. The second section focuses on the exemptions from restrictions on foreign labour. The third section provides an overview of the main findings and conclusions drawn from the discussions presented in this chapter.

7.2 Mechanisms for limiting the use of foreign labour

The DRC and South Africa have put in place some key measures, which are provided for by relevant laws and regulations, and that help to limit the use of foreign labour. A thorough assessment of the implementation procedures for the principles relating to the protection of the national labour force brings to light three basic categories of enforcement mechanisms for these principles.¹¹³⁵

Firstly, there would be an inventory, or the periodic drawing up of a list of jobs or occupations prohibited or closed to foreign workers (1); secondly, the introduction of minimum quotas of foreign workers in companies (2); and thirdly, the procedure for applying for a work permit for foreign nationals (3).

1135 Katansi Protection 216.

7.2.1 Drawing up a list of jobs prohibited to foreign nationals

One way of implementing the principles governing the protection of the national workforce, or of limiting the use of foreign labour is the drawing up of a periodic list of jobs prohibited to foreigners. This mechanism is, in fact, regarded as a way of applying the two principles of hiring priority for nationals and the prohibition on foreign nationals from taking up employment without a work permit.¹¹³⁶ To be in line with the research focus of this thesis, it is worth discussing this mechanism from the DRC's and South African legal perspectives. As this discussion reveals, unlike the South African law, the DRC legislation specifically provides a periodic list of jobs prohibited to foreign nationals. However, while the South African legislation does not contain such a list, the Government is planning on establishing one, and may well refer to the DRC legislation in this regard.

7.2.1.1 The DRC legislation

The DRC State has the right to reserve specific jobs or occupations to national workers, and in this regard existing regulations provide for a list of jobs reserved exclusively for Congolese citizens, or jobs that are prohibited to foreign nationals.¹¹³⁷ These jobs are, in fact, reserved exclusively for DRC's nationals, except for the staff holding diplomatic rank as regulated by the Ministry of Foreign Affairs, and the staff coming under cooperation agreements entered into between States.¹¹³⁸

The periodic list of jobs prohibited to foreign nationals is drawn up by the Minister of Labour, by way of an order, further to the Employment Committee's opinion.¹¹³⁹ The Minister of Labour issued *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008 of 19 September 2008*, which reviews *Departmental Order No. 86/001 of 31 March 1986*. The appendix to this *Ministerial Order* provides the list of jobs that are reserved exclusively for Congolese nationals.¹¹⁴⁰ This list contains two main categories of jobs; on the one hand, jobs that are reserved for all sectors, and jobs

1136 Katansi Protection 217.

1137 See Appendix to *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008 of 19 September 2008*.

1138 Art. 1 & 2 of *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*.

1139 See Art. 7 of *Ordinance No. 74-098 of 6 June 1974*.

1140 See Art. 1.

that are reserved per sector, on the other hand. The first category includes jobs performed by professionals¹¹⁴¹ in all sectors of the labour market.¹¹⁴²

The second category¹¹⁴³ comprises jobs performed in the following six key sectors: agriculture, fisheries, and livestock;¹¹⁴⁴ mining and quarrying;¹¹⁴⁵ manufacturing;¹¹⁴⁶ construction and public works;¹¹⁴⁷ electricity and water;¹¹⁴⁸ and transport, storage, and communication.¹¹⁴⁹

However, and as previously discussed, practical experience shows that certain managerial jobs in specific areas, such as finance and IT that require very specific skills and for which there are not yet enough national professionals, are usually excluded from this periodically renewed list.¹¹⁵⁰ An official waiver is, in theory, required for a foreign national to hold such a job/position, as will be discussed in the following sections.

It is also noticeable that most employers obtain work permits for their foreign employees based on imagined fictitious jobs and then assign these workers to

1141 These professionals include 'fitters, archivists, executive assistants or secretaries (bilingual or trilingual), medical assistants, executive officers, tellers, supply managers, garage managers, heads of legal departments, heads of statistical departments, accountants, machine operators, casting machine operators, deputy works managers, legal or economic advisers, administrative managers, purchasing managers for local agricultural products assistant financial managers, human resources managers, commercial managers, documentalists, building, car, light machinery electricians, data processing machine encoders, scrap metal workers, assistant managers, machinists, storekeepers, mechanics, radio operators, computer machine operators, pharmacists, computer programmers, welders, welders (underwater), monitors, and radiology technicians'.

1142 See para. A of Appendix to *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*.

1143 See para. B of Appendix to *Ministerial Order No. 12/CAB.MIN/ETPS/080/2008*.

1144 The agriculture, fisheries, and livestock sectors include plantation agents; agronomists; veterinary assistants; assistant plantation managers; agronomical engineers; fishing supervisors; light machinery mechanics; veterinary surgeons; agricultural instructors; mechanical officers; agricultural technicians.

1145 The mining and quarrying sector comprises preparatory mining team leaders; geologists; and investigators.

1146 The manufacturing includes furnace operators; casting machine operators; printing press operators; data processing machine operators; tanners; and weavers.

1147 Construction and public works sectors include translator secretaries.

1148 The electricity and water sector includes biologists; chemical engineers; civil electrical engineers; chemical technical engineers; electrical engineers; electrical technical engineers; and laboratory technicians.

1149 The transport, storage, and communication Sector comprises catering managers; warehouse managers; code clerks; passenger service inspectors; makers; dockworkers; and inland waterway seamen.

1150 Katansi Protection 218.

positions reserved for nationals.¹¹⁵¹ In fact, some key positions reserved for Congolese are often assigned to foreign nationals (human resources, purchasing, supplies, sales, cashiering, accounting, etc.).¹¹⁵² In most cases, companies rename the position, but the job descriptions match those of the reserved or forbidden jobs. Often, the Congolese jobholder is just a sidekick.¹¹⁵³ For instance, in many mining companies operating in the country, foreign workers are hired as compliance officers, but in reality, they work as legal coordinators alongside a Congolese legal director whom they manage or supervise.¹¹⁵⁴ This is a perfect example of fraudulent evasion of statutory provisions (of the law), but the perpetrators of such an offence have never been punished as they should be.¹¹⁵⁵

There are other jobs that are not included in the list but are prohibited to foreign nationals by a specific piece of legislation. Such is the case with *Act No. 96/002 of 22 June 1996 laying down the terms and conditions for exercising the freedom of the press*. This piece of legislation requires any newspaper or printed periodical to have an editor of Congolese nationality. This provision implies clearly that the Act prohibits foreigners from taking up this position.¹¹⁵⁶

In addition, there are some jobs or positions, which, under certain conditions, should not be assigned to the expatriate owner of the company, holding the position of personnel manager who is caught between the boss, who may consider him too “soft” in the face of the workers’ demands, and the workers, who may consider him a “sold-out.”¹¹⁵⁷

7.2.1.2 The South African legislation

Unlike the DRC, South Africa does not have any legislation listing jobs that are reserved exclusively for South African citizens, or jobs that are prohibited to foreign nationals. This arguably flows from the Constitution, which guarantees the

1151 Mutshipangu *Relations de travail* 125.

1152 Bayolo *Code du travail congolais* 503.

1153 Bayolo *Code du travail congolais* 503.

1154 Mutshipangu *Relations de travail* 125.

1155 Bayolo *Code du travail congolais* 503.

1156 Bonyi *Droit du travail* 95.

1157 Katansi *Protection* 218.

right to equality that can protect foreign nationals also in the enjoyment of socio-economic rights as affirmed by the majority of the Constitutional Court in the *Khosa* matter¹¹⁵⁸ and the *Larbi-Odam* case.¹¹⁵⁹ The Supreme Court of Appeal of South Africa also held that ‘there appears to be no restrictive legislation or conditions in place that could be [discerned that prohibits] foreign nationals from being [employed or conduct business in certain areas, such as spaza or tuck-shop]’.¹¹⁶⁰

However, the Constitutional Court recognises that ‘there are also limits to the extent to which legal foreigners can avail themselves of the protection of the right to equality’.¹¹⁶¹ In the *Union of Refugee Women* case,¹¹⁶² the Court upheld regulations enacted pursuant to the *Private Security Industry Regulation Act 56 of 2001*, under which only citizens and permanent residents could be registered (and thereby, legally work) as security guards.¹¹⁶³ One of the implications of this restriction is that other migrants are prevented from working as “official” car guards in shopping malls and the like, which is an important form of casual employment for the poorest people in South African cities.¹¹⁶⁴

There are some pieces of legislation that require South African citizenship or permanent residency to qualify for the employment position. For instance, *Public Service Amendment Act, 2007* provides that ‘[N]o person shall be appointed permanently, whether on probation or not, to any post on the establishment in a department unless he or she is a South African citizen or permanent resident’.¹¹⁶⁵

Despite the inexistence of any list of jobs or positions reserved exclusively for South African citizens, or prohibited to foreign nationals, there are now growing

1158 *Khosa v Minister of Social Development* 2004(6) BCLR 569 (CC) (hereinafter the *Khosa* matter).

1159 Pieterse M “Marginal struggles: equality, public presence and livelihood,” in Pieterse M *Rights-based litigation, urban governance and social justice in South Africa: the right to Joburg* (Routledge London 2017) 127.

1160 *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (48/2014) ZASCA 143 (26 September 2014) para. 43.

1161 Pieterse Marginal struggles 128.

1162 See the *Union of Refugee Women* case.

1163 See s23(1)(a).

1164 Pieterse Marginal struggles 128.

1165 See s 15 (a) a) of *Public Service Amendment Act, 2007* [No. 30 of 2007].

calls for the South African Government to look at new regulations with a view to limiting the employment of foreign nationals in various sectors, such as the truck sector.¹¹⁶⁶ In response, the DEL and the DHA have embarked on ‘a process of developing legislation that seeks to address employment of non-South Africans in all sectors of the economy, including road freight’.¹¹⁶⁷

The DEL, in particular, ‘plans to publish the Draft [National Labour Migration] Policy [(NLMP)] [for South Africa] and the *Draft Employment Services Amendment Bill* that aims to give effect to the policy for comment in March/April 2022’.¹¹⁶⁸ The draft Bill, which is likely to be tabled in Parliament in June 2022,¹¹⁶⁹ seeks ‘to limit the hiring of foreign workers in industries, which employ a high number of foreign nationals, including the hospitality sector, restaurants, security, farming and agriculture’.¹¹⁷⁰

In addition, pursuant to the NLMP, ‘[the Department of] Higher Education and Training has released [a list of] scarce and critical skills in high demand to provide guidance to all institutions to prioritise education and training interventions in those areas’.¹¹⁷¹ ‘The list will [serve] ‘as a last resort, to allow foreign nationals with the listed skills that the economy requires, and where job offers have been made, to be allocated work visas’.¹¹⁷² ‘The Government also [intends to] impose various obligations on both the employer and the foreign national to transfer skills to locals and [to ensure that] permits [are] limited to specific durations’.¹¹⁷³ The Government

1166 Staff Writer 2020 *Business Tech* 28 September.

1167 Staff Writer 2020 *Business Tech* 11 December.

1168 Sabinet “National Labour Migration Policy on Track” (Sabinet Johannesburg 2021). <https://legal.sabinet.co.za/articles/national-labour-migration-policy-on-track/> (Date of use: 16 February 2022).

1169 Sabinet National Labour Migration Policy.

1170 eNCA “We need quotas on foreign workers – Nxesi” 2022 eNCA 19 January. <https://www.enca.com/videos/watch-we-need-quotas-foreign-workers-nxesi> (Date of use: 16 February 2022); Staff Writer 2020 *Business Tech* 28 September.

1171 DEL “Employment and Labour on employment of foreign nationals in South Africa” *Media statements* (DEL: Pretoria 25 January 2022). <https://www.gov.za/speeches/employment-and-labour-employment-foreign-nationals-south-africa-25-jan-2022-0000> (Date of use: 16 February 2022).

1172 Staff Writer “New rules planned for foreign workers in South Africa” 2022 *Business Tech* 25 January. <https://businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (Date of use: 16 February 2022).

1173 DEL Media statements; Staff Writer 2022 *Business Tech* 25 January.

is also planning on introducing the maximum quotas of foreign workers, which are precisely the question that is discussed in the following subsection.

7.2.2 Employment quotas for foreign workers in a company

A second mechanism for limiting the use of foreign labour lies in the introduction of authorised quotas, also known as “maximum quotas,” for foreign workers that a company seeking foreign labour can legally employ in the DRC (1) and South Africa (2).¹¹⁷⁴

7.2.2.1 Under the DRC legislation

The second policy involving maximum quotas is provided for by *Ordinance No. 74-098 of 6 June 1974*, as revised to date, which stipulates that the Minister of Labour ‘shall set the maximum quota for foreign workers likely to occupy a position in relation to the total number of workers in the company’.¹¹⁷⁵ These maximum or authorised quotas are established based on three criteria, namely the overall number of workers providing services in the relevant company;¹¹⁷⁶ the business line in which the company concerned operates;¹¹⁷⁷ and the category¹¹⁷⁸ under which the foreign worker applying for employment will fall in the national general workforce classification.¹¹⁷⁹

The *Labour Code* prohibits Congolese or foreign public or private employers, both individuals and legal entities, from hiring foreign employees representing more than 15% of the workforce.¹¹⁸⁰ This overall limitation of the number of foreign employees in a given company guarantees the principles of hiring priority reserved to national workers and ‘local workers’ right to preferential access to the national labour market’.¹¹⁸¹ However, this rate has been reduced by *Ministerial Order No.*

1174 Katansi Protection 218.

1175 See Art. 7.

1176 See Art. 1 of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005*.

1177 These lines of business include agriculture; mining and quarrying; manufacturing; construction and public works; electricity, water, and sanitary services; commerce, banking, and insurance; transport and, services.

1178 These categories included: ordinary or executive category, supervisory category, or managerial category.

1179 Katansi Protection 218.

1180 See Art. 185(8).

1181 Lule *Droit du travail congolais* 216.

12/CAB.MIN/TPS/112/2005 of 26 October 2005 laying down authorised maximum quotas of foreign workers in companies, which sets out these maximum quotas in the Appendix as follows:

Industry sector	Categories I to V of the general job classification	Supervisors and collaborative managers	Senior managers
Agriculture	2 %	2.5 %	2 %
Mining and quarrying	2 %	2.5 %	2 %
Manufacturing industry	2 %	2.5 %	2 %
Construction and public works	2 %	2.5 %	2 %
Electricity, water, and sanitation	2 %	2.5 %	2 %
Trading	0 %	2 %	2 %
Banking, insurance, and property business	0 %	2 %	2 %
Transport	0 %	2 %	2 %
Services	0 %	2 %	2 %
New communication and information technologies	0 %	2 %	2 %

In the mining sector, the *2018 Mining Regulations*,¹¹⁸² in line with the regulation governing the employment of foreign nationals with respect to authorised quotas, set the minimum quota of local employees by category at the different phases of a mining project as follows:

1182 See Art. 405quinquies.

Job category	Project phases				
	Mining exploration	Development and construction	Commercial production		
			1 st -5 th	6 th -10 th	11 th and above
Senior managers	20 %	25 %	60 %	65 %	70 %
Managers and supervisors	30 %	35 %	70 %	75 %	80 %
Skilled workers	60 %	40 %	80 %	85 %	90 %
Manual workers	80 %	85 %	90 %	95 %	100 %

The current legislation provides that failure to comply with this legal requirement, by exceeding the overall limitation of 15% for the number of foreign employees in a company may result in several penalties being imposed under current regulations. Such penalties may be either revocation of the work permit, or refusal to issue or renew the work permit, unless waived by the Committee pursuant to an order issued by the Minister of Labour.¹¹⁸³

In the case of refusal to renew the work permit or in the case of revocation of such permit, the employer is required to immediately terminate the employment contract, subject to paying to the terminated employee a severance payment equivalent to the wages and family allowances payable during the notice period, which the employer would have met.¹¹⁸⁴

Practical experience reveals that the maximum quotas are excessive, on the one hand and that, on the other hand and above all, they are not adhered to at all, with many employers going wildly beyond the authorised quotas.¹¹⁸⁵ These maximum quotas were reduced to a lower rate by the Minister of Labour, who has also granted waivers to employers that need a large number of foreign employees and that have applied for such waivers.¹¹⁸⁶ These waivers may, nevertheless, not

¹¹⁸³ See Art. 24 of *Ordinance No. 74-098 of 6 June 1974 as revised to date.*

¹¹⁸⁴ See Art. 28 of *Ordinance No. 74-098 of 6 June 1974.*

¹¹⁸⁵ Katansi Protection 219.

¹¹⁸⁶ Mutshipangu Relations de travail 124.

exceed the overall limitation of 50% authorised by the Minister, by way of Order, following approval and considered opinion of the National Committee for the employment of foreign workers.¹¹⁸⁷

In practice, waivers have been granted, by way of Ministerial Order, to a number of companies, including West Sodimico Sprl 'WESO'; Congo Dong Fang International Mining Sprl 'CDM'; Compagnie Minière de Musonoï Sprl 'COMMUS'; and la Société Minière de Kasombo Sprl 'MIKAS'.¹¹⁸⁸ The application for such waivers in favour of these companies of the Group known as Zhejiang Huayou Cobalt Co. Ltd was submitted by way of the letter dated 3 July 2010 by the Vice-Chairman of the Group.¹¹⁸⁹

In addition to the reduction of the maximum quotas to a lower rate, the Minister of Labour establishes, pursuant to *Ministerial Order No. 12/CAB.MIN/TPS/112/2005*,¹¹⁹⁰ another ban while specifying that it is without prejudice to Article 185(8) of the *Labour Code*.¹¹⁹¹ Therefore, such reduction of the number of foreign employees working in companies operating in the DRC has no legal basis, given that it fails to comply with the provisions of the *Labour Code*.¹¹⁹²

In other words, the Minister issued an unlawful order, which means in violation of a law, which is a general permanent written rule of imperative character, drafted and passed by an elected Parliament, enacted by the President of the Republic and published in the *Official Gazette*.¹¹⁹³ As discussed later, under DRC law, implementing texts, such as ministerial decrees and orders may not prohibit what

1187 See Art. 2 of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005* of 26 October 2005.

1188 See *Ministerial Orders No. 0043/CAB/PVPM/ETPS/2010; 0044/CAB/PVPM/ETPS/2010; 0045/CAB/PVPM/ETPS/2010; & 0046/CA/PVPM/ETPS/2010* of 9 October 2010 granting a special exemption on maximum percentages of foreign workers authorised to work in specific companies, in DRC Official Gazette, No. 11 (June 2011) 18, 19, 21 & 22.

1189 See the Preamble of *Ministerial Orders No. 0043/CAB/PVPM/ETPS/2010; 0044/CAB/PVPM/ETPS/2010; 0045/CAB/PVPM/ETPS/2010; & 0046/CA/PVPM/ETPS/2010* of 9 October 2010.

1190 See Art. 1.

1191 Bonyi *Droit du travail* 141.

1192 Bonyi *Droit du travail* 141; Mutshipangu *Relations de travail* 124.

1193 Adoue C (ed) *Implementing industrial ecology: methodological tools and reflections for constructing a sustainable development* (CRC Press New York 2010) 12.

basic legislative texts or laws allow, unless the latter expressly give such power to the former.¹¹⁹⁴

7.2.2.2 Under the South African legislation

South Africa introduced the employment quota requirement for foreign workers in companies operating in the country by virtue of section 21(2) of the *Immigration Amendment Act 13 of 2011* – to date. Under this legal provision, the Director-General of the DHA determines, ‘in consultation with the prescribed departments, the maximum number of foreigners to be employed in terms of a corporate visa by a corporate applicant’. The *2014 Immigration Regulations* require the applicant for and ‘the holder of a corporate visa [to] provide proof that at least 60% of the total staff complement that are employed in the operations of the business are citizens or permanent residents employed permanently in various positions’.¹¹⁹⁵

Similarly, a foreign national applying for or holding a business visa is required to ‘employ the prescribed quota or number of citizens or permanent residents within a period of 12 months from the date of issue of the visa’.¹¹⁹⁶ Under the *Immigration Regulations* as amended to date, such a business visa applicant or holder is required to ‘provide an undertaking [or proof] that at least 60% of the total staff complement to be employed [or employed] in the operations of the business [are] South African citizens or permanent residents employed permanently in various positions’.¹¹⁹⁷

Furthermore, ‘given worsening unemployment and perceptions that foreign nationals, especially those who are undocumented, are distorting labour market access’, the Government is considering introducing employment quotas as part of the NLMP.¹¹⁹⁸ The quota system would specify how many ‘foreign nationals with

1194 Bonyi *Droit du travail* 141.

1195 See Regulation of 20(2) & (3) of *2014 Immigration Regulations*.

1196 See s15(1)(c)(ii) of *Immigration Act*.

1197 See Regulation 14(1)(b) & (2)(b).

1198 DEL Media statements; Staff Writer “Government wants to block foreigners from taking certain jobs in South Africa – including Uber drivers” 2021 *Business Tech* 25 June. <https://businesstech.co.za/news/business/501217/government-wants-to-block-foreigners-from-taking-certain-jobs-in-south-africa-including-uber-drivers/> (Date of use: 16 February 2022).

[correct] work visas [could] be employed in major economic sectors [of the economy], such as Agriculture, Hospitality and Tourism, Construction, to name [just] a few'.¹¹⁹⁹ It is, therefore, worth analysing the work permit/ visa application process.

7.2.3 Application procedure for work permits/ visas

Many countries adopt or have adopted labour migration strategies introducing a permit/ visa application process for labour migrants or foreign workers who would contribute to the country's economic growth.¹²⁰⁰ To this end, the authorities have introduced various types of work permits / visas that are applicable to non-citizens coming into the country for work purposes, as discussed below.

7.2.3.1 Types of work permits/ visas

This subsection discusses the types of work permits / visas, which have been introduced by the Government in the DRC (1) and South Africa (2).

7.2.3.1.1 Types of work permits in the DRC

In the DRC, the current legislation establishes two different types of work permits that are applicable to non-citizens, known as "ordinary work permit" and "special work permit".¹²⁰¹

On the one hand, the ordinary work permit is 'valid for a maximum of two years from the date of issuance', and it allows the worker to take up the job for which it is issued.¹²⁰² Clearly, the ordinary work permit has a restricted effect or scope,

1199 DEL Media statements; Cele S "South Africa plans employment quotas for foreign nationals" 2022 *Bloomberg* 8 February. <https://www.bloomberg.com/news/articles/2022-02-08/south-africa-plans-employment-quotas-for-foreign-nationals> (Date of use: 16 February 2022); Nkanjeni U "From quotas to critical skills exchange — four changes proposed for foreign workers in SA" 2022 *Sunday Times* 26 January. <https://www.timeslive.co.za/news/south-africa/2022-01-26-from-quotas-to-critical-skills-exchange-four-changes-proposed-for-foreign-workers-in-sa/> (Date of use: 16 February 2022).

1200 OECD *International migration outlook 2015* (OECD Publishing Paris 2016) 39.

1201 See Art. 8 of *Ordinance No. 74-098 of 6 June 1974*.

1202 See Art. 8(2) of *Ordinance No. 74-098 of 6 June 1974*.

prohibiting the holder from conducting ‘work other than work for which the permit is issued’, which is different for the special work permit.¹²⁰³

The DRC legislation provides for three types of ordinary work permits for foreign nationals.¹²⁰⁴ First, the type “A” ordinary work permit, which is pink-coloured and ‘valid for a maximum of two years from the date of issuance’, enables the holder to carry out the work for which it is issued, and can be renewed.¹²⁰⁵ Second, the type “B” ordinary work permit, which is green-coloured and allows the holder to perform the job for which it is issued, but it is not renewable.¹²⁰⁶ Third, the type “C” ordinary work permit, which is blue-coloured and ‘valid for one year from the date of issuance’ and issued to employees of precious commodities’ purchase counters, and may be renewed.¹²⁰⁷

On the other hand, the special work permit is also ‘valid for a maximum of two years from the date of issuance’ and allows the worker to take up any gainful job under an employment contract. However, the special work permit may only be issued to foreign nationals who are recognised as refugees by the Government.¹²⁰⁸ It is argued, and rightly so, that the special work permit reflects the liberal, if not humanitarian, nature of DRC employment or labour legislation, by giving some preference to foreign nationals residing in the country, in particular those who are in a vulnerable situation.¹²⁰⁹

However, from reading another regulatory instrument,¹²¹⁰ there seems to be a different typology of work permits in the DRC. In terms of the said *Interministerial Order* issued jointly by the Minister of Employment, Labour and Social Welfare and

1203 Katansi Protection 210.

1204 See Art. 1(1) of *Interministerial Order No. 032 of 10 March 1994 laying down tax on work permits for foreign nationals*.

1205 See Art. 1(2) of *Interministerial Order No. 032 of 10 March 1994*.

1206 See Art. 1(3) of *Interministerial Order No. 032 of 10 March 1994*.

1207 See Art. 1(3) of *Interministerial Order No. 032 of 10 March 1994*.

1208 See Art. 8(4) of *Ordinance No. 74-098 of 6 June 1974*.

1209 Katansi Protection 210; Wa-Dondo La législation 265.

1210 *Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022 amending and supplementing Interministerial Order No. 001/CAB/MINETAT/METPS/2019 and CAB/MIN/FINANCES/2019/138 of 28 November 2019 determining rates, taxes, and royalties to be collected at the initiative of Ministry of Employment, Labour and Social Welfare*.

the Minister of Finance on 2 August 2022, there are six (6) types of work permits in total, which are classified according to business lines.¹²¹¹

First, the category “A” work permit is reserved for foreign nationals working in agro-pastoral, livestock, plantation, fishing, forestry, extraction of construction and civil engineering equipment, basic scientific exploration, and drilling of filtering wells.¹²¹²

Second, the category “B” work permit is reserved for foreigners working in construction (civil or steel engineering), power (electricity and water), transport and communications, services (health, education, auditing, catering, customs agency, and tourism.), manufacturing and agro-industry.¹²¹³

Third, the category “C” work permit applies to workers in general trading, banking, financial institutions, and insurance.¹²¹⁴

Fourth, the category “D” work permit is issued to salaried foreign nationals employed in all oil activities other than exploitation and refining; various mining activities (exploration, prospecting, survey, laboratory, infrastructure development, related and ancillary mining activities); purchasing and selling of ores other than gold, diamonds and coloured stones; cutting, smelting and processing of commodities other than gold, diamonds and coloured stones.¹²¹⁵

Fifth, the category “E” work permit is reserved for foreign nationals engaged in telecommunications sector; gambling (casinos, lotteries and the leisure industry).¹²¹⁶

1211 See Art. 1 of *Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022.*

1212 Art. 1.

1213 Art. 1 of *Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022.*

1214 Art. 1.

1215 Art. 1.

1216 Art. 1.

Sixth, the category “F” work permit is applicable to foreign nationals working in oil extraction and refining; mining (extraction, treatment and/or processing of any mineral substance); processing and transformation of ores for third parties; buying and selling counter for precious commodities (gold, diamonds and coloured stones); mining construction (as primary activity).¹²¹⁷

For foreign workers whose employers have entered into mining or partnership agreements with the DRC Government, their work permits are valid for at least five years. This appears to be normal since the agreements in question have been approved by the Head of State by virtue of a presidential ordinance, which conferred on them a regulatory character.¹²¹⁸

Lastly, another regulatory instrument establishes the work permit for foreign nationals in the small-scale mining sector.¹²¹⁹ The foreign nationals’ work permit for the small-scale mining sector is designed for all expatriates working in the precious mineral substances purchasing offices. The holder of this permit, which also serves as a pass, is authorised to stay, and travel in the mining areas without further formalities.¹²²⁰ The foreign nationals’ work permit for the artisanal mining sector is yellow for gold counters and white for diamond counters.¹²²¹

7.2.3.1.2 Types of work visas in South Africa

Under the South African immigration law,¹²²² there are various types of work visas, which are basically temporary residency visas ‘whose primary purpose is to afford their holders the right to work’.¹²²³ These visas include ‘general work visas’, ‘critical skills work visas’, and ‘intra-company transfer work visas’.

1217 Art. 1.

1218 Mutshipangu *Relations de travail* 122.

1219 *Decree No. 0030 of 4 August 1995 establishing the work permit for foreign nationals in the small-scale mining sector.*

1220 Art. 2 of *Decree No. 0030 of 4 August 1995.*

1221 Art. 3 of *Decree No. 0030 of 4 August 1995.*

1222 See s 12 & 13 of the *Immigration Amendment Act 13 of 2011 – to date*, read with Regulation s18 of the *2014 Immigration Regulations.*

1223 Khan F & Hurt S “Temporary residence,” in F Khan (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 102.

Firstly, a general work visa may be issued to a foreign national who has already secured a job offer, which must first be scrutinised by the DEL to ensure that the prospective employer has not found anyone in the country ‘with qualifications equivalent to those of the applicant’.¹²²⁴ To this end, ‘the prospective employer is required to advertise’ the job opening in a national newspaper, and interview applicants whose qualifications and experience correspond to the vacancy.¹²²⁵ Proof of the job advertisement, as well as details of the applicants and reasons why they were not suitable candidates for the job must be provided to the DEL. The DEL then submits a positive or negative letter of recommendation to the DHA based on the submitted evidence.¹²²⁶

In other words, if the DEL finds that the employer has not adequately attempted to find a similarly qualified or experienced South African (or a South African permanent resident), it will issue a negative report and the Director-General will refuse the subsequent application for a general work visa.¹²²⁷ ‘A general work visa shall be issued for a period not exceeding five years’,¹²²⁸ just like the critical skills work visa.¹²²⁹

Secondly, ‘a critical skills work visa may be issued by the Director General to an individual possessing such skills or qualifications determined to be critical for the country from time to time by the Minister [of Home Affairs]’.¹²³⁰ The applicant is required to provide proof that he or she falls within the critical skills category, which is represented as a list of occupations prescribed to be a “critical skill” by the Minister.¹²³¹ On 2 February 2022, the Government gazetted a brand-new critical skills list, which contains 101 occupations regarded as ‘critical for South Africa in relation to an application for a critical skills [work] visa or permanent residence

1224 See s 19(2) of the *Immigration Amendment Act 13 of 2011 – to date*, read with Regulation s18(1) of the *2014 Immigration Regulations*.

1225 OECD “Policies addressing skills imbalances in South Africa,” in OECD *Getting Skills Right: South Africa* (OECD Publishing Paris 2017) 53.

1226 OECD *Skills imbalances in South Africa* 53.

1227 See s 19(2) of *Immigration Amendment Act 13 of 2011* & Regulation 18(3) of *2014 Immigration Regulations*; see also Khan & Hurt Temporary residence 102.

1228 See Regulation 18(4) of *2014 Immigration Regulations*.

1229 See Regulation 18(6) of *2014 Immigration Regulations*.

1230 See s 19(4) of *Immigration Amendment Act 13 of 2011*.

1231 Regulation 18(5) of *2014 Immigration Regulations*.

permit'.¹²³² This list contains occupations ranging from director (enterprise/organisation) (medium enterprises or larger) to instrument mechanician (industrial instrumentation process control) in which skilled foreign nationals will be prioritised.¹²³³

The critical skills work visa can be granted to foreign individuals without a job offering in South Africa, which means that the applicant does not need to have employment in the country to apply for this visa.¹²³⁴ In fact, the visa is issued to the holder for a 12-month period, during which period he/ she will enter the country and look for and secure employment. If within that period, the holder fails to submit proof to the Director-General of obtaining employment in his/ her field of critical skills, the visa is deemed to have lapsed.¹²³⁵ Unlike the general work visa, the critical skills work visa does not require employers 'to prove that they did a diligent search for South African' labour to fill the position before offering it to a foreign national.¹²³⁶

Thirdly, 'an intra-company transfer work [visa] may be issued by the Director-General to a [foreign national] who is employed [overseas and is later sent for work purposes to South Africa]'.¹²³⁷ The potential applicant is required to have been with [the foreign company for at least six months], and once the visa is issued the visa holder may conduct work only for his/ her employer.¹²³⁸ This type of visa is 'issued for a period not exceeding four years and is not renewable'.¹²³⁹ In practice though, 'the visa is valid for a period of up to two years', after which the holder must return home. When submitting the application for this type of visa, the

1232 DHA "Gazetted Critical Skills List" (No. 45860, *Government Gazette*, 02 February 2022). http://www.dha.gov.za/images/notices/Gazetted_Critical_Skills_List_2022-compressed.pdf (Date of use: 18 February 2022).

1233 Business Insider SA "The 101 jobs so critical in South Africa that foreigners should be allowed to do them" 2022 *Business Insider SA* 07 February. <https://www.businessinsider.co.za/critical-skills-list-for-work-visas-and-permanent-residence-in-south-africa-2022-2> (Date of use: 18 Feb. 2022).

1234 Khan & Hurt Temporary residence 103; OECD Skills imbalances in South Africa 54.

1235 Khan & Hurt Temporary residence 103.

1236 OECD Skills imbalances in South Africa 54.

1237 See s 19(5) of *Immigration Amendment Act 13 of 2011*.

1238 See s19(6) of *Immigration Amendment Act 13 of 2011*.

1239 See Regulation 18(10) of *2014 Immigration Regulations*.

applicant is required to include a report from the employer detailing the skills he/she will transfer in the company.¹²⁴⁰

In addition to the above primary work visas allowing foreign nationals the ability to legally work in the country, the South African immigration law provides for other types of visas that allow the holder to conduct work on “a collateral basis”.¹²⁴¹ These types of visas are in fact ‘contingent upon the occupation of the applicant and, [therefore], fundamentally relate to work’.¹²⁴² These visas include corporate visas,¹²⁴³ business visas,¹²⁴⁴ study visas,¹²⁴⁵ exchange visas,¹²⁴⁶ retired person visas,¹²⁴⁷ extended visitor visas,¹²⁴⁸ and to some extent, the refugee status,¹²⁴⁹ as well as special exemption permits, which have been discussed previously, notably the ZEP, the AEP and the LEP.

1240 Khan & Hurt Temporary residence 104.

1241 Khan & Hurt Temporary residence 104.

1242 Khan & Hurt Temporary residence 102.

1243 The “corporate visa”, previously known as ‘corporate permit’, is neither a residence visa nor a work permit per se. It is rather a visa applied for by a “corporate applicant” to ‘conduct business, not-for-gain, agricultural or commercial activities within [South Africa]’. A person employed by the holder of a corporate [visa] will apply for a ‘work [visa]’. See *Director-General: DHA and Another v Mavericks Revue* CC (576/06) [2007] ZASCA 149; [2007] SCA 149 (RSA); [2008] 1 All SA 435 (SCA); 2008 (2) SA 418 (SCA) (28 November 2007) para. 4 & 5.

1244 ‘A business visa may be issued by the Director-General to a foreign [...] [national] intending to establish or invest in, or who has established or invested in, a business in [South Africa] in which he/ she may be employed’. See s 15(1) of 2011 *Immigration Amendment Act*: & Regulation 14(1) & (2) of 2014 *Immigration Regulations*.

1245 ‘A study visa, [which is] issued to a foreign national [for] study purposes in South Africa for a period not less than the period of study, [may allow] the holder to conduct part-time work for a period not exceeding 20 hours per week’. See s 13 of 2011 *Immigration Amendment Act*, & Regulation 12(3) of 2014 *Immigration Regulations*.

1246 ‘An exchange visa may be issued by the Director-General to a foreign national who is under 25 years of age and has received an offer to conduct work for no longer than one year’. See s 22 of 2011 *Immigration Amendment Act*.

1247 ‘A retired person visa may be issued for a period exceeding three months to a foreign national who intends to retire in [South Africa]’. A retired person visa ‘may not exceed a four-year period, at the expiry of which it may be renewed one or more times’. See s 20(1) of 2011 *Immigration Amendment Act*.

1248 An extended visitor visa ‘may be issued to a foreign national [for a period of up to three years to work in] an academic sabbatical, voluntary or charitable activities, research, or any other prescribed activity. See s11(1)(b) of 2011 *Immigration Amendment Act*, & Regulation 11(4) of 2014 *Immigration Regulations*.

1249 See s 27(f) of the *Refugees Act, 1998*; Regulation 17(1) & (2) of *Refugees Regulations (No. 42932 Government Gazette, 27 December 2019)*. Chagunda C “Refugees and asylum seekers from Sub-Saharan African countries and the promotion of healthy human relationships,” in Noyoo N (ed.) *Promoting healthy human relationships in post-apartheid South Africa: social work and social development perspectives* (Springer Cham 2021) 51.

7.2.3.2 Handling of applications for work permits/visas

The DRC and South African legislations require a work permit/ visa for foreign workers seeking employment in the country and an application process has been established to this end. In both countries, a distinction is made between the application procedure for a work permit/ visa, on the one hand and, the application procedure for renewal in the case of expiration of the work permit/ visa thus granted, on the other hand.

7.2.3.2.1 Application procedure for work permits/visas in DRC and South Africa

In the DRC, nine steps have been introduced for the acquisition of the biometric work permit, which the Government established since 23 May 2014 for foreign nationals seeking to take up employment in the country.

The first step involves the filing and programming of the application for the biometric work permit with the Directorate of Employment in Kinshasa and the Provincial Division of Employment and Labour in other provinces.¹²⁵⁰ The second step involves the assessment of the application by the National Committee for the Employment of Foreign Nationals (CNEE),¹²⁵¹ which meets on Wednesdays to consider only applications that contain all the required documents.¹²⁵² The CNEE has the right to freely access or not the application for a work permit given its discretionary authority in this matter.¹²⁵³ In the disputes between the DRC-registered commodity trading and mining company, la Générale des Carrières et des Mines (Gécamines) and its expatriate employees whose work permits were not renewed, the Belgian courts admitted that the CNEE has discretionary authority to issue work permits.¹²⁵⁴

1250 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 of 26 February 2022 relating to the procedure for acquiring the new biometric work permit for foreign nationals.*

1251 See Art. 209 of the 2002 Labour Code.

1252 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 of 26 February 2022.*

1253 Mutshipangu *Relations de travail* 122.

1254 Brussels Court of Appeal 25(1) 2000, Eppe Guy case, unpublished, cited in Mutshipangu *Relations de travail* 122.

The third step is the drawing up of the Minutes of the CNEE meeting by the Technical Secretariat and signing by the members of the CNEE.¹²⁵⁵ The fourth step involves transmitting the CNEE's minutes to the General Directorate of Taxation and Customs and Duties (DGDA) and the DGM, for enforcement purposes.¹²⁵⁶ The fifth step involves the establishment of the collection note by the General Directorate for Administrative, Judicial, Property and Share Revenues (DGRAD), countersignature by the director of employment and payment to the bank (subject to liability).¹²⁵⁷ The sixth step concerns the filing of proofs of payment with the revenue accountant, presentation of the statement of proofs of payment and certification by the Central Bank of Congo.¹²⁵⁸ The seventh step involves the transmittal of statements of work permits to be printed with supporting documents and approval from the administration to the printing technicians.¹²⁵⁹ The eighth step involves the capturing and printing of the work permits for foreign nationals by Sycamore SARL under the supervision of 1 or 2 officials from the Permanent Secretariat for Employment and Labour.¹²⁶⁰ The ninth step concerns the transmittal of the printed work permits to the Directorate of Employment, for delivery to the liable people.¹²⁶¹

The applicants are required to pay an application fee in the amount of USD 200, of which USD 150 shall be paid to the CNEE and USD 50 to Safe Card (the company that produces the biometric work permit), with immediate debit when the application form is collected.¹²⁶² This amount is different from the application fee in the amount of 280 USD as set out in *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 of 26 February 2022*. The applicants are also required to pay 80 USD for the biometric work permit to be collected and paid to Safe Card at the same time as the collection note from the DGRAD.¹²⁶³

1255 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 of 26 February 2022.*

1256 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1257 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1258 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1259 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1260 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1261 *Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022.*

1262 See para. 1 of *Circular Note No. CAB/MIN/ETPS/MBL/MMG/dag/2014 of 26 May 2014 relating to the breakdown of revenues from the work permit for foreigners.*

1263 See para. 2 of *Circular Note No. CAB/MIN/ETPS/MBL/MMG/dag/2014 of 26 May 2014.*

In the event that the CNEE declines to issue a work permit, the employer may lodge an appeal with the Minister of Labour and Social Welfare within 15 days.¹²⁶⁴ In compliance with Article 25 of *Ordinance 74-098 of 6 June 1974*, the work permit can be withdrawn on two grounds; first, the demonstrated refusal of the employer to enforce a provision of the *Labour Code* or its implementing regulations; and second, the occupation by the holder of the work permit of a position other than that for which the permit was issued.¹²⁶⁵ In this regard, there are some examples of non-compliance with this regulatory provision insofar as it is difficult to detect what is actually happening when inspections are carried out. In fact, once the work permit has been issued, many foreign workers have been assigned to other duties without such a change of occupation being declared to the DRC authorities in charge of labour and employment-related matters.¹²⁶⁶

In South Africa, the immigration legislation provides for procedures for applying for work visas, in particular 'general work visas, critical skills work visas, and intra-company transfer work visas'. 'For a general work visa, critical skills work visa or intra-company transfer work visa, [applicants] are required to submit a written undertaking by [employers] accepting responsibility for the costs related to the deportation of the [applicants] and [their] dependent family members, should it become necessary, [as well as] a police clearance certificate'.¹²⁶⁷ '[The] applicants for a [general] work visa [are required] to [submit] a certificate from the [DL] confirming that despite a diligent search, the prospective employer has been unable to find a suitable citizen or permanent resident with qualifications or skills and experience equivalent to those of the applicant'.¹²⁶⁸

This certificate must also confirm 'that the applicant has qualifications or proven skills and experience in line with the job offer, [and] the salary and benefits of the applicant are not inferior to the average salary and benefits of citizens or permanent residents occupying similar positions in South Africa'.¹²⁶⁹ The certificate

1264 Art. 10 of *Departmental order No. 87/005 of 21 January 1987*.

1265 Art. 11 of *Departmental order No. 87/005 of 21 January 1987*.

1266 *Bayolo Code du travail congolais* 502.

1267 Regulation 18(1) of *2014 Immigration Regulations*.

1268 Regulation 18(3)(a)(i) of *2014 Immigration Regulations*.

1269 Regulation 18(3)(a) (ii) & (iii) of *2014 Immigration Regulations*.

must further confirm that 'the contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in South Africa and is made conditional upon the general work visa being approved'.¹²⁷⁰

'Applicants for a [general] work visa [are also required] to [submit] proof of qualifications evaluated by the South African Qualifications Authority (SAQA) and translated by a sworn translator into one of the official languages of South Africa'.¹²⁷¹ 'An application for a general work visa must [also] be accompanied by full particulars of the employer, including, where applicable, proof of registration of the business with the Commission on Intellectual Property and Companies (CIPC)'.¹²⁷² Applicants are required to submit 'an undertaking by the employer to inform the Director-General should the applicant not comply with the provisions of the Act or conditions of the visa'.¹²⁷³ Applicants must further submit 'an undertaking by the employer to inform the Director-General upon the employee no longer being in the employ of such employer or when he or she is employed in a different capacity or role'.¹²⁷⁴

Applicants 'for a critical skills work visa [are] required to [submit] proof that the applicant falls within the critical skills category in the form of a confirmation, in writing, from the professional body, council or board recognised by SAQA or any relevant government department confirming the skills or qualifications of the applicant and appropriate post qualification experience'.¹²⁷⁵ Applicants must also submit 'proof of application for a certificate of registration with the professional body, council or board [recognised] by SAQA, and proof of evaluation of the foreign qualification by SAQA and translated by a sworn translator into one of the official languages of South Africa'.¹²⁷⁶

1270 Regulation 18(3)(a)(iv) of 2014 *Immigration Regulations*.

1271 Regulation 18(3)(b) of 2014 *Immigration Regulations*.

1272 Regulation 18(3)(c) of 2014 *Immigration Regulations*.

1273 Regulation 18(3)(d) of 2014 *Immigration Regulations*.

1274 Regulation 18(3)(e) of 2014 *Immigration Regulations*.

1275 Regulation 18(5)(a) of 2014 *Immigration Regulations*.

1276 Regulation 18(5)(b) & (c) of 2014 *Immigration Regulations*.

Applicants for 'an intra-company transfer work visa are required to [submit] the foreigner's contract of employment with the company abroad valid for a period of not less than six months'.¹²⁷⁷ Applicants must also submit 'a letter from the company abroad confirming that the foreigner shall be transferred to a branch, subsidiary or an affiliate of that company in South Africa'.¹²⁷⁸ They must also submit 'a letter from the branch, subsidiary or an affiliate in South Africa confirming the transfer of the [foreign national] and specifying the occupation and capacity in which that [foreign national] shall be employed'.¹²⁷⁹

7.2.3.2.2 Renewal procedure for work permits/visas in DRC and South Africa

In the DRC, under the current regulations, employers are required to apply for renewal of work permits upon expiration of period of validity.¹²⁸⁰ The application for renewal of the work permit is submitted to the same CNEE, which is free to grant the renewal or not.¹²⁸¹ When processing the application, the CNEE is required to consider the progress made by the company in increasing the number of Congolese staff and the efforts it has made towards training local staff.¹²⁸² Therefore, employers are required to submit to the CNEE or the Employment Board in the province where the company's registered office is located an application containing all the required documentation.¹²⁸³ But practical evidence shows that the CNEE, which operates routinely does not assess the progress made by the company to protect the national labour force against foreign competition and to ensure know-how transfer.¹²⁸⁴

In the event of refusal to renew the work permit or withdrawal thereof, the employer is required to immediately terminate the employment contract, and to pay the employee compensation equal to the salary and family allowances

1277 Regulation 18(8)(a) of 2014 Immigration Regulations.

1278 Regulation 18(8)(b)(i) of 2014 *Immigration Regulations*.

1279 Regulation 18(8)(b)(ii) of 2014 *Immigration Regulations*.

1280 Art. 21(1) of *Ordinance No. 74-098 of 6 June 1974*.

1281 Mutshipangu *Relations de travail* 123.

1282 Art. 21(3) of *Ordinance No. 74-098 of 6 June 1974*.

1283 The required documentation is set out under Art. 3(B) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014*.

1284 Bayolo *Code du travail congolais* 502.

corresponding to the notice period that the employer should have adhered to.¹²⁸⁵ The employer has, however, the right to file an appeal against the CNEE's decision, which declines to issue or renew the permit.¹²⁸⁶ The employer is free to choose whether or not to lodge an appeal, and if he/she does so, the appeal must be filed with the Minister of Employment, Labour and Social Welfare who chairs CNEE.¹²⁸⁷

In South Africa, the immigration legislation sets out the procedures for renewing the various types of work visas once they have expired. As regards the intra-company transfer work visa, it is worth mentioning that it 'shall be issued for a period not exceeding four years and is not renewable'.¹²⁸⁸ An application for the renewal of the other types of work visas 'must be submitted in person at least 60 days prior to the expiry date of the existing [visas]'.¹²⁸⁹ 'The relevant documents in support of the application for the renewal of existing visas must be attached, [in particular in respect of] a general work visa,¹²⁹⁰ a critical skills work visa,¹²⁹¹ and a [business visa]'.¹²⁹²

7.2.3.3 Fate of the employment contract entered into in absence of a work permit/visa

The discussions here mainly revolve around the legal implications of contracts of employment entered into by and between local employers and foreign nationals who do not possess work permits in the DRC (1) and South Africa (1).

1285 Art. 28 of *Ordinance No. 74-098 of 6 June 1974*.

1286 Mutshipangu *Relations de travail* 123.

1287 Art. 5(1) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

1288 See Regulation 18(10) of *2014 Immigration Regulations*.

1289 See s 10(7) of *2011 Immigration Amendment Act* & Regulation 9(9) of *2014 Immigration Regulations*.

1290 In respect of the renewal of a general work visa, supporting documents are provided under s10(7) of *2011 Immigration Amendment Act* & Regulation 9(9) of *2014 Immigration Regulations* (Form 10 (DHA-1739)).

1291 In respect of the renewal of a critical skills work visa, supporting documents are set out under s10(7) of *2011 Immigration Amendment Act* & Regulation 9(9) of *2014 Immigration Regulations* (Form 10 (DHA-1739)).

1292 In respect of the renewal of a business visa, supporting documents are set out under s10(7) of *2011 Immigration Amendment Act* & Regulation 9(9) of *2014 Immigration Regulations* (Form 10 (DHA-1739)).

7.2.3.3.1 Fate of the contract of employment in the DRC

Under DRC law, foreign nationals may not freely enter into employment contracts as they are required to be issued a work permit, which may be held, renewed or withdrawn in terms of regulatory instruments.¹²⁹³ The Supreme Court has, therefore, held that any employment contract entered into between an employer and a foreign employee who does not hold a valid work permit is deemed to be void and is tantamount to an act of convenience that cannot produce any legal effects under DRC labour law.¹²⁹⁴

In fact, such a contract is entered into in breach of the requirement of public order imposed both on the foreign employee to obtain a work permit and on the employer to provide his/ her employees with such a permit.¹²⁹⁵ This legal requirement is in line with the *DRC Constitution* as revised to date, which requires all citizens of the DRC, without distinction or discrimination, to respect and abide by the Constitution and the laws of the Republic.¹²⁹⁶ All foreign nationals living in the DRC are also covered by this constitutional provision, which is directed at all persons, without distinction of nationality or origin.¹²⁹⁷

7.2.3.3.2 Fate of the contract of employment in South Africa

In South Africa, the current legislation prohibits the employment of illegal foreigners, in particular foreign nationals who are employed without a valid work permit.¹²⁹⁸ It is understood that 'liability rests with the employer, and the onus is on the employer to ensure that all workers who are employed have valid work permits and work within the parameters of that work permit'.¹²⁹⁹ The law specifies that foreign workers who are 'employed without a valid work permit are entitled to

1293 See *Ordinance No. 74-098 of 6 June 1974* as revised to date; *Departmental order No. 87/005 of 21 January 1987*; *Decree No. 0030 of 14 August 1995*.

1294 See C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished, cited in Musubao *La jurisprudence congolaise* 89.

1295 C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished.

1296 See Art. 62(2).

1297 Mpala *Juridictions de droit commun* 50.

1298 See ss 38(1) & 49(3) of *2002 Immigration Act*; s 8(1) of *2014 Employment Services Act*.

1299 Wood S-J *What rights do foreign nationals have without work permits?* (Consolidated Employers Organisation Cape Town 2018). <https://ceosa.org.za/what-rights-do-foreign-nationals-have-without-work-permits/> (Date of use: 26 February 2022).

enforce any claim that the employee may have in terms of any statute or employment relationship against [their employer] or any person who is liable in terms of the law'.¹³⁰⁰ In addition, the *Constitution of South Africa* grants 'everyone the right to fair labour practices,¹³⁰¹ which has been interpreted to extend beyond just South African citizens', provided that the person be in an employment relationship.¹³⁰²

This constitutional right and the *Employment Services Act* provision have been given effect through case law, notably in the *Discovery Health* case and in *Sithole v Metal and Engineering Industries Bargaining Council and Others*. In the *Discovery Health* case, the court considered that 'the right to fair labour practices is a fundamental right, and there is no clear indication from the provisions of the *Immigration Act* or any other statute that it was intended to limit that right or accomplish more than to penalise persons who employ others on unauthorised terms'.¹³⁰³ The court concluded that 'the employment of contract between the [employer] and the foreign national not in possession of a valid work permit was [not invalid]'.¹³⁰⁴

In the *Sithole* case, the court aligned itself with the court's findings in *Discovery Health* case and agreed that the *Immigration Act* prohibits the employment of foreign nationals who do not possess valid work permits.¹³⁰⁵ However, the court ruled that the breach of 'the [*Immigration*] Act was never intended to shield employers who knowingly or unknowingly employ a person in breach of the provision from the legal consequences of terminating such [a] contract'.¹³⁰⁶

7.2.3.4 Formalities required of the employer for hiring foreign nationals

This subsection focuses on the formalities that the employer is required to comply with in order to hire foreign nationals in the DRC and South Africa.

1300 See s 8(4) of 2014 *Employment Services Act*.

1301 See s 23(1).

1302 Grogan J "Labour relations," in Currie I & De Waal J *The Bill of Rights handbook – sixth edition* (Juta Cape Town 2013) 475.

1303 See the *Discovery Health* case, para. 29.

1304 See the *Discovery Health* case, para. 54.

1305 See the *Sithole* case, para. 12.

1306 See the *Sithole* case, para. 13.

7.2.3.4.1 Formalities for hiring foreign nationals in the DRC

In the DRC, the procedure for hiring foreign workers is outlined in the *Labour Code*,¹³⁰⁷ *Ordinance 74-098 of 6 June 1974* as supplemented to date,¹³⁰⁸ *Departmental Order No. 87/005 of 21 January 1987 determining terms and conditions for hiring expatriates*, and *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014* establishing the operating procedures of the CNEE.¹³⁰⁹ In addition, these statutory and regulatory instruments are referred to by *Circular Note No. 004/CAB/MINETAT/METPS/01/2020* of 22 July 2020, which recalls the instructions concerning the employment of foreign nationals.

In terms of these instruments, employers wishing to hire a foreign worker is required to obtain the necessary documents, including a work permit, and to comply with the relevant procedure before the CNEE.¹³¹⁰ In fact, employers are required to provide the CNEE or the Employment Board of the province where the company's registered office is located, with an application containing supporting documents.¹³¹¹ But in practice, only the application form, the draft contract of employment, the description of the vacancy to be filled, the applicant's curriculum vitae, and evidence of professional qualifications are required.¹³¹² Yet the documents that are not required¹³¹³ could enable the CNEE to assess compliance with the current regulations concerning the quota of foreign staff with regard to the

1307 Art. 209 *et seq.*

1308 Art. 9 to 11.

1309 Art. 3 & 4.

1310 *Circular Note No. 004/CAB/MINETAT/METPS/01/2020 of 22 July 2020.*

1311 In the case of hiring, the required supporting documents are as follows: the transmittal letter; an application form; the draft contract of employment; the company's organisation chart ; the applicant's curriculum vitae; description of the vacancy to be filled; documents justifying the professional qualification (diploma, certificate or certificate of services rendered); training programme; three passport photos; a list of the names of the foreign staff employed by the company ; proof of payment of contributions to the INSS and the National Institute for Vocational Training (NIVT) (Art. 3(A) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014*; see also Art. 5(a) of *Departmental Order No. 87/005 of 21 January 1987 determining terms & conditions for hiring expatriates*; Art. 9 of *Ordinance No. 74-098 of 6 June 1974*).

1312 Bayolo *Code du travail congolais* 501.

1313 The documents that are not required in practice include the company's organisation chart, the training programme, the list of foreign employees in the company, and proof of contributions to the INSS and the NIVT. See Bayolo *Code du travail congolais* 501.

overall workforce.¹³¹⁴ In addition, practical experience shows that more often the application form contains inaccurate information regarding the number of national and foreign staff.¹³¹⁵

Under the current regulations, the application for a work permit must be made before the worker sets foot on Congolese soil.¹³¹⁶ But in practice the CNEE requires that the passport carry a visa proving that the foreign applicant is on DRC soil. Otherwise, the decision to issue the work permit would mention in the observations: “production of the visa page of the applicant upon entry into the DRC”.¹³¹⁷ In addition, for the purposes of taking of a photo for the biometric work permit, the applicant is required to be present. Such a practice is clearly in conflict with the regulations.¹³¹⁸

After checking that the application complies with the provisions of Article 3 above, the Employment Board is required to immediately forward it to the CNEE’s permanent secretariat.¹³¹⁹ Any employers who have job vacancies are required to declare them immediately and only to the National Employment Board (ONEM) within his/her jurisdiction and this declaration amounts to an offer of employment.¹³²⁰ This declaration must be made within 48 hours of hiring to the provincial branch of the Labour Inspectorate and the provincial office of the ONEM, and any departure of a worker for any reason whatsoever is also subject to a declaration drawn up under the same conditions.¹³²¹ If the job vacancy is not filled within 30 days, the employer has the right to hire a foreign skilled worker and submit the application to the CNEE for consideration.¹³²²

It is noteworthy that the procedure, which consists of filing an application directly with the ONEM’s permanent secretariat against payment of USD 260 for the

1314 Bayolo *Code du travail congolais* 501.

1315 Bayolo *Code du travail congolais* 502.

1316 Art. 3(3) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014*.

1317 Bayolo *Code du travail congolais* 502.

1318 Bayolo *Code du travail congolais* 502.

1319 Art. 4 of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014*.

1320 Art. 3 of *Departmental Order No. 87/005 of 21 January 1987*.

1321 See Art. 1 of *Ministerial Order No. 006/CAB/PVPM/ETPS/2010 of 1st April 2010*.

1322 Art. 4(2) of *Departmental Order No. 87/005 of 21 January 1987*; *Circular Note No. 004/CAB/MINETAT/METPS/01/2020 of 22 July 2020*.

application form seems outdated.¹³²³ In fact, once the work permit has been issued, the ONEM endorses the contract of employment without checking that the offer has been filed in advance. Moreover, the ONEM, which is part of the CNEE, fails to ensure that the procedure thus laid down is complied with.¹³²⁴

Employers are prohibited from employing young expatriate graduates who have no experience while there are local graduates on the labour market.¹³²⁵ Furthermore, the current regulations prohibit the hiring in another company of any expatriate workers who have been dismissed for disciplinary reasons.¹³²⁶ In this case, the employer is required to submit the work permit to the CNEE without delay.¹³²⁷ The regulations further provide that except for the capital representative, no retired expatriate worker may be replaced by another expatriate.¹³²⁸

The entry of expatriates wishing to work in the DRC is subject to the possession of an entry visa issued based on an employment contract approved by the National Employment Service.¹³²⁹ The CNEE is prohibited from considering or processing any application submitted by an expatriate holding a passport bearing a tourist, visit or family visa,¹³³⁰ which is similar to the South African policy.

The work residence visa, which is designed for foreign nationals who can prove that they hold a valid work permit,¹³³¹ can be issued subject to such terms and conditions as set out by the DGM. The applicant is required to: be physically present in the DRC to apply for work residence visa; provide evidence of sufficient and honest livelihoods based on proof of personal residence (lease contract) and a bank certificate or statement from a local bank. It was observed that for the sake of credibility, the bank account must be credited with at least USD 5,000.¹³³² These requirements put in place by the DGM are in breach of the Regulations,

1323 Bayolo *Code du travail congolais* 501.

1324 Bayolo *Code du travail congolais* 501.

1325 See Art. 7 of *Departmental order No. 87/005 of 21 January 1987*.

1326 Art. 8(1) of *Departmental order No. 87/005 of 21 January 1987*.

1327 Art. 8(2) of *Departmental order No. 87/005 of 21 January 1987*.

1328 Art. 9 of *Departmental order No. 87/005 of 21 January 1987*.

1329 See Art. 2(1) of *Departmental order No. 87/005 of 21 January 1987*.

1330 See Art. 2(2) of *Departmental order No. 87/005 of 21 January 1987*.

1331 See Art. 9 of *Ordinance No. 87-281 of 13 August 1987*.

1332 Bayolo *Code du travail congolais* 503.

given that they make it possible for employers to bring foreign workers into the country on a visa other than a work residence visa.¹³³³

7.2.3.4.2 Formalities for hiring foreign nationals in South Africa

In South Africa, ‘employers may consider hiring a foreign national when all submitted local applications do not satisfy their minimum requirements’.¹³³⁴ Businesses hiring foreign nationals are required to follow specific procedures that the DEL has outlined.¹³³⁵ First of all, employers who have vacant posts are required to advertise them nationally in the local media, in particular through newspapers or online. South African candidates ‘then get first chance to take up the said employment opportunity by submitting their applications for the post to the employer’.¹³³⁶

In fact, local candidates are considered through a thorough interview and recruitment process. In the event of the employers finding ‘suitable candidates for the post’, they then ‘hire from the local pool of applications’ and the process comes to an end.¹³³⁷ However, if ‘all the submitted local applications [fail to] satisfy the employer’s minimum requirements [in terms of] competencies, education, work experience, for the vacant post, ‘the employer may consider hiring a foreign national’.¹³³⁸ Once a stage of considering hiring a foreign employee has been reached by the employer, the following procedures set out by the DEL must be followed.

First, the employment opportunity must be registered with the DEL, and to this effect, ‘an “opportunity recruitment form” [must be completed] after which [the] DEL would provide the employer with the requisite skills required for the job –

1333 Bayolo *Code du travail congolais* 503.

1334 Sokutu B “Government outlines laws on hiring of foreigners” 2019 *The Citizen* 4 November. <https://www.citizen.co.za/news/2199740/government-outlines-laws-on-hiring-of-foreigners/> (Date of use: 26 February 2022).

1335 Sokutu 2019 *The Citizen* 4 November.

1336 Kempton Express “Government outlines laws on hiring of foreigners” 2019 *Kempton Express* 4 November. <https://kemptonexpress.co.za/inn/833857/government-outlines-laws-hiring-foreigners/> (Date of use: 27 February 2022).

1337 Kempton Express 2019 *Kempton Express* 4 November.

1338 See s 8(2)(b) of *Employment Services Act (Act 4 of 2014)*.

referring suitable candidates for placement'.¹³³⁹ Second, 'an employer [is required to confirm to the] DEL whether the referred candidates have been placed'.¹³⁴⁰ Third, 'a checklist [must be obtained] from a provincial DEL office on steps to be followed in instances requiring services of foreign nationals'.¹³⁴¹ Fourth, 'visa applications [must be obtained] from [the] DEL, in case of foreign nationals and be submitted to a provincial DEL office'.¹³⁴² Five, 'a visa finalisation notification letter [must] then [be] sent to the employer and later submitted to the [DHA]'.¹³⁴³

7.3 Exemptions from restrictions on foreign labour

The basic formalities for implementing the principles relating to the protection of the national labour force are the periodic list of jobs or occupations prohibited to foreign nationals, the authorised quotas of foreign workers in a company and, lastly, the work permit/ visa. It seems that each of these mechanisms restricting the foreign labour force is subject to two types of exemptions, notably direct (1) and indirect (2) exemptions.

7.3.1 Direct exemptions

Direct exemptions are those relating to the authorised quotas of foreign workers in companies (1), on the one hand, and to the work permits for foreign nationals (2), on the other hand.¹³⁴⁴

7.3.1.1 Exemptions relating to the authorised quotas of foreign workers

Concerning the authorised quotas of foreign workers, the exemptions are explicitly provided for by the current legislation, particularly in the DRC. Under *Ordinance No. 74-098 of 6 June 1974*, the maximum number of foreigners who may be employed in a company cannot be exceeded.¹³⁴⁵ In the event of the quota being exceeded, the work permit would be withdrawn or denied or not renewed, unless

1339 Kempton Express 2019 *Kempton Express* 4 November.

1340 Sokutu 2019 *The Citizen* 4 November.

1341 Kempton Express 2019 *Kempton Express* 4 November.

1342 Sokutu 2019 *The Citizen* 4 November

1343 Kempton Express 2019 *Kempton Express* 4 November.

1344 Katansi Protection 225.

1345 Art. 24(1) of *Ordinance No. 74-098 of 6 June 1974*.

an exemption is granted by virtue of an order of the Minister of Labour.¹³⁴⁶ The minister is, therefore, vested with discretionary power to grant exemptions to employers, especially those in need of and seeking a great number of foreign workers.¹³⁴⁷ In exercising this discretionary power, the minister must take into account the organisation of the company, the state of the labour market and the vocational training programmes that the company must put in place in compliance with the labour legislation.¹³⁴⁸

7.3.1.2 Exemptions from application procedure for work permits

Under DRC legislation, the fact that a certain number of foreign workers are treated in the same way as nationals, as discussed previously, in a way reduces the scope of exemptions from the requirement to hold a work permit.¹³⁴⁹ The only key exemption from meeting the requirements to obtain a work permit prior to taking up paid employment in the DRC is provided for under Article 11(1) of *Ordinance No. 74-098 of 6 June 1974* as revised to date.¹³⁵⁰

The requirement of a work permit seems to have been laid down to avoid any overflow, as the workers concerned might be tempted, at the end of their “temporary assignment”, to take up paid employment permanently in the absence of a work permit.¹³⁵¹ It goes without saying that the failure by an employer using foreign workers on temporary assignments to apply for a work permit for them would result in penalties identical to those imposed on any employer using one or several foreign workers in ordinary cases, without having first applied for and obtained work permits for them.¹³⁵²

1346 Art. 24(2) of *Ordinance No. 74-098 of 6 June 1974*; Art. 185(8) of the *Labour Code*; Art. 1 & 2 of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005*.

1347 Mutshipangu *Relations de travail* 124.

1348 Katansi Protection 225-226.

1349 Katansi Protection 225.

1350 Art. 11(1) of *Ordinance No. 74-098 of 6 June 1974* as revised to date provides that ‘employees entrusted with temporary tasks, such as delivery, assembling machinery, building factories, prospecting, and whose employer does not carry out any professional activity in the DRC, may obtain a work permit without having to meet [the legal requirements]’.

1351 Katansi Protection 226.

1352 Katansi Protection 227.

In South Africa, the immigration legislation provides for exemptions and waiver of prescribed requirements. The *Immigration Act* provides that ‘upon application, the minister may under terms and conditions determined by him or her, for good cause, waive any prescribed requirement or form’.¹³⁵³ In respect of the waiver of prescribed requirements, the *Immigration Regulations* provide that ‘an application contemplated in section 31 (2) (c) of the [*Immigration*] Act shall be made to the minister on Form 48 illustrated in Annexure A, supported by reasons for the application’.¹³⁵⁴

One of the applicable case scenarios is ‘where a general work visa holder has been endorsed to work for a specific employer and in a specific role, and he/she will continue his/her employment as endorsed on the visa’.¹³⁵⁵ In such a case, ‘the requirement may be waived as the [*Immigration*] Act identifies the requirement as applicable to “prospective employers.”’¹³⁵⁶

Other ‘typical scenarios would include a waiver letter [that] can be submitted with the general work visa application in-lieu of the [DEL] Certificate; the employer/applicant [that] may have received negative recommendation from the DEL; the applicant [that] may not be able to produce an evaluation from the SAQA of their foreign qualifications; the applicant [that] is unable to obtain/ produce a police clearance certificate’.¹³⁵⁷ ‘The [waiver of prescribed requirements can also be contemplated] in the case where numerous people of an organisation need the same prescribed requirement waived – a company may apply for a blanket waiver (mostly used for corporate visa applications)’.¹³⁵⁸

7.3.2 Indirect exemptions

1353 See s 31(2)(C).

1354 See Regulation 29.

1355 Work Permits SA *Benefits of a South African work visa* (Work Permits SA Johannesburg 2022). <https://www.workpermitsouthafrica.co.za/general-work-visa/> (Date of use: 26 Feb. 2022).

1356 Work Permits SA *South African work visa*.

1357 Work Permits SA *What necessitates the need for a waiver?* (Work Permits SA Johannesburg 2022). <https://www.workpermitsouthafrica.co.za/waiver-exemptions/> (Date of use: 26 Feb. 2022).

1358 Work Permits SA *The need for a waiver*.

Indirect exemptions involve the transfer of local labour,¹³⁵⁹ which constitutes a sort of waiver of the mechanism of the list of jobs prohibited to foreign nationals and concerns only the DRC as South Africa has not put an emigration policy in place. The DRC state can authorise local workers representing a portion of the national labour force to be employed outside the country.¹³⁶⁰ Such a transfer of national labour leaves a vacuum or a quota of virtual jobs on the national labour market that foreign workers could fill.¹³⁶¹

From reading the DRC legislation, there is some reluctance from the Ministry of Labour to grant authorisation for exporting DRC labour.¹³⁶² Any application for such an authorisation must be supported by an employment contract,¹³⁶³ a copy of which, duly prepared and approved by the Ministry of Labour must be sent to the DRC Embassy or alternatively the Ministry of Foreign Affairs, within one month of the arrival of the Congolese worker in the host country.¹³⁶⁴ The Congolese workers emigrating under these conditions may not in any way suffer wage or other discrimination in the host country,¹³⁶⁵ and are required to transfer all or part of their earnings under the employer's responsibility.¹³⁶⁶ Any employers wishing to use Congolese labour abroad are required to enter into a special agreement with the Ministry of Labour, after receiving prior approval from the Ministry of Foreign Affairs.¹³⁶⁷

These regulatory provisions imply that the transferred local workforce is employed in a foreign country by a subsidiary or branch of the exporting company, which is based in the DRC.¹³⁶⁸ Otherwise, it is difficult to figure out how the DRC lawmakers could impose any requirements on a foreign employer who, even if they were to employ Congolese workers, would have no territorial or legal ties with

1359 *Departmental Order No. 067/81 of 5 November 1981.*

1360 Katansi Protection 225.

1361 Katansi Protection 225.

1362 Art. 1 of *Departmental Order No. 067/81 of 5 November 1981.*

1363 Art. 2 of *Departmental Order No. 067/81.*

1364 Art. 3 of *Departmental Order No. 067/81.*

1365 Art. 4 of *Departmental Order No. 067/81.*

1366 Art. 5 of *Departmental Order No. 067/81.*

1367 Art. 6 of *Departmental Order No. 067/81.*

1368 Katansi Protection 227.

DRC.¹³⁶⁹ The only possibility of defending their nationals or their interests being, it would seem, the recourse to the classic mechanism of diplomatic protection, the strict conditions of which are also well known.¹³⁷⁰

7.4 Conclusion

This chapter has provided an insight into measures for implementing basic principles governing the protection of national labour force in the DRC and South Africa. To this end, the first section discussed the mechanisms put in place by the two countries for limiting foreign labour. The focus lies on three key mechanisms, notably the drawing up of a list of jobs prohibited to foreign nationals, employment quotas for foreign workers in a company, and the application procedure for work permits/ visas.

Concerning the list of jobs prohibited to foreign nationals, there is a significant difference between the two countries. While the DRC legislation provides for the periodic list of jobs prohibited to foreign nationals as drawn up by the Minister of Labour, South Africa does not have any such legislation, and is currently planning on establishing one. South Africa could learn from the DRC legislation, which may serve as a good reference for South Africa. However, South Africa has enacted some pieces of legislation that require South African citizenship or permanent residency to qualify for the employment position.

As regards employment quotas for foreign workers in a company, there are similarities between the two countries given that they both have introduced the employment quota requirement for foreign workers. As for the application procedure for work permits/ visas, there are numerous similarities between the two countries in terms of types of work permits/ visas, the handling of applications for work permits/visas, the fate of the employment contract entered into in absence of

1369 Katansi Protection 227.
1370 Katansi Protection 228.

a work permit/visa, and the formalities required of the employer for hiring foreign nationals.

The second section focused on the exemptions from restrictions on foreign labour, which amounts to discussing two types of exemptions. First, direct exemptions, namely exemptions from the maximum quotas and exemptions from application procedure for work permits/ visas; and second, indirect exemptions under DRC legislation bearing in mind that South Africa has not introduced such exemptions.

Concerning the exemptions relating to the authorised quotas of foreign workers, there are no similarities between the two countries given that while the DRC legislation provides for such exemptions, South Africa does not. In terms of exemptions from application procedure for work permits, both countries' legislations have provided for some, which are applicable in a particular way for each country. Concerning the indirect exemptions, they are applicable only to the DRC because this country's legislation organises the emigration or transfer of local workers abroad, unlike the South African legislation.

This chapter has further revealed that the two countries are different in terms of the spheres of law-making competence concerning the legislation governing the protection of national labour force, which is discussed in detail in the next chapter.

CHAPTER EIGHT

CRITICAL REVIEW OF REGULATORY COMPLIANCE AND EFFECTIVENESS OF LEGISLATION PROTECTING THE NATIONAL LABOUR FORCE IN THE DRC AND SOUTH AFRICA

8.1 Introduction

The DRC and South Africa have introduced the legislative and regulatory framework, which stems from the lawmakers' concern to protect the national labour force against foreign competition. In both countries, efforts have been made to implement and enforce existing regulatory policies relating to immigration and/or emigration for employment purposes. As pointed out in the preceding chapter, both countries have put in place the mechanisms aimed at limiting foreign labour as well as exemptions from restrictions on foreign labour.

On the one hand, this chapter seeks to draw a general picture of the DRC's and South Africa's efforts to implement and enforce labour migration legal and regulatory policies with a view to achieving the fullest measure of protection of national labour force. On the other hand, the chapter critically assesses regulatory challenges and problems faced by the two countries.

For this purpose, the chapter is subdivided into three sections and related subsections, including a conclusion. The first section discusses the two countries' efforts to enforce labour migration legal and regulatory policies. The second section introduces a distinction between the two spheres of law-making competence in the DRC and South Africa, respectively. The third section provides an overview of the main findings and conclusions drawn from the discussions presented in this chapter.

8.2 The DRC's and South Africa's efforts to enforce labour migration legal and regulatory policies

The DRC and South Africa have both made some efforts to enforce labour migration policies aimed at protecting the national labour force against foreign competition. In fact, the two countries put in place rules to manage and restrict migration inflows and these rules are accompanied by strict migration control policies.¹³⁷¹ Immigration control or enforcement consists of three major policy goal, notably the prevention of illegal entries (1); the deportation of unauthorised or illegal foreign nationals (2); and deterrence of unauthorised or illegal immigration (3).¹³⁷²

8.2.1 The prevention of illegal entries

In most countries around the world, the prevention of illegal entries has always occurred through border security, which means security measures put in place at and between legal ports of entry.¹³⁷³ Such prevention also increasingly extends into countries of origin and transmigration as destination countries create “thicker” borders.¹³⁷⁴ Between ports of entry, prevention includes ‘a mix of physical (natural and man-made) barriers to prevent or [deter] illegal entry, surveillance to detect illegal entries, and deployment of personnel to apprehend and remove illegal immigrants’.¹³⁷⁵ At ports of entry, the prevention task necessarily implies a screening process, which involves preventing unwanted migration by screening out excludable aliens and prohibited goods while permitting and even facilitating legal immigrants and legitimate commercial flows.¹³⁷⁶

1371 Rosenblum M & Cornelius W “Dimensions of immigration policy,” in Rosenblum M & Tichenor D (eds) *The Oxford handbook of the politics of international migration* (OUP Oxford 2012) 258.

1372 Rosenblum & Cornelius Immigration policy 258; 259; & 261.

1373 Rosenblum & Cornelius Immigration policy 258; Argueta C *Border security: immigration enforcement between ports of entry* (CRS Washington DC 2016) 1.

1374 Rosenblum & Cornelius Immigration policy 258.

1375 Haddal C, Kim Y & Garcia M *Border security: barriers along the U.S. international border* (CRS Washington DC 2010) 2; Rosenblum & Cornelius Immigration policy 258; Rosenblum M R “Alternatives to migration in the United States: policy issues and economic impact” 2012 *American Behavioral Scientist* 56(8) at 1110-1111.

1376 Rosenblum & Cornelius Immigration policy 259.

To prevent the flow of illegal immigration, countries establish enhanced law enforcement, such as entry screening (1); inspection of passports and work permits/ visas (also referred to as passports and work permits/ visas checks) (2); workplace and other raids (3); and employer sanctions (4).¹³⁷⁷

8.2.1.1 Entry screening

A screening, which is usually biometric, is an appointment set up by the immigration services for the purpose of carefully checking the visitors', immigrants', refugee claimants' or asylum seekers' security and health backgrounds by taking their picture, fingerprint, signature, and temperature, before they may enter the country.¹³⁷⁸ This screening serves to ensure that the persons coming into the country do not pose a threat to the health (unrelated to Novel Coronavirus - COVID-19), safety or security of the country's citizens.¹³⁷⁹

The purpose of immigration law is precisely to ensure that foreign nationals undergo pre-entry screening and be sanctioned if they side-step the said screening'.¹³⁸⁰ Countries establish at land border ports of entry a screening procedure whereby immigration officers stationed at the primary or initial inspection point rapidly process arriving persons and vehicles.¹³⁸¹ These immigration officers allow into the country those found admissible and refer those requiring additional examination to a separate area of the traffic lanes for further inquiry by a secondary officer.¹³⁸²

1377 Robin S & Barros L "Review and evaluation of the measures implemented in OECD Member Countries," in OECD *Combating the illegal employment of foreign workers* (OECD Paris 2000) 91.

1378 Serrano Law Firm PLLC *What is a biometric screening?* (Serrano Law Firm PLLC Houston, TX 2021). <https://serranoplpc.com/what-is-a-biometric-screening/> (Date of use: 12 March 2022); Canada Border Services Agency (CBSA) *Security screening* (CBSA Ottawa 2015). <https://www.cbsa-asfc.gc.ca/security-secureite/screen-verific-eng.html> (Date of use: 12 March 2022).

1379 The Government of Canada *CIMM - Security screening and admissibility* (The Government of Canada Ottawa 2020). <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-nov-25-2020/cimm-security-screening-admissibility-nov-25-2020.html> (Date of use: 12 March 2022).

1380 Brown E "Outsourcing immigration compliance," in Morriss A & Estreich S (eds) *Global labour and employment law for the practicing lawyer* (Kluwer Law International 2010) 401.

1381 Noto M "Travel and domestic controls" 1966 AAPSS vol. 367, *The New Immigration* at 81; INS & Bowser J "Role of the immigrant inspector," in *I & N Reporter - Volumes 8-14* (U.S. Department of Justice, INS 1959) 108.

1382 Noto 1966 AAPSS vol. 367 at 81; INS & Bowser Role of the immigrant inspector 108.

In South Africa, immigration officers are appointed by the Director-General of the DHA 'to perform the functions of either the permitting office, port of [entry]¹³⁸³ or inspectorate', as the case may be.¹³⁸⁴ In fact, immigration officers carry out entry screening of migrants coming to South Africa for purposes of employment, inter alia. They may, therefore, allow foreign workers into the country or refuse them entry. Immigration officers who refuse 'entry to any person or finds any person to be an illegal foreigner [are required to] inform that person that he or she may in writing request the Minister [of Home Affairs] to review that decision'.¹³⁸⁵

In the DRC, just like in the Dominican Republic, 'the DGM is the executive branch of the Ministry of Interior and Police, which is directly responsible for enforcing the [im]migration [and] [e]migration] law'.¹³⁸⁶ The DGM officers act as immigration officers who perform border controls at entry and exit points to ensure that the migrants crossing the border meet the requirements for entering or leaving the DRC.¹³⁸⁷ This implies that the DGM officers carry out entry screening of migrants coming into the DRC for purposes of employment. All foreign nationals are required, upon entering the country, to complete and submit an arrival card to the immigration officer.¹³⁸⁸

The DRC immigration officers also have free access on vessels docking at a DRC port and on aircraft landing in the country, as well as on trains, motor vehicles and buses crossing the border.¹³⁸⁹ The immigration officers are vested with the power and authority to refuse entry to any foreign nationals presenting themselves at the

1383 'Port of entry refers to a place designated by the Minister in [South Africa] where all persons have to report to an immigration officer before entering, sojourning or remaining within, or departing from, the country'. See s 9A (1) of *Immigration Act 13 of 2002*; DHA *Green Paper* para. m) at 5.

1384 See s 1(1) of *Immigration Act 13 of 2002* as amended to date; Regulation 31(1) of *Immigration Regulations of 22 May 2014*.

1385 See s 8(1) of *Immigration Act 13 of 2002* as amended to date.

1386 OECD "The Dominican Republic's migration landscape," in OECD *Interrelations between public policies, migration and development in the Dominican Republic* (OECD Publishing Paris 2017) 52.

1387 Ministry of Interior, Decentralisation and Safety *DGM brochure* (DGM Kinshasa 2013) 13.

1388 See Art. 16 of *Ordinance No. 87-281 of 13 August 1987*.

1389 See Art. 25 of *Legislative Order No. 83-033 of 12 September 1983*.

border post to enter the country without being in possession of the necessary documents, including a valid passport and vaccination certificate.¹³⁹⁰

8.2.1.2 Inspection of passports and work permits/ visas

The immigration officers in both the DRC and South Africa conduct passports and work permits/ visas checks before foreign nationals' admission into the country. In the DRC, except for foreign nationals who are exempt from the visa requirement,¹³⁹¹ or from the passport and visa requirement,¹³⁹² immigration officers are required to stamp the foreign national's passport, both on entry and exit, bearing the date of the border crossing.¹³⁹³

In South Africa, the immigration legislation requires 'any person wishing to enter or depart from [the country to be] in possession of a valid passport, and in the case of a minor, [to have] his or her own valid passport'.¹³⁹⁴ The law prohibits foreign nationals from entering or departing from the country 'unless the entry or departure is recorded by an immigration officer'.¹³⁹⁵ The recording of the entry or departure must be done 'by means of scanning the passport and [the relevant] form, and by endorsing the entry or departure in the passport of the person [concerned]'.¹³⁹⁶

1390 Art. 13 of *Legislative Order No. 83-033 of 12 September 1983*; Art. 1 of *Ordinance No. 87-281 of 13 August 1987*.

1391 Those exempt from the transit visa are as follows: 1. foreign nationals transiting through the DRC by air or sea only, provided that they do not leave the airport or port during their stopovers; 2. foreign nationals transiting through the DRC by air only, who must wait for the time strictly necessary to make the first connection to continue their journey, without being able to deliberately split the journey for their own reasons; 3. foreign nationals who, as passengers on an airline, make a stopover at Kinshasa airport and continue their journey by another aircraft departing from Brazzaville aerodrome, on the understanding that they may also benefit from this exemption when traveling from Brazzaville to Kinshasa. See Art. 14(1) of *Ordinance No. 87-281 of 13 August 1987*.

1392 Those exempt from the passport and visa requirement include: 1. foreign nationals under the age of 15 years, provided that their identity is specified on the passport of the person they are accompanying, their ascendant or their guardian; 2. foreign nationals who are crew members of airlines or shipping lines making a stopover in the DRC provided that they hold a valid crew member's license or certificate. See Art. 14(2) of *Ordinance No. 87-281 of 13 August 1987*. Nationals of States neighbouring the DRC who meet the requirements for special border traffic regimes are exempt from the passport and visa requirements for travel within the border zone. See Art. 15 of *Ordinance No. 87-281 of 13 August 1987*.

1393 Art. 18 of *Ordinance No. 87-281 of 13 August 1987*.

1394 See s 9(3)(a) of *Immigration Act 13 of 2002* as amended to date.

1395 See s 9(3)(c) of *Immigration Act 13 of 2002* as amended to date.

1396 Regulation 16 of *Immigration Regulations of 22 May 2014*.

The immigration officers are required to refuse entry to 'any person who provides [him/ her] with incorrect or false information knowing it to be incorrect or false'.¹³⁹⁷

The law further requires foreign nationals entering the country to produce to an immigration officer, on demand, a valid port of entry visa, granted under the law.¹³⁹⁸ Those foreign nationals holding a valid visa for purposes of working are deemed, upon their entry into South Africa 'and after having been issued with that [visa, to] be in possession of a valid [port of entry] visa'.¹³⁹⁹

Immigration Regulations require that 'any person who destroyed a passport or presented a passport that is confirmed to be false or fraudulently altered, be refused entry [into South Africa]'. In such a case, immigration officers are required to confirm such refusal on the relevant form, 'confiscate such passport, and cause such person to be returned to his or her point of embarkation'.¹⁴⁰⁰ The passport thus confiscated must, together with the relevant form, be handed to the purported issuing authority's embassy, high commission, or representation in South Africa.¹⁴⁰¹ *Immigration Regulations* require employers to ensure that their employees' passports are 'valid at all times for the duration of [their] employment',¹⁴⁰² and workplace inspections and other raids may take place to ensure that this requirement is complied with.

8.2.1.3 Workplace and other raids

Law enforcement agencies conduct raids or random inspections on illegal immigrants at places of employment to ensure employers of foreign nationals comply with immigration laws, as is the case in both South Africa (1) and the DRC (2).

1397 Regulation 17 of *Immigration Regulations of 22 May 2014*.

1398 See s10A (1) of *Immigration Act 13 of 2002* as amended to date.

1399 See s10A (2)(a)(vii) of *Immigration Act 13 of 2002* as amended to date.

1400 See Regulation 13 of *Immigration Regulations of 22 May 2014*.

1401 See Regulation 14 of *Immigration Regulations of 22 May 2014*.

1402 See s18(2) of *Immigration Regulations of 22 May 2014*.

8.2.1.3.1 Workplace and other raids in South Africa

The South African immigration law establishes an inspectorate, which includes immigration officers¹⁴⁰³ who may, at any time before the commencement or during an investigation, conduct an inspection in loco.¹⁴⁰⁴ The DHA organises from time-to-time inspections and other raids along with the South African Police Service (SAPS) to track down illegal immigrants. For instance, on 11 March 2022 the Gauteng division of SAPS together with Johannesburg Metropolitan Police Department have kicked off “Operation Restore” in the province to combat illegal immigration in the country at large.¹⁴⁰⁵ SAPS have confirmed that over 200 immigrants have been arrested and taken into custody during the operation for being undocumented and for working in the country illegally.¹⁴⁰⁶

Similarly, the DHA officials visited and undertook a routine inspection at the Africa News Network 7 (ANN7)¹⁴⁰⁷ studios in Midrand, Johannesburg on 22 February 2018 with a view to verifying information related to visas of certain individuals employed by the organisation.¹⁴⁰⁸ Following the investigation with human-resources staff, four of the eight foreign nationals who trained employees of the ANN7 news channel were ordered to leave South Africa on the grounds that they were working with expired visas.¹⁴⁰⁹

1403 See s33(1) of *Immigration Act 13 of 2002* as amended to date.

1404 See s33(4)(a) of *Immigration Act 13 of 2002* as amended to date.

1405 Makwea R “Saps arrests more than 200 foreigners without permits” 2022 *The Citizen* 12 March. <https://www.citizen.co.za/news/south-africa/3047838/saps-arrests-more-than-200-foreigners/> (Date of use: 12 March 2022).

1406 Riddle S “Operation Restore: Police arrest over 200 foreigners in Gauteng raids” 2022 *The South African* 11 March. <https://www.thesouthafrican.com/news/police-kick-off-operation-restore-gauteng/> (Date of use: 12 March 2022).

1407 ANN7 was a 24-hour satellite TV news channel that operated in South Africa from August 2013 to August 2018. See Ramkissoo N “The Gupta goofs: ANN7 news channel fumbles through launch” 2013 *Sunday Times* 23 August. <https://www.timeslive.co.za/tshisa-live/tshisa-live/2013-08-23-the-gupta-goofs-ann7-news-channel-fumbles-through-launch/> (Date of use: 07 March 2022); Staff Reporter “Guptas sell The New Age and ANN7 to Mzwanele Manyi for R450m” 2017 *Mail & Guardian* 21 August. <https://mg.co.za/article/2017-08-21-oakbay-sells-the-new-age-and-ann7-to-mzwanele-manyi-for-r450-million/> (Date of use: 07 March 2022).

1408 DHA *Media statement on routine inspections by immigration officials* (DHA Johannesburg 22 February 2018). <http://www.dha.gov.za/index.php/statements-speeches/1076-media-statement-on-routine-inspections-by-immigration-officials> (Date of use: 07 March 2022).

1409 Sapa “Foreign ANN7 employees ordered to leave SA” 2013 *Sapa* 8 October. <https://mg.co.za/article/2013-10-08-foreign-ann7-employees-ordered-to-leave-sa/> (Date of use: 07 March 2022); eNCA “Four ANN7 staff ordered to leave SA” 2013 *eNCA* 8 October.

Moreover, DHA immigration officers work in conjunction with the DEL, and the Directorate for Priority Crime Investigation (Hawks) in organising raids into companies or businesses from time to time to check compliance with laws and regulations.¹⁴¹⁰ For instance, in November 2019 the DEL organised the raids into two factories in Johannesburg, in compliance with the *BCEA of 1997* as amended to date, to monitor and enforce labour laws.¹⁴¹¹ During the raids, the immigration officers were tasked with verifying the status of the employees, while the DEL inspectors were in charge of conducting workplace inspection, checking compliance with labour laws.¹⁴¹² According to the DEL, the two factories were suspected of violating labour and immigration laws, as the owners who mostly were Chinese, were suspected, among others, of employing foreign nationals mostly from Malawi who did not have work visas.¹⁴¹³ As a result, the owners of the two factories were issued with fines and were expected to appear in court.¹⁴¹⁴

In 2020, the DEL initiated an investigation in conjunction with the DHA into 'the local unit of the Chinese technology group, Huawei'.¹⁴¹⁵ The audit revealed that 90% of Huawei SA's staff were foreign nationals and only 10% were South Africans, which Huawei did not deny arguing that it was granted permission by the DHA 'to employ the number of foreign nationals that they did'.¹⁴¹⁶ But according to the DEL, a subsequent investigation revealed that Huawei was granted a permit in accordance with the provisions of the *Immigration Regulations* that required it to employ 60% South Africans and 40% foreign nationals.¹⁴¹⁷ In response, the DEL

<https://www.enca.com/south-africa/four-ann7-staff-ordered-leave-sa> (Date of use: 07 March 2022).

1410 Ntshidi E "Hawks raid JHB factories accused of flouting labour laws" 2019 *Eyewitness News*, Johannesburg 8 November. <https://ewn.co.za/2019/11/27/hawks-raid-jhb-factories-accused-of-flouting-labour-laws> (Date of use: 07 March 2022).

1411 See s 63 (1) of *BCEA of 1997* as amended to date.

1412 SAnews "Labour inspectors, Hawks raid illegal factories" 2019 *SAnews* 8 November. <https://www.sanews.gov.za/south-africa/labour-inspectors-hawks-raid-illegal-factories> (Date of use: 07 March 2022).

1413 SAnews 2019 *SAnews* 8 November.

1414 Ntshidi 2019 *Eyewitness News* 8 November; SAnews 2019 *SAnews* 8 November.

1415 Staff Writer "Huawei accused of breaching employment equity policy in SA" 2022 *ITWeb* 11 February. <https://www.itweb.co.za/content/WnpNgM2KEwBqVrGd> (Date of use: 07 March 2022).

1416 Khumalo S "90% of Huawei SA's staff are foreigners - govt wants to send 'strong message'" 2022 *Fin 24* (12 February). <https://www.news24.com/fin24/companies/90-of-huawei-sas-staff-are-foreigners-govt-wants-to-send-strong-message-20220212> (Date of use: 07 March 2022).

1417 Khumalo 2020 *Fin 24* (12 February); Staff Writer 2022 *ITWeb* 11 February.

decided to take Huawei to court for non-compliance with employment equity policies, in a case that is meant to “send a strong message” to transgressors, even if Huawei reaffirmed its commitment to complying with local laws and regulations.¹⁴¹⁸

‘The DEL’s assessment report shows specific contentions indicating that at top management level, Huawei has five employees, and all five (100%) are foreign nationals, and Huawei intends to keep this number for the next two years without employing any of the designated groups.¹⁴¹⁹ At professionally qualified level, out of a total of 435 employees, 378 (87%) are foreign nationals and still Huawei projects to increase the number to 405 in the next two years without any projections for increase for the designated groups.¹⁴²⁰ At senior management level, out of a total of 71 employees, 27 (38%) are foreign nationals and Huawei is projecting to increase this number.¹⁴²¹ At the skilled-technical level, 138 (76%) of the 181 employees are foreign nationals, with Huawei projecting an increase to 168 in the next two years.¹⁴²² At the semi-skilled level, there is currently only 1 (one) employee who is a foreign national, with Huawei projecting an increase to 11 in the next two years without any designated group being employed.¹⁴²³

8.2.1.3.2 Workplace and other raids in the DRC

In the DRC, two separate bodies are responsible for workplace and other raids regarding foreign nationals’ worker permits. On the one hand, the labour inspectors are tasked with carrying out special inspection visits in matters relating,

1418 Khumalo 2020 *Fin 24* (12 February); Staff Writer 2022 *ITWeb* 11 February.

1419 DEL *Court papers filed against Huawei Technologies South Africa for employment equity violations* (DEL Pretoria 11 February 2022). <https://www.labour.gov.za/court-papers-filed-against-huawei-technologies-south-africa-for-employment-equity-violations> (Date of use: 07 March 2022).

1420 Staff Writer “Government takes Huawei South Africa to court over employment equity violations” 2022 *Business Tech* 11 February. <https://businesstech.co.za/news/technology/557498/government-takes-huawei-south-africa-to-court-over-employment-equity-violations/> (Date of use: 07 March 2022).

1421 DEL *Court papers*; Staff Writer 2022 *Business Tech* 11 February.

1422 Masilela B “Huawei SA faces court action over hiring too many foreign workers” 2022 *IOL* 11 February. <https://www.iol.co.za/news/south-africa/gauteng/huawei-sa-faces-court-action-over-hiring-too-many-foreign-workers-cafaba24-4bd9-4cf4-8049-35f9a07d959c> (Date of use: 07 March 2022).

1423 DEL *Court papers*; Staff Writer 2022 *Business Tech* 11 February; Masilela 2022 *IOL* 11 February.

inter alia, to the workforce,¹⁴²⁴ and arguably to foreign workers. The Minister of Labour and Social Welfare decided to deploy a team of inspectors and experts on the ground for carrying out, as of 21 August 2017, the checks on the foreign nationals' work permits.¹⁴²⁵ The move served to enable the Government to record, identify and manage the number of foreign nationals working in the employment sector in the DRC.¹⁴²⁶

On the other hand, DGM officers undertake routine inspections and other raids in the workplace in a view to ensuring that all foreign workers comply with labour and immigration laws and regulations. The DGM launched in May 2019 an operation involving the checking of foreign nationals' work permits to ensure 'the protection of jobs that are reserved for nationals'.¹⁴²⁷ Following the operation, many foreign nationals, including in particular, workers from Asia, were deported after having been found to be in an unlawful situation,¹⁴²⁸ while their employers were subject to penal sanctions.

8.2.1.4 Employer sanctions

Most countries around the world prevent and deter future illegal immigration by imposing strict penalties on employers who knowingly hire illegal immigrants as employees¹⁴²⁹ and on communities who harbour such illegal immigrants.¹⁴³⁰ Both the DRC and South Africa do have an employer sanctions regime that punishes

1424 Art. 192 b) of 2002 *Labour Code*.

1425 Media Congo "Carte de travail pour étrangers: le ministère du Travail contrôle dès ce 21 août (Foreign nationals' work permit: the ministry of labour to control as of August 21)" 2017 Media Congo 15 August. <https://www.mediacongo.net/article-actualite-29537-carte-de-travail-pour-etrangers-le-ministere-du-travail-controle-des-ce-21-aout.html> (Date of use: 07 March 2022).

1426 Media Congo 2017 *Media Congo* 15 August.

1427 RFI "RDC: la DGM lance une opération de contrôle des étrangers » (DRC: DGM launches an operation to check foreign nationals)" 2019 *RFI* 25 May. <https://www.rfi.fr/fr/afrique/20190525-rdc-migrations-operation-controle-etrange-roland-kashwantale-chihoza> (Date of use: 07 March 2022).

1428 RFI 2019 *RFI* 25 May.

1429 Batog K "Immigration policy v. labour policy: an analysis of the application of domestic labour laws to unauthorised foreign workers" 2005 *Loy U Chi Int'l L Rev* 3(1) at 117-118; Newbold K "Population policies," in Newbold K *Population geography: tools and issues – fourth edition* (Rowman & Littlefield Publishers 2021) 513.

1430 Ciment J (ed) *Encyclopedia of American immigration: immigration issues* (M.E. Sharpe Armonk NY 2001) 1143.

employers who hired undocumented/ illegal foreign workers or fail to determine if an employee is eligible to work in the country.¹⁴³¹

In South Africa, the law prohibits¹⁴³² and punishes the employment of illegal foreign nationals by ‘a fine or imprisonment not exceeding one year or by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of the offences by imprisonment not exceeding five years without the option of a fine’, in the case of second conviction of the offence.¹⁴³³

Similarly, in the DRC, the current legislation¹⁴³⁴ prohibits and punishes the employment of illegal foreign workers, which means foreign nationals who do not possess a work permit, either because the permit has been denied or renewed, or because the permit has been withdrawn or revoked.¹⁴³⁵ This offence is punishable by one month’s imprisonment and a fine not exceeding 25,000 CF (USD 12,50) or either of these sentences.¹⁴³⁶

In both countries, the government have expressed concern at illegal recruitment practices in the labour market. In South Africa, the DEL has noted with concern that ‘there are some employers who continue to employ especially undocumented foreign nationals and citizens who continue to be subjected to inferior labour standards’.¹⁴³⁷ In the DRC, the Minister of Employment, Labour, and Social Welfare has noted with regret the hiring of foreign workers by several companies in breach of the current legislation protecting the national labour force.¹⁴³⁸ The minister has particularly referred to the hiring of foreign workers who do not hold a work permit or their continued employment beyond the period prescribed by the

1431 In South Africa, see s 49(3) of *Immigration Act 13 of 2002* as amended to date; s 50(4) of *Employment Services Act, 2014 (Act No. 4 of 2014)*. In the DRC, see Art. 323 e) of 2002 *Labour Code*; Art. 29 of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

1432 See ss38(1)(a) & 38(5) of *Immigration Act 13 of 2002*; s 8(1) of *Employment Services Act, 2014*.

1433 See s 49(3) of *Immigration Act 13 of 2002*; s 50(4) of *Employment Services Act, 2014*.

1434 See Art. 5 & 6 of *Ordinance No. 74-098 of 6 June 1974*.

1435 Lule *Droit du travail congolais* 225.

1436 Art. 323 e) of 2002 *Labour Code*; Art. 29 of *Ordinance No. 74-098 of 6 June 1974*.

1437 SAnews “Labour expresses concern at illegal recruitment practices” 2022 SAnews 25 January. <https://www.sanews.gov.za/south-africa/labour-expresses-concern-illegal-recruitment-practices> (Date of use: 03 March 2022).

1438 See § 1 of Preamble of *Circular Note No. 004/CAB/MINETAT/METPS/01/2020*.

legislation.¹⁴³⁹ Any such foreign workers must be regarded as illegal immigrants, and as such they must depart or be deported.

8.2.2 Deportation of unauthorised or illegal foreign nationals

The deportation of unauthorised or illegal foreign nationals and other removable foreign nationals from within host states is regarded as the second major component of immigration control.¹⁴⁴⁰ Many countries have adopted a “deportation regime,” where forced repatriation or removal is regarded as the most prolific form of immigration control.¹⁴⁴¹

The term “deportation” is commonly used in many countries today to mean ‘the removal of [foreign nationals] by state power from the territory of that state, either “voluntarily,” under threat of force, or forcibly’.¹⁴⁴² It is important to note that “expulsion” is more generally used in international law, whereas “deportation” is more common in municipal law,¹⁴⁴³ such as in South Africa (1), unlike in the DRC (2).

8.2.2.1 Deportation of illegal foreigners in South Africa

In South Africa, the term “deport” or “deportation” is used in the *Immigration Act* and *Regulations* and refers to ‘the action or procedure aimed at causing an illegal foreigner to leave the country’.¹⁴⁴⁴ The term “illegal foreigner” means ‘a [foreign national] who is in South Africa in contravention of the *Immigration Act*’.¹⁴⁴⁵ Falling

1439 See para. 3 of Preamble of *Circular Note No. 004/CAB/MINETAT/METPS/01/2020*.

1440 Rosenblum & Cornelius *Immigration policy* 259.

1441 De Genova N “The deportation regime: sovereignty, space, and the freedom of movement,” in De Genova N & Peutz N (eds) *The deportation regime: sovereignty, space, and the freedom of movement* (Duke University Press Durham 2010) 33–68; Leyro S “Repatriation,” in Martinez R, Hollis M, & Stowell J (eds) *The handbook of race, ethnicity, crime, and justice* (Wiley Blackwell Hoboken NJ 2020) 514; Leyro S “Fear of deportation as a barrier to immigrant integration,” in Brotherton D & Kretsedemas P (eds) *Immigration policy in the age of punishment: detention, deportation, and border control* (Columbia University Press New York 2017) 205

1442 Walters W “Deportation, expulsion, and the international police of aliens,” in De Genova N & Peutz N (eds) *The deportation regime: Sovereignty, space, and the freedom of movement* (Duke University Press Durham & 2010) 73.

1443 Henckaerts J *Mass expulsion in modern international law and practice* (Martinus Nijhoff The Hague 1995) 5.

1444 See s 1(1) of *Immigration Act 13 of 2002* as amended to date.

1445 See s 1(1) of *Immigration Act 13 of 2002* as amended to date.

under this definition are, on the one hand, foreign nationals who have ‘entered the country without a visa or by a means other than a port of entry (such as a border crossing or an international airport)’.¹⁴⁴⁶ On the other hand, this definition includes ‘foreign nationals who [were previously] authorised to stay in the country’, but whose authorisation has lapsed or expired as they overstayed.¹⁴⁴⁷

Any migrants holding any type of visa may be declared illegal foreigners by an immigration officer and face deportation to their home country should they violate the conditions of their visa.¹⁴⁴⁸ Such should, for instance, be the case ‘of a foreign national who is employed [in a position other than] the specific position for which the visa has been issued’, thus contravening the terms of the immigration legislation.¹⁴⁴⁹ The same should also apply to a student who is found working beyond the 20 hours per week as permitted under Regulation 12(3) of the *Immigration Regulations*.¹⁴⁵⁰

8.2.2.2 Expulsion of illegal foreign nationals in the DRC

In the DRC, the term “expulsion” is used in various laws and regulations to refer to deportation of illegal foreign nationals.¹⁴⁵¹ Pursuant to regulations governing immigration control,¹⁴⁵² any illegal immigrant, meaning any foreign national entering the DRC without the required documents,¹⁴⁵³ is subject to deportation from the DRC territory.¹⁴⁵⁴ The same expulsion measure may be imposed on any foreign national considered to be illegal for having stayed in the country for more

1446 Cote D “Deportation,” in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 224.

1447 Cote Deportation 224.

1448 Cote Deportation 224.

1449 See s 19(5) (a) of *Immigration Act 13 of 2002* as amended to date; Regulation 18(9) of *Immigration Regulations of 22 May 2014*. See also the Huijskens case, para. 5.3.

1450 Cote Deportation 224.

1451 See Art. 9; 15; 16; 17; 20; & 21 of *Legislative Order No. 83-033 of 12 September 1983*; Art. 8(2) of *Decree No. 0030 of 14 August 1995*; Art. 9; 22; 30; 31 of *DRC Refugees Act (No. 021/2002 of 16 October 2002)*; Art. 145(5); 146(5); 149 bis (5) of *Penal Code (Decree of 30 January 1940)* as amended to date.

1452 See Art. 3 of *Ordinance No. 83-033 governing immigration control*.

1453 A valid passport or any other valid travel document, and the vaccination certificate are required by the immigration control regulations. See Art. 13 of *Legislative Order No. 83-033 of 12 September 1983*; Art. 1 of *Ordinance No. 87-281 of 13 August 1987*.

1454 Arts. 15 to 17 of *Legislative Order No. 83-033 of 12 September 1983*.

than six months without holding a residence permit, or for having stayed without a residence visa or with an expired residence visa.¹⁴⁵⁵

Under the *Penal Code*, permanent expulsion from the DRC may be imposed in addition to the principal prison sentence in the case of embezzlement, bribery or corruption and misappropriation by a foreign national vested with a public authority or entrusted with a service or assignment by the State or a State-owned company. Such expulsion may be executed only after the foreign defendant has served the principal prison terms.¹⁴⁵⁶

In practice, expulsion of illegal immigrants does not take place on a regular basis although illegal immigration into the DRC is prevalent even if it is not officially recorded by the State.¹⁴⁵⁷ Two main reasons have been put forward for this limited number of expulsion decisions being taken. On the one hand, many illegal immigrants, especially those from neighbouring countries, which share the same ethnic groups with the DRC, enjoy “communal transnationalism”¹⁴⁵⁸ that allows them a sort of immunity from expulsion from the country. On the other hand, illegal immigrants from other parts of Africa work in the informal sector, and those from other countries, such as China, India, Pakistan, and Lebanon work in the companies run by their fellow countrymen sometimes under the protection of corrupt immigration officials.¹⁴⁵⁹

However, a few expulsion decisions have been taken in recent years, including by the Minister of Mines who expelled illegal expatriates who were illegally mining gold in Bunia.¹⁴⁶⁰ More recently, on 26 May 2021, the DGM expelled from the country several illegal foreign nationals for not having met all the basic requirements for being granted visas, including proof of sufficient and honest

1455 Art. 6 of *Legislative Order No. 83-033 of 12 September 1983*. See Ngoie & Lelu *Migration* 58.
1456 Art.145(5); 146(5);149 bis (5) of *Penal Code (Decree of 30 January 1940)* as amended to date.

1457 Ngoie & Lelu *Migration* 58.

1458 Sindjoun L *Sociologie des relations internationales africaines* (Karthala Paris 2002).

1459 Ngoie & Lelu *Migration* 58.

1460 Radio Okapi “Exploitation minière en Ituri: Martin Kabwelulu décide d’expulser les expatriés non en règle” (“Mining in Ituri: Martin Kabwelulu decides to expel illegal expatriates”) 2016 *Radio Okapi* 05 June.
<https://www.radiookapi.net/2016/06/06/actualite/economie/exploitation-miniere-en-ituri-martin-kabwelulu-decide-dexpulser-les> (Date of use: 08 March 2022).

means of subsistence.¹⁴⁶¹ It is argued and rightly so, that these effective and removal policies also contribute to a third goal of immigration control: deterrence of illegal immigration.¹⁴⁶²

8.2.3 Deterrence of unauthorised or illegal immigration

Deterrence of unauthorised or illegal immigration consists in ‘convincing would-be unauthorised immigrants to remain [in their] home [country] or to choose a different destination’.¹⁴⁶³ For this purpose, some governments adopt strict measures, such as ‘raising the expected costs of unauthorised migration, including by making it more difficult, and often more physically dangerous, to enter without inspection’.¹⁴⁶⁴ Other measures adopted by governments include reducing expected benefits, in particular through the threat of deportation.¹⁴⁶⁵ In South Africa, for instance, the Minister of Home Affairs has the power to make regulations relating to the ‘steps to be taken to prevent the entry of illegal foreigners into the [country] and to facilitate the tracing and identification of illegal foreigners in, and their removal from, [South Africa]’.¹⁴⁶⁶

In the DRC, the refoulement measure is established against would-be unauthorised immigrants who are thus prevented from entering the country by being turned back by the border control officers.¹⁴⁶⁷ This refoulement measure may not be appealed, and the foreign national concerned is immediately escorted back to the other side of the border for repatriation, any costs being borne by the carrier.¹⁴⁶⁸ This measure is further recorded in an undesirability report drawn up by an immigration officer and notified to the person concerned.¹⁴⁶⁹

1461 Masamuna M « RDC: plusieurs étrangers en situation irrégulière expulsés par la DGM à Kinshasa » (“RDC: Several foreign nationals in an illegal situation expelled by the DGM in Kinshasa”) 2021 *ZoomEco* 3 June. <https://zoom-eco.net/a-la-une/rdc-plusieurs-etrangers-en-situation-irreguliere-expulses-par-la-dgm-a-kinshasa/> (Date of use: 08 March 2022).

1462 Rosenblum & Cornelius Immigration policy 260.

1463 Rosenblum & Cornelius Immigration policy 260.

1464 Anastasopoulos C “Linking the deterrence concept to migration,” in Filippidou A (ed) *Deterrence: concepts and approaches for current and emerging threats* (Springer Cham 2020) 164; Rosenblum & Cornelius Immigration policy 260.

1465 Anastasopoulos The deterrence concept to migration 164; Rosenblum & Cornelius Immigration policy 260.

1466 See s 7(1)(b) of *Immigration Act 13 of 2002* as amended to date.

1467 See Art. 13(1) of *Legislative Order No. 83-033*.

1468 See Art. 13(1) of *Legislative Order No. 83-033*.

1469 See Art. 13(2) of *Legislative Order No. 83-033*.

In addition, some governments decide to penalise 'attempted re-entries after deportation with [prison sentence] and bars to legal re-entry, a strategy of enforcement with "enhanced consequences".¹⁴⁷⁰ In the DRC, the current legislation implicitly prevents any re-entry as it provides that 'the residence permit shall automatically be revoked in the event of expulsion, removal or permanent departure'.¹⁴⁷¹ Any foreign national who refrains from the enforcement of an expulsion order or who, having been expelled from the DRC, re-enters the country without special authorisation, shall be liable to imprisonment for a period of between one and six months and a fine, or to one of these penalties only.¹⁴⁷²

A prison sentence for a maximum of three months and a fine or one of these penalties only shall be imposed on any illegal foreigner who enters the DRC without complying with the applicable regulations.¹⁴⁷³ The same sentences are applicable to any foreign national who, without a valid excuse, fails to apply within the legal time limit for the issue of a residence permit.¹⁴⁷⁴ Any foreign national to whom the residence permit has been denied or revoked and who remains in the country after the expiry of the time limit set for him/ her, shall be punishable by the same sentences¹⁴⁷⁵ The same sentence shall be applicable to any foreign national who carries an invalid residence permit or application receipt.¹⁴⁷⁶ The same sentences should be imposed on any person who, by way of direct or indirect assistance, facilitates or attempts to facilitate the unauthorised entry, movement, or residence of a foreign national in the country.¹⁴⁷⁷

There are also countries that seek to deter unauthorised immigration by denying access to host-state labour markets, social welfare systems, and other services.¹⁴⁷⁸ Social insurance laws in almost all the SADC countries tend to be

1470 Anastasopoulos *The deterrence concept to migration* 164; Rosenblum & Cornelius *Immigration policy* 260; LeMay M *U.S. immigration: a reference handbook* (ABC CLIO Oxford 2004) 173.

1471 Art. 9 of *Legislative Order No. 83-033 of 12 September 1983*.

1472 Art. 21 of *Legislative Order No. 83-033*.

1473 Art. 22(1) of *Legislative Order No. 83-033*.

1474 Art. 22(2) of *Legislative Order No. 83-033*.

1475 Art. 22(3) of *Legislative Order No. 83-033*.

1476 Art. 22(4) of *Legislative Order No. 83-033*.

1477 Art. 22(5) of *Legislative Order No. 83-033*.

1478 Rosenblum & Cornelius *Immigration policy* 260.

very categorical and exclusionary vis-a-vis non-citizens, except for Mauritius¹⁴⁷⁹ and South Africa. In South Africa, 'non-citizens who are lawfully employed usually qualify for employment-based social insurance benefits, such as unemployment insurance, compensation for occupational injuries and diseases, and occupational-based retirement benefits'.¹⁴⁸⁰

Non-citizens with temporary residence (including contract migrants) can access several insurance schemes, including occupational old age and disability pension, and 'non-employment based social insurance scheme'.¹⁴⁸¹ 'Temporary residents can also access compensation for occupational injuries and diseases'. In terms of healthcare (including health insurance), temporary residents qualify for 'health care, which is available to them through private schemes', that is contributory in nature.¹⁴⁸²

Apart from deterrence strategy for unauthorised or illegal immigration, many countries have also established penalties, which are imposed on undocumented migrants' actions.¹⁴⁸³ In South Africa, for instance, the *Immigration Act* punishes, by 'a fine or imprisonment not exceeding four years, any illegal foreigner who fails to depart when so ordered by the Director-General'.¹⁴⁸⁴ The *Immigration Act* further punishes 'anyone who knowingly assists an illegal foreigner by a fine or imprisonment not exceeding five years'.¹⁴⁸⁵

A fine shall also be imposed on 'anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled'.¹⁴⁸⁶ An imprisonment not exceeding eight years shall be imposed without the option of a fine on 'any public servant who provides false or intentionally

1479 Olivier Social protection for non-citizens 31 & 48.

1480 Nyenti M, du Plessis M, & Apon L. *Access to social services for noncitizens and the portability of social benefits within the SADC: South Africa country report - a report to the World Bank* (University of Johannesburg, Johannesburg 2007) 1.

1481 See s 17 of *Road Accident Fund Act, 1996 (No. 56 of 1996)*.

1482 Nyenti, du Plessis, & Apon Access to social services for noncitizens 2.

1483 Anastasopoulos The deterrence concept to migration 166.

1484 See s 49(1)(b) of *Immigration Act 13 of 2002* as amended to date.

1485 See s 49(2) of *Immigration Act 13 of 2002* as amended to date.

1486 See s 49(4) of *Immigration Act 13 of 2002* as amended to date.

inaccurate or unauthorised documentation or benefit to an illegal foreigner'.¹⁴⁸⁷ The same sentence is also applicable to any public servant who facilitates 'an illegal foreigner to disguise his or her identity or status or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion'.¹⁴⁸⁸ If such public servant is employed by the DHA, 'the offence shall be punishable by imprisonment not exceeding 15 years without the option of a fine'.¹⁴⁸⁹

A thorough analysis of the foregoing reveals that in both the DRC and South Africa there are two spheres of law-making competence, which are worth discussing.

8.3 Introducing a distinction between the two spheres of law-making competence in the DRC and South Africa

This section introduces a distinction between the two spheres of law-making competence that are defined and vested by the *Constitution*, respectively, in parliament and in the government in both the DRC (1) and South Africa (2).

8.3.1 Two spheres of law-making competence in the DRC

The discussion concerning law-making powers in the DRC is directly related to the constitutional position of the country, just like 'all those countries, which have been influenced by French public law'.¹⁴⁹⁰ The basic statements assigning law-making powers are to be found in the Constitution,¹⁴⁹¹ which assigns legislative powers to the two institutions. On the one hand, the *2006 Constitution* as revised to date 'vests the legislative authority of the national sphere of government in Parliament, which consists of two Houses or Chambers, notably the National Assembly, and the Senate'.¹⁴⁹²

1487 See s 49(5) of *Immigration Act 13 of 2002* as amended to date.

1488 See s 49(5) of *Immigration Act 13 of 2002* as amended to date.

1489 See s 49(5) of *Immigration Act 13 of 2002* as amended to date.

1490 Ojwan J "The residue of legislative power in English and French-Speaking Africa – a comparative study of Kenya and the Ivory Coast" 1980 *ICLQ* 29 (2 & 3) 313.

1491 See Art. 79; 92; 93; 100; 122; 124; 128; 197; 205; 206; 207 of the *2006 Constitution* as revised to date.

1492 See Art. 100 of the *2006 Constitution* as amended to date.

On the other hand, the *2006 Constitution* vests the legislative authority to the executive or the government, which operates by way of acts having statutory force (the force of law) or legally binding acts.¹⁴⁹³ It is argued that the executive shares the exercise of legislative authority (the power to make laws) with parliament.¹⁴⁹⁴ This relationship between the two institutions represents ‘two spheres of law-making competence—*le domaine de la loi*¹⁴⁹⁵ and *le domaine du règlement*¹⁴⁹⁶—, which are defined and vested, respectively, in parliament and in the government.¹⁴⁹⁷ Pursuant to the constitutional provisions, the subjects falling within the parliamentary legislative sphere include the law laying down the rules governing labour law and social welfare.¹⁴⁹⁸ The *Labour Code* is, in fact, a specific piece of legislation, because it regulates employment and labour related matters in a specific way and goes into great detail.¹⁴⁹⁹ The immigration control regulations, which are relevant in the context of this study, should also be regarded as forming part of the police and safety legislation.¹⁵⁰⁰

The subjects falling within the parliamentary legislative sphere are themselves subdivided into two categories. ‘The first sub-category, which [encompasses] some of the most crucial areas of law-making’, falls within the unconditional competence of Parliament.¹⁵⁰¹ This sub-category includes key subjects, such as ‘citizenship and nationality, civil liberties, matrimony and inheritance, crime, amnesty, civil and administrative tribunals, elections, organisation of the administration, [and] state of emergency.’¹⁵⁰²

1493 See Art. 79; 92; 93; & 129 of the *2006 Constitution* as amended to date.

1494 Te Pemako V “L’histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005),” in *Liber Amicorum Marcel Antoine Lihau Pour l’épanouissement de la pensée juridique congolaise* (Bruylant et Presse de l’Université de Kinshasa Bruxelles 2006) 269-315; Te Pemako & DJ’Andima *Traité de droit administratif de la RDC* 218.

1495 The French term “*domaine de la loi*”, which is translated literally into English as “area of the law”, refers to parliamentary legislative sphere (or matters exclusively reserved for parliamentary legislation in a particular country. See Bridge F H S & Council of Europe *The Council of Europe French-English legal dictionary* (Council of Europe Press Strasbourg 1994) 87.

1496 The French term “*domaine du règlement*”, which is translated literally into English as “area of the regulation”, refers to the sphere of governmental regulation (or matters reserved for governmental regulation in a given country).

1497 Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

1498 Art. 122(14) of the *2006 Constitution* as revised to date.

1499 Te Pemako *L’histoire constitutionnelle* 228.

1500 Te Pemako *L’histoire constitutionnelle* 225.

1501 Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

1502 Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

'The second sub-category [encompasses] subjects in relation to which Parliament has only a *limited* law-making competence'. In this sphere, 'Parliament can make only enabling laws (*loi-cadre*), leaving the Executive to make more specific laws'.¹⁵⁰³ 'The relevant subjects include: organisation of national defence, education, the holding of private property, alienation of State property, commerce, labour, transport, [and] telecommunications'.¹⁵⁰⁴ The entire field of law-making outside the two sub-categories falls within the exclusive competence of the executive authority.¹⁵⁰⁵ It may be safe to argue that the protection of national labour force in the DRC is governed by some delegated or subordinate legislation, also known as regulations,¹⁵⁰⁶ which is not the same in South Africa where there are also two spheres of law-making competence.

8.3.2 Two spheres of law-making competence in South Africa

In South Africa, the employment of foreign nationals is governed by 'primary legislation, also referred to as Acts of Parliament', or statutes,¹⁵⁰⁷ which are different from the various types of delegated legislation.¹⁵⁰⁸ There is, therefore, a clear distinction between the parliamentary legislative sphere, which refers to 'matters that are exclusively reserved for parliamentary legislation (the exclusive legislative domain)', and the exclusive regulatory domain covering matters that are reserved for the executive.¹⁵⁰⁹ This distinction clearly reflects the two spheres of law-making competence set out in the *Constitution of South Africa*, 1996.¹⁵¹⁰

On the one hand, 'section 43(a) of the *Constitution* vests the legislative authority of the national sphere of government in Parliament', which consists of the National

1503 Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

1504 Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

1505 See Art. 128(1) of the 2006 *Constitution* as revised to date.

1506 See for instance, *Ordinance No. 74-098 of 6 June 1974*; *Departmental Order No. 87/005 of 21 January 1987*.

1507 See *Immigration Act (Act 13 of 2002)*; *Employment Services Act (Act 4 of 2014)*; and *Refugees Act (Act 130 of 1998)*.

1508 Hoexter C *Administrative law in South Africa* (Juta Cape Town 2012) 52.

1509 Fombad C "An overview of the separation of powers under modern African constitutions," in Fombad C (ed) *Separation of powers in African constitutionalism (Stellenbosch Handbooks in African Constitutional Law)* (OUP Oxford 2016) 85; Ojwan 1980 *ICLQ* 29 (2 & 3) 313.

1510 See ss 42; 43; 44; 55; 68; 84; 85; 97; 99; 101(3); 104; 114; 125; 140(3); 155(7); 156 of the 1996 *Constitution* as revised to date.

Assembly and the National Council of Provinces.¹⁵¹¹ This confers on the National Assembly the power to consider, pass, amend or reject any legislation before the National Assembly and to initiate or prepare legislation, except Money Bills.¹⁵¹² It also confers on the National Council of Provinces the power to consider, pass, amend, propose amendments or reject any legislation before the council and initiate or prepare legislation falling within a functional area listed in Schedule 4 of the Constitution or other legislation referred to in section 76(3), except Money Bills.¹⁵¹³

Being regarded as elected and deliberative bodies, ‘parliament, provincial legislatures, or municipal councils make legislation in accordance with original legislative powers conferred on them by the Constitution’.¹⁵¹⁴ The result of their legislative activity is original or primary legislation rather than administrative action.¹⁵¹⁵

On the other hand, original or primary legislation, which is legislation enacted by parliament, a provincial legislature or a municipal council, confers or delegates authority in accordance with powers conferred directly by the *Constitution*.¹⁵¹⁶ Most of legislation is, therefore, produced not by original law-making authorities but by administrative authorities,¹⁵¹⁷ and this legislative administrative activity results in “delegated” legislation, including regulations, proclamations, rules, orders, declarations, directives, decrees, and schemes.¹⁵¹⁸

Delegated legislation, which is legislation made under the authority of original legislation, such as regulations made by cabinet ministers or proclamations made

1511 See s 42(1).

1512 See s 44(1)(a).

1513 See s 44(1)(b). see also National legislature (Parliament). <https://www.gov.za/about-government/government-system/national-legislature-parliament#:~:text=and%20cooperative%20governance,-Law%2Dmaking,prepare%20legislation%2C%20except%20Money%20Bills> (Date of use: 09 March 2022).

1514 Hoexter *Administrative law* 52.

1515 Hoexter *Administrative law* 52.

1516 Hoexter *Administrative law* 32.

1517 Currie I & Hoexter C *The new constitutional and administrative law: administrative law* (Juta Cape Town 2001) 29; Hoexter *Administrative law* 32.

1518 Hoexter *Administrative law* 52; Bannister J et al “Delegated legislation,” in Bannister J et al *Government accountability: Australian administrative law* (CUP Cambridge 2015) 110.

by the president, may confer powers on the administration, in particular on other administrative officials.¹⁵¹⁹ In other words, a cabinet minister may be authorised to make regulations according to a prescribing statute.¹⁵²⁰ For instance, ‘the Minister [of Home Affairs] may, after consultation with the board, make regulations relating, [inter alia], to the powers and duties of immigration officers, the steps to be taken to illegal immigration into [South Africa]’.¹⁵²¹

To be valid and binding upon the community, subordinate legislation must meet some requirements, including falling within the authority given to the specific subordinate legislator (otherwise it will be ultra vires), being reasonable, impartial, or unbiased, being clear and certain, and being promulgated, or published.¹⁵²² In fact, of all the administrative acts, ‘delegated legislation is probably the easiest’ to identify because of its publication in ‘the gazette, with a title, numbered clauses and so on’.¹⁵²³ This is in line with the Constitution, which requires that ‘[p]roclamations, regulations and other instruments of subordinate legislation must be accessible to the public’.¹⁵²⁴

Practical experience shows, however, that in many instances of the implementation and enforcement efforts for the national policies relating to migration for employment purposes there has been substantial impairment of existing legislation by regulatory authorities in both the DRC and South Africa, as discussed in the next subsection.

8.4 Conclusion

This chapter has critically reviewed the regulatory compliance and effectiveness of legislation protecting national labour force in the DRC and South Africa. To this end, the discussion has focused upon four critical issues surrounding the two

1519 Hoexter *Administrative law* 32.

1520 Millard D & Kuschke B “General Introduction,” in Millard D & Kuschke B *Insurance law in South Africa* (Kluwer Law International The Hague 2018) 13.

1521 See s 7(1) of *Immigration Act 13 of 2002* as amended to date.

1522 Millard & Kuschke General Introduction 13.

1523 Currie & Hoexter *The new constitutional and administrative law* 29.

1524 See s 101(3).

countries' policy strategies aimed at achieving the fullest protection of their respective national labour force.

Firstly, both countries have made some efforts to enforce labour migration legal and regulatory policies, in particular through the prevention of illegal entries (which involves entry screening, inspection of passports and work permits/ visas, workplace and other raids, as well as employer sanctions), deportation or expulsion of unauthorised or illegal foreign nationals, and deterrence of unauthorised or illegal immigration.

Secondly, the two countries' efforts evolve around laws and regulations, which emanate from two spheres of law-making competence that are defined and vested by the Constitution. On the one hand, parliament consisting of two houses or chambers, namely the National Assembly and the National Council of Provinces in South Africa, and the National Assembly and the Senate in the DRC. On the other hand, the executive, or the government, which operates by way of acts having statutory force (the force of law) or legally binding acts in both countries.

CHAPTER NINE

THE IMPLEMENTATION OF LABOUR MIGRATION STATUTORY AND REGULATORY POLICIES IN THE DRC AND SOUTH AFRICA: CHALLENGES AND POSSIBLE REMEDIES

9.1 Introduction

The DRC and South Africa have introduced the legislative and regulatory framework, which stems from the lawmakers' concern to protect the national labour force against foreign competition. In both countries, efforts have been made to implement and enforce existing regulatory policies relating to immigration and/or emigration for employment purposes. As pointed out in the preceding chapter, both countries have put in place the mechanisms aimed at limiting foreign labour as well as exemptions from restrictions on foreign labour. However, practical experience shows that both countries face challenges in implementing and enforcing labour migration legal and regulatory policies.

On the one hand, this chapter seeks to draw a general picture of the DRC's and South Africa's efforts to implement and enforce labour migration legal and regulatory policies with a view to achieving the fullest measure of protection of national labour force. On the other hand, the chapter critically assesses regulatory challenges and problems faced by the two countries.

For this purpose, the chapter is divided into five major sections and related subsections, including a conclusion. The first section discusses the two countries' efforts to enforce labour migration legal and regulatory policies. The second section introduces a distinction between the two spheres of law-making competence in the DRC and South Africa, respectively. The third section focuses on the challenges and problems encountered by the DRC and South Africa in the implementation of labour migration legal and regulatory policies. The fourth section

deals with the remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies in the DRC and South Africa. The fifth section provides an overview of the main findings and conclusions drawn from the discussions presented in this chapter.

9.2 Challenges and problems encountered by the DRC and South Africa in the implementation of labour migration legal and regulatory policies

This subsection discusses the various challenges and problems encountered by the DRC and South Africa in the implementation of labour migration legal and regulatory policies, which protect national labour against foreign competition. For this purpose, the focus lies on three key issues: substantial impairment of existing laws by regulatory authorities in many instances of the implementation and enforcement efforts for this national policy (1); interference with the sphere assigned to lawmakers by the regulatory authority (2); non-compliance of labour migration policies with the international and regional human rights instruments and international labour standards (3); and legislative inertia and statutory obsolescence (4).

9.2.1 Substantial impairment of existing legislation by regulatory authorities

Since regulating labour migration falls within each state's sovereign discretion, many countries retain the prerogative to regulate immigration of foreign nationals, and labour market migration in their territory by way of law with the implementation of specific rules.¹⁵²⁵ In fact, labour migration policy generally 'involves two streams, [notably] the legal immigration of foreign nationals, and temporary and labour market migration'.¹⁵²⁶ Most countries have established a legal and regulatory framework for protecting national labour force against foreign competition. Practical experience reveals that some substantial discretionary power seems to be left in the hands of government officials and ministers, when issuing decrees or

¹⁵²⁵ Cholewinski Migration for employment 27.

¹⁵²⁶ Fenger M, van der Steen M & van der Torre L (eds) "The responsiveness of labour migration policies," in Fenger M, van der Steen M & van der Torre L *The responsiveness of social policies in Europe: the Netherlands in comparative perspective* (Policy Press Bistol 2013) 95.

orders that are contrary to or in conflict with statutory laws and legislative acts, or legislative orders in both the DRC (1) and South Africa (2).

9.2.1.1 Practical case studies on impairment of existing legislation in the DRC

This subsection discusses, on the one hand, practical case studies in the DRC based on doctrinal writing and case law (1), bearing in mind that doctrinal writing has accompanied the progress of case law and legislation throughout the years.¹⁵²⁷ On the other hand, the focus lies on specific practical examples of impairment of existing legislation by regulatory authorities (2).

9.2.1.1.1 The position of doctrinal writing and case law

As most critical legal scholars argue, legislative acts including legislative orders are regarded as and must be assimilated to the laws, because they have the same binding force or power.¹⁵²⁸ As such, legislative orders are placed, *stricto sensu*, in the hierarchy of the acts of public authorities, at the same level as the laws and above regulatory acts.¹⁵²⁹ The Supreme Court's case law consistently holds that in terms of Article 126(2) of the *2006 Constitution* as revised to date, the term *legislative act* encompasses not only laws *stricto sensu*, but also texts having force (or value) of law, which shall include legislative orders.¹⁵³⁰

In addition, legislative orders deliberated upon by the Council of Ministers and duly ratified may not be amended in their provisions except by statutory law'.¹⁵³¹ Given

1527 Halpérin J "French doctrinal writing," in Jansen N (ed) *The Development and making of legal doctrine: Volume 6* (Cambridge University Press Cambridge 2014) 94.

1528 Lihau E L *Droit constitutionnel et institutions politiques, cours polycopié, Faculté de droit de l'Université de Kinshasa* (Constitutional law and political institutions, duplicated lecture notes, Faculty of Law, University of Kinshasa) n.d., n°177 at 86; cited in Mabanga M *Contentieux constitutionnel* (Editions Universitaires Africaines 1999) 37 fn 112; Te Pemako *L'histoire constitutionnelle* 272; Te Pemako *Traité de droit administratif* 857.

1529 Te Pemako *L'histoire constitutionnelle* 272; Kahombo Congolese Constitutional Court 11; Yabili M *République Démocratique du Congo et sa nouvelle fiscalité réglementaire* (Marcel Yabili Lubumbashi 2016) 74.

1530 C.S.J., R. Const. 137/TSR, 22 octobre 2010; C.S.J., R. Const., 51/T.S.R., 31 juillet 2007; C.S.J., Arrêt R.A. 320 du 21 Août 1996, Bull. Arrêts, 161-62; C.S.J., R.A. 320, 21 août 1996; cited in Kabu *Cour suprême de Justice* 927; Adjolohoun *Made in Courts' Democracies?* 264; Senga 2008 *Revue de Droit et de Science Politique du Graben* (No. 5) at 27; Kahombo *Congolese Constitutional Court* 12 fn 65.

1531 See Art. 129(4) of the Constitution.

that legislative orders do carry the weight of law, failure to comply with them shall be seen as a failure to comply with statutory laws. It is, therefore, unlawful for a public authority to act incompatibly with a law or legislative act, which has the same binding force as the law itself. In this regard, the *Constitution* provides that the judicial authorities may apply the laws and regulatory measures, so long as they are consistent with applicable laws.¹⁵³² The Supreme Court held that this constitutional provision gives national courts the power and the duty to assess the legality of the actions of the administrative authorities.¹⁵³³

Until recently, the administrative section of the Supreme Court was, indeed, competent to hear, as court of first and final jurisdiction, the applications for annulment filed on grounds of breach 'of the law, against measures, regulations and decisions of the central authorities' and decentralised bodies.¹⁵³⁴ However, under Article 155(1) of the *Constitution* and Article 85(2) of *Institutional Act No. 16-027 of 15 October 2016*, this competence is now assigned to the Council of State. Pending the setting up of administrative courts, in particular the Council of State, the Supreme Court had the authority to exercise the powers vested in the Council of State by the *Constitution*.¹⁵³⁵

Under current legislation, non-compliance with the law amounts, indeed, to the breach of statutory laws.¹⁵³⁶ Therefore, the Supreme Court held that 'since it is widely accepted that all the grounds for the action are decisive, if an administrative action is based on various different grounds, it only takes one unlawful ground to have the action overturned or annulled'.¹⁵³⁷

1532 See Art. 153(4).

1533 C.S.J., R.C. 320, in B.A., 1980 à 1984, 2001, at 289; See also Kabu *Cour suprême de Justice* 369 & 922.

1534 Art. 147 of *Legislative Order No. 82-020 of 31 March 1982 enacting the Code of organisation and jurisdiction of courts*; C.S.J., R.A. 459 et consorts, 26 Sept. 2001, *Les Analyses Juridiques*, n° 5 / 2005, 75-80.

1535 See Art. 154 of *Institutional Act No. 13/011-B of 11 April 2013 governing the organisation, functioning and competence of courts of the judicial order*.

1536 Art. 96 (4) of *Institutional Act No. 13-011-B of 11 April 2013*; Art. 85(3) of *Institutional Act No. 16-027 of 15 October 2016 governing the organisation, competence and functioning of administrative courts*.

1537 C.S.J., R.A. 76, 9 septembre 1985, cited in Kabu *Cour suprême de Justice* 922.

However, practical experience in the DRC reveals that the immigration of foreign nationals, and labour market migration are regulated by some problematic decisions, which are dealt with in this next subsection.

9.2.1.1.2 Specific practical examples of impairment of existing legislation by regulatory authorities

The legislative and regulatory framework stems from the DRC lawmakers' concern to protect the national labour force against foreign competition. But, in many instances of the implementation and enforcement efforts for such national policy there has been substantial impairment of existing laws by regulatory authorities, including the Prime Minister, ministers, deputy ministers, local authorities, to name just a few. This subsection focuses on three cases of substantial impairment of existing laws by regulatory authorities.

First, ministerial decisions relating to the overall limitation for the number of foreign employees working in companies operating in the DRC (1). Second, the Prime Minister's and ministers' letters concerning the treatment to be granted to nationals of neighbouring countries and refugees in respect of employment (2). Third, the Minister's decision requiring work permits from foreigners hired by employers based abroad on the basis of a contract for services, equipment supply contract or turn-key and plant supply contract (3).

9.2.1.1.2.1 Ministerial decisions relating to the overall limitation of the number of foreign workers

The overall limitation of 15% for the number of foreign employees in any given company guarantees the principles of hiring priority reserved to national workers as well as local workers' right to preferential access to the national labour market. Existing legislative and regulatory instruments set out the maximum quota of foreign workers in the total workforce of any given company and determine the conditions for granting exemptions to the limitation for the number of foreign

employees.¹⁵³⁸ Failure to comply with this legal requirement may result in a few penalties being imposed under current regulations. Such penalties may be either revocation of the work permit, or refusal to issue or renew the work permit, unless waived by the CNEE pursuant to an order of the Minister of Labour.¹⁵³⁹ But, practical experience shows that most companies operate with a workforce exceeding the regulatory limits by as much as 30% of the total workforce. In such cases, no penalties have ever been imposed and any possible detection of such regulatory offence has always been settled by payment of a fine.¹⁵⁴⁰

However, as pointed out earlier, the maximum quotas of foreign workers were reduced to a lower rate by the Minister of Labour, who has also granted waivers to employers that need many foreign employees and that have applied for such waivers. Such waivers may, nevertheless, not exceed the overall limitation of 50% authorised by the Minister, by way of Order, following approval and considered opinion of the CNEE.¹⁵⁴¹

In practice, waivers have been granted, by way of ministerial order, to a number of companies.¹⁵⁴² In addition to the reduction of the maximum quotas to a lower rate, the Minister of Labour establishes another ban while specifying that it is without prejudice to Article 185(8) of the *Labour Code*.¹⁵⁴³ It is clear, therefore, that such reduction of the number of foreign employees working in companies operating in the DRC has no legal basis, given that it fails to comply with the provisions of the *Labour Code*.

In other words, the Minister issued an unlawful order, meaning in violation of a law, which is a general permanent written rule of imperative character, elaborated and passed by an elected Parliament, enacted by the President of the Republic and

1538 See Art. 7 of *Ordinance No. 74-098 of 6 June 1974* as revised to date; Art. 185(8) of the 2002 *Labour Code*.

1539 See Art. 24 of *Ordinance No. 74-098 of 6 June 1974*.

1540 *Bayolo Code du travail congolais* 502.

1541 See Art. 2 of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005*.

1542 See *Ministerial Orders No. 0043/CAB/PVPM/ETPS/2010; 0044/CAB/PVPM/ETPS/2010; 0045/CAB/PVPM/ETPS/2010; & 0046/CA/PVPM/ETPS/2010 of 9 October 2010 granting a special exemption on maximum quotas of foreign workers authorised to work in specific companies*, in DRC Official Gazette No. 11 (June 2011) at 18, 19, 21 & 22.

1543 See Art. 1 of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005*; *Bonyi Droit du travail* 141.

published in the *Official Gazette*.¹⁵⁴⁴ Under DRC law, implementing instrument, including ministerial decrees and orders may not prohibit what basic legislative instruments, or laws allow, unless the latter expressly give such power to the former.¹⁵⁴⁵

9.2.1.1.2.2 The Prime Minister's and ministers' letters concerning the treatment of nationals and refugees from neighbouring countries

The Prime Minister's letter concerning the treatment of nationals and refugees from neighbouring countries in respect of employment raises a few issues from a legal and regulatory point of view. In his *Letter No. RDC/GC/PM/1077/2010 of 18 November 2010* to the Deputy Prime Ministers, ministers of labour and of the Interior and Security, the Prime Minister seeks to allow employers to benefit from the preferential treatment of the category of employees that should take up positions falling into a general plan of job classification.¹⁵⁴⁶

As such, the letter aims to promote the rule of national treatment, also known as the principle of assimilation.¹⁵⁴⁷ This principle requires a country to grant foreign nationals the same treatment or rights as it does to nationals, with certain exceptions to be provided by law.¹⁵⁴⁸ The letter specifically calls for nationals of neighbouring countries who are lawfully staying in the DRC to be treated much the same as the country's citizens as regards hiring for employment within the overall job classification.¹⁵⁴⁹ The letter further recalls that refugees should enjoy the same treatment pursuant to the *DRC Refugees Act (No. 021-2002 of 16 October 2002)*.¹⁵⁵⁰

However, where they are hired or promoted to jobs in the categories of senior executives, other executives or supervisors, foreign nationals must be subject to

1544 Adoue *Industrial ecology* 12.

1545 Bonyi *Droit du travail* 141.

1546 Lule *Droit du travail congolais* 214.

1547 Kerever A *The rule of national treatment or the principle of assimilation* (AFDA-RIDA Paris 1993).

1548 Tiburcio C "Development of the treatment of aliens from diplomatic protection to human rights" in Tiburcio C *The human rights of aliens under international and comparative law* (Martinus Nijhoff Publishers The Hague 2001) 45.

1549 *Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010*.

1550 See Art. 27, 28 & 32 of the *DRC Refugees Act (No. 021-2002 of 16 October 2002)*.

the general terms and conditions relating to employment of expatriates, in particular hiring priority reserved for national workers and obtaining of work permit in advance.¹⁵⁵¹ Clearly, the Prime Minister's letter fails to comply with Articles 185 and 209 of the *Labour Code* on two counts.

On the one hand, workers who are nationals of neighbouring countries do not necessarily have refugee status and, on the other hand, their number may exceed 15% of the overall workforce in the company. Yet, legally, a letter from the Prime Minister has no regulatory authority and is not legally binding on the users or on people outside the general government.¹⁵⁵² Even if he had to issue a decree, the Prime Minister has no power to deviate from the legislative instrument or the statutory law, in particular the provisions of the *Labour Code*.¹⁵⁵³

From the current DRC law point of view, there is absolute primacy and precedence of a legal instrument that is enacted by the President of the Republic over the other regulatory provisions that would ensue therefrom.¹⁵⁵⁴ This means that the other subsequent provisions must not go against the spirit and the letter of this law in their implementing measures.¹⁵⁵⁵ Any other action contrary to this law must, therefore, be taken only by another law repealing the first and generally taken by the same requesting authority, thus preserving the principle of parallelism of form or structure.¹⁵⁵⁶ It is, therefore, clear that where a decree has an infra-legal value, its non-compliance with a law would result in it being declared unlawful.¹⁵⁵⁷

Similarly, the Minister of Labour issued *Letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983 on the protection of the national labour force, particularly focusing on the case of nationals of African States, which became independent after 6 June 1974*. Under *Ordinance No. 74-098 of 6 June 1974 as revised to date*, natives of the non-independent African countries are provisionally assimilated to Congolese

1551 See Arts. 4; 5; & 6 of *Ordinance No. 74-098 of 6 June 1974*.

1552 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 260.

1553 Lule *Droit du travail congolais* 215.

1554 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 219.

1555 Elenga-Di-Okanga A *Lutte contre la fraude douanière en RDC* (L'Harmattan Paris 2010) 16.

1556 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 255 & 256.

1557 Mbuta L *Droit Administratif, notes de cours, Finances Publiques (Administrative Law, lecture notes, Public Funds)* (GII D&A, ENF Kinshasa 1999-2000), cited in Elenga-Di-Okanga *Fraude douanière* 16.

workers and are, therefore, not required to hold a work permit until their countries become independent.¹⁵⁵⁸ Moreover, the DRC Government may enter into reciprocity agreements granting nationals of certain countries more favourable treatment than that granted to other foreign workers.¹⁵⁵⁹ However, such agreements must be applicable only after ratification.¹⁵⁶⁰

In this letter, the minister specifically refers to the case of many Africans in general, and Congolese (from Congo-Brazzaville) and Angolan nationals working in the DRC or being employed by some DRC registered companies.¹⁵⁶¹ Before Angola's independence in November 1975, Angolan nationals were assimilated to DRC nationals and were not subject to the requirement of obtaining a work permit as long as their country had not yet gained access to independence and national sovereignty.¹⁵⁶²

But most of the foreign workers come from African States that have now become independent and have friendly relations with the DRC, without any employment-related agreement. Should they, therefore, be required to hold a work permit in compliance with current regulations and legislation or continue to be assimilated to Congolese workers?

In response to this key question, the Minister suggests a dual approach when hiring and employing African workers based 'on whether they are line managers or ordinary workers, under the general [plan of job] classification', which is applicable in the DRC.¹⁵⁶³ Furthermore, notwithstanding the strict observance by the parties of Title IV of the *Labour Code* relating to employment contracts and in order to prevent any abuse, the benefit of such preferential treatment must be subject to the approval by the ONEM of the list of workers concerned. This list should include, for each of the workers concerned, the full identity, the level of education and the position assigned to him/ her.¹⁵⁶⁴

1558 Art. 2 of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

1559 See Art. 3 of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

1560 See Art. 3 of *Ordinance No. 74-098 of 6 June 1974* as revised to date.

1561 See *Circular Letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983*.

1562 *Lule Droit du travail congolais* 215 fn 376.

1563 See *Circular Letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983*.

1564 See *Circular Letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983*.

In view of the foregoing, it is obvious that the Minister of Labour's Letter is not in compliance with the provisions of Article 2 of *Ordinance No. 74-098 of 6 June 1974* insofar as it assimilates to national workers foreign workers who are nationals of already independent African countries. Even though Angola has gained independence, Angolan nationals continue to benefit from the preferential treatment, which is still applicable to this day in the DRC.¹⁵⁶⁵ In addition, as previously pointed out, a mere letter from the Minister dealing with an attitude has no regulatory authority and is not legally binding.¹⁵⁶⁶ It would have required an act having the same legal value as the ordinance to establish this special treatment and thus deviate from *Ordinance No. 74-098*.¹⁵⁶⁷

9.2.1.1.2.3 The Minister's decision requiring work permits from foreigners hired by employers based abroad on the basis of a contract for services, equipment supply contract or turn-key and plant supply contract

The other legal challenge relates to foreign workers placed at the disposal of companies operating in the DRC by their employers who are based abroad under technical assistance on the basis on a contract for services, equipment supply contract or turn-key and plant supply contract.¹⁵⁶⁸ The Ministry of Labour requires that these foreign workers be issued with a work permit.¹⁵⁶⁹ Pursuant to *Circular Note No. 22/METPS/SGET/CPEF/710/010 of 8 September 2010* issued by the Permanent Secretary for Employment and Labour, the application for a work permit must be submitted by the company using such foreign technical assistants.¹⁵⁷⁰ Such an application must be supported by a copy of the letter of placement at disposal of the company, the contract entered into between the workers' employer and the company using such foreign technical assistants as well as two passport photos of the workers concerned.¹⁵⁷¹

¹⁵⁶⁵ Lule *Droit du travail congolais* 215 fn 376.

¹⁵⁶⁶ Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 260; Lule *Droit du travail congolais* 215.

¹⁵⁶⁷ Lule *Droit du travail congolais* 215.

¹⁵⁶⁸ Mutshipangu *Relations de travail* 124.

¹⁵⁶⁹ See *Circular Note No. 22/METPS/SGET/CPEF/710/010 of 8 September 2010*.

¹⁵⁷⁰ Mutshipangu *Relations de travail* 124.

¹⁵⁷¹ See *Circular Note No. 22/METPS/SGET/CPEF/710/010 of 8 September 2010*.

Given that the workers placed at the disposal of the company are entrusted with short-duration tasks, their work permits must be issued within a short period of time.¹⁵⁷² It is worth mentioning that these work permits refer to companies using foreign technical assistants as their employers.¹⁵⁷³ This is problematic from a legal point of view, especially as regards exceptional tax on expatriates' wages. Under existing laws and regulations, companies using foreign technical assistants must not be liable to this exceptional tax given that they pay no wages to the staff placed at their disposal.¹⁵⁷⁴ Under the current regulatory regime, the rate of this exceptional tax is set at 25 %, ¹⁵⁷⁵ while it was set at 33 % under the DRC's previous regulatory framework.¹⁵⁷⁶ This exceptional tax is based on the amount of wages paid by each employer to its expatriate staff and must only be imposed upon individuals and companies that pay wages and not upon the beneficiaries of the wages.¹⁵⁷⁷

It is worth stressing that the Ohada legislation applicable in the DRC defines temporary staff, seconded or loaned, as the salaried staff of an entity that makes them available to another service-user entity for a fixed term.¹⁵⁷⁸ This provision further specifies that the service must be invoiced as an external service by the employing entity, which may be either a temporary employment entity or another business or commercial entity, generally belonging to the same group.¹⁵⁷⁹ The current DRC legislation considers that temporary employees are not paid directly by the company.¹⁵⁸⁰

Clearly, both the Minister of Labour and the Permanent Secretary have acted unlawfully in implicitly and wrongly asserting that the companies using foreign technical assistants must be liable for exceptional tax on expatriates' wages, even

1572 See supplement to *Circular Note No. 22/METPS/SGET/CPEF/710/010 of 8 September 2010*.

1573 Mutshipangu *Relations de travail* 124.

1574 Mutshipangu *Relations de travail* 124.

1575 See Art. 1 of *Ministerial Order No. 082/CAB/MIN/ECO-FIN&BUD/2002 of 26 February 2002*.

1576 See Art. 6 of *Legislative Ordinance No. 69-007 of 10 February 1969 relating to the exceptional tax on wages paid by employers to their expatriate staff*.

1577 See Art. 5 of *Legislative Ordinance No. 69-007 of 10 February 1969*.

1578 See Chapter 27 of the *revised OHADA General Accounting Plan (PCGO) of the OHADA Accounting System (SYSCOHADA)*.

1579 See Chapter 27 of the *PCGO of the OHADA Accounting System (SYSCOHADA)*.

1580 See Chapter II, para. II.3.6 of the specific chart of accounts for the insurance sector, annexed to *Decree No. 17/008 of 21 August 2017 establishing the specific chart of accounts for the insurance sector*.

though they are not these foreign workers' employers, whom they must not pay wages to. As a result of this breach of regulatory instruments, in practice tax authorities take legal action, without any justification, against these companies for tax recovery and make larger tax adjustments against them, not to mention tax penalties they incur.¹⁵⁸¹ It is, nevertheless, worth noting that any foreign worker employed by a company located abroad who, on behalf of the said company, performs work in the DRC for a period not exceeding six months must be subject to the general social security scheme for all branches.¹⁵⁸²

In a similar scenario, work permits are required for working partners and all foreign workers employed by one-man businesses, under any status whatsoever.¹⁵⁸³ As a result, the rates of taxes and royalties to be collected at the initiative of the Ministry of Labour shall apply to working partners and foreign workers irrespective of their status in one-man businesses.¹⁵⁸⁴ Similarly, tax rates on work permits for foreign nationals must also apply to working partners, as well as to expatriate workers, family members of the owners working in one-man businesses.¹⁵⁸⁵

However, under the current legislation, wages paid to working partners or to the sole proprietor must not be liable to exceptional tax on wages paid by employers to their expatriate staff.¹⁵⁸⁶ The Ministry of Labour has, clearly, acted unlawfully when issuing orders, which override a legislative order duly issued by the President of the Republic. Legally, legislative orders are regarded as acts of the executive power having force (or value) of law and as such, they are part of legislative acts.¹⁵⁸⁷ How then does the DRC legislation deal with this kind of

1581 Mutshipangu *Relations de travail* 124.

1582 See Art. 3(8) of *General Social Security Scheme Act (No. 16/009 of 15 July 2016)*.

1583 Lule *Droit du travail congolais* 219 fn 386.

1584 Art. 2 of *Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022 amending and supplementing Interministerial Order No. 001/CAB/MINETAT/METPS/2019 and CAB/MIN/FINANCES/2019/138 of 28 November 2019*.

1585 Art. 3 of *Interministerial Order No. 032 of 10 March 1994* as amended by Art. 2 of *Interdepartmental Order No. 013/95 of 31 January 1995*.

1586 Art. 2 of *Legislative Order No. 69-007 of 10 February 1969*, as amended by Art. 5 of *Ministerial Order No. 045 of 22 January 1999*.

1587 See Art. 129 (1) of the *2006 Constitution of the DRC* as revised to date; Art. 46 of Ordinance No. 22-002 of 7 January 2022 governing the organisation and functioning of the Government, terms of collaboration between the President of the Republic and the Government as well as between the members of the Government; see also Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 230 et seq.

impairment of the legislative texts? Replying to this critical question is of great study significance and will be dealt with in the final section of this chapter following the discussion relating to practical case studies on impairment of existing legislation in South Africa.

9.2.1.2 Practical case studies on impairment of existing legislation in South Africa

In South Africa specific rules regarding migration for employment are found in Acts of Parliament. These are supplemented by several regulations that seek to give hiring preference to and training programmes for local workers. Practical experience reveals that these regulatory instruments have been *ultra vires* the enabling legislation, and inconsistent with the *1996 Constitution*. This is illustrated by a few cases in which the court of competent jurisdiction held that the authors of the relevant regulations, namely the ministers have acted beyond the powers conferred on them, which means that they have exceeded the bounds of their authority.¹⁵⁸⁸

In the *Larbi-Odam* case, the Constitutional Court declared Regulation 2(2)¹⁵⁸⁹ to be inconsistent with the *Constitution* and invalid, on the grounds that it discriminates unfairly against 'permanent residents who are entitled to compete for jobs with South Africans'.¹⁵⁹⁰ In addition, this case reveals a discrepancy between the law as understood and practised by the DHA, via departmental circulars and public statements made by departmental officials as regards permanent residents' rights to access to employment.¹⁵⁹¹

However, although the Constitutional Court did not discuss further whether regulation 2(2) was *ultra vires* its enabling legislation,¹⁵⁹² this study assumes that

1588 See the *Larbi-Odam* case; the *Discovery Health* case; and the *Ndikumdavyi* case.

1589 This provision states that '... no person shall be appointed as an educator in a permanent capacity, unless he or she is a South African citizen and meets the requirements of section 212(4) of the Constitution...'. See the Ministerial Regulations regarding the Terms and Conditions of Employment of Educators (GN R1743 of 13 November 1995) published in Government Gazette No. 16814 dated 13 November 1995.

1590 See the *Larbi-Odam* case para. 35 & 49.

1591 Collier et al *Labour law in South Africa* 446; Joubert & Faris *The law of South Africa* 35.

1592 In this instance, the enabling legislation would be *Educators' Employment Act (Act 138 of 1994)*.

this provision also failed to comply with section 25(1) of *Immigration Act No. 13, 2002*, as well as the DHA Policy.¹⁵⁹³ Furthermore, this study assumes that a subordinate legislation governing a specific subject matter¹⁵⁹⁴ should be regarded as *ultra vires* a primary legislation or Act of Parliament¹⁵⁹⁵ governing a completely different subject matter, which is clearly not specifically authorised by its enabling legislation.

In the *Discovery Health* case, the Labour Court of South Africa found that the contract of employment entered into between a South African employer and an illegal foreign employee was not invalid.¹⁵⁹⁶ However, this study assumes that if the court were required to rule solely on the validity of the work permit at the time of employment, the outcome would have been different on the grounds that such employment was based on an invalid work permit.¹⁵⁹⁷

In the *Ndikumdavyi* case, 'the National Department of Health's policy on the recruitment and employment of foreign health professionals in the South African health sector', which prevented a refugee's continued employment, is found to constitute 'an unfair labour practice in terms of section 188(1) of the *LRA*'.¹⁵⁹⁸ Although 'the case has not provided the court with an opportunity to examine the constitutionality of the policy',¹⁵⁹⁹ this study assumes that this policy should be regarded as unconstitutional.

9.2.2 Interference with the sphere assigned to lawmakers by the regulatory authority

The protection of the national labour force against foreign competition, which relates to the employment of foreign nationals falls under labour migration law in both the DRC and South Africa. The most significant difference between the two

1593 According to the DHA, 'expatriates lawfully in possession of a South African Permanent Residence Permit are granted the same privileges as South African Citizens'. See the *Larbi-Odam* case para. 24.

1594 In this instance, the subordinate legislation would be the Ministerial Regulations regarding the Terms and Conditions of Employment of Education.

1595 In this instance, the primary legislation would be *Immigration Act (Act 13 of 2002)*.

1596 See the *Discovery Health* case para. 54

1597 See 38(1) of *Immigration Act*.

1598 See the *Ndikumdavyi* case para. 28(1)

1599 See the *Ndikumdavyi* case para. 27.

countries in this regard is based on the relevant legal instruments regulating this subject matter of the research, in particular primary legislation being the governing instrument in South Africa and delegated legislation in the DRC.

Under the DRC Constitution, this important matter, which basically falls within the scope of the law or Act of Parliament,¹⁶⁰⁰ is being governed by delegated or subordinate legislation, in particular regulations issued by executive authorities.¹⁶⁰¹ The doctrinal writing argues that the protection of national labour force in the DRC seems to fall only under the sphere of governmental regulation because there appears to be no law or Act of Parliament, *stricto sensu*, governing the matter.¹⁶⁰² At the very most, one can mention, as legislative instruments or Acts of Parliament in the full sense of the term, a few provisions of the *Labour Code*, which, directly or indirectly, deal with the matter.¹⁶⁰³

The subject matter of this study falling under the sphere of governmental regulation in the DRC amounts to an interference with the sphere assigned to lawmakers by the regulatory authority, which can only be dealt with by virtue of protective legal mechanisms provided for by the Constitution.¹⁶⁰⁴ The primary legislation or Acts of Parliament are, in both countries, of an exorbitant character compared to all other regulatory acts and local custom, except for the Constitution.¹⁶⁰⁵

In fact, Acts of Parliament or laws are ranked higher than regulations, which refer to enforcement measures taken by executive authorities, bearing in mind that 'the Administration's regulatory activity is heavily restricted and channelled by the

1600 See Art. 122 of the *DRC Constitution of 2006* as revised to date.

1601 See, in particular, *Ordinance No. 74-098 of 6 June 1974*; *Departmental Order No. 87/005 of 21 January 1987 determining terms & conditions for hiring expatriates*.

1602 Katansi Protection 205.

1603 See Art. 185(8); 208; 209(2); 210; 211; 218(1); & 323 e) of the *2002 Labour Code*.

1604 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 252-254 para. 415-416; Te Pemako *Traité de droit administratif* 315.

1605 See Arts. 153 (2) & (4); 155(1); & 207 (2) of the *DRC Constitution of 2006* as revised to date; Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 236 para 388; 257 para 422.1; Vedel G & Delvolve P *Droit administratif* 637-646, cited in Te Pemako *Traité de droit administratif* 307 fn 359; Du Plessis & Du Plessis *An introduction to law* 72; du Bois Introduction 38.

statutory rule'.¹⁶⁰⁶ It is worth stressing that Parliament is the highest legislative authority in both the DRC¹⁶⁰⁷ and South Africa,¹⁶⁰⁸ and it may, subject to the Constitution, pass legislation with regard to any matter.¹⁶⁰⁹ The key question remains, however, whether such legislative and regulatory mechanisms or measures taken to govern labour migration are in line with the international and regional human rights instruments as well as international labour standards governing labour migration. The answer to this key question is provided in the following subsection.

9.2.3 Compliance and non-compliance of labour migration policies with the international and regional human rights instruments and international labour standards

This subsection assesses whether the national laws and practices are implemented and enforced effectively in accordance with the provisions of ratified international, regional, and sub-regional labour migration standards. The study assumes that in both the DRC and South Africa, the protection of foreign workers, which is characterised by three fundamental principles of international law,¹⁶¹⁰ is hardly secured by the national legislation. Yet, as the ILO recommends, domestic laws, regulations and policies should apply and build upon 'the minimum norms accepted at the international and regional level'.¹⁶¹¹

Practical examples of employment restrictions and limited access to the labour market in both countries support this study's assumption. For instance, in both

1606 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 257.

1607 See Art. 100 of the *DRC Constitution of 2006* as revised to date.

1608 See s 43 of the *Constitution of South Africa, 1996*.

1609 See s 44(1)(a)(ii) of the *Constitution of South Africa, 1996*; Art. 100(2) of the *Constitution of the DRC of 2006* as revised to date.

1610 The three fundamental principles are notably: 'equality of treatment between regular migrant workers and nationals in the realm of employment and occupation; core universal human rights applicable to all migrants, regardless of status; and a broad array of international labour standards providing for protection in treatment and conditions at work applicable to all workers'. See Baruah N & Cholewinski R "Post-admission policies: rights of migrant workers," in Baruah N & Cholewinski R (eds) *IOM Handbook on establishing effective labour migration policies in countries of origin and destination* (OSCE/ IOM/ ILO Vienna/ Geneva 2006) 133; Wickramasekara P (eds) *International labour migration: a rights-based approach* (ILO Geneva 2010) 138.

1611 Baruah & Cholewinski Post-admission policies 133; Wickramasekara International labour migration 146.

countries, foreign workers' free choice of employment and access to the labour market are restricted through policies, such as the system of work permits,¹⁶¹² which limit access of foreign nationals to certain categories of jobs and restrict their job choices.¹⁶¹³

Another example of employment restrictions suggested by the ILO¹⁶¹⁴ would be the adoption of taxation measures imposed on foreign workers regardless of their status in a given company or their employers.¹⁶¹⁵ In the DRC, as previously pointed out, the law establishes the exceptional tax on wages paid by employers to their expatriate staff,¹⁶¹⁶ which is levied on the salary package paid by each employer to his/her expatriate employees.¹⁶¹⁷ This exceptional tax is paid on a monthly basis under the same conditions and within the same time limits as the occupational income tax.¹⁶¹⁸

Under the South African income tax regime,¹⁶¹⁹ foreign nationals are only liable for income tax on income earned by them while working in the country, irrespective of from where or by whom that amount is paid (subject to possible tax treaty

1612 For the DRC, see Art. 5 & Art. 6 of *Ordinance No. 74-098 of 6 June 1974*; Art. 4 & 9 of *Ordinance No. 87-281 of 13 August 1987*; Art. 3(A)(2) of *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014*. For South Africa, see Art. 19 of *Immigration Act, 13 of 2002*; see also Art 8(1) & 9 of *ESA (Act No. 4 of 2014)*.

1613 ILO "Patterns of discrimination at work: recent developments," in ILO *Equality at work: tackling the challenges: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work - 96th Session 2007 Report I (B)* (ILO Geneva 2007) 32.

1614 ILO *Patterns of discrimination at work* 32.

1615 For the DRC, see Art. 3 of *Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022 amending and supplementing Interministerial Order No. 001/CAB/MINETAT/METPS/2019 and CAB/MIN/FINANCES/2019/138 of 28 November 2019 determining rates, taxes, and royalties to be collected at the initiative of Ministry of Employment, Labour and Social Welfare*. South Africa does not impose employment or social taxes on foreign nationals performing services locally, although remuneration to an employee is subject to employees' tax. See Bester H "South Africa Chapter," in Kontrimas A & Samsa M (eds) *International expatriate employment handbook* (Kluwer Law International Alphen aan den Rijn 2006) 542. See also SAICA "Tax for expatriates" 2009 *International Tax-1717*, Issue 115 https://www.saica.co.za/integritax/2009/1717_Tax_for_expatriates.htm (Date of use: 11 March 2022); SARS "Non-residents" 2019 <https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Tax-and-Non-Residents/Pages/default.aspx> (Date of use: 11 March 2022).

1616 Art. 1 of *Legislative Ordinance No. 69-007 of 10 February 1969*.

1617 Art. 2 of *Legislative Ordinance No. 69-007 of 10 February 1969*.

1618 Art. 9 of *Legislative Ordinance No. 69-007 of 10 February 1969*.

1619 See *Income Tax Act, 1962 (Act No. 58 of 1962)*.

relief).¹⁶²⁰ South African employers are required to deduct employees' tax from foreign nationals' income,¹⁶²¹ while in the case of foreign employers who are not residents of South Africa employees' tax must be deducted by an agent that is resident in South Africa, and who has the authority to pay any remuneration to the foreign nationals.¹⁶²²

It is worth stressing that the principle of equal treatment for men and women as regards access to employment¹⁶²³ is enshrined in numerous international,¹⁶²⁴ continental,¹⁶²⁵ regional human rights instruments,¹⁶²⁶ and international labour standards,¹⁶²⁷ as well as domestic legal instruments applicable in the DRC¹⁶²⁸ and in South Africa.¹⁶²⁹ The legal doctrine considers that 'the principles of equality and non-discrimination can be regarded as the twin pillars upon which the whole edifice of the modern international law of human rights is established'.¹⁶³⁰ This principle, which seeks to guarantee gender equality in respect of opportunities in the workplace and to eliminate gender discrimination gradually, prohibits employers and legislators from treating similarly situated women and men differently because of their gender.¹⁶³¹

1620 SARS *Guide on the taxation of foreigners working in South Africa* (2014/15) (SARS Pretoria 2015) 1. <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G21-Guide-on-the-Taxation-of-Foreigners-working-in-South-Africa.pdf> (Date of use: 12 March 2022).

1621 'Income from South African employers for services rendered in South Africa (salary, bonus, benefits, allowances) is subject to South African employees' tax (often referred to as Pay-As-You-Earn or PAYE), which is deducted on a monthly basis'. See Mazwi Z *The income tax provisions that are applicable to foreign employees temporarily working in south Africa* (University of the Witwatersrand Johannesburg 2018); SARS *Guide on the taxation* 5.

1622 Mazwi *The income tax provisions*; SARS *Guide on the taxation* 5.

1623 Zaccaron G "Equality as a principle," in Zaccaron G *Equality and non-discrimination in the EU: the foundations of the EU legal order* (Edward Elgar Publ. Cheltenham UK 2021) 74.

1624 UDHR, 1948; CEDAW, 1979; CRC, 1989.

1625 The *Maputo Protocol*, 2000.

1626 SADC *Protocol on Gender and Development*, 2008.

1627 C100; C111; C156; & C183.

1628 See *Constitution of 2006*, as revised to date (Art. 11, 12, 13, 14, 36(3) & 66); *Gender Equality Act* (Act No. 15/013 of 1 August 2015) (Art. 20; 21; 22); *2002 Labour Code* as amended and supplemented to date (Art. 1; 7; 62; 86; 128(2)); *Act No. 13/013 of 1 June 2013 pertaining to the status of national Police career personnel* (Art. 19); *Act No. 13/005 of 15 January 2013 pertaining to the status of members of the DRC's Armed Forces* (Art. 11); *Institutional legislative Decree of 29 June 1961 pertaining to social security*.

1629 *Constitution of South Africa, 1996*; *Commission for Gender Equality Act 39 of 1996*; *Employment Equity Act, 55 of 1998*; *Equality Act*; *LRA*; *BCEA*.

1630 Rehman J *The weaknesses in the international protection of minority rights* (Kluwer Law International The Hague 2000)104.

1631 Harvey R "Equal treatment of men and women in the workplace: the implementation of the European community's equal treatment legislation in the Federal Republic of Germany" 1990 *AJCL* vol. 38(1) at 31.

Despite these protective standards, both the DRC and South Africa face great challenges with the application and enforcement of the law. As for South Africa, the most recent figures show that women are in unfavourable positions compared with men, in terms of access to the labour market and men have far greater access to paid employment than women, regardless of race.¹⁶³² This simply means that the women's position in the labour market 'hasn't changed much over the last decade and has, in fact, deteriorated in some respects'.¹⁶³³

In the DRC, the *Labour Code* and some regulatory instruments contain protective standards for working women that seem to be contrary to the principle of equal treatment of men and women.¹⁶³⁴ For instance, under 'the *Labour Code*, some types of work are prohibited for women by way of a ministerial order¹⁶³⁵ issued following an opinion issued by the National Labour Council'.¹⁶³⁶ Such prohibition must be regarded as discriminatory and in breach of Article 12 of the DRC *Constitution*, which proclaims equality of all citizens.¹⁶³⁷ Therefore, many renowned legal scholars suggest that the principle prohibiting women from performing certain jobs should be repealed on the grounds of unconstitutionality and non-compliance with international human rights instruments ratified by the DRC.¹⁶³⁸ It is, indeed, argued that all job seekers should be granted an equal opportunity 'because any exclusion made based on gender nullifies or impairs equality of opportunity or treatment in employment or occupation'.¹⁶³⁹

1632 SSA Statistical release - P0211 - quarterly labour force survey (QLFS), *2nd Quarter 2021* (SSA Pretoria 2021) 26 & 27. <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2021.pdf> (Date of use: 11 March 2022).

1633 Statistics South Africa "How do women fare in the South African labour market?" *P0211 - Quarterly Labour Force Survey (QLFS) 2nd Quarter 2018* (31 July 2018). <https://www.statssa.gov.za/?p=11375> (Date of use: 11 March 2022).

1634 Kamwimbi TK "Workplace gender equality in the DRC: a critical analysis of existing legislation," paper presented at the ILERA 8th Africa Regional Congress 2018 (ILERA Mauritius May 2018) 15.

1635 *Ministerial Order No. 68/13 of 17 May 1968 prohibits employers from hiring women in work exceeding their strength, exposing them to high occupational risks, in particular regular manual transport of loads* (Arts. 1 & 18).

1636 See Art. 128.

1637 Kamwimbi Workplace gender equality 16.

1638 Kamwimbi Workplace gender equality 16; Mvioki *Droit congolais* 140; Mutshipangu *Relations de travail* 298.

1639 Mvioki *Droit congolais* 140; Mutshipangu *Relations de travail* 298.

In addition, unlike the old Article 125(1) of the 2002 *Labour Code*, the new amended version of Article 125 of the *Labour Code* (Act No. 16/010 of 15 July 2016) allows women to perform night work in public or private industrial units.¹⁶⁴⁰ This new provision is in contradiction with Article 13 of *Ministerial Order No. 68/13 of 17 May 1968 determining the conditions of work of women and children*, which is still in force and] prohibits women, regardless of age, from performing night work in industrial production units.¹⁶⁴¹ This is yet another case of a regulatory instrument having no legal basis on the grounds of its failure to be in line with the provisions of the *Labour Code*, which is an Act of Parliament. Such a regulatory act should, in theory, become null and void, as will be discussed later.

Under *Ministerial Order No. 68/13 of 17 May 1968*, women employed in domestic work may, however, work 54 hours a week.¹⁶⁴² This working time is regarded as time of attendance amounting to statutory working time and paid based on 8 hours of actual work per day.¹⁶⁴³ Such is the reason why this time is referred to as the working-time equivalency.¹⁶⁴⁴ It is argued that this regime is open to criticism on the grounds that it discriminates against women employed in domestic work, which is, therefore, regarded as unfair and must be abolished'.¹⁶⁴⁵ Besides, doctrinal writings consider that it is wrong for women employed in domestic work to be regarded as contract workers'.¹⁶⁴⁶ With the series of innovations brought about by the new *Labour Code*, the regulatory instruments that supplement this piece of legislation seem to raise the issue of legislative inertia and statutory obsolescence.

9.2.4 Legislative inertia and statutory obsolescence

One of the issues that many countries, including the DRC and South Africa, face and which do raise complex legal problems in terms of legal framework governing

1640 Kamwimbi Workplace gender equality 16.

1641 Kamwimbi Workplace gender equality 16.

1642 See Art. 6.

1643 Art. 6 of *Ministerial Order No. 68/13 of 17 May 1968*; Kamwimbi Workplace gender equality 17.

1644 Mvioki *Droit congolais* 140; Mutshipangu *Relations de travail* 298; Kamwimbi *Workplace gender equality* 17.

1645 Kamwimbi Workplace gender equality 17.

1646 Mutshipangu *Relations de travail* 297; Kamwimbi Workplace gender equality 17 & 18.

labour migration concerns the legislative inertia and statutory obsolescence.¹⁶⁴⁷ The legislative inertia and statutory obsolescence are both regarded as a serious problem¹⁶⁴⁸ that has become a ground on which to challenge any legislation.¹⁶⁴⁹ Legislative inertia is raised with respect to the rules that are usually affected by changes over time and are adaptable to varying circumstances.¹⁶⁵⁰

The DRC is particularly concerned with this issue of legislative inertia and statutory obsolescence, as most of the regulations governing labour migration remain substantially unchanged despite numerous constitutional and legislative amendments.¹⁶⁵¹ It is, indeed, argued that the modernity of the DRC's legislation relating to the protection of national labour force, as it stands at present, is somewhat questionable and problematic.¹⁶⁵²

Therefore, these labour migration regulations do not fit the current constitutional and legislative "landscape" or "fabric", and no longer reflect the current government structure, yet remain in force.¹⁶⁵³ But, in theory, obsolescence may not apply to any specific regulatory act, because even if it is very old, even if it has been forgotten by everyone, a regulatory act shall be deemed to remain in full force and effect as long as it has not been terminated by an act that is contrary thereto.¹⁶⁵⁴ The DRC may learn from South Africa where most laws and regulations governing labour migration are quite recent. It is, indeed, argued that the adoption of new laws helps "clean up" legislation in order to update outmoded statutes, and has the potential to overcome the legislative inertia that retards social change by keeping obsolete laws on the books.¹⁶⁵⁵

1647 Legal or statutory obsolescence is defined as '[t]he combination of lack of fit and lack of current legislative'. See Calabresi Choking on statutes 2; Henket Statutes 182.

1648 In countries, such as France and Armenia, immediate priorities for proposed growth strategies include removing outdated and obsolete laws and regulations from the regulatory framework. See Delattre Bill; Freinkman Executive summary 11.

1649 Hetzel, Libonati & Williams Legislative law and statutory interpretation 66; Hetzel, Libonati & Williams Legislative law and process 184.

1650 Parisi & Fon Optimal specificity 17; Langevoort 1987 *Michigan Law Review* at 67.

1651 The relevant regulatory instruments are dated, respectively, 6 June 1974; 26 November 1975; 12 September 1983; 31 March 1986; 21 January 1987; and 13 August 1987.

1652 Shutsha *Six leçons* 399 para. 678.

1653 Ngoie & Lelu *Migration* 79; Brand Statutes 217; Beschle 1988 *ILJ* vol. 63 (3) at 565.

1654 Te Pemako *Traité de droit administratif* 809.

1655 Ginsburg R "Let's have E.R.A. as a signal," in Hunt H (ed) "Ruth Bader Ginsburg: in her own words", 1977 *ABA Journal* vol (63) 73; Kolasa B *The legal environment of business* (Addison-Wesley Reading MA 1984) 27.

In this respect, 'the South African Law Reform Commission is tasked, inter alia, with making recommendations for the development, improvement, modernisation, or reform of all branches of the law of South Africa including the repeal of obsolete or unnecessary provisions and the removal of anomalies.¹⁶⁵⁶ It is argued that identifying and repealing statutes, which are no longer useful in practice' form precisely the focus of statutory law revision.¹⁶⁵⁷ The purpose of statutory law revision is to modernise outdated laws and regulations that need updating and repeal obsolete ones in order to respond to today's realities.¹⁶⁵⁸

Under DRC law, a Permanent DRC Law Reform Commission was set up, which is tasked with calling into question the country's entire legal system.¹⁶⁵⁹ Under the old legal regime, the commission was tasked with preparing the reform and, in particular the unification of DRC civil law.¹⁶⁶⁰ The legal reform should also relate to the issue of the unconstitutionality of laws, regulations and measures governing labour migration, including national policy protecting the national labour force against foreign competition, which requires some remedies.

1656 See s 4 of the *South African Law Reform Commission Act (Act 19 of 1973)* as amended to date.

1657 South African Law Reform Commission *Project 25: Statutory Law Revision: Report on Legislation administered by the Department of Public Service and Administration* [2017] ZALRC 1 (1 Sept 2017) 2 & 3, para. 1.8. <http://www.saflii.org/za/other/ZALRC/2017/1.html> (Date of use: 10 March 2022); Scott J et al *The law of commerce in South Africa* (OUP Southern Africa Cape Town 2009) 169.

1658 South African Law Reform Commission *Project 25*, 2 & 3, para. 1.8; Scott et al *The law of commerce* 169.

1659 See *Document No 36/CR/026/18*. Official record of the (Commission's) meeting held on 16 November 1978, 1, cited in Malewa J *Justice pénale et réalités sociétales: de l'analyse du modèle R.D. Congo à la formulation d'une politique criminelle participative* (L'Harmattan Paris 2007) 12.

1660 See Art. 1 of *Act No. 71-002 of 12 June 1971 establishing the Zairean Civil Law Reform Commission*, as repealed by virtue of Article 9 of *Act No. 76-017 of 15 June 1976 relating to establishing a Permanent DRC Law Reform Commission*; Pauwels J "La Réforme du droit civil au Zaïre - comment concilier tradition et développement?" [The reform of civil law in Zaire - how to reconcile tradition and development?] 1973 *Journal of African Law* vol. 17 (2) at 218.

9.3 Remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies in the DRC and South Africa

This section offers the remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies in the DRC (1) and South Africa (2).

9.3.1 Remedies to the challenges and problems in the DRC

In the DRC some implementing instruments issued by regulatory authorities, including the Prime Minister,¹⁶⁶¹ ministers,¹⁶⁶² deputy ministers, local authorities that are not in line with their enabling legislation should be regarded as unconstitutional.¹⁶⁶³ As a result, in theory, any regulatory instruments regarded as unconstitutional should be repealed on the grounds of unlawfulness and replaced by a new law.¹⁶⁶⁴

It would, therefore, be advisable for the DRC's lawmakers gathered in Parliament to pass a new legislation aimed at protecting domestic labour force against foreign competition, in compliance with the rule of law and following the law-making due process. Parliament may unilaterally repeal these regulatory texts without being obliged to first seek the opinion of the Constitutional Court.¹⁶⁶⁵

1661 For instance, the Prime Minister's *Circular Letter No. RDC/GC/PM/1077/2010* has no regulatory authority and fails to comply with Articles 185 and 209 of the Labour Code. See Lule *Droit du travail congolais* 215.

1662 For instance, the Minister of Labour's *Circular letter No. 12/D.T.P.S./CAB/0730/105/83* fails to comply with the provisions of Article 2 of *Ordinance No. 74-098* insofar as it assimilates to national workers foreign workers who are nationals of already independent African countries. See Lule *Droit du travail congolais* 215 fn 376. In addition, the Minister's decision to set the overall limitation of 50% for the number of foreign workers authorised to work in companies by way of *Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005* has no legal basis, given that it fails to comply with the provisions of the *Labour code*. See also Bonyi *Droit du travail* 141.

1663 For instance, *Departmental order No. 87/005 of 21 Jan 1987 determining terms and conditions for hiring expatriates* should be declared unconstitutional, because it is inconsistent with Article 122 (14) of the 2006 Constitution, which provides that the subject matter of labour or employment law falls within the scope of the law, notably Act of Parliament.

1664 See Art. 5(1); 100; 122; 123; & 202 of the *DRC Constitution of 2006* as revised to date. See Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 259 & 260.

1665 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 254 para. 416; Te Pemako *Traité de droit administratif* 317.

In case these unconstitutional regulatory instruments are not repealed and replaced by a new legislation, as suggested above, this research study assumes that the said regulatory instruments may not escape censorship by the ordinary court, namely the Constitutional Court, pursuant to Article 223 of the *Constitution*.¹⁶⁶⁶ In fact, such regulatory instruments may be subject to a plea of unlawfulness, which enables any ordinary court of law to dismiss the enforcement of any flawed administrative acts.¹⁶⁶⁷

Furthermore, the discussion reveals that the issue related to the protection of national labour force against foreign competition continues to be governed by regulatory instruments under the old *Labour Code of 9 August 1967*, which is now repealed. The current *Labour Code* provides that 'institutions, procedures and regulatory measures existing under the labour legislation and regulations that are not contrary to the provisions of *the 2002 Labour Code* shall remain in force'.¹⁶⁶⁸ This means that while the *2002 Labour Code* has repealed and replaced all previous legislation governing labour related matters, namely the old *1967 Labour Code*, several old provisions shall remain in full force and effect provided that they are not in line or inconsistent with the provisions of the current *Labour Code*.¹⁶⁶⁹

The *2002 Labour Code*,¹⁶⁷⁰ which is an Act of Parliament or primary legislation contains a limited number of provisions that deal indirectly with the protection of the national labour force.¹⁶⁷¹ Clearly, law or primary legislation acknowledges only implicitly the protection of domestic labour force against foreign competition. However, as rightly pointed out by Lee, it is essential that the law is clear as to its

1666 Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 259 para 423; Te Pemako *Traité de droit administratif* 326.

1667 See Art 153(4) of the DRC *Constitution of 2006* as revised to date; Te Pemako & DJ'Andima *Traité de droit administratif de la RDC* 253 para 416; Te Pemako *Traité de droit administratif* 316.

1668 See Art. 332(2).

1669 Mutshipangu *Relations de travail* 48.

1670 The *2002 Labour Code* as amended and supplemented to date is the primary piece of legislation governing labour and employment matters in the DRC.

1671 Art. 209(2) of the *2002 Labour Code* provides that the National Committee on Foreign Workers' Employment is tasked with, inter alia, advising the Minister of Labour on measures that might improve the legislation protecting the national labour force against foreign competition. Article 323 (e) of the *Labour Code* provides that without prejudice to the provisions of the *Penal Code*, a prison sentence of one (1) month and/or a fine not exceeding 25,000 Congolese Francs shall be imposed on anyone who breaches regulations governing the protection of the national labour force.

scope so that it may be applicable to the present state of society.¹⁶⁷² Therefore, this study assumes that in cases where public policy measures as important as the protection of the national labour force are involved, such measures should be set out in the primary legislation passed by Parliament in a clear and unequivocal fashion.

The Political Committee of the Sovereign National Conference (CNS)¹⁶⁷³ recommended, in its general policy statement submitted to the CNS Presidium in June 1992, that the question pertaining to nationality and other related matters¹⁶⁷⁴ should henceforth be the exclusive responsibility of Parliament.¹⁶⁷⁵ The Committee further recommended the strict enforcement of the legislation governing immigration control of foreign nationals and compliance with legislation governing matters relating to refugees, except for matters relating to statelessness in the DRC.¹⁶⁷⁶

The committee's approach is in line with the model applicable in South Africa and in most of the European countries, where the framework rules governing labour migration 'are found in primary legislation, although the detailed measures are located in subordinate legislation and policy rules, such as circulars, decrees, orders and regulations'.¹⁶⁷⁷ Similarly, it has been submitted that 'any proposed

1672 Lee G "The lawyer's position in society," in Fuller H (ed) *The Green Bag: an entertaining magazine for lawyers - volume 8* (The Boston Book Boston, Mass. 1896) 250.

1673 The DRC's national conference on political reform known as the CNS, which was the largest, with its 2,842 delegates, including political, religious and civic leaders, and the longest running in Africa, was convened from 7 August 1991 to 6 December 1992. See Nzongola-Ntalaja G "The struggle for multiparty democracy," in Nzongola-Ntalaja G *The Congo from Leopold to Kabila: a people's history* (Zed Books London 2002) 189 ; Nzongola-Ntalaja G "From Zaire to the DRC," 2004 *Current African* (No. 28) at 9; Savage T "The DRC: inchoate transition, interlocking conflicts," in Doxtader E & Villa-Vicencio C (eds) *Through fire with water: the roots of division and the potential for reconciliation in Africa* (IJR Cape Town 2003) 142; Savage T & Vanspauwen K "The conflict in the DRC: a story of failed transitions and interlocking conflicts," in Aertsen I et al (eds) *Restoring justice after large-scale violent conflicts: Kosovo, DRC and the Israeli-Palestinian case* (Willan Cullompton 2008) 327.

1674 The other nationality-related matters that were discussed included, inter alia, the protection of the national labour force and the regulation of the employment of foreigners; the strict enforcement of the law governing the residence and movement of foreigners in mining areas. See Centre d'Études pour l'Action Sociale (CEPAS) « Les travaux en commissions, » (Centre for Studies for Social Action "Committee sessions") 1993 *Zaire-Afrique* (Issues 271-280) at 163.

1675 CEPAS 1993 *Zaire-Afrique* (Issues 271-280) at 163.

1676 CEPAS 1993 *Zaire-Afrique* (Issues 271-280) at 163.

1677 Cholewinski R *The legal status of migrants* 81.

[immigration] restrictions should be clearly spelt out in primary legislation by Parliament itself, not left to the generous rule-making powers afforded to various subordinate officials'.¹⁶⁷⁸

In addition, in terms of legal instruments governing the protection of domestic labour force, the DRC law itself is confusing as to the distinction between the sphere of the primary law or legislative domain¹⁶⁷⁹ and the sphere of the regulations or regulatory domain.¹⁶⁸⁰ Such confusion is so evident under the provisions of Articles 209(2) and 323 (e) of the 2002 *Labour Code*, which refer, respectively, either to “legislation” or “regulations” concerning the same subject matter.¹⁶⁸¹

9.3.2 Remedies to the challenges and problems in South Africa

In South Africa, remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies have been provided through numerous court rulings. For instance, the High Court of South Africa, Free State Division in Bloemfontein dealt with the matter relating to the constitutionality of a specific legal provision regarding the employment of foreign nationals in the *Rafoneke* case.¹⁶⁸² The ‘judgment concerns the constitutionality of section 24(2)(b) (read with section 115) of the *Legal Practice Act (LPA), 2014 (No. 28 of 2014)*’.¹⁶⁸³ This provision ‘precludes foreign nationals (who are not permanent residents in South Africa) (and not admitted as legal practitioners in foreign jurisdictions) from being admitted and enrolled as non-practising legal practitioners’.¹⁶⁸⁴

1678 House of Lords, House of Commons and Joint Committee on Human Rights *Legislative Scrutiny: Borders, Citizenship and Immigration Bill - Ninth Report of Session 2008-09* (HL Paper 62-HC 375 - 25 March 2009) (The Stationery Office Limited London 2009) 74. <https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/62/62.pdf> (Date of use: 12 March 2022).

1679 Also referred to as parliamentary legislative sphere.

1680 Also referred to as executive’s regulatory sphere.

1681 See Katansi Protection 205.

1682 *Rafoneke v Minister of Justice and Correctional Services and Others* (3609/2020) [2021] ZAFSHC 229; [2022] 1 All SA 243 (FB); 2022 (1) SA 610 (FB) (16 September 2021).

1683 See the *Rafoneke* case, para. 1.

1684 See the *Rafoneke* case, para. 115.

In terms of remedies, the Court decided that a just and equitable remedy would be a declaration of invalidity and a suspensive order to allow the legislature to cure the defect. Due to the hardships that non-citizens are exposed to and the immediate change in their employability, development, and financial position the judgment might bring, the Court decided to grant interim relief. The interim relief serves to benefit non-citizens but would not prejudice the government's policy or the interest of practising legal practitioners.¹⁶⁸⁵

In another case,¹⁶⁸⁶ the Supreme Court of Appeal ruled that '[the DHA] *Immigration Directive 21 of 2015* issued by the Director-General of the DHA on 3 February 2016 is inconsistent with the *Immigration Act 13 of 2002* and invalid'.¹⁶⁸⁷ In fact, *Immigration Directive 21 of 2015* 'imposes a blanket ban on asylum seekers from applying for visas without provision for an exemption application under section 31(2)(c) of the *Immigration Act 13 of 2002*'.¹⁶⁸⁸ The Court further ruled that *Immigration Directive 21 of 2015* 'is declared inconsistent with regulation 23 of the *Immigration Regulations, 2014* published under Government Notice R413 in Government Gazette 37697 of 22 May 2014 and invalid'.¹⁶⁸⁹ In this instance, Immigration Directive 21 of 2015 prohibits asylum seekers from applying for permanent residence permits while inside South Africa.¹⁶⁹⁰

In the *Nandutu* case,¹⁶⁹¹ the Constitutional Court of South Africa declared 'Regulation 9(9)(a) of the *Immigration Regulations* GNR 413 GG 37679, 22 May 2014 (*Immigration Regulations*) to be inconsistent with the Constitution and therefore invalid'.¹⁶⁹² The rights accorded by means of the exceptional circumstances contemplated in section 10(6)(b) of the *Immigration Act 13 of 2002*

1685 See the *Rafoneke* case, para. 116.

1686 *Ahmed and Others v Minister of Home Affairs and Another* (CCT273/17) [2018] ZACC 39; 2018 (12) BCLR 1451 (CC); 2019 (1) SA 1 (CC) (9 October 2018).

1687 See the *Ahmed* case, para. 67(3).

1688 See the *Ahmed* case, para. 67(3).

1689 See the *Ahmed* case, para. 67(4).

1690 See the *Ahmed* case, para. 67(4).

1691 *Nandutu and Others v Minister of Home Affairs and Others* (CCT114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC); 2019 (5) SA 325 (CC) (28 June 2019).

1692 The *Nandutu* case, para. 95 (3)(a).

are not extended to the foreign spouse or child of a South African citizen or permanent resident.¹⁶⁹³

9.3 Conclusion

This chapter has critically reviewed the challenges of and possible remedies for implementation of labour migration statutory and regulatory policies in the DRC and South Africa. The two countries encounter or have encountered four types of challenges and problems in the implementation of labour migration legal and regulatory policies.

The first challenge or problem involves substantial impairment of existing legislation by regulatory authorities, including by way of ministerial decisions. The second challenge or problem concerns interference with the sphere assigned to lawmakers by the regulatory authority. Unlike in South Africa where the employment of foreign workers is governed by the primary legislation or Act of Parliament, in the DRC this matter is basically governed by delegated or subordinate legislation, even if it falls within the parliamentary legislative sphere.

The third challenge or problem relates to compliance and non-compliance of labour migration policies with the international and regional human rights instruments and international labour standards. The fourth challenge or problem is in connection with legislative inertia and statutory obsolescence, especially in the DRC where most of the regulations governing labour migration remain substantially unchanged and do not fit the current constitutional and legislative landscape. One of the solutions offered in both countries to tackle this problem is the development, improvement, modernisation, or reform of all branches of the law,¹⁶⁹⁴ as recommended by both countries' respective Law Reform Commissions.

In order to address the challenges and problems encountered in the implementation of labour migration legal and regulatory policies challenges, some

¹⁶⁹³ The *Nandutu* case, para. 95 (3)(b).

¹⁶⁹⁴ Okpechi A *Access to justice by refugees and asylum seekers in South Africa* (PhD thesis University of Cape Town 2011) 189.

remedies have been offered, notably through court decisions in both South Africa and the DRC.

CHAPTER TEN

CONCLUSIONS AND RECOMMENDATIONS

10.1 Introduction

This final chapter contains concluding remarks and embodies the summary of the main findings regarding the protection of national labour force against foreign competition under DRC's and South Africa's labour migration laws and policies. This chapter further contains practical recommendations for dealing with the evident incoherence in the DRC and South African legislation and the discrepancy between the law in books and the law in action¹⁶⁹⁵ in the two countries.

10.2 Conclusions

This thesis involves a comparative analysis of the DRC's and South Africa's labour migration laws and policies focusing on the protection of national labour force against foreign competition. The analysis begins with an important background information and context, which includes the definition of labour migration, the scope of this definition, and some relevant terminological observations.¹⁶⁹⁶ The DRC and South Africa have both made a clear distinction between people who migrate for employment purposes and those who migrate on a temporary basis for other non-work purposes,¹⁶⁹⁷ as well as those seeking asylum or refugee status.¹⁶⁹⁸ Both countries' immigration laws and regulations prohibit those migrating for other non-work purposes, such as visitors or tourists from conducting full-time work in the country.¹⁶⁹⁹ However, in both countries, refugees are entitled to seek employment and take up gainful jobs under a contract of employment.¹⁷⁰⁰

1695 Brittle R & Desmet E "Thirty years of research on children's rights in the context of migration: towards increased visibility and recognition of some children, but not all?" 2020 *IJCR* 28 at 51.

1696 See Chapter 2.

1697 Howe & Owens The regulatory challenges 7.

1698 See Chapter 2, subsection 2.2.2.2.

1699 See Chapter 2, subsection 2.2.2.2.

1700 See Chapter 6, subsection 6.4.2.

These labour migration laws and regulations fall under the ambit of the principle of national sovereignty of states to manage and control migration into their territory and thereby protect essential national security interests.¹⁷⁰¹ To this effect, the DRC and South Africa have both established state institutions, which fall mainly within the Ministry/ Department of labour and the Ministry/ Department of the Interior or Home Affairs' area of responsibility.¹⁷⁰² In both countries, these state institutions are vested with a large power of discretion in the fields of migration and labour law, which reveals the strong relationships between migration law and labour law.

Through management and regulation of migration of foreign-born workers, the DRC and South Africa both seek to control access to the domestic labour market and protect the labour market by preventing competition between citizen and foreign-born workers. To this effect, the two countries have imposed the main protectionist measures by way of two basic principles governing the protection of national labour force: employment priority for local employees, and requirement to hold a work permit and/ or visa. In both the DRC and South Africa, these principles do not apply to three categories of people offering their services in the country, notably the diplomatic and consular personnel and representatives of international organisations, the refugees, and some nationals from neighbouring countries.

To enforce these basic principles governing the protection of national labour force, the DRC and South Africa have put in place some key mechanisms, which help to limit the use of foreign labour. These mechanisms include the periodic drawing up of a list of jobs or occupations prohibited or closed to foreign workers; the introduction of minimum quotas of foreign workers in companies; the procedure for applying for and obtaining a work permit for foreign nationals; the preparation of a skills transfer plan; and the requirement to report vacancies immediately and solely to employment agency.

1701 Friðriksdóttir Migration management 12.

1702 See Chapter 3, subsections 3.3.2 and 3.3.3.

As regards South Africa, such measures include the procedure for obtaining applicable and valid work visas for foreign nationals;¹⁷⁰³ the introduction of minimum quota of foreign workers in companies operating in the country;¹⁷⁰⁴ the promotion of the transfer of skills from foreigners to citizens and residents;¹⁷⁰⁵ and 'use of public employment services or private employment agencies for recruiting suitable local employees.¹⁷⁰⁶

In addition, the DRC and South Africa have both made some efforts to enforce labour migration policies aimed at protecting the national labour force against foreign competition.¹⁷⁰⁷ The two countries put in place strict migration control policies, which involve the prevention of illegal entries, the deportation of unauthorised or illegal foreigners, and deterrence of unauthorised or illegal immigration.¹⁷⁰⁸

Practical experience reveals that both countries have encountered four types of challenges and problems in the implementation of labour migration legal and regulatory policies.¹⁷⁰⁹ These challenges include notably: first, substantial impairment of existing laws by regulatory authorities in many instances of the implementation and enforcement efforts for the national policies;¹⁷¹⁰ second, interference with the sphere assigned to lawmakers by the regulatory authority;¹⁷¹¹ third, non-compliance of labour migration policies with the international and

1703 DHA *How do I obtain a work permit?* (DHA Pretoria 2022). <https://www.gov.za/faq/foreigners/how-do-i-acquire-work-permit> (Date of use: 19 October 2022).

1704 Grootes S "Government's plan to introduce foreign labour quotas is unjust and impossible to enforce" 2022 *Daily Maverick* 02 March. <https://www.dailymaverick.co.za/article/2022-03-02-governments-plan-to-introduce-foreign-labour-quotas-is-unjust-and-impossible-to-enforce/> (Date of use: 19 October 2022).

1705 See s 2(1)(j)(ii) of *Immigration Act, 2002 (No. 13 of 2002)* (as repealed to date by section 3 of Act 19 of 2004); Govindjee A "Employment protection in South Africa: an analysis of recent labour and social security legislative and policy developments," in Amine S (ed) *Employment protection legislation in emerging economies* (IGI Global Hershey PA 2018) 146.

1706 Govindjee *Employment protection in South Africa* 146.

1707 See Chapter 8, section 8.2.

1708 See Chapter 8, subsection 8.2.1.

1709 See Chapter 9, section 9.2.

1710 See Chapter 9, subsection 9.2.1.

1711 See Chapter 9, subsection 9.2.2.

regional human rights instruments and international labour standards;¹⁷¹² and lastly, legislative inertia and statutory obsolescence.¹⁷¹³

The DRC and South Africa have both provided remedies to the challenges and problems encountered in the implementation of labour migration legal and regulatory policies.¹⁷¹⁴ While in South Africa remedies to the challenges have mostly been provided through numerous court rulings,¹⁷¹⁵ in the DRC the remedies have not been adequately addressed, hence the recommendations made, *inter alia*, to the DRC's lawmakers.¹⁷¹⁶

As pointed out by Karlen and Arsel,¹⁷¹⁷ this comparative study is more valuable when it involves constructive criticism through identifying the merits and flaws of each system. While it must evidently be based on a careful and accurate analysis of the laws under investigation, such a comparison should ultimately define similarities and contrasts, and speculate upon what each system might learn from the other.¹⁷¹⁸ In fact, this study highlights possible areas in each system upon which domestic lawmakers of the other system can rely to take action and initiate reforms.

10.3 Recommendations

As extensively discussed throughout this thesis, both the DRC and South Africa offer valuable experiences, lessons, and opportunities for the two national legal systems to learn from each other and copy each other's rules or approaches. Therefore, the recommendations rely on each of the two countries' main policy strengths and impediments or weaknesses, as well as potential vulnerabilities.

1712 See Chapter 9, subsection 9.2.3.

1713 See Chapter 9, subsection 9.2.4.

1714 See Chapter 9, section 9.3.

1715 See Chapter 9, footnote 1682.

1716 See Chapter 9, footnote 1665.

1717 Karlen D & Arsel I "Civil litigation in Turkey," 1960 *AJCL* vol. 9 (2) at 309.

1718 Karlen & Arsel 1960 *AJCL* vol. 9 (2) at 309.

10.3.1 Recommendations to the DRC

First, the DRC's lawmakers gathered in Parliament should pass a new legislation aimed at protecting domestic labour force against foreign competition, in compliance with the rule of law and following the law-making due process. The new law would be repealing the current regulations on the grounds of unconstitutionality and unlawfulness. In addition, any such new legislation or Act of Parliament, which is of an exorbitant character, would replace the regulatory texts or delegated or subordinate legislation that currently govern the employment of foreign nationals, which, in theory, falls within the scope of the law. In fact, the DRC where the protection of national labour force continues to be governed by several administrative sub-laws, delegated or subordinate legislation, including ministerial regulations, departmental orders, ordinances, decrees, rules, and other regulations issued by executive authorities¹⁷¹⁹ could learn from South Africa where the employment of foreign nationals is governed by primary legislation, also referred to as Acts of Parliament, or Statutes.¹⁷²⁰

Second, the DRC should successfully implement and reinforce labour migration policies to facilitate the entry of foreign workers into the local labour market¹⁷²¹ by addressing the challenges that undermine the implementation of migration policy initiatives. Such a move by the DRC government would surely prevent any frustration of local workers over the hiring of foreign workers and anti-immigrant tensions.

Third, the DRC State should address the problems related to violent conflicts, wars, political instability, weak governance, corruption among officers and state officials involved in immigration and emigration matters.¹⁷²² Such a move would

1719 See *Ordinance No. 74-098 of 6 June 1974* referred to above; *Legislative Order No. 83-033 of 12 September 1983*; *Ordinance No. 87-281 of 13 August 1987 laying down implementing measures of Legislative Order No. 83-033 of 12 September 1983*; *Departmental Order No. 87/005 of 21 January 1987*.

1720 See *Immigration Act 13 of 2002 as amended to date*; and *Employment Services Act 4 of 2014*.

1721 Ngoie & Lelu *Migration* 57 & 59; Flahaux & Schoumaker DRC.

1722 Giacca G "Introduction," in Giacca G *Economic, social, and cultural rights in armed conflict* (OUP Oxford 2014) 11; Ngoie & Lelu *Migration* 58; Usanov A et al "Coltan, Congo and conflict: Polinares case Study" 2013 *HCSS* No. 20 (03)(13) at 10, 76, 82 & 86.

allow the DRC government to adequately deal with the labour migration issues, such as illegal employment of foreign workers.

Fourth, the DRC State should also address the issues of bureaucratic inefficiencies and a lack of substantial capacity within the DGM, and other public institutions¹⁷²³ responsible for migration and the movements of foreign nationals.¹⁷²⁴ This would allow the State immigration services to be better equipped for carrying out their immigration enforcement duties, including controlling, regulating and facilitating immigration and the movement of persons in particular for employment purposes, and for handling asylum claims.

10.3.2 Recommendations to South Africa

First, South Africa should try and learn from the DRC's labour migration system by incorporating provisions specifically listing jobs reserved exclusively for local workers and restricting the number of foreign workers that should be employed by a company. This might help solve the recurring problem of anti-immigrant sentiments and xenophobia in the country.

Second, South Africa should pass clear legislation for regulating and controlling emigration of South Africans for employment purposes, which is not dealt with in the current labour migration legislation. This would allow the South African Government to monitor the movement of labour emigrants and to deal adequately with the issue of brain drain, which affects the country's economic growth and social development.

Third, the South African State should deal with the implementation gap that is widened by a series of administrative inefficiencies or bureaucratic vacuum and a lack of capacity within the DHA, which oversees labour migration.

¹⁷²³ The other main public institutions in this area include: the National Committee in charge of the Employment of Foreign Nationals (Art. 208 of *Labour Code*; *Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014*; *Departmental Order No. 81/014 of 23 February 1981*); the Directorate for Employment (Art. 203 of *Labour Code*); the Ministry of Social Affairs, Humanitarian Action and National Solidarity (Art. 1 (B)(1)(37) of *Ordinance No. 22-003 of 7 January 2022 laying down the powers of the ministries*); the National Committee for Refugees (Art. 8 of the *DRC Refugees Act of 16 October 2002*).

¹⁷²⁴ Usanov et al 2013 *The Hague Centre for Strategic Studies* at 74; Ngoie & Lelu *Migration* 27.

Fourth, South Africa should also deal with some laxity and looseness in the implementation of immigration enforcement procedures, which have produced several problematic results, including corruption, irregular or illegal immigration, xenophobia, human rights abuses, to name just a few.¹⁷²⁵

10.3.3 Recommendations to both the DRC and South Africa

First, the DRC and South Africa should both ratify without delay all international, continental, and regional labour migration treaties, including *International Migrant Workers Convention* (1990) and other relevant ILO instruments, notably *ILO Migration for Employment Convention* (Revised) (No.97), and *ILO Migrant Workers (Supplementary Provisions) Convention* (No.143). By ratifying and implementing these labour migration treaties, the two countries would achieve fair labour migration governance.

Second, the DRC and South Africa should both effectively address the discrepancies between national legislation and international and regional instruments relating to the non-nationals' access to the labour market. In so doing, the two countries would follow the basic principle of international law, which requires State parties to international treaties to ensure that their own domestic laws and practice are consistent with what is required by the said treaties.¹⁷²⁶

Third, the DRC and South Africa should both deal adequately with the fundamental tension between globalising labour market, which refers to 'the objectives of [widening] employers' access to [foreign] workers and protecting [local workers'] employment prospects and conditions'.¹⁷²⁷

Fourth, the DRC and South Africa should both fully meet their obligations and responsibilities to both their citizens and the migrants, the whole labour migration phenomenon needs to be approached differently. The two countries may, for

1725 Segatti A & Landau L "Executive summary," in Segatti & Landau *Migration in post-apartheid South Africa* 38.

1726 Byrnes A et al "From exclusion to equality: realising the rights of persons with disabilities" 2007 *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (No. 14) at 51.

1727 Ruhs Labour market protectionism 61;

instance, rely on the African Union's Executive Council's recommendation calling upon African countries 'to establish regular, transparent, and comprehensive labour migration policies, legislation and structures at the national level [that can significantly benefit them], as well as migrant workers and members of their families'.¹⁷²⁸

¹⁷²⁸ AU Executive Council ACPMD 4 & 5 para. 3.3.

CHAPTER ELEVEN

BIBLIOGRAPHY

11.1 Introduction

The focus of this thesis being on the protection of the national labour force against foreign competition under labour migration laws and policies in the DRC and South Africa, the following sources provide a wealth of information for those interested in pursuing research into this area.

These sources of authority are categorised into two major types: primary sources, including case law and legislation (1); and secondary sources, including books, reports, papers, essays or chapters in edited collections, journal articles, lecture material, newspaper reports, and internet sources (2).

11.2 Primary sources

Primary legal sources are regarded as documents that establish the law on a particular issue in the form of constitutions, court cases, statutes, treaties, and administrative rules and regulations.¹⁷²⁹

¹⁷²⁹ McKinsey J & Burke D *Carper's understanding the law – seventh edition* (Delmar Cengage Learning New York 2014) 703; Miller R & Cross F *The legal environment today - summarized case edition - 8th edition* (Delmar Cengage Learning New York 2015) 6; Bast C & Hawkins M “Overview of the research process and ethical considerations,” in Bast C & Hawkins M *Foundations of legal research and writing – fifth edition* (Delmar Cengage Learning New York 2012) 204.

11.2.1 Case law

11.2.1.1 DRC case law

Bulletin des arrêts de la Cour suprême de justice, Années 2004 à 2009, 2 tomes [Gazettes of Judgments of the Supreme Court, Years 2004 to 2009, 2 volumes] (Éditions du Service de Documentation et d'Études du Ministère de la Justice et Droits humains, Kinshasa 2010).

Bulletin des arrêts de la Cour suprême de justice, Années 2000 à 2003 [Gazettes of Judgments of the Supreme Court, Years 2000 to 2003] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2004).

Bulletin des arrêts de la Cour suprême de justice, Années 1990 à 1999 [Gazettes of Judgments of the Supreme Court, Years 1990 to 1999] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2003).

Bulletin des arrêts de la Cour Suprême de Justice, Années 1980 à 1984 [Gazettes of Judgments of the Supreme Court, Years 1980 to 1984] Éditions du Service de Documentation et d'Études du Ministère de la justice et des Affaires parlementaires, Kinshasa 2001].

C.S.J., R. Const. 137/TSR, 22 octobre 2010, *Affaire Roger Nsingi Mbemba C/Assemblée Provinciale de Kinshasa*, *Les Analyses Juridiques*, n° 21, 50-55.

CSJ, *Trésor Kapuku Ngoy c/Assemblée provinciale du Kasai Occidental*, R.Const.51/TSR du 31 juillet 2007; inédit. [CSJ, *Trésor Kapuku Ngoy v/ Kasai Occidental's Provincial Assembly*, RConst 051/TSR of 31 July 2007; unpublished].

C.S.J., R.C. 2023, December 4, 1998, *Case of Carlos Nunes v. Hôtel Excelsior*, *R.C.D.T.S.S (No. 09/1999)*.

C.S.J.R.C. 2481 of 30/11/2001, *C. vs. Utradi*, unpublished.

11.2.1.2 South African case law

Ahmed and Others v Minister of Home Affairs and Another (CCT273/17) [2018] ZACC 39; 2018 (12) BCLR 1451 (CC); 2019 (1) SA 1 (CC) (9 October 2018) (hereinafter the *Ahmed* case).

Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC); (2018) 39 ILJ 1911 (CC); 2018 (5) SA 323 (CC); 2018 (11) BCLR 1309 (CC) (26 July 2018) (hereinafter the *Assign Services* case).

Baloro v University of Bophuthatswana 1995 4 SA 197 (BSC) (hereinafter the *Baloro* case).

Buthlezi and Another v Minister of Home Affairs and Others (242/12) [2012] ZASCA 174; 2013 (3) SA 325 (SCA) (29 November 2012)

Commissioner Jammy in Herbst v Elmar Motors (1999) 20 ILJ 2465 (CCMA).

Discovery Health Ltd v CCMA & others (2008) 29 ILJ 1480 (LC) (hereinafter the *Discovery Health* case).

Dawood v Minister of Home Affairs and Others 2000 (1) SA 997 (C), 1043.J. (hereinafter the *Dawood* case).

Director-General: Department of Home Affairs and Another v Mavericks Revue CC (576/06) [2007] ZASCA 149; [2007] SCA 149 (RSA); [2008] 1 All SA 435 (SCA); 2008 (2) SA 418 (SCA) (28 November 2007) (hereinafter the *Mavericks Revue* case).

Dunwell Property Services CC v. Sibande and Others [2012] 2 BLLR 131 (LAC) (hereinafter the *Dunwell Property Services* case).

Huijskens and Another v Minister of Home Affairs (9745/2017) [2017] ZAGPPHC 180 (23 March 2017) (hereinafter the *Huijskens* case).

Khosa v Minister of Social Development 2004(6) BCLR 569 (CC) (hereinafter the *Khosa* matter).

LAD Brokers (Pty) Ltd v Mandla (2001) 22 ILJ 1813 (LAC) (hereinafter the *LAD Brokers* case).

Larbi-Odam and Others v Member of the Executive Council for Education and Another 1996 (12) BCLR 1612 (B) (hereinafter the *Larbi-Odam* case).

Nandutu and Others v Minister of Home Affairs and Others (CCT114/18) [2019] ZACC 24; 2019 (8) BCLR 938 (CC) ; 2019 (5) SA 325 (CC) (28 June 2019) (hereinafter the *Nandutu* case).

Ndikumdavyi v Valkenberg Hospital and Others (2012) 33 *ILJ* 2648 (LC) (23 April 2012) (hereinafter the *Ndikumdavyi* case).

Niselow v Liberty Life Association of Africa Ltd 1998 (4) SA 163 (SCA) (hereinafter the *Niselow* case).

Pam Goldings Properties (Pty) Ltd v Erasmus and Others (C455/07) [2009] ZALC 135; (2010) 31 *ILJ* 1460 (LC) (4 December 2009) (hereinafter the *Pam Goldings Properties* case).

Rafoneke v Minister of Justice and Correctional Services and Others (3609/2020) [2021] ZAFSHC 229; [2022] 1 All SA 243 (FB); 2022 (1) SA 610 (FB) (16 September 2021) (hereinafter the *Rafoneke* case).

Sithole v Metal and Engineering Industries Bargaining and Others (JR318/15) [2017] ZALCJHB 434; (2018) 39 *ILJ* 472 (LC) (24 November 2017) (hereinafter the *Sithole* case).

Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism (48/2014) ZASCA 143 (26 September 2014) (hereinafter the *Somali Association of South Africa* case).

Sweyeli v Minister of Home Affairs and Others (1479/16) [2016] ZAWCHC 177 (30 November 2016) (hereinafter the *Sweyeli* case).

Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC); (2007) 28 *ILJ* 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006) (hereinafter the *Union of Refugee Women* case).

Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) (28 November 2003) (hereinafter the *Watchenuka* case).

Wyeth SA (Pty) Ltd v Manqele and Others (JA 50/03) [2005] ZALAC 1 (23 March 2005).

11.2.1.3 American case law

Chae Chan Ping v. U.S., 130 U.S. 581 (1889), (*the Chinese Exclusion Case*).

Espinoza v. Farah Manufacturing Co., 1973, [6 EPD T8944] 414 U. S. 86, 94 S. Ct. 334, 38 L. Ed. 2d 287.

Fong Yue Ting v. United States, 149 U.S. 698 (1893).

Nishimura Ekiu v. United States [1982] 142 U.S. 651, Gray J., 659.

The Chinese Exclusion Case (Chae Chan Ping v. U.S.), 130 U.S. 581 (1889).

11.2.1.4 Canadian case law

Attorney-General for Canada v. Cain [1906] AC 542, 546.

11.2.1.5 English case law

Musgrove v. Chun Teong Toy, 60 L. J., P. C.28; [1891] A.C. 272.

11.2.1.6 Argentinian case law

Habeas Corpus de Irene Amor Magaz de Gonzalez, 148 Fallos, 410, 414.

Habeas Corpus de Francisco Macia, et al., No. 282, 74 Gaceta del Foro, 169.

11.2.1.7 Brazilian case law

Habeas Corpus de Everardo Dias, 26 Revista de Supremo Tribunal, 19, 20.

Corpahnia de Seguros Garantia v. Uniao Federal, No. 696, 88 0 Direito, 250, 264, Supreme Court, Brazil.

11.2.1.8 Australian case law

Musgrove v. Chun Teong Toy, 60 L. J., P. C.28; [1891] A.C. 272.

11.2.1.9 Belgian case law

Brussels Court of Appeal 25(1) 2000, *Eppe Guy* case.

11.2.2 Legislation

11.2.2.1 Statutes

11.2.2.1.1 Statutes of the DRC

Act No. 16/010 of 15 July 2016 amending and supplementing Act No. 015/2002 of 16 October 2002 pertaining to the labour Code [Loi n° 16/010 du 15 juillet 2016 modifiant et complétant la loi n° 015/2002 portant Code du travail (Journal officiel de la RDC, 57^{ème} année, 1^{ère} partie, n° spécial, 29 juillet 2016, col. 1, Cabinet du Président de la République – Kinshasa)].

Act No. 007/2002 of 11 July 2002 pertaining to the Mining Code [Loi n° 007/2002 du 11 juillet 2002 portant Code Minier [(Journal Officiel de la RDC, 43^{ème} Année, Numéro Spécial, 15 juillet 2002, Cabinet du Président de la République – Kinshasa)].

Act No. 18/001 of 09 March 2018 amending and supplementing Act No. 007/2002 of 11 July 2002 pertaining to the Mining Code [Loi n°18/001 du 09 mars 2018 modifiant et complétant la Loi n° 007/2002 du 11 juillet 2002 portant Code Minier (Journal Officiel de la RDC, 59^{ème} Année, Numéro Spécial, 28 mars 2018, Cabinet du Président de la République – Kinshasa)].

Act No. 08/001 of 26 March 2008 repealing Act No. 86/007 of 27 December 1986 organising the stay and movement of foreigners in mining areas [loi n° 08/001 du 26 mars 2008 portant abrogation de la loi n° 86/007 du 27 décembre 1986 sur le séjour et la circulation des étrangers dans les zones minières (Journal Officiel de la RDC, 59^{ème} Année, Numéro Spécial, 28 mars 2008, col. 3, Cabinet du Président de la République – Kinshasa)].

Act No. 13/005 of 15 January 2013 pertaining to the status of members of Armed Forces of the Democratic Republic of Congo [loi n° 13-005 du 15 janvier 2013 portant statut du militaire des Forces armées de la République

- démocratique du Congo (Journal Officiel de la RDC, 54^{ème} Année, 25 janvier 2013, n° spécial, p. 5, Cabinet du Président de la République – Kinshasa)].
- Act No. 13/013 of 1 June 2013 pertaining to the status of national Police career personnel* [Loi n° 13/013 du 1^{er} juin 2013 portant statut du personnel de carrière de la Police nationale (Journal Officiel de la RDC, 54^{ème} Année, numéro spécial, 6 juin 2013, Cabinet du Président de la République – Kinshasa)].
- Act No. 15/013 of 1 August 2015 laying down detailed rules for the fulfilment of women's rights and gender equality* [Loi n° 15-013 du 1^{er} août 2015 portant modalités d'application des droits de la femme et de la parité (Journal Officiel de la RDC, 56^{ème} Année, numéro 16, Première partie - 15 août 2015, col. 7, Cabinet du Président de la République – Kinshasa)].
- Act No. 15/012 of 1 August 2015 pertaining to the general regime for oil and gas* [Loi n° 15/012 du 1^{er} août 2015 portant régime général des hydrocarbures (Journal officiel de la RDC, 56^{ème} année, 1^{ère} partie, n° spécial, 7 août 2015, n° spécial, col. 1, Cabinet du Président de la République – Kinshasa)].
- Act No. 16/009 of 15 July 2016 laying down the rules relating to the general social security scheme* [Loi n° 16/009 du 15 juillet 2016 fixant les règles relatives au régime général de sécurité sociale (Journal officiel de la RDC, 57^{ème} année - n° spécial, 28 juillet 2016, p. 5, Cabinet du Président de la République – Kinshasa)].
- Act No. 17/001 of 8 February 2017 establishing the rules applicable to subcontracting in the private sector* [Loi n° 17/001 du 8 février 2017 fixant les règles applicables à la sous-traitance dans le secteur privé (Journal officiel de la RDC, 58^{ème} année - n° 4, 15 février 2017, col. 7, Cabinet du Président de la République – Kinshasa)].
- Act No. 18/016 of 9 July 2018 relating to public-private partnership* [Loi n° 18/016 du 9 juillet 2018 relative au partenariat public-privé (Journal officiel de la RDC, 59^{ème} année - 23 juillet 2018, n° spécial, col. 18, Cabinet du Président de la République – Kinshasa)].
- Act No. 004-2002 of 21 February 2002 pertaining to the Investment Code* [Loi n° 004-2002 du 21 février 2002 portant Code des investissements (Journal

officiel de la RDC, 43^{ème} année - 15 mars 2002, n° 6, Cabinet du Président de la République – Kinshasa)].

Act No. 021/2002 of 16 October 2002 relating to the status of refugees in the Democratic Republic of Congo [Loi n° 021/2002 du 16 octobre 2002 portant statut des réfugiés en République démocratique du Congo (Journal officiel de la RDC, 43^{ème} année - 1^{er} novembre 2002, n° spécial, p. 4, Cabinet du Président de la République – Kinshasa)].

Act No. 04/024 of 12 November 2004 relating to Congolese citizenship [Loi n° 04/024 du 12 novembre 2004 relative à la nationalité congolaise (Journal officiel de la RDC, 45^{ème} année - 17 novembre 2004, n° spécial, p. 5, Cabinet du Président de la République – Kinshasa)].

Act No. 96/002 of 22 June 1996 laying down the terms and conditions for exercising the freedom of the press [Loi n° 96/002 du 22 juin 1996 fixant les modalités de l'exercice de la liberté de presse (Journal officiel de la RDC, 42^{ème} année - août 2001, n° spécial, p. 5, Cabinet du Président de la République – Kinshasa)].

Act No. 76-017 of 15 June 1976 relating to establishing a Permanent DRC Law Reform Commission repealing Act No. 71-002 of 12 June 1971 establishing the Committee for the reform and unification of Zairean civil law [Loi n° 76-017 du 15 juin 1976 relative à la création d'une Commission permanente de réforme du droit [congolais] abrogeant la loi 71-002 du 12 juin 1971 relative à la création d'une Commission de réforme et d'unification du droit civil zaïrois (Journal officiel de la République du Zaïre, 1^{er} août 1976, n° 15, p. 791, Cabinet du Président de la République– Kinshasa)].

Act No. 74/020 of 15 August 1974 revising the Constitution of 24 June 1967 [Loi n°74/020 du 15 août 1974 portant révision de la Constitution du 24 juin 1967 (J.O.Z., numéro spécial, 1974, p. 11, Cabinet du Président de la République – Kinshasa)].

Agreement of 4 May 2000 between the United Nations and the Democratic Republic of the Congo regarding the status of the United Nations Organisation Mission in the Democratic Republic of the Congo [Accord du 4 mai 2000 entre l'Organisation des Nations Unies et la République

Démocratique du Congo concernant le statut de la Mission de l'Organisation des Nations Unies en République Démocratique du Congo (Journal officiel de la RDC, 43^{ème} année – Première partie – 1^{er} juin 2002, n° 11, Cabinet du Président de la République – Kinshasa)].

Agreement of 26 July 2011 amending the Agreement between the Governments of Burundi, the DRC and Rwanda on the free movement of CEPGL nationals [l'Accord du 26 juillet 2011 sur l'amendement de l'Arrangement du 7 décembre 1980 entre le Gouvernement de la République du Burundi, le Gouvernement de la République Rwandaise et le Gouvernement de la République du Zaïre relatif à la libre circulation des fonctionnaires et des hommes d'affaires au sein de la Communauté économique des pays des Grands Lacs (Journal Officiel de la République du Zaïre, 15 juin 1982, n° 12, p. 17, Bureau du Président de la République: Kinshasa)].

Basic Act of 17 June 1960 relating to public liberties [Loi Fondamentale relative aux libertés publiques du 17 juin 1960, in *Moniteur congolais* (24 juin 1960) 390-394].

Circular letter No. 12/D.T.P.S./CAB/0730/105/83 of 13 August 1983 on the protection of the national labour force (in case of nationals of African countries that became independent after 6 June 1974) [Lettre circulaire n° 12/D.T.P.S./CAB/0730/105/83 du 13 août 1983 sur protection de la main-d'œuvre nationale (cas des ressortissants d'États africains devenus indépendants après la date du 6 juin 1974) (Ministère du Travail et de la Prévoyance sociale)].

Circular Letter No. RDC/GC/PM/1077/2010 of 18 November 2010 concerning the treatment to be granted to nationals of neighbouring countries and refugees in respect of employment. [Lettre circulaire n° RDC/GC/PM/1077/2010 of 18 novembre 2010 relative au traitement de ressortissants des pays limitrophes et des réfugiés en matière de travail (*Recueil des modalités d'application du Code du travail*, 30 septembre 2013, p. 252)].

Circular Note No. 22/METPS/SGET/CPEF/710/010 of 8 September 2010 issued by the Permanent Secretary for Employment and Labour [Note circulaire n° 22/METPS/SGET/CPEF/710/010 du 8 septembre 2010 de la Secrétaire générale de l'emploi et du travail].

Circular Note No. 004/CAB/MINETAT/METPS/01/2020 of 22 July 2020 relating to the reminder of regulatory instructions concerning the employment of foreign nationals in companies and businesses of all kinds [Note circulaire n° 004/CAB/MINETAT/METPS/01/2020 du 22 juillet 2020 relative au rappel des instructions réglementaires sur le travail des étrangers dans les entreprises et établissements de toute nature].

Circular Note No. CAB/MIN/ETPS/MBL/MMG/dag/2014 of 26 May 2014 relating to the breakdown of revenues from the work permit for foreigners [Note circulaire n° CAB/MIN/ETPS/MBL/MMG/dag/2014 du 26 mai 2014 relative à la répartition des recettes issues de la carte de travail pour étranger (*Ministère de l'Emploi, du Travail et de la Prévoyance sociale*)].

Circular Note No. 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 of 26 February 2022 relating to the procedure for acquiring the new biometric work permit for foreign national [Note circulaire n° 004 CAB/MIN/ETPS/CNM/MKH/JBL/2022 du 26 février 2022 relative à la procédure d'acquisition de la nouvelle carte biométrique de travail pour étranger (*Ministère de l'Emploi, Travail et Prévoyance sociale*)].

Constitution of the DRC (as amended by Act No. 11/002 of 20 January 2011 amending some Articles of the Constitution of the DRC of 18 February 2006) [Constitution de la RDC modifiée par la Loi n° 11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la RDC du 18 février 2006' Journal Officiel de la RDC, n° Spécial - 52ème Année, Cabinet du Président de la République - Kinshasa - 5 février 2011.]

Constitution of the Democratic Republic of Congo of 24 June 1967 [*Constitution de la République Démocratique du Congo du 24 Juin 1967*, Journal officiel de la République (8e année), n°14 du 15 juillet 1967, Cabinet du Président de la République – Kinshasa, pp. 564-576)].

Constitution of the Republic of Zaire updated on 27 June 1988, now repealed [Constitution de la République du Zaïre mise à jour le 27 juin 1988, abrogée (Journal officiel de la République du Zaïre, n° 1 du 1^{er} janvier 1983, Cabinet du Président de la République – Kinshasa)].

Decision No. 06/DGM/064/019 of 16 February 2019 granting an entry visa to foreigners of Congolese origin (Directorate General of Migration) [Décision n°

06/DGM/064/019 du 16 février 2019 portant octroi d'un visa d'entrée aux étrangers d'origine congolaise (Direction générale des migrations)].

Decree of 30 July 1888 relating to contracts or contractual obligations as amended to date (Civil Code of Obligations, volume III) [Décret du 30 juillet 1888 portant réglementation des contrats ou des obligations conventionnelles tel que modifié à ce jour (B.O., 1888, p. 109)].

Decree No. 0030 of 14 August 1995 establishing the work permit for foreigners for the artisanal mining sector [Décret n° 0030 du 14 août 1995 portant institution de la carte de travail d'étranger du secteur minier artisanal (Ministère des Mines)].

Decree No. 038/2003 of 26 March 2003 pertaining to Mining Regulations as amended and supplemented by Decree No. 18/024 of 8 June 2018 [Décret n° 038/2003 du 26 mars 2003 portant Règlement minier tel que modifié et complété par le décret n° 18/024 du 8 juin 2018 [(Journal officiel de la RDC, 59^{ème} Année, n° special, 12 juin 2018, p. 5, Cabinet du Président de la République – Kinshasa)].

Decree No. 03/014 of 5 August 2003 governing the organisation and functioning of the National Committee for Refugees and Appeal Board [Décret n° 03/014 du 5 août 2003 portant organisation et fonctionnement de la Commission nationale pour les réfugiés et de la Commission des recours [(Journal officiel de la RDC, 44^{ème} Année, n° 16, Première partie - 15 août 2003, col. 4, Cabinet du Président de la République – Kinshasa)].

Decree No. 06/096 of 24 May 2006 laying down implementing measures for Act No. 04/024 of 12 November 2004 regulating Congolese citizenship [Décret n° 06/096 du 24 mai 2006 portant mesures d'exécution de la loi n° 04-024 du 12 novembre 2004 relative à la nationalité congolaise [(Journal officiel de la RDC, 47^{ème} Année, 1^{er} juin 2006, n° 11, col. 14, Cabinet du Président de la République – Kinshasa)].

Decree No. 09/55 of 3 December 2009 establishing the statutes of a public institution known as the National Institute for Vocational Training, abbreviated as "INPP") [Décret n° 09/55 du 3 décembre 2009 fixant les statuts d'un établissement public dénommé Institut national de préparation

professionnelle en sigle « INPP » (Journal officiel de la RDC, 50^{ème} Année, 10 décembre 2009, n° spécial, p. 133)].

Decree No. 012/003 of 19 January 2012 laying down the Charter of a state-owned entity known as “National Employment Agency,” abbreviated as “Onem” [Décret n° 012/003 du 19 janvier 2012 fixant les statuts d’un établissement public dénommé « Office national de l’emploi », « Onem », en sigle (Journal officiel de la RDC, 53^{ème} année - n° 4, col. 20, Première partie – 15 février 2012, Cabinet du Président de la République – Kinshasa)].

Decree No. 18/027 of 14 July 2018 governing the creation, organisation and functioning of a state-owned institution known as the National Social Security Fund, abbreviated as “CNSS” [Décret n° 18/027 du 14 juillet 2018 portant création, organisation et fonctionnement d’un établissement public dénommé Caisse nationale de sécurité sociale, en sigle « CNSS » (Journal officiel de la RDC, 59^e Année, n° special, 5 décembre 2018, col. 45, Cabinet du Président de la République – Kinshasa)].

Decree No. 17/008 of 21 August 2017 establishing the specific chart of accounts for the insurance sector [Décret n° 17/008 du 21 août 2017 portant fixation du plan comptable spécifique du secteur des assurances (Journal officiel de la RDC, 58^e Année, 1^{er} septembre 2017, n° 17, col. 11, Cabinet du Président de la République – Kinshasa)].

Decree No. 18/040 of 24 November 2018 approving the national employment and vocational training policy, abbreviated as PNEFP [(Décret n° 18/040 du 24 novembre 2018 portant approbation de la politique nationale de l’emploi et de la formation professionnelle, en sigle PNEFP (Journal officiel de la RDC, 60^e Année, n° 2, 15 janvier 2019, col. 9, Cabinet du Président de la République – Kinshasa)].

Departmental Order No. 87/005 of 21 January 1987 determining terms & conditions for hiring expatriates [Arrêté départemental n° 87/005 du 21 janvier 1987 déterminant les conditions d’engagement des expatriés (J.O.Z., 15 mars 1987, n° 6, p. 40)].

Departmental Order No. 86/001 of 31 March 1986 determining the list of jobs prohibited to foreigners [Arrêté départemental n° 86/001 du 31 mars 1986

déterminant la liste des emplois interdits aux étrangers (J.O.Z., 1^{er} avril 1987, n° 7, p. 36)].

Departmental Order No. 067/81 of 5 November 1981 regulating the transfer of [Congolese] labour abroad [Arrêté départemental n° 067/81 du 5 novembre 1981 réglementant le transfert à l'étranger de la main-d'œuvre zaïroise (J.O.Z., 1^{er} janvier 1982, n° 1, p. 15)].

Departmental Order No. 81/014 of 23 February 1981 amending and superseding Order No. 07/74 of 12 July 1974 pertaining to standing orders of the National Committee in charge of the Employment of Foreign Nationals [Arrêté départemental n° 81/014 du 23 février 1981 modifiant et remplaçant l'arrêté 07/74 du 12 juillet 1974 portant règlement intérieur de la commission nationale de l'emploi des étrangers (J.O.Z., 1^{er} mars 1981, n° 5, p. 45)].

Departmental Order No. 78/0036 of 17 June 1978 regulating the export of Congolese labour [Arrêté départemental n° 78/0036 du 17 juin 1978 réglementant l'exportation de la main d'œuvre zaïroise].

Directive No. 056/93 of 10 November 1993 relating to the processing of applications for the work permit for foreigners. [Instruction n° 056/93 sur 10 novembre 1993 relative au Traitement des dossiers de demande de la carte de travail pour étrangers (Ministère du Travail et de la Prévoyance sociale)].

Document No 36/CR/026/18. Official record of the (Permanent DRC Law Reform Commission's) meeting held on Thursday, 16 November 1978.

Institutional Act No. 13-011-B of 11 April 2013 governing the organisation, functioning and competence of courts of the judicial order. [Loi organique n° 13-011-B du 11 avril 2013 portant organisation, fonctionnement et compétences des juridictions de l'ordre judiciaire (Journal officiel de la RDC, 54^{ème} année, Première partie, n° spécial, 4 mai 2013, col. 1, Cabinet du Président de la République – Kinshasa)].

Institutional Act No. 16-027 of 15 October 2016 governing the organisation, competence and functioning of administrative courts. [Loi organique n° 16-027 du 15 octobre 2016 portant organisation, compétence et fonctionnement des juridictions de l'ordre administratif (Journal officiel de la RDC, 57^{ème} année, Première partie, n° spécial, 18 octobre 2016, col. 1, Cabinet du Président de la République – Kinshasa)].

Institutional legislative Decree of 29 June 1961 pertaining to social security.

[Décret-loi du 29 juin 1961 organique de la sécurité sociale].

Interministerial Order No. 032 of 10 March 1994 setting out tax on the work permits for foreign nationals [Arrêté interministériel n° 032 du 10 mars 1994 portant fixation de la taxe sur la carte du travail des étrangers (Ministère du Travail et de la Prévoyance sociale)].

Interministerial Order No. 005/CAB/MIN/ETPS/06/2022 and 048/CAB/MIN/FINANCES/2022 of 2 August 2022 amending and supplementing Interministerial Order No. 001/CAB/MINETAT/METPS/2019 and CAB/MIN/FINANCES/2019/138 of 28 November 2019 determining rates, taxes, and royalties to be collected at the initiative of Ministry of Employment, Labour and Social Welfare [Arrêté interministériel n° 005/CAB/MIN/ETPS/06/2022 et 048/CAB/MIN/FINANCES/2022 du 2 août 2022 modifiant et complétant l'arrêté interministériel 001/CAB/MINETAT/METPS/2019 et CAB/MIN/FINANCES/2019/138 du 28 novembre 2019 portant fixation des taux des droits, taxes et redevances à percevoir à l'initiative du ministère de l'Emploi, Travail et Prévoyance sociale (Journal officiel de la RDC, 63^{ème} année - Première partie – 15 septembre 2022, n° 18, col. 25, Cabinet du Président de la République – Kinshasa)].

Legislative Order No. 68/1 of 2 January 1968 authorising accession to the Protocol relating to the Status of Refugees, done at New York on 31 January 1967, with subsequent amendments [Ordonnance-loi n° 68/1 du 2 janvier 1968 autorisant l'adhésion au Protocole relatif au statut des réfugiés, signé à New York le 31 janvier 1967 avec amendements subséquents (M.C., n° 2 du 15 janvier 1968, 9^e année, 1^{ère} partie – Kinshasa, p. 102)].

Legislative Decree of 1 February 1961 governing employment contracts [Décret-loi du 1er février 1961 sur le contrat de louage de services (Moniteur Congolais, II, 9, 28 mars 1961)].

Legislative Decree No. 002-2003 of 11 January 2003 establishing and organising the Directorate General for Migration [Décret-loi n° 002-2003 du 11 janvier 2003 portant création et organisation de la Direction générale de migration (Président de la République)].

- Legislative Order No. 206 of 29 June 1964 establishing the National Institute for Vocational Training* [Ordonnance-loi n° 206 du 29 juin 1964 portant création de l'Institut National de Préparation Professionnelle, « INPP »].
- Legislative Order No. 66-260 of 21 April 1966 subjecting the registration of foreigners, foreign companies, and certain Congolese companies in the Trade Register to financial securities.* [Ordonnance-loi n° 66-260 du 21 avril 1966 subordonnant à des garanties financières l'immatriculation au registre du commerce des étrangers, des sociétés étrangères et de certaines sociétés congolaises, in *Moniteur congolais* (1966) p. 243].
- Legislative Order No. 69-007 of 10 February 1969 concerning exceptional tax on wages paid by employers to their expatriate staff.* [Ordonnance-loi n° 69-007 du 10 février 1969 relative à l'impôt exceptionnel sur les rémunérations versées par les employeurs à leur personnel expatrié (Journal Officiel de la République du Zaïre, 15 janvier 1972, n° 2, p. 52, Bureau du Président de la République : Kinshasa)].
- Legislative Order No. 82-020 of 31 March 1982 enacting the Code of organisation and jurisdiction of courts.* [Ordonnance-loi n° 82-020 du 31 mars 1982 portant Code de l'organisation et de la compétence judiciaires (Journal Officiel de la République du Zaïre, 23^{ème} année, 1^{er} avril 1982, n° 7, p. 39, Bureau du Président de la République : Kinshasa)].
- Legislative Order No. 83-033 of 12 September 1983 concerning immigration control* [Ordonnance-loi n° 83-033 du 12 septembre 1983 relative à la police des étrangers. (J.O.Z., 15 septembre 1983, n° 18, p. 15)].
- Ministerial Order No. 68/13 of 17 May 1968 determining the conditions of work of women and children (Moniteur Congolais, 1968) [LS 1968-Congo (Kin.) 2] [(Arrêté ministériel No. 68/13 du 17 mai 1968 fixant les conditions de travail des femmes et enfants. Code du Travail - Mesures d'application, Ministère du Travail et de la Prévoyance sociale, Kinshasa, col. 16)].*
- Ministerial Order No. 082/CAB/MIN/ECO-FIN&BUD/2002 of 26 February 2002* [Arrêté ministériel n° 082/CAB/MIN/ECO-FIN&BUD/2002 du 26 février 2002].
- Ministerial Order No. 12/CAB.MIN/TPS/ar/kf/0100/03 of 27 June 2003 amending Departmental Order No. 78/001 of 12 January 1978 pertaining to the*

composition of the National Committee in charge of the Employment of Foreign Nationals [Arrêté ministériel n° 12/CAB.MIN/TPS/ar/kf/0100/03 du 27 juin 2003 modifiant l'arrêté départemental 78/001 du 12 janvier 1978 portant composition de la commission nationale de l'emploi des étrangers (Recueil des modalités d'application du Code du travail, 30 septembre 2013, p. 246)].

Ministerial Order No. 12/CAB.MIN/TPS/112/2005 of 26 October 2005 laying down authorised maximum quotas of foreign workers in companies [Arrêté ministériel n° 12/CAB.MIN/TPS/112/2005 du 26 octobre 2005 fixant les pourcentages maxima autorisés des travailleurs étrangers au sein des entreprises (Journal officiel de la RDC, 46^{ème} année - n° 23, col. 51, Première partie – 5 décembre 2005, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 261/CAB/MIN/J/2006 of 4 July 2006 laying down implementing measures for Act No. 04/024 of 12 November 2004 regulating Congolese citizenship [Arrêté ministériel n° 261/CAB/MIN/J/2006 du 4 juillet 2006 portant certaines mesures d'exécution de la loi n° 04/024 du 12 novembre 2004 relative à la nationalité congolaise (Journal officiel de la RDC, 48^{ème} année - n° 3, col. 13, Première partie – 1^{er} février 2007, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 12/CAB.MIN.ETPS/044/2008 of 8 August 2008 laying down the terms and conditions for the placing of workers [Arrêté ministériel n° 12/CAB.MIN.ETPS/044/2008 du 8 août 2008 fixant les modalités de placement des travailleurs (Journal officiel de la RDC, 49^{ème} année - n° 16, col. 22, Première partie – 15 août 2008, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 12/CAB.MIN/ETPS/080/2008 of 19 September 2008 establishing the list of jobs reserved exclusively for Congolese citizens [Arrêté ministériel n° 12/CAB.MIN/ETPS/080/2008 du 19 septembre 2008 fixant la liste des emplois réservés exclusivement aux congolais (*Ministère de l'Emploi, Travail et Prévoyance sociale*)].

Ministerial Order No. 006/CAB/PVPM/ETPS/2010 of 01 April 2010 laying down the procedures for declaring a worker's hiring and departure [Arrêté ministériel n°

006/CAB/PVPM/ETPS/2010 du 1^{er} avril 2010 fixant les modalités de déclaration d'embauche et de départ d'un travailleur (Journal officiel de la RDC, 51^{ème} année - n° 16, col. 20, Première partie – 15 août 2010, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 0043/CAB/PVPM/ETPS/2010 of 9 October 2010 granting a special exemption on maximum percentages of foreign workers authorised to work in the company referred to as West Sodimico Sprl 'WESO' [Arrêté ministériel n° 0043/CAB/PVPM/ETPS/2010 du 09 octobre 2010 accordant une dérogation spéciale concernant les pourcentages maxima autorisés des travailleurs étrangers au sein de la Société West Sodimico Sprl « WESO » (Journal officiel de la RDC, 52^{ème} année - n° 11, col. 18, Première partie – 1^{er} juin 2011, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 0044/CAB/PVPM/ETPS/2010 of 9 October 2010 granting a special exemption on maximum percentages of foreign workers authorised to work in the company referred to as Congo Dong Fang International Mining 'CDM Sprl'. [Arrêté ministériel n° 0044/CAB/PVPM/ETPS/2010 du 09 octobre 2010 accordant une dérogation spéciale concernant les pourcentages maxima autorisés des travailleurs étrangers au sein de la société Congo Dong Fang International Mining « CDM Sprl » (Journal officiel de la RDC, 52^{ème} année - n° 11, col. 19, Première partie – 1^{er} juin 2011, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 0045/CAB/PVPM/ETPS/2010 of 9 October 2010 granting a special exemption on maximum percentages of foreign workers authorised to work in the company referred to as Compagnie Minière de Musonoï Sprl 'COMMUS'. [Arrêté ministériel n° 0045/CAB/PVPM/ETPS/2010 du 09 octobre 2010 accordant une dérogation spéciale concernant les pourcentages maxima autorisés des travailleurs étrangers au sein de la société Compagnie Minière de Musonoï Sprl « COMMUS » (Journal officiel de la RDC, 52^{ème} année - n° 11, col. 21, Première partie – 1^{er} juin 2011, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 0046/CA/PVPM/ETPS/2010 of 9 October 2010 granting a special exemption on maximum percentages of foreign workers authorised to work in the company referred to as Minière de Kasombo Sprl 'MIKAS' [Arrêté

ministériel n° 0046/CA/PVPM/ETPS/2010 du 09 octobre 2010 accordant une dérogation spéciale concernant les pourcentages maxima autorisés des travailleurs étrangers au sein de la Société Minière de Kasombo Sprl « MIKAS » (Journal officiel de la RDC, 52^{ème} année - n° 11, col. 22, Première partie – 1^{er} juin 2011, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 25/CAB/MININTERSEDAC/025/2012 of 7 August 2012 pertaining to the internal rules of procedure of the Appeals Board [Arrêté ministériel n° 25/CAB/MININTERSEDAC/025/2012 du 7 août 2012 portant règlement intérieur de la commission des recours (Journal officiel de la RDC, 53^{ème} année - n° 18, col. 29, Première partie – 15 septembre 2012, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 of 21 October 2014 laying down the procedures for the functioning of the National Committee in charge of the Employment of Foreign Nationals [Arrêté ministériel n° 168/CAB/MIN/ETPS/MBL/SGET/dag/2014 du 21 octobre 2014 fixant les modalités de fonctionnement de la Commission nationale de l'emploi des étrangers (Journal officiel de la RDC, 55^{ème} année - 1^{er} novembre 2014, n° 21, col. 31, Cabinet du Président de la République – Kinshasa)].

Ministerial Order No. 003/CAB/MIN/CA/DIRA/SA/2016 of 11 February 2016 organising archival activity and profession in the Democratic Republic of Congo [Arrêté ministériel n° 003/CAB/MIN/CA/DIRA/SA/2016 du 11 février 2016 portant organisation de l'activité et de la profession archivistique en République démocratique du Congo (Journal officiel de la RDC, 59^{ème} année - 1^{er} mai 2018, n° 9, col. 103, Cabinet du Président de la République – Kinshasa)].

Ordinance No. 87-281 of 13 August 1987 laying down implementing measures of Legislative Order No. 83-033 of 12 September 1983 concerning immigration control [Ordonnance n° 87-281 du 13 août 1987 portant mesures d'exécution de l'ordonnance-loi 83-033 du 12 septembre 1983 relative à la police des étrangers (J.O.Z., 1^{er} septembre 1987, n° 17, p. 7)].

- Ordinance No. 71-055 of 26 March 1971 organising vocational training* [Ordonnance n° 71-055 du 26 mars 1971 portant organisation de la formation professionnelle (*Moniteur Congolais*, 15 mai 1971, n° 10, p. 416)].
- Ordinance No. 74-098 of 6 June 1974 protecting the national labour force against foreign competition as revised by Ordinance No. 75-304 bis of 26 November 1975 protecting the national labour force* [Ordonnance 74-098 du 6 juin 1974 révisée par l'ordonnance 75-304 bis du 26 novembre 1975 portant protection de la main d'œuvre nationale (*Présidence de la République*)].
- Ordinance No. 20/017 of 27 March 2020 laying down the powers of the ministries* [Ordonnance n° 20/017 du 27 mars 2020 fixant les attributions des ministères (Journal officiel de la RDC, 61^{ème} année – Première partie - n° spéciale du 27 avril 2020, col. 25, Cabinet du Président de la République – Kinshasa)].
- Ordinance No. 22-002 of 7 January 2022 governing the organisation and functioning of the Government, terms of collaboration between the President of the Republic and the Government as well as between the members of the Government* [Ordonnance n° 22-002 du 7 janvier 2022 portant organisation et fonctionnement du Gouvernement, modalités de collaboration entre le président de la République et le Gouvernement ainsi qu'entre les membres du Gouvernement (Journal officiel de la RDC, 63^{ème} année – Première partie - n° spéciale du 19 janvier 2022, col. 1, Cabinet du Président de la République – Kinshasa)].
- Ordinance No. 22-003 of 7 January 2022 laying down the powers of the ministries* [Ordonnance n° 22-003 du 7 janvier 2022 fixant les attributions des ministères (Journal officiel de la RDC, 63^{ème} année – Première partie - n° spéciale du 19 janvier 2022, col. 29, Cabinet du Président de la République – Kinshasa)].
- Ordinance No. 15/051 of 14 July 2015 appointing provincial directors and deputy provincial directors within the Directorate General of Migration, abbreviated as "DGM"* [Ordonnance n°15/051 du 14 juillet 2015 portant nomination des Directeurs provinciaux et des Directeurs provinciaux adjoints au sein de la Direction Générale de Migration, en sigle « DGM »].

Uniform Act of 26 January 2017 relating to Accounting Law and Financial Reporting and the new OHADA accounting system [Acte uniforme du 26 janvier 2017 relatif au droit comptable et à l'information financière et système comptable Ohada (Syscohada) (Journal officiel de la RDC, 58^{ème} année, Première partie – 15 février 2017, n° spécial, p. 10, Cabinet du Président de la République – Kinshasa)].

11.2.2.1.2 Statutes of South Africa

Act Natives (Urban Areas) Consolidation Act, 1945 [Act No. 25 of 1945].

Basic Conditions of Employment Act, 1997 [Act No. 75 of 1997].

Basic Conditions of Employment Amendment Act, 2002 [Act No. 11 of 2002].

Businesses Act, 1991 [Act No. 71 of 1991].

Commission on Gender Equality Act, 1996 [Act No. 39 of 1996].

Compensation for Occupational Injuries and Diseases Act, 1993 [Act No. 130 of 1993].

Constitution of the Republic of South Africa, 1996.

Department of Bantu Administration & Development General Circular No. 32 of 1966.

Diplomatic Immunities and Privileges Act, 2001 [Act No. 37 of 2001].

Diplomatic Immunities and Privileges Amendment, 2008 [Act No. 35 of 2008].

Educators' Employment Act, 1994 [Act No. 138 of 1994].

Employment Equity Act, 1998 [Act No. 55 of 1998] (hereinafter 'EEA').

Employment Services Act, 2014 [Act No. 4 of 2014] [hereinafter 'ESA'].

Employment Services Amendment Bill, 2021, as introduced in the National Assembly (proposed section 75); explanatory summary of Bill published in Government Gazette No. 45962 of 28 February 2022).

Gauteng Township Economic Development Bill [B – 2020] (Extraordinary Provincial Gazette No. 198 of the Province of Gauteng, vol. 27 of 17 June 2021).

Higher Education Laws Amendment, 2010 [Act No. 26 of 2010].

Immigration Act, 2002 [Act No. 13 of 2002].

Immigration Amendment Act, 2011 [Act No. 13 of 2011].

Immigration Amendment Act, 2007 [Act No. 3 of 2007].

Immigration Amendment Act, 2004 [Act No. 19 of 2004].

Immigration Regulations (DHA- Form 48) in Government Gazette No. 37679, 22 May 2014, Vol 587 No. 10199, p. 266.

Income Tax Act, 1962 [Act No. 58 of 1962].

Joint Initiative for Priority Skills Acquisition (JIPSA) launched in March 2006 to identify solutions to major skills shortages constraining South Africa's ability to meet the economic growth objectives contained in the Accelerated and Shared Growth Initiative for South Africa (AsgiSA). <https://hrdcsa.org.za/2-jipsa-artisan-report-final-october-2009/> (Date of use: 23 October 2021).

Kaffir Employment Act, 1857 [Act No. 24 of 1857] as repealed by Act No. 17 of 26 July 1864.

Kaffir Employment Act, 1857 [Act No.27 of 1857].

Kaffir Pass Act, 1857 [Act No. 23 of 1857].

Labour Relations Act, 1995 [Act No. 66 of 1995].

Manpower Training Act, 1981 [Act No. 56 of 1981].

Ministerial Regulations regarding the Terms and Conditions of Employment of Educators (GN R1743 of 13 November 1995) published in Government Gazette No. 16814 dated 13 November 1995.

National Qualifications Framework Act, 2008 [Act No. 67 of 2008].

National Minimum Wage Act, 2018 [Act No. 9 of 2018].

Occupational Diseases in Mines and Works Act, 1973 [Act No. 78 of 1973].

Occupational Health and Safety Act, 1993 [Act No. 85 of 1993].

Promotion of Equality and Prevention of Unfair and Discrimination Act, 2000 (Act No. 4 of 2000) [hereinafter 'Equality Act'].)

Protected Disclosures Act, 2000 [Act No. 26 of 2000].

Public Service Amendment Act, 2007 [No. 30 of 2007].

Refugees Act, 1998 (Act No. 130 of 1998).

Regulations to the Refugees Act, 1998 (Act No. 130 of 1998) (No. 42932 Government Gazette, 27 December 2019).

Road Accident Fund Act, 1996 [Act No. 56 of 1996].

Skills Development Levies Act, 1999 [Act No. 9 of 1999] [hereinafter 'SDLA'].)

Skills Development Act, 1998 [Act No. 97 of 1998] [hereinafter 'SDA'].)

Skills Development Amendment Act, 2003 [Act No. 31 of 2003].

Skills Development Amendment Act, 2009 [Act No. 37 of 2008].

South African Citizenship Amendment Act, 2010 [Act No. 17 of 2010].

South African Law Reform Commission Act, 1973 (Act 19 of 1973).

South African Qualifications Authority Act, 1995 [Act No. 58 of 1995].

South African Law Reform Commission Act (previously South African Law Commission Act) 19 of 1973 (Act No. 19 of 1973) as amended to date.

Unemployment Insurance Act, 2001 [Act No. 63 of 2001] [hereinafter 'UIA'].

Unemployment Insurance Contributions, 2002 [Act No.4 of 2002] [hereinafter 'UICA'].

11.2.2.1.3 Statutes of Rwanda

Act No. 57/2018 of 13 August 2018 on immigration and emigration in Rwanda (Official Gazette No. Special of 20 September 2018).

11.2.2.1.4 Statutes of the Republic of the Congo (Congo Brazzaville)

Act No. 29-2017 of 7 August 2017 amending and supplementing certain provisions of Act No. 23-96 of 6 June 1996 laying down the conditions for the entry, stay and exit of foreigners in the Republic of Congo [Loi n° 29-2017 du 7 août 2017 modifiant et complétant certaines dispositions de la loi n° 23-96 du 6 juin 1996 fixant les conditions d'entrée, de séjour et de sortie des étrangers en République du Congo (Journal Officiel de la République du Congo, 21 septembre 2017, p. 1207)].

11.2.2.1.5 Statutes of Slovenia

Act on Protection of Workers Temporarily Employed Abroad (1980).

11.2.2.1.6 Statutes of Germany

Basic Law for the Federal Republic of Germany, promulgated by the Parliamentary Council on 23 May 1949 as amended up to June 2008 (published by

German Bundestag – Administration – Public Relations Division Berlin, 2008).

11.2.2.2 International Treaties and Conventions

African Union, *African Youth Charter*, 2 July 2006.

African Charter on Human and Peoples' Rights, 27 June 1981, entered into force 21 October 1986, OAU Doc. CAB/LEG/67/3 rev. 5; 1520 UNTS 217; 21 ILM 58 (1982).

African Charter on Democracy, Elections and Governance (2007/2012) [adopted in Addis Ababa, Ethiopia, on 30 January 2007 and entered into force on 15 February 2012].

African Union *Executive Council African Common Position on Migration and Development* (Ninth Ordinary Session 25 – 29 June 2006, Banjul, the Gambia [Doc. EX.CL/277 (IX) Assembly/AU/JUN. 2006] African Union Addis Ababa).

African Union *Migration Policy Framework for Africa*, EX.CL/276 (IX), adopted in the Ninth Ordinary Session of the Executive Council of the AU, Banjul, The Gambia (25–29 June 2006).

African Union Commission *The Migration Policy Framework for Africa (MPFA) and plan of action (2018 – 2030)* (AU Department for Social Affairs, Addis Ababa 2018). https://au.int/sites/default/files/documents/35956-doc-au-mpfa_2018-eng.pdf (Date of use: 14 April 2022).

Charter of the Fundamental Social Rights in SADC of 2003, signed at Dar-es-Salaam on 01 August 2003.

Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, entered into force Oct. 24, 1945.

Commission de l'Union africaine, *Cadre de politique migratoire pour l'Afrique révisé et plan d'Action (2018 – 2030)* (Commission de l'Union africaine /Département des Affaires sociales : Addis Abeba 2018).

Common Market for Eastern and Southern Africa (COMESA) Protocol on Free Movement of Persons, Labour, Services, the Right of Establishment and Residence (adopted at Kinshasa, DRC on 29 June 1998).

Conseil exécutif de l'Union africaine, *Décision sur la Position africaine commune relative à la Migration et au développement* – Doc.EX.CL/277(IX) Neuvième session ordinaire 25 – 29 juin 2006, Banjul (GAMBIE), UA Addis Ababa.

Convention concerning the Abolition of Forced Labour (No. 105), opened for signature 25 June 1957, 320 UNTS 291, entered into force 17 January 1959.

Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No. 98), opened for signature 1 July 1949, 96 UNTS 257, entered into force 18 July 1951.

Convention concerning Discrimination in respect of Employment and Occupation Convention (No. 111), opened for signature 25 June 1958, 362 UNTS 31, entered into force 15 June 1960.

Convention concerning Forced or Compulsory Labour (ILO No. 29), 39 U.N.T.S. 55, entered into force 1 May 1932.

Convention concerning Migration for Employment, 1 July 1949, I.L.O. No. 97, 120 U.N.T.S. 70 [hereinafter Migration for Employment Convention (Revised)], (entered into force 22 January 1952).

Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 24 June 1975, I.L.O. No. 143, 1120 U.N.T.S. 323, (entered into force 09 December 1978).

Convention concerning Minimum Age for Admission to Employment (No. 138), opened for signature 26 June 1973, 1015 UNTS 297, entered into force 19 June 1976.

Convention Concerning Private Employment Agencies (No. 181), opened for signature 19 June 1997, 2115 U.N.T.S. 249, entered into force 19 Jun 1997.

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), opened for signature 17 June 1999, 38 ILM 1207, entered into force 19 November 2000.

Convention concerning Tripartite Consultations to Promote the Implementation of International Labour Standards, opened for signature 21 June 1976, entered into force 16 May 1978, (1976) 15 ILM 1076 226.

Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 U.N.T.S. 45, entered into force 20 June 1974.

Convention on the Elimination of All Forms of Discrimination Against Women, Sept. 3, 1981, G.A. Res. 34/180, U.N. GAOR Supp. No. 46 at 193, art. 12, U.N. Doc. A/34/46, 1249 U.N.T.S. 13, 19 I.L.M. 33 (1980).

Convention on the Privileges and Immunities of the Specialised Agencies of the United Nations, done at New York, Nov. 21, 1947, entered into force Dec. 2, 1948, 33 U.N.T.S. 261.

Convention on the Rights of the Child (New York, 20 November 1989), 1577 U.N.T.S. 3, 28 I.L.M. 1456 (1989), G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), (entered into force Sept. 2 1990).

Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, reprinted in 19 U.S.T. 6259, T.I.A.S. No. 6577, updated by *1967 Protocol Relating to the Status of Refugees*, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267.

Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live [G.A. res. 40/144, annex, 40 U.N. GAOR Supp. (No. 53) at 252, U.N. Doc. A/40/53 (1985)].

East African Community Common Market, adopted in 2009 and entered into force on 1 July 2010.

Employment Policy Convention, No. 122, adopted July 9, 1964, 569 U.N.T.S. 65, entered into force July 9, 1965.

Equal Remuneration Convention (No. 100), opened for signature 29 July 1951, 165 UNTS 303, entered into force 23 May 1953.

Freedom of Association and Protection of the Right to Organise Convention (ILO No. 87), 68 U.N.T.S. 17, entered into force July 4, 1950.

General Act of the Conference of Berlin Concerning the Congo, signed at Berlin, 26 February 1885.

General Agreement on Trade in Services, opened for signature 15 April 1994, 1869 U.N.T.S. 183 Art XVII (entered into force 1 January 1995).

General Convention on the Privileges and Immunities of the United Nations, 1 U.N.T.S. 15, 13 February 1946, entered into force Sept. 17, 1946.

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998.

International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, G.A. res. 2106 (XX), Annex, 20 U.N. GAOR Supp. No. 14 at 47, art. 5(e)(iv), U.N. Doc. A/6014 (1966).

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force 1 July 2003*.

International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities, G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006), *entered into force May 3, 2008*.

International Covenant on Civil and Political Rights, Apr. 2, 1992, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 6 I.L.M. 368 (1967) (entered into force Mar. 23, 1976).

International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 6 I.L.M. 368 (1967) (entered into force Jan. 3, 1976).

Labour Inspection Convention, 1947 (ILO No. 81), opened for signature 11 July 1947, 54 U.N.T.S. 3, *entered into force 7 April 1950* [hereinafter 'C081'].

Labour Inspection (Agriculture) Convention, 1969 (No. 129) (adopted 25 June 1969, *entered into force 19 January 1972*) 812 UNTS 87.

Labour Migration Action Plan (2020-2025), adopted by the Southern African Development Community (SADC) in 2020.

Maternity Protection Convention, 2000 (No. 183) (adopted 15 June 2000, I.L.O. No. 183, 40 I.L.M. 2 (entered into force 7 February 2002) 2181 UNTS 253.

Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime, G.A. Res. 55/25, annex III, U.N. GAOR, 55th Sess., Supp. No. 49, at 65, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force Jan. 28, 2004*.

Protocol Relating to the Status of Refugees, done Jan. 31, 1967, G.A. Res 2198, 21 U.N. GAOR Supp. (No. 16) at 48, U.N. Doc. A/6316 (1966), 606 U.N.T.S. 267, entered into force 4 October 1967.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, G.A. Res. 25, annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/55/49 (Vol. I) (2001), entered into force Dec. 25, 2003.

Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, adopted in Kinshasa, June 29, 1998.

Protocol on Trade in the SADC Region (1996), as amended in 2010.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd Ordinary Session of the Assembly of the Union, Maputo, CAB/LEG/66.6 (Sept. 13, 2000); reprinted in 1 Afr. Hum. Rts. L.J. 40, entered into force 25 November 2005.

Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment, adopted by the 30th Ordinary Session of the Assembly, held in Addis Ababa, Ethiopia on 29 January 2018.

Recommendation No. 86 concerning Migration for Employment (Revised 1949), adopted July 1, 1949, reproduced in 1 *International Labour Conventions and Recommendation 508*.

Recommendation No. 151 concerning Migrant Workers (1975), Geneva, 60th ILC session (24 Jun 1975).

Regional Strategy to Combat Illegal Migration, Smuggling of Migrants and Trafficking in Persons (2016-2020).

Revised OHADA General Accounting Plan (PCGO) of the OHADA Accounting System (SYSCOHADA), applicable as of 1 January 2018.

SADC Guidelines on Coordinated Border Management (2011).

SADC Protocol on Employment and Labour signed at Victoria Falls, Republic of Zimbabwe on 18 August 2014 (Doc SADC/MJ/3/2014/9).

SADC Protocol on Gender and Development as revised on 23 June 2016 in Gaborone, Botswana.

SADC Protocol on the Facilitation of Movement of Persons (signed in Gaborone, Botswana 18 August 2005).

SADC Protocol on Gender and Development (as revised on 23 June 2016 at Gaborone, Botswana).

SADC Protocol on Trade in Services (PTIS) of 2012, signed 18 August 2012.

SADC Regional Policy Framework on the Management of Refugees and Asylum-Seekers adopted in 2019.

SADC-United Nations High Commissioner for Refugees Action Plan (UNHCR) (2020-2024).

Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926, 60 L.N.T.S. 253, *entered into force* 9 March 1927.

Southern African Development Community (SADC) *SADC Labour Migration Policy* (SADC/ELSJTSCM/1/2013/9) (December 2013).
https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/---ilo-pretoria/documents/meetingdocument/wcms_239821.pdf (Date of use: 01 October 2022).

Solemn Declaration on Gender Equality in Africa (2004), adopted by the AU Assembly of Heads of State and Government in Addis Ababa, Ethiopia in July 2004.

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 226 U.N.T.S. 3, *entered into force* 30 April 1957.

Treaty of 20 September 1976 establishing the Economic Community of the Great Lakes Countries (CEPGL), as amended on 9 September 1977 [Convention du 20 septembre 1976 portant création de la Communauté économique des pays des Grands Lacs (CEPGL), tel qu'amendée en date du 9 septembre 1977 (Journal Officiel de la République du Zaïre, 21^{ème} année, n° 20 – 15 octobre 1980, n° 20, p. 5, Bureau du Président de la République : Kinshasa)].

Treaty establishing the Common Market for Eastern and Southern Africa (COMESA), adopted 5 November 1993, *entered into force* 8 December 1994.

Treaty for the Establishment of the East African Community, signed on 30 November 1999, *entered into force* on 7 July 2000 (as amended on 14

December 2006 and 20 August 2007). <https://www.eac.int/> (Date of use: 10 June 2022).

Treaty of the Southern African Development Community (17 August 1992) as amended by *Amendment Treaty of 2015 signed on 04 July 2019*.

United Nations Convention Against Transnational Organised Crime, G.A. Res. 25, annex I, U.N. GAOR, 55th Sess., Supp. No. 49, at 44, U.N. Doc. A/45/49 (Vol. I) (2001), *entered into force Sept. 29, 2003*.

United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, reprinted in 19 U.S.T. 6259, T.I.A.S. No. 6577, *entered into force 22 April 1954*.

Universal Declaration of Human Rights, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

Vienna Convention on Consular Relations, 596 U.N.T.S. 261, *entered into force March 19, 1967*.

Vienna Convention on Diplomatic Relations, 500 UNTS 95, 23 UST 3227, 55 AJIL 1064 (1961).

Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force 27 January 1980*.

Workers with Family Responsibilities Convention (adopted 23 June 1981, *entered into force 11 August 1983*, 1331 UNTS 295).

11.3 Secondary sources

Secondary sources, which are materials that discuss, explain, analyse, and critique the law, give the researcher a more in-depth understanding of the legal issues being analysed.¹⁷³⁰ Secondary legal sources include law review articles, law journals, periodicals, textbooks, legal encyclopedias, treatises, legal dictionaries, and other research and assessments of the subject under investigation or relevant issues.¹⁷³¹

1730 Moorman A & Grady J "Legal research," in Andrew D, Pedersen P M & MacEvoy C *Research methods and design in sport management* (Human Kinetics Champaign IL 2011) 182.

1731 McCarthy M "Legal research: tensions involving student expression rights," in Hoy W & DiPaola M (eds) *Analysing school contexts: influences of principals and teachers in the service of students* (Information Age Pub. Charlotte NC 2010) 234; Miller R & Meinzingler M

11.3.1 Books, papers, and reports

Abdelkarim A *UAE labour market*

Abdelkarim A *UAE labour market and problems of employment of nationals: an overview and policy agenda* (Tanmia Dubai 2001).

Abella *et al* *Sending workers abroad*

Abella M *et al* *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 1997).

Abioye *The rule of law*

Abioye F “The rule of law in English speaking African countries: the case of Nigeria and South Africa” (LLD thesis University of Pretoria 2011).

Adams & Heirbaut *The method and culture of comparative law*

Adams M & Heirbaut D (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Hart Publishing Oxford 2014).

Adoue *Industrial ecology.*

Adoue C (ed) *Implementing industrial ecology: Methodological tools and reflections for constructing a sustainable development* (CRC Press New York 2010).

AFD *Democratic Republic of the Congo*

AFD *Democratic Republic of the Congo* (AFD Paris 2021).
<https://www.afd.fr/en/page-region-pays/democratic-republic-congo> (Date of use: 04 February 2022).

African Union *The Migration Policy Framework*

African Union “The Migration Policy Framework for Africa” Executive Council, Ninth Ordinary Session EX.CL/276 (IX) (Banjul 25–29 June 2006).

“Legal research and analysis,” in Miller R & Meininger M *Paralegal today: the legal team at work – seventh edition* (Delmar Cengage Learning New York 2016) 210.

Allen *The history of black mineworkers*

Allen V *The history of black mineworkers in South Africa - Volume 2* (Moor Press Keighley 2003).

Amuedo-Dorantes *Remittance flows*

Amuedo-Dorantes C "The good and the bad in remittance flows" *IZA World of Labour* (San Diego State University & IZA Germany 2014).
<https://wol.iza.org/uploads/articles/97/pdfs/good-and-bad-in-remittance-flows.pdf>
(Date of use: 04 February 2022).

Appave & Cholewinski *World Migration Report 2008*

Appave G & Cholewinski R (eds) *World Migration Report 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008).

Appleyard, IOM & UN *The human rights of migrants*

Appleyard R, IOM & UN (eds) *The human rights of migrants* (IOM Geneva 2001).

Argueta *Border security*

Argueta C *Border security: immigration enforcement between ports of entry* (CRS Washington DC 2016).

Arias *Informal vendors*

Arias J *Informal vendors in Johannesburg, South Africa* (University of Pennsylvania, Philadelphia PA 2019).

Arnold, Howarth, & Khera *A Unique migration*

Arnold P, Howarth B, & Khera A, *A Unique migration: South African doctors fleeing to Australia* (CreateSpace Seattle 2011).

Ashcroft, Griffiths, & Tiffin *Post-colonial studies*

Ashcroft B, Griffiths G, & Tiffin H *Post-colonial studies: the key concepts – third edition* (Routledge London 2013).

Ashcroft, Griffiths, & Tiffin *Key concepts*

Ashcroft B, Griffiths G, & Tiffin H *Key concepts in post-colonial studies* (Routledge London 2001).

Atong, Mayah, & Odigie *Africa labour migration to the GCC States*

Atong K, Mayah E, & Odigie A *Africa labour migration to the GCC States: the case of Ghana, Kenya, Nigeria and Uganda - an African trade union overview* (ITUC-Africa Lomé 2018). https://www.ituc-africa.org/IMG/pdf/ituc-africa_study-africa_labour_migration_to_the_gcc_states.pdf (Date of use: 15 October 2022).

Azhar *Female employment in India*

Azhar R *Female employment in India: growth and structure independent* (Publishing Company Delhi 2000).

Bammens *The principle of non-discrimination*

Bammens N *The principle of non-discrimination in international and European tax law* (IBFD Amsterdam 2012).

Banda *Migration from Malawi*

Banda C *Migration from Malawi to South Africa: a historical and cultural novel*. (African Books Collective Oxford 2017).

Barclays National Bank *Doing business*

Barclays National Bank *Doing business in South Africa* (BNB Johannesburg 1980).

Bassarsky *et al International migration policies*

Bassarsky L *et al* (eds) *International migration policies: government views and priorities* (United Nations New York 2013).

Batanga *Contentieux administratif*

Batanga B *Précis du contentieux administratif congolais - Tome 2 (Congolese administrative litigation handbook - Volume 2)* (Academia – L’Harmattan Louvain-la-Neuve 2018).

Bayolo *Code du travail congolais*

Bayolo H C *Code du travail congolais: annoté et commenté (DRC Labour Code: annotated and commented)* (éd Concordia, Kinshasa 2022).

Bazenguissa-Ganga *Congo-DRC and Congo country study*

Bazenguissa-Ganga R *Democratic Republic of Congo (Congo-DRC) and Republic of Congo (Congo) country study: a part of the report on informal remittance systems in Africa, Caribbean and Pacific (ACP) countries* (Oxford University ESRC COMPAS Oxford 2005).

Beine, Docquier, & Rapoport *Brain drain*

Beine M, Docquier F, & Rapoport H *Brain drain and human capital formation in developing countries: winners and losers* (UCL Louvain Belgium 2006).

Benjamin *Private employment agency work*

Benjamin P *Law and practice of private employment agency work in South Africa* (ILO Geneva 2013).

Bevelander & Nielsen *Declining employment assimilation*

Bevelander P & Nielsen H “Declining employment assimilation of immigrants in Sweden: observed or unobserved characteristics?”, *Discussion Paper No. 2132* (Centre for Economic Policy Research London 1999).

Bikari *Droit congolais*

Bikari G *Droit congolais du travail* (Congolese labour law) (C.P.T.T: Kinshasa 2014).

Böhning *Employing foreign workers*

Böhning W *Employing foreign workers: A manual on policies and procedures of special interest to middle and low-income countries* (ILO Geneva 1996).

Bonyi *Droit du travail*

Bonyi M *Droit du travail* (Labour law) (CRDS Brussels 2008).

Bonyi *Grands arrêts*

Bonyi M *Grands arrêts de la jurisprudence congolaise de droit du travail* (Major Congolese labour case law decisions) (CRDS Kinshasa 2000).

Boon, Huq, & Lovelace *U.S. approaches*

Boon K, Huq A, & Lovelace D *U.S. approaches to global security challenges- terrorism: commentary on security documents* (OUP Oxford 2012).

Boynton Protectionism

Boynton E "Protectionism and national migration policy in South Africa" (Master's dissertation UCT Cape Town 2015).

Brand & Heyns *Socio-economic rights*

Brand D & Heyns C *Socio-economic rights in South Africa* (PULP Pretoria 2005) 209-248.

Brander P *et al Compass*

Brander P *et al Compass: manual for human rights education with young people* (Council of Europe Strasbourg 2012).

Breytenbach *Migratory labour arrangements*

Breytenbach W *Migratory labour arrangements in Southern Africa* (AISA Pretoria 1979).

Bridge & Council of Europe *French-English legal dictionary*

Bridge F H S & Council of Europe *The Council of Europe French-English legal dictionary* (Council of Europe Press Strasbourg 1994).

British Parliament *South Africa Act of 1909*

British Parliament *South Africa Act of 1909* (Amazon Digital Services LLC - KDP Print US Seattle WA 2019).

Brock & Blake *Debating brain drain*

Brock G and Blake M *Debating brain drain: may governments restrict emigration?* (OUP Oxford 2015).

Bryan Cave LLP *Legal issues*

Bryan Cave LLP *Legal issues related to doing business in the United Arab Emirates* (Bryan Cave LLP Dubai 2004).
<https://www.bclplaw.com/images/content/8/1/v2/814/MiddleEastArticle2-04.pdf>
(Date of use: 09 February 2022).

Budlender D *Private employment agencies*

Budlender D *Private employment agencies in South Africa* (ILO Geneva 2013)

Bureau du président *Profiles of Zaire*

Bureau du Président *Profiles of Zaire* (President of the Republic of Zaire's Office Kinshasa 1976).

Butterfield Fowler's *dictionary*

Butterfield J (ed) *Fowler's dictionary of modern English usage – fourth edition* (OUP Oxford 2015).

Butts & Thomas *The geopolitics of Southern Africa*

Butts K & Thomas P *The geopolitics of Southern Africa: South Africa as regional superpower* (Routledge London 2019).

CBSA *Security screening*

Canada Border Services Agency (CBSA) *Security screening* (CBSA Ottawa 2015).
<https://www.cbsa-asfc.gc.ca/security-securite/screen-verific-eng.html> (Date of use:
12 March 2022).

Cape of Good Hope Select Committee

Cape of Good Hope (South Africa) *Select Committee on the Pass Laws of the Colony, Report of the Select Committee on the Pass Laws of the Colony: ordered by the House of Assembly* (W.A. Richards & Sons Cape Town 1883).

Cape of Good Hope Statutes

Cape of Good Hope (South Africa) *Statutes of the Cape of Good Hope: Passed by the Third Parliament, During the sessions 1864-1868* (Saul Solomon & Co. Cape Town 1868).

Casale & Perulli Single employment contract

Casale G & Perulli A *Towards the single employment contract: comparative reflections* (Hart Publishing Portland OR 2014).

Chinweizu On negrophobia

Chinweizu I *On negrophobia: psychoneurotic obstacles to black autonomy* (Sundoor Publications Lagos 2005).

Cholewinski Migrant workers

Cholewinski R *Migrant workers in international human rights law: their protection in countries of employment* (Clarendon Press Oxford 1997).

Cholewinski The legal status of migrants

Cholewinski R *The legal status of migrants admitted for employment - A comparative study of law and practice in selected European states* (Council of Europe Publications Strasbourg 2008).

Ciment Encyclopedia of American immigration

Ciment J (ed) *Encyclopedia of American immigration: immigration issues* (M.E. Sharpe Armonk NY 2001).

Coetzer & Bismilla *Employing foreigners*

Coetzer N & Bismilla S *What employers need to know about employing foreigners in South Africa* (Labour Guide Pretoria 2021). <https://www.labourguide.co.za/most-recent/2412-what-employers-need-to-know-about-employing-foreigners-in-south-africa> (Date of use: 04 February 2022).

Cohen *Global diasporas*

Cohen R *Global diasporas: an introduction – 2nd edition* (Routledge London 2008).

Collier *et al Labour law in South Africa*

Collier *et al Labour law in South Africa: contexts and principles* (OUP Southern Africa Cape Town 2018).

Colombo *et al Help wanted?*

Colombo F *et al "Help wanted?: Providing and paying for long-term care," OECD Health Policy Studies* (OECD Publishing Paris 2011).

Commission of the European Communities Library *Biblio East*

Commission of the European Communities Library *Biblio East* (Commission of European Communities Central Library Brussels 1993).

CERD *General Recommendation No. 30*

Committee on Elimination of Racial Discrimination (CERD), *General Recommendation No. 30: Discrimination against non-citizens*, UN Doc. CERD/C/64/Misc.11/rev.3, 19 August 2004.

Cohen *Semi-citizenship in democratic politics*

Cohen E F *Semi-citizenship in democratic politics* (Cambridge University Press Cambridge UK 2009).

Countouris *Defining and regulating work relations*

Countouris N *Defining and regulating work relations for the future of work* (ILO Geneva 2019).

Costello & Freedland *Migrants at work*

Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014).

Crabb *The legal system*

Crabb J *The legal system of Congo-Kinshasa* (The Michie Company Charlottesville Virginia 1970).

Crush *Beyond control*

Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998).

Crush and Williams *Counting brains*

Crush J & Williams V "Counting brains: measuring emigration from South Africa", *2001 Migration Policy Brief*, No. 5, Southern African Migration Project (SAMP).

Crush & Williams *International migration and development*

Crush J & Williams V *International migration and development: dynamics and challenges in South and Southern Africa* (UN New York 2005).

Crush *et al Harnessing migration*

Crush J *et al Harnessing migration for inclusive growth and development in Southern Africa - Special Report* (Southern African Migration Programme - SAMP Waterloo ON 2017).

CSJ *Bulletin des arrêts 2004 à 2009*

CSJ *Bulletin des arrêts de la Cour suprême de justice, Années 2004 à 2009, 2 tomes* [*Gazettes of Judgments of the Supreme Court, Years 2004 to 2009, 2*

volumes] (Éditions du Service de Documentation et d'Études du Ministère de la justice et Droits humains, Kinshasa 2010).

CSJ Bulletin des arrêts 2000 à 2003

CSJ Bulletin des arrêts de la Cour suprême de justice, Années 2000 à 2003 [Gazettes of Judgments of the Supreme Court, Years 2000 to 2003] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2004).

CSJ Bulletin des arrêts 1990 à 1999

CSJ Bulletin des arrêts de la Cour suprême de justice, Années 1990 à 1999 [Gazettes of Judgments of the Supreme Court, Years 1990 to 1999] (Éditions du Service de Documentation et d'Études du Ministère de la Justice, Kinshasa 2003).

CSJ Bulletin des arrêts 1980 à 1984

CSJ Bulletin des arrêts de la Cour Suprême de Justice, Années 1980 à 1984 [Gazettes of Judgments of the Supreme Court, Years 1980 to 1984] (Éditions du Service de Documentation et d'Études du Ministère de la justice et des Affaires parlementaires, Kinshasa 2001).

Currie & Hoexter The new constitutional and administrative law

Currie I & Hoexter C The new constitutional and administrative law: administrative law (Juta Cape Town 2001).

Dainow The role of judicial decisions

Dainow J (ed) The role of judicial decisions and doctrine in civil law and in mixed jurisdictions (Louisiana State University Press Baton Rouge LA 1974).

David & Brierley Major legal systems

David R & Brierley J Major legal systems in the world today: an introduction to the comparative study of law - 2d edition (Free Press New York 1978).

Davis & Senior South Africa

Davis G & Senior M (eds) *South Africa, the privileged and the dispossessed: students' book, Volume 1* (F Schöningh Paderborn 1983).

DoFE Labour migration for employment

DoFE *Labour migration for employment: a status report for Nepal, 2013-2014* (Government of Nepal, Ministry of Labour and Employment, Department of Foreign Employment Kathmandu 2014).

Dowling & Valenzuela Economic development

Dowling J & Valenzuela R *Economic development in Asia* (Thomson Singapore 2004).

DRC General Directorate for Migration

Democratic Republic of the Congo, Ministry of the Interior, Decentralisation and Security and General Directorate for Migration, *General Directorate for Migration – DGM Booklet* (ZK Advertising Kinshasa 2016).

DRC's Official Gazette Website

DRC's Official Gazette Website. <http://www.journalofficiel.cd> (Date of use: 14 April 2022).

DEL Court papers

DEL Court papers filed against Huawei Technologies South Africa for employment equity violations (DEL Pretoria 11 February 2022). <https://www.labour.gov.za/court-papers-filed-against-huawei-technologies-south-africa-for-employment-equity-violations> (Date of use: 07 March 2022).

DEL Media statements

Department of Employment and Labour (DEL) "Employment and Labour on employment of foreign nationals in South Africa" *Media statements* (DEL Pretoria 25 January 2022). <https://www.gov.za/speeches/employment-and-labour->

employment-foreign-nationals-south-africa-25-jan-2022-0000 (Date of use: 16 February 2022).

De la Vega Dictionary

De la Vega C *Dictionary of international human rights law* (Edward Elgar Cheltenham /Northampton 2013).

Department of Health Health on cooperation

Department of Health “Health on cooperation between South Africa and Tunisia” (3 January 2007). <https://www.gov.za/health-cooperation-between-south-africa-and-tunisia> (Date of use: 26 July 2022).

Department of Health Recruitment of foreign professionals

Department of Health *Recruitment of foreign professionals in the South African health sector as approved by the National Health Council on 5 February 2010* (Department of Health Pretoria 2010).

Department of Health Policy Recruitment and employment

Department of Health Policy (ed) *Recruitment and employment of foreign health professionals in the Republic of South Africa* (National Department of Health Pretoria 2006).

Department of Higher Education and Training Skills supply

Department of Higher Education and Training *Skills supply and demand in South Africa* (Department of Higher Education and Training Pretoria 2019).

DHA How do I obtain a work permit?

DHA *How do I obtain a work permit?* (DHA Pretoria 2022) <https://www.gov.za/faq/foreigners/how-do-i-acquire-work-permit> (Date of use: 19 October 2022).

DHA Media statement

DHA *Media statement on routine inspections by immigration officials* (DHA Johannesburg 22 February 2018). <http://www.dha.gov.za/index.php/statements-speeches/1076-media-statement-on-routine-inspections-by-immigration-officials> (Date of use: 07 March 2022).

DHA New Lesotho Exemption Permit

DHA *Minister opens the application process for the New Lesotho Exemption Permit (LEP)* (DHA Pretoria 18 November 2019). [http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep#:~:text=The%20new%20Lesotho%20Exemption%20Permit%20\(LEP\)%20project%20will%20begin%20on,valid%20LSP%20permit%2Dholders%20only.&text=Cut%2Doff%20date%20for%20submission%20of%20applications%20is%2031%20March,of%20R1090%20will%20be%20charged](http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep#:~:text=The%20new%20Lesotho%20Exemption%20Permit%20(LEP)%20project%20will%20begin%20on,valid%20LSP%20permit%2Dholders%20only.&text=Cut%2Doff%20date%20for%20submission%20of%20applications%20is%2031%20March,of%20R1090%20will%20be%20charged) (Date of use: 26 February 2022).

DHA Statement by Minister Mkhize

Department of Home Affairs “Statement by Minister Mkhize on the closure of the Zimbabwean Special Permit (ZSP) and the opening of the New Zimbabwean Exemption Permit (ZEP)” (DHA Pretoria 08 September 2017). <http://www.dha.gov.za/index.php/statements-speeches/1034-statement-by-minister-mkhize-on-the-closure-of-the-zimbabwean-special-permit-zsp-and-the-opening-of-the-new-zimbabwean-exemption-permit-zep> (Date of use: 10 February 2022).

DHA Angolan Special Dispensation Permits

DHA *The Department of Home Affairs invites qualifying holders of Angolan Special Dispensation Permits to apply for the Angolan Exemption Permit* (DHA Pretoria 05 August 2021). <http://www.dha.gov.za/index.php/statements-speeches/1467-the-department-of-home-affairs-invites-qualifying-holders-of-angolan-special-dispensation-permits-to-apply-for-the-angolan-exemption-permit> (Date of use: 26 February 2022).

DHA White Paper

Department of Home Affairs “White Paper on International Migration for South Africa” (*Government Gazette No. 41009* of 28 July 2017).

Department of Home Affairs *White Paper on Home Affairs*
Department of Home Affairs *White Paper on Home Affairs* (DHA Pretoria 14 January 2019).

Department of Higher Education and Training *Skills supply*
Department of Higher Education and Training *Skills supply and demand in South Africa* (Department of Higher Education and Training Pretoria 2019).

DHA *Critical skills visa*
Department of Home Affairs (DHA) *Critical skills visa* (DHA Pretoria 2021).
<http://www.dha.gov.za/index.php/immigration-services/scarce-skills-work-permits>
(Date of use: 19 July 2022).

DHA Gazetted Critical Skills List
Department of Home Affairs (DHA) “Gazetted Critical Skills List” (No. 45860, *Government Gazette*, 02 February 2022).
http://www.dha.gov.za/images/notices/Gazetted_Critical_Skills_List_2022-compressed.pdf (Date of use: 18 February 2022).

DHA *Immigration Directive No. 01 of 2021*
Department of Home Affairs (DHA) *Minister’s Immigration Directive No. 01 of 2021 - Extension of ZEP for a period of 12 months* (DHA Pretoria 2022). Available at
<http://www.dha.gov.za/index.php/notices/1506-minister-s-immigration-directive-no-01-of-2022-extension-of-zep-for-a-period-of-12-months> (Date of use: 10 February 2022).

DHA *South African position*
Department of Home Affairs (DHA) *South African position on the implementation of the African Union (AU) Agenda 2063 as it relates to migration, regional integration and Africa passport* (DHA Pretoria November 2017).

DHA Qualifying holders of Angolan Special Dispensation Permits
DHA *The Department of Home Affairs invites qualifying holders of Angolan Special Dispensation Permits to apply for the Angolan Exemption Permit* (DHA Pretoria 05 August 2021). <http://www.dha.gov.za/index.php/statements-speeches/1467-the-department-of-home-affairs-invites-qualifying-holders-of-angolan-special-dispensation-permits-to-apply-for-the-angolan-exemption-permit> (Date of use: 26 February 2022).

DHA official website

DHA official website. <http://www.dha.gov.za/index.php/about-us/organisational-structure> (Date of use: 14 April 2022).

DIESA - Population Division *World Population*
Department of International Economic and Social Affairs (DIESA) - Population Division *World population monitoring* (United Nations New York 1991).

DEL *Draft national labour migration policy*
Department of Employment and Labour (DEL) *Draft national labour migration policy for South Africa* (DEL Pretoria February 2022).

Desai *et al The Greenwood encyclopedia*
Desai M *et al The Greenwood encyclopedia of women's issues worldwide: the Middle East and North Africa* (Greenwood Press Westport, Conn 2003).

Don Nanjira *The status of aliens in East Africa*
Don Nanjira D *The status of aliens in East Africa: Asians and Europeans in Tanzania, Uganda, and Kenya* (Praeger New York 1976).

du Bois Wille's principles
du Bois D (ed) *Wille's principles of South African law - 9th edition* (Juta and Co Ltd Cape Town 2007).

Du Plessis *The interpretation of statutes*

Du Plessis L *The interpretation of statutes* (Butterworths Durban 1986).

Du Plessis & Du Plessis *An introduction to law*

Du Plessis L & Du Plessis A *An introduction to law* (Juta Cape Town 1992).

Du Plessis & Fouché *Practical guide*

Du Plessis J & Fouché M *Practical guide to labour law - ninth edition* (LexisNexis SA Durban 2019).

Efron & Ravid *Writing the literature review*

Efron S & Ravid R *Writing the literature review: a practical guide* (The Guilford Press New York 2019).

Elenga-Di-Okanga *Fraude douanière*

Elenga-Di-Okanga A *Lutte contre la fraude douanière en RD Congo* (Fight against customs fraud in the DR Congo) (L'Harmattan Paris 2010).

Encontre *Why does the tourist Dollar matter?*

Encontre P *Why does the tourist Dollar matter? an introduction to the economics of tourism in the British Virgin Islands* (British Virgin Islands Tourist Board Road Town 1989).

Erasmus & Breier *Skills shortages*

Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010).

Eriksson *Reproductive freedom*

Eriksson MK *Reproductive freedom in the context of international human rights and humanitarian law* (Martinus Nijhoff Publishers The Hague 2000).

Esses *et al Race Prejudice*

Esses V *et al Race Prejudice and the evaluation of immigrant skills* (University of Western Ontario, Richard Ivey School of Business Ontario 2003).

European Commission *Migration*

European Commission *Migration and Home Affairs* (European Union Brussels 2021). https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/brain-circulation_en

(Date of use: 10 July 2022).

European Commission *Glossary*

European Commission *Glossary: labour force statistics explained* (European Union Brussels 2021). https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:Labour_force

(Date of use: 03 February 2022).

Falola *African cultures*

Falola T *African cultures and societies before 1885* (Carolina Academic Press Durham, NC 2000).

Fanon *Black skin*

Fanon F *Black skin, white masks* (Grove Press New York 1967).

Farrell & Fenwick *World yearbook of education 2007*

Farrell L & Fenwick T (eds) *World yearbook of education 2007: educating the global workforce: knowledge, knowledge work and knowledge workers* (Routledge London 2007) 227-238.

Fauvelle-Aymar *Migration and employment in South Africa*

Fauvelle-Aymar C *Migration and employment in South Africa: An econometric analysis of domestic and international migrants (QLFS (Q3) 2012) - MiWORC Report N°6* (African Centre for Migration & Society, University of the Witwatersrand Johannesburg 2014).

Feld *Remittances*

Feld S “Remittances to developing countries,” in Feld S *International migration, remittances and brain drain: impacts on development* (Springer Cham 2021) 77-77.

Feldman *et al* *International labour mobility*

Feldman M *et al* *Measuring international labour mobility* (United Nations New York 2018).

Ferris & Donato *Refugees*

Ferris E & Donato K *Refugees, migration and global governance: negotiating the global compacts* (Routledge London 2019).

Finch *et al* *Re-migration trends*

Finch T *et al* *Shall we stay or shall we go? Re-migration trends among Britain's immigrants* (Institute for Public Policy Research London 2009).

Flahaux & Schoumaker *Democratic Republic of the Congo*

Flahaux M & Schoumaker B *Democratic Republic of the Congo: a migration history marked by crises and restrictions* (Migration Policy Institute Washington DC 2016). <https://www.migrationpolicy.org/article/democratic-republic-congo-migration-history-marked-crises-and-restrictions> (Date of use: 14 April 2022).

Fontana *The state of migration research*

Fontana B *The state of migration research in South Africa* (Foundation for Global Dialogue Johannesburg 1997).

Fox & Gaal *Working out of poverty*

Fox L & Gaal M S *Working out of poverty: job creation and the quality of growth in Africa* (World Bank Group Washington DC 2008).

Gallo-Mosala *Migrants' experiences*

Gallo-Mosala S (ed) *Migrants' experiences within the South African labour market* (Scalabrini Centre Cape Town 2009).

Gammarano *Work and employment*

Gammarano R *Work and employment are not synonyms* (ILO Geneva 2019).
<https://ilostat.ilo.org/work-and-employment-are-not-synonyms/> (Date of use: 01 February 2022).

Garcés-Mascreñas *Labour migration*

Garcés-Mascreñas B *Labour migration in Malaysia and Spain: markets, citizenship and rights* (Amsterdam University Press Amsterdam 2012).

Giampietro, Mayumi, & Sorman *The metabolic pattern of societies*

Giampietro M, Mayumi K, & Sorman A *The metabolic pattern of societies: where economists fall short* (Routledge London 2012).

Gibson *Mercantile and company law*

Gibson J *South African mercantile and company law* (Juta Cape Town 2008).

Great Britain: Home Office *A Points-based system*

Great Britain: Home Office *A Points-based system: making migration work for Britain* (The Stationery Office London 2006).

Great Britain: National Audit Office *Immigration*

Great Britain: National Audit Office *Immigration: the points-based system - work routes, Home Office: UK Border Agency - HC 819 of Session 2010-11* (The Stationery Office London 2011).

Great Britain Parliament *Parliamentary Papers*

Great Britain Parliament, House of Commons *Parliamentary Papers- Volume 36* (W Clowes & Sons London 1849) 26-28.

Grahl-Madsen *Commentary*

Greer J & Moberg D (eds) *Research in the social scientific study of religion: volume 11* (JAI Press Stamford CT 2000).

Haddal, Kim & Garcia *Border security*

Haddal C, Kim Y, & Garcia M *Border security: barriers along the U. S. international border* (CRS Washington DC 2010).

Handjiski B *et al Enhancing regional trade integration*

Handjiski B *et al Enhancing regional trade integration in Southeast Europe. World Bank working paper No. 185* (World Bank Washington DC 2010).

Handmaker, De la Hunt, & Klaaren *Advancing refugee protection*

Handmaker J, De la Hunt L, & Klaaren J (eds.) *Advancing refugee protection in South Africa* (Berghahn Books New York 2008).

Hathaway *The rights of refugees*

Hathaway J *The rights of refugees under international law – second edition* (CUP Cambridge 2021).

Hay & Craven *Masters*

Hay D & Craven P (eds) *Masters, servants, and magistrates in Britain and the Empire, 1562-1955* (UNCP Chapel Hill 2004).

HRDC *Joint Initiative*

HRDC *Joint Initiative on Priority Skills Acquisition (JIPSA) Oct 2009* (HRDC Pretoria 2021). <https://hrdcsa.org.za/2-jipsa-artisan-report-final-october-2009/> (Date of use: 14 April 2022).

Heiss *Self-reliance*

Heiss M *Self-reliance and the right to work for refugees: lessons from the case studies of South Africa and Germany for the implementation of the global compact on refugees by the European Union* (LLM dissertation UCT Cape Town 2021).

Helfer *et al The world blind union guide*

Helfer L *et al The world blind union guide to the Marrakesh Treaty: facilitating access to books for print-disabled individuals* (OUP Oxford 2017).

Henckaerts *Mass expulsion*

Henckaerts J *Mass expulsion in modern international law and practice* (Martinus Nijhoff The Hague 1995).

Hetzel, Libonati & Williams *Legislative law and statutory interpretation*

Hetzel O, Libonati M, & Williams R (eds) *Legislative law and statutory interpretation: cases and materials* (LexisNexis New York 2008).

Hetzel, Libonati, & Williams *Legislative law and process*

Hetzel O, Libonati M, & Williams R (eds) *Legislative law and process: cases and materials* (Michie Co. Charlottesville, Va. 1993).

Hirschl *Comparative matters*

Hirschl R *Comparative matters: the renaissance of comparative constitutional law* (OUP Oxford 2014).

Hoexter *Administrative law*

Hoexter C *Administrative law in South Africa* (Juta Cape Town 2012).

House of Lords *Citizenship and Immigration Bill*

House of Lords, House of Commons and Joint Committee on Human Rights *Legislative scrutiny: borders, Citizenship and Immigration Bill - ninth report of session 2008-09* (HL Paper 62-HC 375 - 25 March 2009) (The Stationery Office Limited London 2009).
<https://publications.parliament.uk/pa/jt200809/jtselect/jtrights/62/62.pdf> (Date of use: 12 March 2022).

Howe & Owens *Temporary labour migration*

Howe J & Owens R *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publishing Oxford 2016).

Gingombe *Le contentieux administrative*

Gingombe R *Le contentieux administratif dans le système juridique de la République Démocratique du Congo* [Administrative litigation within the Democratic Republic of Congo's legal system] (Academia-Bruylant, Louvain-la-Neuve 2004).

Good *Africa's unfinished struggle*

Good R *Africa's unfinished struggle for freedom: the real issues* (Department of States US GPO Washington DC 1962).

Grigorian & Kryshko *Deposit insurance*

Grigorian D & Kryshko M *Deposit insurance, remittances, and dollarization: Survey-based evidence from a top remittance-receiving country - Working Paper No. 2017/132* (IMF Washington DC 2019).

Gutto *Equality*

Gutto S *Equality and non-discrimination in South Africa: The political economy of law and law making* (New Africa Books Claremont 2001).

IBP *Nepal labour laws*

IBP *Nepal labour laws and regulations handbook: strategic information and basic laws* (IBP Washington DC 2016).

IBP *Malaysia labour laws*

IBP *Malaysia labour laws and regulations handbook - strategic information and basic laws* (IBP Washington DC 2013).

Ifill *The African diaspora*

Ifill M *The African diaspora: a drama of human exploitation* (Economic and Business Research, Port-of-Spain 1986).

ILO *Addressing governance challenges*

ILO *Addressing governance challenges in a changing labour migration landscape - ILC 106th Session Report IV Fourth item on the agenda* (ILO Geneva 2017).

ILO Labour and social trends

ILO *Labour and social trends in ASEAN, 2008: driving competitiveness and prosperity with decent work* (ILO Regional Office for Asia and the Pacific Bangkok 2008).

ILO Migrant workers

ILO *Migrant workers, vol 1 (2) –III (1B)* (ILO Geneva 1999).

ILO Official Bulletin

ILO *Official Bulletin, Volume 42* (ILO Geneva 1959).

ILO & IOM Bilateral labour migration agreements

ILO & IOM *Bilateral labour migration agreements in African Union Member States: taking stock and the way forward* (ILO & IOM Geneva 2019).

Immigration & Naturalisation Institute *Annual Immigration*

Immigration and Naturalisation Institute *Annual Immigration and Naturalisation Institute - Volume 41* (Practising Law Institute New York 2008).

INPP's website

INPP's website. <https://www.inpp.cd/index.php/offres-de-formation> (Date of use: 08 February 2022).

ICG Mineral Concessions

International Crisis Group (ICG) "Mineral concessions: avoiding conflict in DR Congo's mining heartland" 2020 *Africa Report 290* (ICG Brussels 30 June). <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/290-mineral-concessions-avoiding-conflict-dr-congos-mining-heartland> (Date of use: 04 February 2022).

International Relations & Cooperation *National Assembly question*
International Relations and Cooperation of the Republic of South Africa *National Assembly question for written reply* (25 February 2021) 1-2.
https://www.parliament.gov.za/storage/app/media/Docs/exe_rq_na/50c9a631-3697-4bd8-9aea-07294f9b92dc.pdf (Date of use: 26 July 2022).

Ionesco, Mokhnacheva, & Gemenne *The Atlas*
Ionesco D, Mokhnacheva D, & Gemenne F *The Atlas of environmental migration* (Routledge London 2017).

IOM *Labour migration*
IOM *Labour migration: trends, challenges and policy responses in countries of origin* (IOM Geneva 2003).

IOM *World migration*
IOM *World migration – 2005 costs and benefits of international migration* (IOM Geneva 2005).

Isaku & Afram *The Qatar-Nepal remittance corridor*
Isaku E & Afram G *The Qatar-Nepal remittance corridor: enhancing the impact and integrity of remittance flows by reducing inefficiencies in the migration process* (World Bank Washington DC 2011).

Jacobson *America's foreign policy*
Jacobson H *America's foreign policy* (Random House New York 1965).

Janisch *et al The national skills*
Janisch W *et al The national skills development handbook 2007/8* (RainbowSA Johannesburg 2008).

Johnson *Imagining the Cape Colony*
Johnson D *Imagining the Cape Colony: history, literature, and the South African Nation* (Edinburgh University Press Edinburgh 2013).

Jørgensen M & Schierup C *Politics of precarity*

Jørgensen M & Schierup C (eds) *Politics of precarity: migrant conditions, struggles and experiences* (Brill NV Leiden 2017).

Joubert *The Law of South Africa*

Joubert W *The law of South Africa – volume 33* (LexisNexis Butterworths Durban 2008).

Joubert & Faris *The law of South Africa*

Joubert W & Faris J *The law of South Africa - volume 11* (LexisNexis Butterworths Durban 2003).

Kabu *Cour suprême de Justice*

Kabu N *Cour suprême de Justice: Héritage de demi-siècle de jurisprudence* (Supreme Court: a half-century legacy of case law) (Les Analyses Juridiques Kinshasa 2015).

Kabuinji *Procédure*

Kabuinji D *Procédure devant la section administrative de la Cour Suprême de Justice* (Procedure applicable before the administrative section of the Supreme Court) (Ed Connaissance et pratique du droit zaïrois Kinshasa 1987).

Kamwimbi *Forced child labour*

Kamwimbi TK *Legal aspects of forced child labour: the case of the Democratic Republic of the Congo* (Juta Cape Town 2021).

Kamwimbi *Workplace gender equality*

Kamwimbi TK “Workplace gender equality in the DRC: a critical analysis of existing legislation,” paper presented at the *ILERA 8th Africa Regional Congress 2018* (ILERA Mauritius May 2018).

Kaplan *et al* Area handbook

Kaplan I *et al* "Area handbook for the Republic of South Africa", Report Volume 550, Issue 93 (U. S. Government Printing Office Washington DC 1971).

Kerever *The rule of national treatment*

Kerever A *The rule of national treatment or the principle of assimilation* (AFDA-RIDA Paris 1993).

Khan *Immigration law*

Khan F (ed) *Immigration law in South Africa* (Juta Claremont 2018).

Khan & Schreier *Refugee law*

Khan F & Schreier T (eds) *Refugee law in South Africa* (Juta Cape Town 2014).

Kisangani & Bobb *Historical dictionary*

Kisangani E & Bobb F *Historical dictionary of the Democratic Republic of the Congo - third edition* (The Scarecrow Press Lanham 2010).

Kok *et al* *Migration in South and Southern Africa*

Kok P *et al* (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006).

Kihato *Migrant women*

Kihato C *Migrant women of Johannesburg everyday life in an in-between city* (Palgrave Macmillan New York 2013).

Kolasa *The legal environment*

Kolasa B *The legal environment of business* (Addison-Wesley Reading, MA 1984).

Landau *Popular politics*

Landau P *Popular politics in the history of South Africa, 1400–1948* (CUP Cambridge 2010).

Landau & Segatti *Human development impacts of migration*

Landau L & Segatti A *Human development impacts of migration: South Africa case study - human development research paper 2009/05* (UNDP New York 2009).

Landau & Pampalone *I want to go home forever*

Landau L & Pampalone T *I want to go home forever: stories of becoming and belonging in South Africa's Great Metropolis* (WUP Johannesburg 2018).

Lauterpacht *Bill of the Rights*

Lauterpacht H *An International Bill of the Rights of Man* (OUP Oxford 2013).

Lee, Johnson & Joyce *Budgeting systems*

Lee R, Johnson R, & Joyce P G *Public budgeting systems - 8th edition* (Jones and Bartlett Publishers Sudbury MA 2008).

Legum *Africa Contemporary record*

Legum C *Africa Contemporary record: annual survey and documents- volume 21* (Africa Research Limited London 1992).

Lelu *Amélioration des données*

Lelu D (ed) *Amélioration des données sur les migrations dans la République démocratique du Congo: évaluation et recommandations* [Improving migration data in the Democratic Republic of Congo: assessment and recommendations] (OIM & Observatoire ACP sur les Migrations Kinshasa 2013).

LeMay *U.S. immigration*

LeMay M *U.S. immigration: a reference handbook* (ABC CLIO Oxford 2004).

Letterman *Letterman's law*

Letterman G *Letterman's law of private international business, Volume 1* (Lawyers Co-operative Publishing Rochester, New York 1990).

Libercier, Schneider, & OECD *Migrants*

Libercier M, Schneider H, & OECD *Migrants: partners in development co-operation* (Development Centre, OECD 1996).

Lihau *Droit constitutionnel*

Lihau E *Droit constitutionnel et institutions politiques*, cours polycopié, Faculté de droit de l'Université de Kinshasa (Constitutional law and political institutions, duplicated lecture notes, Faculty of Law, UNIKIN) n.d., n°177.

Lule *Droit du travail congolais*

Lule L *Précis de droit du travail congolais - 2^e édition* (Congolese labour law handbook - 2nd edition) (Editions LULE Kinshasa 2017).

Lule *Droit du travail zairois*

Lule L *Précis de droit du travail zairois (Zairian labour law handbook)* (Editions LULE: Kinshasa 1989).

Mabanga *Contentieux constitutionnel*

Mabanga M *Le contentieux constitutionnel congolais (Congolese constitutional litigation)* (Editions Universitaires Africaines 1999).

Malewa *Justice pénale et réalités sociétales*

Malewa J *Justice pénale et réalités sociétales: De l'analyse du modèle R.D.Congo à la formulation d'une politique criminelle participative* [Criminal justice and societal realities: from the analysis of the DR Congo model to the formulation of a participatory criminal policy] (L'Harmattan Paris 2007).

Manby *Citizenship law in Africa*

Manby B *Citizenship law in Africa: a comparative study - 3rd edition* (Open Society Foundations New York & African Minds Cape Town 2016).

Martin *The legal and normative framework*

Martin S *The legal and normative framework of international migration* (GCIM Geneva 2005).

Massey *et al* *Worlds in motion*

Massey D *et al* *Worlds in motion: Understanding international migration at the end of the millennium* (Clarendon Press Oxford 2005).

Mazwi *The income tax provisions*

Mazwi Z *The income tax provisions that are applicable to foreign employees temporarily working in south Africa* (University of the Witwatersrand Johannesburg 2018).

Mbuta *Droit Administratif*

Mbuta L *Droit Administratif*, notes de cours, Finances Publiques (Administrative Law, lecture notes, Public Funds) (GII D&A, ENF Kinshasa 1999-2000).

McDougal, Lasswell & Che *Human rights and world public order*

McDougal M, Lasswell H & Che L *Human rights and world public order: the basic policies of an international law of human dignity* (OUP Oxford 2019).

McKinsey & Burke *Carper's understanding the law*

McKinsey J & Burke D *Carper's understanding the law – seventh edition* (Delmar Cengage Learning New York 2014).

Meier & Rauch *Leading issues*

Meier G & Rauch J *Leading issues in economic development* (OUP Oxford 1995).

Meloni *Visas*

Meloni A “Visas in international and municipal laws,” in Meloni A *Visa policy within the European Union structure* (Springer Heidelberg 2006).

Mermelstein *The Anti-apartheid reader*

Mermelstein D *The Anti-apartheid reader: the struggle against white racist rule in South Africa* (Grove Press New York 1987).

Merryman & Pérez-Perdomo *The civil law tradition*

Merryman J & Pérez-Perdomo R *The civil law tradition: an introduction to the legal systems of Europe and Latin America - 3rd Edition* (SUP Stanford Calif. 2007).

Miller & Cross *The legal environment today*

Miller R & Cross F *The legal environment today - summarized case edition - 8th edition* (Delmar Cengage Learning New York 2015).

Mokyr *The Oxford Encyclopedia*

Mokyr J *The Oxford Encyclopedia of economic history – vol. 5* (OUP Oxford 2003).

MDR *Analyse des conditions de travail*

Mouvement pour les Droits de l'Homme et la Reconciliation (MDR) *Analyse des conditions de travail au sein des entreprises asiatiques : cas de CDM et de Golden African Resources* (MDR Lubumbashi 2016).
https://congomines.org/system/attachments/assets/000/001/230/original/MDR-publication_entreprises_asiatiques.pdf?1489058298 (Date of use: 04 February 2022).

Ministry of Interior *DGM brochure*

Ministry of Interior, Decentralisation and Safety *DGM brochure* (DGM Kinshasa 2013).

Mobutu Sese Seko Presidential address

Mobutu Sese Seko J *Discours présidentiel de la politique générale prononcé le 30 novembre 1973* (Presidential address on general policy delivered on November 30, 1973) (Institut Makanda Kabobi Kinshasa 1973).

Mpala *Juridictions de droit commun*

Mpala M *Juridictions de droit commun siégeant en matière du travail: composition, compétence et saisine irrégulières* (Ordinary courts sitting as labour courts: unlawful composition, jurisdiction and referrals] (ed Nata Kinshasa 2008).

Mumengi *L'avenir à bras le corps*

Mumengi D *L'avenir à bras le corps: prospective pour le développement de la République démocratique du Congo* [The future in hand: foresight for the development of the Democratic Republic of Congo] (Editions Universitaires Africaines Kinshasa 2001).

Musubao *La jurisprudence congolaise*

Musubao L *La jurisprudence congolaise en droit du travail et de la sécurité sociale - volume 1* (Congolese case law in labour and social security law - volume 1) (Edition On s'en sortira Kinshasa 2006).

Mutshipangu *Relations de travail*

Mutshipangu T *Droit congolais des relations de travail* (Congolese labour relations law) (Editions Connaissance du droit Kinshasa 2017).

Mvioki *Droit congolais*

Mvioki JMP *Droit congolais du travail* (Congolese labour law) (L'Harmattan Paris 2015).

National legislature

National legislature (Parliament). <https://www.gov.za/about-government/government-system/national-legislature-parliament#:~:text=and%20cooperative%20governance.-.Law%2Dmaking,prepare%20legislation%2C%20except%20Money%20Bills> (Date of use: 09 March 2022).

NMCM *Kaffir Employment Act*

Nelson Mandela Centre of Memory (NMCM) *Kaffir Employment Act No. 27* (NMCM Houghton). <https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01674.htm> (Date of use: 13 May 2022).

NMCM *Kaffir Pass Act*

Nelson Mandela Centre of Memory (NMCM) *Kaffir Pass Act No. 23* (NMCM Houghton).

<https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv01538/04lv01646/05lv01673.htm> (Date of use: 13 May 2022).

Newbold Population policies

Newbold K "Population policies," in Newbold K *Population geography: tools and issues – fourth edition* (Rowman & Littlefield Publishers 2021) 508-559.

Nghenda *Zaïrianisation*

Nghenda L *Zaïrianisation, radicalisation, rétrocession en République du Zaïre : considérations juridiques* [Zaireanization, radicalisation, retrocession in the Republic of Zaire: legal considerations] (PUZ Rectorat Kinshasa 1979).

Ngoie & Lelu *Migration*

Ngoie G & Lelu D (eds) *Migration en République Démocratique du Congo: Profil National* [Migration in the Democratic Republic of Congo: National Profile] (OIM Genève 2009) https://publications.iom.int/system/files/pdf/drc_profile_2009.pdf (Date of use: 14 April 2022).

Nicoli, Kachingwe, & Kaput *The market for remittance services*

Nicoli M, Kachingwe N, & Kaput E (eds) *The market for remittance services in Southern Africa* (World Bank Group Washington DC 2018).

N'songo *Contentieux administratif congolais*

N'songo W *Contentieux administratif congolais: essai d'analyse de doctrine et de jurisprudence* (Congoese administrative litigation: an attempt to analyse doctrinal writings and case law) (Collection Informations juridiques Kinshasa 1998);

Ntabala *Droit administratif*

Ntabala K *Droit administratif - volume 3* [Administrative law - Volume 3] (Université de Kinshasa, Kinshasa 2001).

Ntabala Droit administratif et institutions administratives

Ntabala K *Droit administratif et institutions administratives – Tome 1* [Administrative law and administrative institutions - Volume 1] (PUK Kinshasa 1997).

Nyenti, du Plessis, & Apon Access to social services for noncitizens

Nyenti M, du Plessis M, & Apon L *Access to social services for noncitizens and the portability of social benefits within the Southern African Development Community (SADC): South Africa country report - a report to the World Bank* (University of Johannesburg, Johannesburg 2007).

Nzongola-Ntalaja The Congo

Nzongola-Ntalaja G *The Congo from Leopold to Kabila: a people's history* (Zed Books London 2002).

OECD International Migration Outlook 2011

OECD International Migration Outlook 2011 (OECD Publishing Paris 2011).

OECD International Migration Outlook 2015

OECD International Migration Outlook 2015 (OECD Publishing Paris 2016).

OECD Territorial Reviews

OECD, *OECD Territorial Reviews: Stockholm, Sweden 2006* (OECD Publishing Paris 2006).

OECD Recruiting immigrant workers

OECD *Recruiting immigrant workers: New Zealand 2014* (OECD Publ. Paris 2014).

OECD Trends in international migration 2004

OECD Trends in international migration 2004 (OECD Publishing Paris 2005).

OECD/European Union Economic migration

OECD/European Union *Matching economic migration with labour market needs* (OECD Publishing Paris 2014).

OECD/ILO *How immigrants contribute to South Africa's Economy*
OECD/ILO *How immigrants contribute to South Africa's economy* (OECD Publishing Paris 2018). <http://dx.doi.org/10.1787/9789264085398-en> (Date of use: 14 April 2022).

OHCHR *The economic, social and cultural rights of migrants*
Office of the United Nations High Commissioner for Human Rights (OHCHR) *The economic, social and cultural rights of migrants in an irregular situation* (UN New York 2014).

Okafor *African theology*
Okafor N *African theology* (Wisdom of Zion Amafor Nkpor 2003).

Okpechi *Access to justice*
Okpechi A *Access to justice by refugees and asylum seekers in South Africa* (PhD thesis University of Cape Town 2011).

Olivier *Social protection for non-citizens*
Olivier M *Regional overview of social protection for non-citizens in the Southern African Development Community (SADC) - SP Discussion Paper No. 0908* (World Bank Washington DC 2009).

Parshotam *Migration trends*
Parshotam A *Migration trends in Southern Africa: Southern Africa's attitude towards migration* (SAIIA Johannesburg 2018).

Peberdy *Not quite white?*
Peberdy S *Not quite white?: not quite black? not quite South African? constructions of race, nation and immigration in South Africa* (University of the Witwatersrand, Institute for Advanced Social Research Johannesburg 1996).

Perruchoud & Redpath-Cross *Glossary on migration*

Perruchoud R & Redpath-Cross J (eds) *Glossary on migration - international migration law series No. 25* (IOM Geneva (2011)).

Prunier *From genocide to continental war*

Prunier G *From genocide to continental war: the 'Congolese' conflict and the crisis of contemporary Africa* (Hurst London 2009).

Ratha *Remittances*

Ratha D *Remittances: funds for the folks back home* (IMF Washington DC 2020).
<https://www.imf.org/external/pubs/ft/fandd/basics/remitt.htm> (Date of use: 04 February 2022).

Ratha & Shaw *South-south migration*

Ratha D & Shaw W *South-south migration and remittances - World Bank working paper No. 102* (World Bank Washington DC 2007).

Rendu *Traité pratique de droit industriel*

Rendu A *Traité pratique de droit industriel, ou exposé de la législation et de la jurisprudence sur les établissements industriels, les brevets d'invention, la propriété industrielle, artistique et littéraire, les obligations particulières à l'industrie* (ILGJ Cosse Paris 1855).

Reynolds *Labour law and practice*

Reynolds C A *Labour law and practice in the Republic of Zaire - Report No. 393* (U.S. Bureau of Labour Statistics Washington D C 1972).

O'Connell *Vindicating socio-economic rights*

O'Connell P *Vindicating socio-economic rights: international standards and comparative experiences* (Routledge New York 2012).

Pillai *HSRC and IPSOS look at drivers*

Pillai M *HSRC and IPSOS look at drivers of anti-immigrant sentiment in South Africa* (HSRC Pretoria 2020). <http://www.hsrc.ac.za/en/media-briefs/dces/anti-immigrant-sentiment-sa> (Date of use: 08 February 2022).

Presidency of the Republic, *State of the Nation Address*

Presidency of the Republic, *State of the Nation Address by the Head of State before Parliament gathered in Congress* (Presidency of the Republic Kinshasa - 13 December 2019).

Presidency of the Republic *Speech by the Head of State*

Presidency of the Republic, *Speech by the Head of State marking the second anniversary of his accession to the supreme magistracy* (Lubumbashi 26 January 2003). <https://repositories.lib.utexas.edu/bitstream/handle/2152/5299/2595.pdf?sequence=1&isAllowed=y> (Date of use: 15 July 2022).

Rehman *The weaknesses*

Rehman J *The weaknesses in the international protection of minority rights* (Kluwer Law International The Hague 2000).

Ridge & Smith *The global forced migration crisis*

Ridge T & Smith G *Confronting the global forced migration crisis: a report of the CSIS task* (Rowman & Littlefield London 2018).

Ruhs *The price of rights*

Ruhs M *The price of rights: regulating international labour migration* (Princeton University Press Princeton 2013).

Sabinet National Labour Migration Policy

Sabinet “National Labour Migration Policy on Track” (Sabinet Johannesburg 2021). <https://legal.sabinet.co.za/articles/national-labour-migration-policy-on-track/> (Date of use: 16 February 2022).

SADC Regional Migration Policy Framework

SADC “SADC develops Regional Migration Policy Framework” (SADC 22 Oct. 2020).

SADC Labour Migration Policy

SADC “SADC Labour Migration Policy” SADC/ELSJTSCM/1/2013/9 (December 2013).

SARS Non-residents

SARS “Non-residents” 2019.
<https://www.sars.gov.za/ClientSegments/Individuals/Tax-Stages/Tax-and-Non-Residents/Pages/default.aspx> (Date of use: 11 March 2022).

Saunders *The South African labour market*

Saunders I *The South African labour market: all the facts* (The Department of Labour Pretoria 2013). https://www.groundup.org.za/article/south-african-labour-market-all-facts_842/ (Date of use: 03 February 2022).

Schabas & Imbleau *Rwandan law*

Schabas W & Imbleau M *Introduction to Rwandan law* (Les Editions Yvon Blais, Cowansville, Quebec 1997).

Scott *et al The law of commerce*

Scott J *et al The law of commerce in South Africa* (OUP Southern Africa Cape Town 2009).

Segatti & Landau *Contemporary migration to South Africa*

Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011).

Segatti and Landau *Migration in post-apartheid South Africa*

Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (AFD No. 38 Paris 2008).

Serrano Law Firm PLLC *Biometric screening*

Serrano Law Firm PLLC *What is a biometric screening?* (Serrano Law Firm PLLC Houston, TX 2021). <https://serranoplhc.com/what-is-a-biometric-screening/> (Date of use: 12 March 2022).

Setai *The making of poverty*

Setai B *The making of poverty in South Africa* (SAPES Books Harare 1998).

Shempe & SADC *23rd SADC Summit*

Shempe H & SADC (eds) *23rd SADC Summit, 25-26 August 2003, Dar Es Salaam, United Republic of Tanzania* (SADC Secretariat Dar Es Salaam 2003).

Shutsha *Six leçons*

Shutsha D *Six leçons de droit du travail* (Six lessons of Labour Law) (Ed. Espérance Paris 2018).

Siems *Comparative law*

Siems M *Comparative law* (Cambridge University Press Cambridge 2014).

Simanovsky, Strepetova, & Naido *Brain drain*

Simanovsky S, Strepetova M, & Naido G *Brain drain from Russia: problems, prospects, and ways of regulation* (Nova Science Publishers Commack NY 1996).

Sindjoun *Sociologie*

Sindjoun L *Sociologie des relations internationales africaines* (Karthala Paris 2002).

Skogly *Beyond national borders*

Skogly S *Beyond national borders: States' Human Rights obligations in international cooperation* (Intersentia Antwerpen Oxford 2006).

Smith *Studies critical*

Smith T *Studies critical and comparative* (W Green & Son Ltd Edinburgh 1962).

South Africa Act, 1909

South Africa, *South Africa Act, 1909: an Act to Constitute the Union of South Africa* (Government Print and Stationery Office Pretoria 1910).

South Africa Archives Department Archives year book

South Africa Archives Department *Argief-Jaarboek vir Suid-Afrikaanse Geskiedenis: Archives year book for South African History* (Perskor Doornfontein Johannesburg 1954).

SAHRC *Braamfontein Statement on Xenophobia*

SAHRC *Braamfontein Statement on Xenophobia*, released on the 15 Oct. 1998.

South African Law Reform Commission Project 25

South African Law Reform Commission Project 25: statutory law revision: report on legislation administered by the Department of Public Service and Administration [2017] ZALRC 1 (1 September 2017) <http://www.saflii.org/za/other/ZALRC/2017/1.html> (Date of use: 10 March 2022).

SARS *Guide on the taxation*

South African Revenue Service (SARS) *Guide on the taxation of foreigners working in South Africa (2014/15)* (SARS Pretoria 2015). <https://www.sars.gov.za/wp-content/uploads/Ops/Guides/LAPD-IT-G21-Guide-on-the-Taxation-of-Foreigners-working-in-South-Africa.pdf> (Date of use: 12 March 2022).

SADC *Southern Africa*

Southern African Development Community (SADC) *Southern Africa: a framework and strategy for building the community* (SADC Harare 1994).

Stana *Foreign workers*

Stana R (ed) *Foreign workers: information on selected countries' experiences - Report to the Chairman, Committee on the Judiciary, House of Representatives* (GAO Washington DC 2006).

Statistics South Africa *P0211 - Quarterly Labour Force Survey*

Statistics South Africa "How do women fare in the South African labour market?" *P0211 - Quarterly Labour Force Survey (QLFS) 2nd Quarter 2018* (31 July 2018). <https://www.statssa.gov.za/?p=11375> (Date of use: 11 March 2022).

Statistics South Africa *Statistical release - P0211*

Statistics South Africa *Statistical release - P0211 - Quarterly Labour Force Survey (QLFS), 2nd quarter 2021* (Statistics South Africa Pretoria 24 August 2021). <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2021.pdf> (Date of use: 11 March 2022).

Stevenson *Oxford Dictionary*

Stevenson A (ed) *Oxford Dictionary of English* (OUP Oxford 2010).

Stevenson & Waite *Concise Oxford English dictionary*

Stevenson A & Waite M *Concise Oxford English dictionary: luxury edition* (OUP Oxford 2011).

Ström *Migration and development*

Ström G *Migration and development - dependence on South Africa: a study of Lesotho* (SIAS Uppsala 1986).

Sundström *The exchange economy*

Sundström L *The exchange economy of pre-colonial tropical Africa* (Hurst London 1974).

Suparamaniam-Kallerdah *Nationalising a workforce*

Suparamaniam-Kallerdah N *Nationalising a workforce* (Vysus Group Manchester 2021). <https://www.vysusgroup.com/articles/nationalising-a-workforce> (Date of use: 09 February 2022).

Taran et al Economic migration

Taran P *et al Economic migration, social cohesion and development: towards an integrated approach* (Council of Europe Strasbourg 2009).

Te Pemako Traité de droit administratif

Te Pemako V *Traité de droit administratif* (Administrative law treatise) (Afrique Editions & Larcier Bruxelles 2007).

Te Pemako & DJ'Andima Traité de droit administratif de la RDC

Te Pemako V & DJ'Andima J *Traité de droit administratif de la République démocratique du Congo – 2^e édition* (Treatise on Administrative Law of the Democratic Republic of the Congo - 2nd edition) (Bruylant Bruxelles 2020).

The Government of Canada Security screening

The Government of Canada *CIMM - Security screening and admissibility* (The Government of Canada Ottawa 2020). <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-nov-25-2020/cimm-security-screening-admissibility-nov-25-2020.html> (Date of use: 12 March 2022).

Truen & Chrisandza South Africa-SADC remittance channel

Truen S & Chrisandza S *The South Africa-SADC remittance channel* (DNA Economics Pretoria 2012).

Tshabalala-Msimang Speech

Tshabalala-Msimang M *Speech, signing of the memorandum of understanding between South Africa and the UK* (Department of Health Pretoria 2003) <https://www.polity.org.za/article/tshabalalamsimang-signing-of-agreement-between-sa-amp-uk-24102003-2003-10-24> (Date of use: 04 August 2022).

Tshiyembe *La transition en République démocratique du Congo*

Tshiyembe M (ed) *La transition en République démocratique du Congo: bilan, enjeux et perspectives [The transition in the Democratic Republic of Congo: assessment, challenges and prospects]* (L'Harmattan Paris 2005).

The World Bank New study

The World Bank “New study finds immigrants in South Africa generate jobs for locals” (The World Bank Pretoria, 13 November 2018).
<https://www.worldbank.org/en/country/southafrica/publication/new-study-finds-immigrants-in-south-africa-generate-jobs-for-locals> (Date of use: 08 February 2022).

Tiirkeistudien Migration movements

Tiirkeistudien Z “Migration movements from Turkey to the European Community”, prepared for the Commission of the European Communities (Brussels 1993).

Tshibambe & Kabunda *La dynamique migratoire en RDC*

Tshibambe G & Kabunda G (eds) *La dynamique migratoire en RDC: morphologie, logique et incidences à Lubumbashi - Rapport final pour le projet financé par le MacArthur Foundation: “Perspectives Africaines sur la Mobilité Humaine”* (UNILU Lubumbashi 2010).

Tshibambe & Mukohya Profil migratoire par pays

Tshibambe G & Mukohya V (eds) “Profil migratoire par pays: cas de la RDC,” [Migration profile per country: the case of the DRC] in *Country Paper: The Democratic Republic of Congo* (UNILU Lubumbashi 2008).

UCT SALDRU *Carnegie Conference Paper*

UCT SALDRU *Carnegie Conference Paper, Issues 154-165* (SALDRU/ School of Economics UCT Cape Town 1984).

UCT SALDRU *Conference papers*

UCT SALDRU *Conference papers - Issue 157* (SALDRU UCT Cape Town 1984).

CESCR General comment No. 20

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20.

CESCR General comment No. 18

UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 18: the right to work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18.

UNCTAD Contemporary labour migration

UNCTAD “Contemporary labour migration,” in *Economic development in Africa Report 2018: Migration for structural transformation* (United Nations Publications New York & Geneva 2018) 65-92. https://unctad.org/system/files/official-document/edar2018_ch3_en.pdf (Date of use: 19 July 2022).

UNCTAD Economic development in Africa

United Nations Conference on Trade and Development (UNCTAD) *Economic development in Africa: migration for structural transformation* (UNCTAD Geneva2017). <https://unctad.org/en/Pages/ALDC/Africa/EDAR2018-Key-Statistics.aspx> (Date of use: 14 April 2022).

Universiteit van Amsterdam et al Workshop proceeding

Universiteit van Amsterdam et al Workshop proceeding: Now you see them, now you don't: defining irregular migrants in Europe and Asia and the immigration measures applied to them, 7-9th January 2008 (Institute of Occidental Studies, Universiti Kebangsaan Malaysia 2008).

UN Security Council *Report of the Panel of Experts*

UN Security Council *Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC* [UN Doc. S/2001/357

(12 April 2001)] <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/DRC%20S%202001%20357.pdf> (Date of use: 18 April 2022).

UN Security Council *resolution 1925 (2010)*

UN Security Council, *Security Council resolution 1925 (2010) [on extension of the mandate of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)]*, 28 May 2010 [SC Res 1925, UN Doc S/RES/1925].

US Congress *Reviewing America's commitment*

United States Congress, Senate Committee on the Judiciary *Reviewing America's commitment to the Refugee Convention: The Refugee Protection Act of 2010 : hearing before the Committee on the Judiciary, United States Senate, one hundred eleventh congress, second session, May 19, 2010* (US Government Printing Office Washington DC 2010) <https://www.govinfo.gov/content/pkg/CHRG-111shrg58223/pdf/CHRG-111shrg58223.pdf> (Date of use: 10 April 2020).

US Congress *Congressional Record*

United States Congress *Congressional Record: Proceedings and Debates of the 106th Congress, Second Session, Volume 146, Part 11* (US Government Printing Office Washington DC 2000) 15279-15280.

INS & Bowser *Role of the immigrant inspector*

US Immigration and Naturalisation Service (INS) & Bowser J "Role of the immigrant inspector," in *INS I & N Reporter - Volumes 8-14* (U.S. Department of Justice, INS 1959) 105-110.

Usher & IOM *Essentials of migration management*

Usher E & IOM (eds) *Essentials of migration management: developing migration policy* (IOM Geneva 2004).

Van der Merwe *Notice of intention*

Van der Merwe L “Notice of intention to introduce a Private Member’s Bill and invitation for comment on the Draft Bill, namely the Employment Services Amendment Bill, 2021” *Government Gazette No. 43981* (11 December 2020).

Van Orshoven *The Belgian judicial code*

Van Orshoven P “The Belgian judicial code (1967),” in van Rhee C (ed) *European traditions in civil procedure* (Intersentia Antwerpen 2005).

Van Themaat *International economic law*

Van Themaat P *The changing structure of international economic law: a contribution of legal history, of comparative law and of general legal theory to the debate on a new international economic order* (Martinus Nijhoff Publishers The Hague 1981).

Vedel & Delvolve *Droit administratif*

Vedel G & Delvolve P *Droit administratif*, Tome 1, 12 ed. (Administrative Law, volume 1, 12 ed (P.U.F Paris 1992).

Wickramasekara *Bilateral agreements*

Wickramasekara P *Bilateral agreements and memoranda of understanding on migration of low skilled workers: a review* (ILO Geneva 2015).

Wickramasekara *International labour migration*

Wickramasekara P (eds) *International labour migration: a rights-based approach* (ILO Geneva 2010).

Wickramasekara & Ruhunage *Good practices*

Wickramasekara P & Ruhunage L *Good practices and provisions in multilateral and bilateral labour agreements and memoranda of understanding* (ILO Geneva 2018).

Whittaker *Asylum seekers and refugees*

Whittaker D *Asylum seekers and refugees in the contemporary world* (Routledge London 2006).

Wood Work permits

Wood S-J *What rights do foreign nationals have without work permits?* (Consolidated Employers Organisation Cape Town, 5 October 2018). <https://ceosa.org.za/what-rights-do-foreign-nationals-have-without-work-permits/> (Date of use: 26 February 2022).

Work Permits SA South African work visa

Work Permits SA *Benefits of a South African work visa* (Work Permits SA Johannesburg 2022). <https://www.workpermitsouthafrica.co.za/general-work-visa/> (Date of use: 26 February 2022).

Work Permits SA The need for a waiver

Work Permits SA *What necessitates the need for a waiver?* (Work Permits SA Johannesburg 2022). <https://www.workpermitsouthafrica.co.za/waiver-exemptions/> (Date of use: 26 February 2022).

World Bank Defying predictions

World Bank "Defying predictions, remittance flows remain strong during COVID-19 crisis" *Press Release No: 2021/147/SPJ* (World Bank Washington DC 2021). <https://www.worldbank.org/en/news/press-release/2021/05/12/defying-predictions-remittance-flows-remain-strong-during-covid-19-crisis> (Date of use: 04 February 2022).

World Bank East Asia and Pacific

World Bank *East Asia and Pacific in the Time of COVID-19* (World Bank Washington DC 2020).

World Bank Unemployment

World Bank *Unemployment, total (% of total labour force) (modelled ILO estimate)* (World Bank Washington DC 2021).

<https://data.worldbank.org/indicator/SL.UEM.TOTL.ZS?view=chart> (Date of use: 07 February 2022).

WHO From the workforce

World Health Organisation (WHO) "From the workforce," in WHO *Working together for health* (WHO Geneva 2006) 97-117.

World Health Organisation Report

World Health Organisation *Report on the world health situation* (WHO Geneva 1987).

WTO Members

WTO *Members and Observers* (WTO Geneva 2022).
https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (Date of use: 03 May 2022).

Yabili *Nouvelle fiscalité réglementaire*

Yabili M *République Démocratique du Congo et sa nouvelle fiscalité réglementaire : « 50.000 TAXES » redevances et droits- 30 ministères - 26 provinces- 1435 entités territoriales* (Democratic Republic of Congo and its new regulatory taxation: "50,000 TAXES" royalties and rights - 30 ministries - 26 provinces - 1435 territorial entities) (Marcel Yabili Lubumbashi 2016).

Yuzhanin *et al Bilateral Labour Migration Agreements*

Yuzhanin V *et al Bilateral Labour Migration Agreements (BLMAs): rapid assessment of the Southern Corridor (Ethiopia - Kenya - Tanzania - South Africa)* (IOM/UN Migration Nairobi 2021).

Zimmermann & Visser *Southern cross*

Zimmermann R & Visser D (eds) *Southern cross: civil law and common law in South Africa* (Clarendon Press Oxford 1996).

11.3.2 Essays or chapters in edited collections

Abella Global competition for skilled workers

Abella M “Global competition for skilled workers and consequences,” in Kuptsch C and Fong P (eds) *Competing for global talent* (ILO Geneva 2006) 11-32.

Abella & Abrera-Mangahas Specialised foreign employment office

Abella M & Abrera-Mangahas M “Organising a specialised foreign employment office,” in Abella M & Abrera-Mangahas M *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 2000) 39-48.

Abella & Abrera-Mangahas Foreign employment policy

Abella M & Abrera-Mangahas M “The first steps to be taken to formulate a foreign employment policy,” in Abella M & Abrera-Mangahas M *Sending workers abroad: a manual for low- and middle- income countries* (ILO Geneva 2000) 23-38.

Adam & Moodley Youth voices

Adam H & Moodley K “Youth voices: views from a township”, in Adam H & Moodley K *Imagined liberation: xenophobia, citizenship and identity in South Africa, Germany and Canada* (Sun Press & STIAS Stellenbosch 2013) 51-74.

Adebayo Kòse-é-máni

Adebayo A “Kòse-é-máni: Idealism and contradiction in the Yorùbá view of money,” in Stiansen E & Guyer J (eds) *Credit, currencies and culture African financial institutions in historical perspective* (NAI Stockholm 1999) 152-178.

Adepoju Internal and international migration

Adepoju A “Internal and international migration within Africa”, in Kok P *et al* (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 26-45.

Adepoju Intercontinental migration

Adepoju A “Regional and intercontinental migration in Sub-Saharan Africa,” in C Inglis, W Li, & B Khadria (eds) *The SAGE Handbook of International Migration* (SAGE London 2019) 232-246.

Adepoju Migration to, within and from Africa

Adepoju A “Migration to, within and from Africa: that’s where we belong,” in Knauf D & Morena B (eds) *Leaving home: migration yesterday and today* (Edition Temmen Bremen 2010) 249-264.

Adeniran African demographic dividend

Adeniran A “African demographic dividend, migration—development nexus and global economic reality,” in Adeniran A *Migration crises in 21st century Africa: patterns, processes and projections* (Palgrave Macmillan Singapore 2020) 63-85.

Adjolohoun Made in courts’ democracies?

Adjolohoun S “Made in courts’ democracies? – Constitutional adjudication and politics in African constitutionalism,” in Fombad C (ed) *Constitutional adjudication in Africa* (OUP Oxford 2017) 247–292.

Adepoju Migration in Africa

Adepoju A “Migration in Africa,” in Baker J & Aina T (eds) *The migration experience in Africa* (NAI Uppsala 1995) 87-108.

Agunias & Newland From “return of talent”

Agunias D & Newland K ‘From “return of talent” to “brain circulation” to “virtual return”: evolving ideas on the transfer of human capital,’ in *Developing a road map for engaging diasporas in development: a handbook for policymakers and practitioners in home and host countries* (IOM / MPI Geneva/ Washington DC 2012) 159-186.

Ahmad and Hansson Employing foreign workers

Ahmad R K and Hansson B "Employing foreign workers in Sweden in construction sector," in Bust P *Contemporary ergonomics 2008* (Taylor & Francis Chippenham 2008) 215-220.

Åkesson & Baaz Introduction

Åkesson L & Baaz M "Introduction," in Åkesson L & Baaz M (eds) *Africa's return migrants: the new developers?* (Zed Books London 2015) 1-22.

Akinola The scourge of xenophobia

Akinola A "The scourge of xenophobia: from Botswana to Zambia," in Akinola A (ed) *The political economy of xenophobia in Africa* (Springer International Publishing Cham 2018) 23-35.

Akokpari Globalisation

Akokpari J "Globalisation, migration, and the challenges of development in Africa," in Patterson R (ed) *African brain circulation: beyond the drain-gain debate* (Brill Leiden 2007) 59–86.

Akpotor Introductory

Akpotor A "Introductory," in Akpotor A *Politics and law: African perspectives* (Cigodson Benin City, Nigeria 2001) 1-21.

Akokpari, Price & Thompson The 'northern problem'

Akokpari J, Price C & Thompson K "The 'northern problem' : is pan-Africanism or regionalism the answer?" in Ndlovu-Gatsheni S & Mhlanga B *Bondage of boundaries and identity politics in postcolonial Africa: the 'Northern problem' and ethno-futures* (AISA Pretoria 2013) 305-322.

Amadi Understanding regional integration

Amadi V "Understanding regional integration and the laws regulating the movement of persons," in Amadi V *Trade, migration and law: free movement of persons in the Southern African Development Community* (Routledge London 2022) 1-52.

Amit & Kriger Making migrants 'il-legible'

Amit R & Kriger N "Making migrants 'il-legible': the policies and practices of documentation in post-apartheid South Africa". In Uma Dhupelia – Mesthrie (ed) *Paper Regimes. Kronos 40*, November 2014, 269-291.

Anastasopoulos The deterrence concept to migration

Anastasopoulos C "Linking the deterrence concept to migration," in Filippidou A (ed) *Deterrence: concepts and approaches for current and emerging threats* (Springer Cham 2020) 157-126.

Appave & Cholewinski Managing the labour migration

Appave G & Cholewinski R (eds) "Managing the labour migration and development equation," in *World migration 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008) 327-392.

Anderson Migration in South Africa

Anderson B "Migration in South Africa in comparative perspective," in Kok P, Gelderblom D, Oucho J & Van Zyl J (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 97-117.

Anderson & Ruhs Responding to employers

Anderson B & Ruhs M "Responding to employers: skills, shortages and sensible immigration policy," in Brochmann G & Jurado E (eds) *Europe's immigration challenge: reconciling work, welfare and mobility* (I.B.Tauris & Co Ltd London 2013) 95-104.

Anderson, Kotzé, & Morse Immigrants

Anderson R, Kotzé L, & Morse S "Immigrants and refugees," in Anderson R, Kotzé L, & Morse S (eds) *Berkshire encyclopedia of sustainability 9/10: Afro-Eurasia: assessing sustainability* (Berkshire Publishing Group Great Barrington MA 2012) 160-64.

Andreasson Botswana

Andreasson S “Botswana: paternalism and the developmental state,” in Andreasson S *Africa’s development impasse: rethinking the political economy of transformation* (Zed Books London 2013) 93-118.

Andrews Democratic Republic of Congo

Andrews C “Democratic Republic of Congo: growth with governance in the mining sector,” *Report No. 43402-ZR* (World Bank Washington DC 2008).

Aron, Kahn, & Kingdon South African economic policy

Aron J, Kahn B, & Kingdon G “South African economic policy under democracy: overview and prospects,” in Aron J, Kahn B, & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 1-27.

Arora Economic growth

Arora V “Economic growth in post-apartheid South Africa: a growth accounting analysis,” in Nowak N & Ricci L (eds) *Post-apartheid South Africa: the first ten years* (IMF Washington DC 2005) 13–22.

Attias-Donfut, Cook, & Hoffman Understanding African migration

Attias-Donfut C, Cook J, & Hoffman J “Understanding African migration: intergenerational relations, citizenship and belonging in a comparative context,” in Attias-Donfut C *et al* (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 165-188.

Baaz Successive flops

Baaz M “Successive flops and occasional feats: Development contributions and thorny social navigation among Congolese return migrants,” in Åkesson L & Baaz M (eds) *Africa’s return migrants: the new developers?* (Zed Books London 2015) 23-43.

Babalola Democratic Republic of the Congo

Babalola A "Democratic Republic of the Congo," in Danver S (ed) *Native peoples of the world: an encyclopedia of groups, cultures, and contemporary issues - volume 1-3* (Routledge London 2015) 599-601.

Bade Migration

Bade K "Migration in nineteenth- and early twentieth-century Europe," in Bade K *Migration in European history* (Blackwell Publishing Oxford 2003) 53-164.

Baker & Zetter From relief to development

Baker J & Zetter R "From relief to development: refugees as development resources: A macro-economic perspective," in Baker J & Zetter R *Refugee and labour movements in Sub-Saharan Africa: a review - shelter provision and settlement policies for refugees: a state of the art review* (NAI Uppsala 1995) 83-90.

Baker & Bones Children and refugee law

Baker T & Bones K "Children and refugee law in Australia and the United States," in Crock M and Benson L (eds) *Protecting migrant children: in search of best practice* (Edward Elgar Cheltenham UK 2018) 274-298.

Bakuri Roads to prosperity

Bakuri A "Roads to prosperity: social zones of transit," in Akinyoade A & Gewald J (eds) *African roads to prosperity: People en route to socio-cultural and economic transformations* (Brill Leiden 2015) 15-43.

Ballard How to go

Ballard S "How to go," in Ballard S *South Africa handbook - 3rd edition* (Footprint Handbooks London 1999) 21-75.

Banda Xenophobic experiences

Banda C "Xenophobic experiences of Malawian migrants in South Africa during the contemporary migration period," in Banda C *Perspectives of labour migration*

from Mzimba District, Malawi, to South Africa (RPCIG Mankon, Bamenda 2017) 73-88.

Banda Migration from Malawi

Banda H "An overview of migration from Malawi," in H Banda *Migration from Malawi to South Africa: a historical and cultural novel* (Langaa RPCIG Bamenda 2018) 1-22.

Banhegyi *et al* The business environment

Banhegyi S *et al* "The business environment," in Banhegyi S *et al Business management: fresh perspectives* (Pearson Education South Africa Cape Town 2009) 95-136.

Bannister *et al* Delegated legislation

Bannister J *et al* "Delegated legislation," in Bannister J *et al Government accountability: Australian administrative law* (CUP Cambridge 2015) 106-151.

Banya & Zajda Globalisation

Banya K & Zajda J "Globalisation, the brain drain, and poverty reduction in Sub-Saharan Africa," in Zajda J (ed) *Second international handbook on globalisation, education and policy research* (Springer London 2015) 263-285.

Baofu The same

Baofu P "The same and its two poles," in Baofu P *The future of post-human migration: a preface to a new theory of sameness, otherness, and identity* (Cambridge Scholars Publishing Cambridge UK 2012) 137-236.

Baofu The others

Baofu P "The others and their twin faces," in Baofu P *The future of post-human migration: a preface to a new theory of sameness, otherness, and identity* (Cambridge Scholars Publishing Cambridge UK 2012) 239-340

Barnard-Wills Subjectivity

Barnard-Wills D "Subjectivity and subject positions in discourses of surveillance," in Barnard-Wills D *Surveillance and identity: discourse, subjectivity and the state* (Ashgate Farnham 2012) 127-144.

Barnett & Blackman The executive power

Barnett R & Blackman J "The executive power," in Barnett R & Blackman J *Constitutional law: cases in context, 2021 supplement* (Wolters Kluwer New York 2021) 73–125.

Barnow, Trutko, & Piatak Occupational labour shortages

Barnow B, Trutko J, & Piatak J "Conceptual basis for identifying and measuring occupational labour shortages," in Barnow B, Trutko J, & Piatak J *Occupational labour shortages concepts, causes, consequences, and cures* (W.E. Upjohn Institute for Employment Research Kalamazoo, Michigan 2013) 1-33.

Barou, Aigner, & Mbenga African migration

Barou J, Aigner P, & Mbenga B "African migration in its national and global context," in Attias-Donfut C *et al* (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 13-39.

Bartram, Poros, & Monforte Brain drain

Bartram D, Poros M, & Monforte P "Brain drain/gain/circulation," in Bartram D, Poros M, & Monforte P *Key concepts in migration* (SAGE London 2014) 23-25.

Bartram, Poros, & Monforte Migration

Bartram D, Poros M, & Monforte P "Migration," in Bartram D, Poros M, & Monforte P *Key concepts in migration* (SAGE London 2014) 4-8.

Bartram, Poros & Monforte Labour migration

Bartram D, Poros M & Monforte P "Labour migration," in Bartram D, Poros M & Monforte P *Key concepts in migration* (SAGE London 2014) 91-93.

Baruah & Cholewinski Post-admission policies

Baruah N & Cholewinski R “Post-admission policies: rights of migrant workers,” in Baruah N & Cholewinski R (eds) *IOM handbook on establishing effective labour migration policies in countries of origin and destination* (OSCE/ IOM/ ILO Vienna/ Geneva 2006) 133-160.

Bast C & Hawkins Overview of the research process

Bast C & Hawkins M “Overview of the research process and ethical considerations,” in Bast C & Hawkins M *Foundations of legal research and writing – fifth edition* (Delmar Cengage Learning New York 2012) 191-208.

Battistella Labour migration in Asia

Battistella G “Labour migration in Asia and the role of bilateral migration agreements,” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave McMillan New York 2015) 299-324.

Bauböck Introduction

Bauböck R “Introduction,” in Bauböck R *Migration and citizenship: legal status, rights and political participation* (AUP Amsterdam 2006) 9-14.

Bauböck Citizenship and migration

Bauböck R “Citizenship and migration – concepts and controversies,” in Bauböck R *Migration and citizenship: legal status, rights and political participation* (AUP Amsterdam 2006) 15-32.

Bauder How migration regulates labour markets

Bauder H “How migration regulates labour markets: a framework,” in Bauder H *Labour movement: how migration regulates labour markets* (OUP Oxford 2006) 15-34.

Beauchemin Congolese migration

Beauchemin C *et al* "Congolese migration and family life between Africa and Europe," in Beauchemin C *Migration between Africa and Europe* (Springer Cham 2018) 239-264.

Bedford Contemporary patterns

Bedford R "Contemporary patterns of international migration," in Opeskin B, Perruchoud R & Redpath-Cross J (eds) *Foundations of international migration law* (CUP Cambridge 2012) 17-55.

Beckman R Southern Africa

Beckman R "Southern Africa," in Beckman R (ed) *Colonial and postcolonial Africa* (Britannica Educational Pub. New York 2017).

Bell Invisible actors

Bell M "Invisible actors?: Irregular migrants and discrimination," in Bogusz B *et al* (eds) *Irregular migration and human rights: theoretical, European and international perspectives* (Martinus Nijhoff Leiden 2004) 345-362.

Berntsen & De Lange Employer sanctions

Berntsen L & De Lange T "Employer sanctions: instrument of labour market regulation, migration control, and worker protection?" in Rijken C & De Lange T (eds) *Towards a decent labour market for low waged migrant workers* (AUP Amsterdam 2018) 208-230.

Bertucci *et al* Socio-economic challenges

Bertucci G *et al* "Socio-economic challenges facing HRM," in Bertucci G *et al* *Unlocking the human potential for public sector performance: world public sector report 2005* (United Nations New York 2005) 35-52.

Berwouts In search of root causes

Berwouts K “In search of root causes - the importance of local conflict: land and identity,” in Berwouts K *Congo’s violent peace: conflict and struggle since the Great African War* (Zed Books London 2017) 32-46.

Bester South Africa chapter

Bester H “South Africa chapter,” in Kontrimas A & Samsa M (eds) *International expatriate employment handbook* (Kluwer Law International Alphen aan den Rijn 2006) 537-552.

Bhorat & Oosthuizen Evolution of the labour market

Bhorat H & Oosthuizen M “Evolution of the labour market: 1995–2002,” in Bhorat H & Kanbur S (eds) *Poverty and policy in post-apartheid South Africa* (HSRC Press Cape Town 2006) 143-200.

Biffi & Skrivanek temporary labour migration and posted work

Biffi G & Skrivanek I “The distinction between temporary labour migration and posted work in Austria: labour law versus trade law,” in Howe J & Owens R (eds) *Temporary labour migration in the global era: the regulatory challenges* (Hart Publishing Oxford 2016) 91-110.

Bischoff SADC and the culture of security

Bischoff P “How much its own and to what end? SADC and the culture of security and regional organisation in Southern Africa”, in Aris S & Wenger A (eds) *Regional organisations and security: conceptions and practices* (Routledge London 2015) 59-77.

Blair Resources and commodity flows

Blair J “Resources and commodity flows,” in Blair J *Local economic development: analysis and practice* (SAGE Publications London 2013) 189-210.

Boeri & Ours Migration policies

Boeri T and Ours J “Migration policies,” in Boeri T and van Ours J *The economics of imperfect labour markets: second edition* (PUP Princeton NJ 2013) 245-273.

Böhning The first steps

Böhning W “The first steps to be taken to formulate a policy,” in Böhning *Employing foreign workers: A manual on policies and procedures of special interest to middle- and low-income countries* (ILO Geneva 1996) 15-28.

Bonifazi & Strozza Conceptual framework

Bonifazi C & Strozza S “Conceptual framework and data collection in international migration,” in Caselli G, Vallin J, & Wunsch G (eds) *Demography: analysis and synthesis, four volume set: a treatise in population* (AP London 2006) 535–554.

Boswell The politics of irregular migration

Boswell C “The politics of irregular migration,” in Azoulay L & de Vries K (eds) *EU migration law: legal complexities and political rationales* (OUP Oxford 2014) 41-68.

Botma Race talk

Botma G “Race talk in the white colonial press during British rule,” in Botma G *Race talk in the South African Media* (African Sun Media Stellenbosch 2020) 15-36.

Bouckaert & D’Hondt The Growing impact

Bouckaert S & D’Hondt S “The Growing impact of human rights standards on the socio-economic status of undocumented migrants in Belgium: a few illustrations,” in van der Auweraert P *et al* (eds) *Social, economic and cultural rights - an appraisal of current european and international developments* (Maklu Apeldoorn/Antwerpen 2002) 289-214.

Brand Statutes

Brand J “Statutes,” in Brand J *Philosophy of law: introducing jurisprudence* (Bloomsbury London 2013) 208-224.

Breen Difference’ or discrimination?

Breen C “‘Difference’ or discrimination? Exploring the concepts underpinning children's Rights, discrimination and the need to acknowledge difference,” in Breen C *Age discrimination and children's rights: ensuring equality and acknowledging difference* (Martinus Nijhoff Publishers Leiden 2006) 1–43.

Breier Doctors

Breier M “Doctors,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: Case studies of key professions* (HSRC Press Cape Town 2010) 113-131.

Brock Temporary labour migration

Brock G “Temporary labour migration,” in *Justice for People on the Move: Migration in Challenging Times* (CUP Cambridge UK 2020) 138-165.

Brody Theories of labour migration

Brody B “Theories of labour migration and immigrant integration,” Brody B *Opening the doors: immigration, ethnicity, and globalisation in Japan* (Routledge London 2012) 15-30.

Broeck Introduction

Broeck J “Introduction: the economics of labour migration – a process of survival,” in Broeck J (ed) *The economics of labour migration* (Edward Elgar Publishing Cheltenham UK 1996) 1-6.

Brown Outsourcing

Brown E “Outsourcing immigration compliance,” in Morriss A & Estreich S (eds) *Global labour and employment law for the practicing lawyer* (Kluwer Law International 2010) 399-475.

Brown, Lauder, & Ashton The war

Brown P, Lauder H, & Ashton D “The war for talent,” in Brown P, Lauder H, & Ashton D *The global auction: the broken promises of education, jobs and incomes* (OUP Oxford 2011) 83-97.

Buchan New opportunities

Buchan J "New opportunities: United Kingdom recruitment of Filipino nurses," in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 47-61.

Butler A rainbow nation

Butler A "A rainbow nation?," in Butler A *Contemporary South Africa - 3rd edition* (Palgrave Macmillan London 2017) 31-51.

Bystrom Seeing Johannesburg anew

Bystrom K "Seeing Johannesburg anew: conviviality and opacity in Khalo Matabane's," in Hemer O, Frykman M, & Ristilammi P (eds) *Conviviality at the crossroads: the poetics and politics of everyday encounters* (Palgrave Macmillan Cham 2020) 267-284.

Cabrelli Examining the labour law

Cabrelli D "Examining the labour law & social dimension of human rights: The UK & South Africa," in Reid E & Visser D (eds) *Private law and human rights: bringing rights home in Scotland and South Africa* (EUP Edinburgh 2013) 391-417.

Calabresi Choking on statutes

Calabresi G "Choking on statutes," in Calabresi G *Common law for the age of statutes* (HUP Cambridge MA 1982) 1-7.

Campbell International migration and human rights

Campbell E "International migration and human rights in Sub-Saharan Africa," in Oucho J (ed) *Migration in the service of African development: essays in honour of Professor Aderanti Adepaju* (Safari Books Ibadan 2011) 207-255.

Campbell Irregular migration

Campbell E "Irregular migration within and to the Republic of South Africa and from the African Continent to the European Union: tapping latent energy of the

youth,” in Adepoju A (ed) *Migration within, to and from Africa in a globalised world* (Sub-Saharan Publishers Legon-Accra 2010) 169-207.

Carciotto International migration and development

Carciotto S “International migration and development in South Africa,” in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 57-73.

Carens Immigration

Carens J “Immigration, political realities, and philosophy,” in Hoesch M & Mooren N (eds) *Joseph Carens: between aliens and citizens* (Springer Cham 2020) 17-29.

Carens Irregular migrants

Carens J “Irregular migrants,” in Carens J *The ethics of immigration* (OUP Oxford 2013) 129-157.

Carens Ordinary admissions

Carens J “Ordinary admissions,” in Carens J *The ethics of immigration* (Oxford University Press Oxford 2013) 173-191.

Castagnone *et al* Afro-European economic integration

Castagnone E *et al* “Understanding Afro-European economic integration between origin and destination countries,” in Beauchemin C (eds) *Migration between Africa and Europe* (Springer Cham 2018) 123-148.

Castells The transformation of work

Castells M “The transformation of work and employment: networkers, jobless, and flex-timers,” in Castells M (1996) *The rise of the networked society - second edition* (Blackwell Publishing Oxford 2010) 216-354.

Castles Contract labour migration

Castles S “Contract labour migration,” in Castles S *Ethnicity and globalisation: from migrant worker to transnational citizen* (SAGE London 2000) 95-103.

Castles Contract

Castles S “Contract labour migration,” in Cohen R (ed) *The Cambridge survey of world migration* (CUP Cambridge 1995) 510-514.

Castles *et al* Irregular migration

Castles S *et al* “Irregular migration: causes, patterns, and strategies,” in Omelaniuk I (ed) *Global perspectives on migration and development: GFMD Puerto Vallarta and beyond* (Springer London 2012) 117-151.

Chacha, Chiuri, & Nyangena Racial and ethnic mobilisation

Chacha B, Chiuri W, & Nyangena K “Racial and ethnic mobilisation and classification in Kenya,” in Rocha Z & Aspinall P (eds) *The Palgrave international handbook of mixed racial and ethnic classification* (Palgrave Macmillan Cham 2020) 517-534.

Chagunda Refugees and asylum seekers

Chagunda C “Refugees and asylum seekers from Sub-Saharan African countries and the promotion of healthy human relationships,” in Noyoo N (ed.) *Promoting healthy human relationships in post-apartheid South Africa: social work and social development perspectives* (Springer Cham 2021) 49-65.

Chanda Legal pluralism

Chanda K “Continuing legal pluralism with gradual juridical integration: the way forward for post-colonial Africa,” in Hinz M & Patemann H (eds) *The shade of new leaves: governance in traditional authority: a Southern African perspective* (Lit Verlag Berlin 2006) 47-55.

Chanock South Africa

Chanock M “South Africa, 1841–1924: race, contract, and coercion,” in Hay D & Craven P (eds) *Masters, servants, and magistrates in Britain and the Empire, 1562-1955* (UNC Press Chapel Hill 2004) 338-364.

Chaskalson The right of black persons

Chaskalson A “The right of black persons to seek employment and be employed in the Republic of South Africa,” in Bennett T *Urban black law: being a series of articles* (Juta Cape Town 1985) 33-41.

Chazan *et al* Political economy

Chazan N *et al* “Political economy: policy choices in a constraining environment,” in Chazan N *et al Politics and society in contemporary Africa* (Lynne Rienner Boulder 1992) 227-274.

Cheru, Materu, & O’Reilly Overcoming the implementation gap

Cheru F, Materu J, & O’Reilly D (eds) “Overcoming the implementation gap: the way forward,” in Cheru F, Materu J, & O’Reilly D *Structural transformation in Ethiopia: the urban dimension building ‘economically productive, socially inclusive, environmentally sustainable & well governed’ cities* (UN-Habitat Nairobi 2014) 85-89.

Chetail History

Chetail V “History of international migration law,” in Chetail V *International migration law* (OUP Oxford 2019) 18-75.

Chetail Migrant workers

Chetail V “Migrant workers,” in Chetail V *International migration law* (OUP Oxford 2019) 200-250.

Chetail Sources of international migration law

Chetail V “Sources of international migration law,” in Opeskin B, Perruchoud R, & Redpath-Cross J (eds) *Foundations of international migration law* (CUP Cambridge 2012) 56-92.

Chetail The transnational movement

Chetail V “The transnational movement of persons under general international law – mapping the customary law foundations of international migration law,” in Chetail

V & Bauloz C (eds) *Research handbook on international law and migration* (Edward Elgar Cheltenham, UK 2014) 1-74.

Cholewinski International labour migration

Cholewinski R “International labour migration,” in Opeskin B, Perruchoud R & Redpath-Cross J (eds) *Foundations of international migration law* (University Press Cambridge, Cambridge 2012) 283-311.

Cholewinski International migration

Cholewinski R “International migration for employment, aliens and citizens,” in Cholewinski R *Migrant workers in international human rights law: their protection in countries of employment* (Clarendon Press Oxford 1997) 11-76.

Cholewinski International standards

Cholewinski R “International standards and processes for the protection of migrant rights,” in Ness I (ed) *The encyclopedia of global human migration* (Wiley-Blackwell Hoboken NJ 2013).

Cholewinski Introduction

Cholewinski R “Introduction,” in Cholewinski R *The legal status of migrants admitted for employment - a comparative study of law and practice in selected European states* (Council of Europe Publications Strasbourg 2008) 5-8.

Cholewinski Labour migration management

Cholewinski R “Labour migration management and the rights of migrant workers,” in Edwards A & Ferstman C (eds) *Human security and non-citizens: law, policy and international affairs* (2010) 273-313.

Cholewinski Migration for employment

Cholewinski R “Migration for employment,” in Plender R (ed) *Issues in international migration law* (Brill Nijhoff Leiden Boston 2015) 27–80.

Clayton Nationalism

Clayton A “Nationalism, postcolonialism, and the politics of representation: Laretta Ngcobo's and they didn't die,” in Clayton A *Postcolonial perspectives: English South African fiction under apartheid* (Vocamus Press Guelph Ontario 2017) 119-135.

Coates, Smith, & Walldorf Immigration

Coates D, Smith K & Walldorf W “Immigration, domestic consequences of,” in Coates D, Smith K & Walldorf W (eds) *The Oxford companion to American Politics - Volume 2* (OUP Oxford 2012) 513–516.

Cohen, Humphries, & Mynott Locating the debate

Cohen S, Humphries B, & Mynott E “Introduction: locating the debate,” in Cohen S, Humphries B, & Mynott E (eds) *From immigration controls to welfare controls* (Routledge London 2014) 1-8.

Cole Human rights as myth

Cole W “Human rights as myth and ceremony? reevaluating the effectiveness of human rights treaties, 1981–2007,” in Weston B & Gear A (eds) *Human rights in the world community: issues and action – fourth edition* (UPP Philadelphia 2016) 303-312.

Colombo *et al* Help wanted?

Colombo F *et al* “Help wanted?: Providing and paying for long-term care,” in OECD *Health Policy Studies* (OECD Publ. Paris 2011).

Cook Incorporation of unauthorised immigrants

Cook M “Is incorporation of unauthorised immigrants possible? Inclusion and contingency for nonstatus migrants and legal immigrants,” in Hochschild J *et al* (eds) *Outsiders no more?: models of immigrant political incorporation* (OUP Oxford 2013) 43-64.

Costello EU migration and asylum law

Costello C “EU migration and asylum law: a labour law perspective,” in Bogg A, Costello C, & Davies A (eds) *Research handbook on EU labour law* (Edward Elgar Pub Cheltenham 2016) 299-334.

Costello Migrants and forced labour

Costello C “Migrants and forced labour: a labour law response,” in Bogg A *et al* (eds) *The autonomy of labour law* (Hart Publishing Oxford 2015) 189–228.

Cote Deportation

Cote D “Deportation,” in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 222-233.

Crais Empire

Crais C “Empire and the ancestors,” in Crais C *White supremacy and Black resistance in pre-industrial South Africa: the making of the colonial order in the Eastern Cape, 1770–1865* (CUP Cambridge 1992) 191-210.

Crawley, Swailes & Walsh The dark side

Crawley E, Swailes S, & Walsh D “The dark side of international employment,” in Crawley E, Swailes S, & Walsh D *Introduction to international human resource management* (OUP Oxford 2013) 323-345.

Crock Contract or compact

Crock M “Contract or compact: Skilled migration and the dictates of politics and ideology,” in Crock M & Lyons K (eds) *Nation skilling: Immigration, labour and the law in Australia, Canada, New Zealand and the United States* (Desert Pea Press Sydney 2002) 49-66.

Crush & Chikanda Forced migration

Crush J & Chikanda B “Forced migration in Southern Africa,” in Qasmiyeh E *et al* (eds) *The Oxford Handbook of refugee and forced migration studies* (OUP Oxford 2014) 554-570.

Crush & Chikanda Staunching the flow

Crush J & Chikanda A “Staunching the flow: the brain drain and health professional retention strategies in South Africa,” in Czaika M (ed) *High-skilled migration: drivers and policies* (OUP Oxford 2018) 337-359.

Crymble Xenophobia

Crymble L ““Xenophobia is an African sickness; a greater African disease”: Contesting dominant migrant discourse through opposing metaphors,” in Dedaić M N (ed) *Singing, speaking and writing politics: South African political discourses* (John Benjamins Amsterdam 2015) 113–146.

Currie & De Waal Freedom of movement

Currie I & De Waal J “Freedom of movement and residence,” in Currie I & De Waal J *The Bill of Rights handbook – sixth ed.* (Juta Cape Town 2013) 451-457.

Currie & De Waal Slavery

Currie I & De Waal J “Slavery, servitude and forced labour,” in Currie I & De Waal J *The Bill of Rights handbook – sixth ed.* (Juta Cape Town 2013) 290-293.

Cyrus & Kovacheva Undocumented migration

Cyrus N & Kovacheva V “Undocumented migration in Germany - many figures, little comprehension,” in Triandafyllidou A (ed) *Irregular migration in Europe: myths and realities* (Routledge London 2016) 125-144.

Da Lomba The ECHR

Da Lomba S “The ECHR, health care and irregular migrants,” in Freeman M, Hawkes S, & Bennett B (eds) *Law and global health: current legal issues volume 16* (OUP Oxford 2014) 149-164.

Daniels Restrictive immigration policy

Daniels R “The growth of restrictive immigration policy in the colonies of settlement,” in Cohen R (ed) *The Cambridge survey of world migration* (CUP Cambridge 1995) 39-43.

Danov & Becker Research methodology

Danov M & Becker F “Research methodology,” in Danov M, Becker F, & Beaumont P (eds) *Cross-border EU competition law actions* (Hart Pub. Oxford 2013) 25-31.

Datta Changing patterns of migration

Datta A “Changing patterns of migration, remittances, and sources of income in rural Bihar,” in Datta A *Migration and development in India: the Bihar experience* (1st ed.) (Routledge London 2022) 80-97.

Davies International migration

Davies A “International migration, the health of migrants, and global health governance,” in Cooper A *et al* (eds) *Africa’s health challenges: sovereignty, mobility of people and healthcare governance* (Routledge London 2013) 93-107.

Davies Introduction

Davies S “Introduction,” in Davies S *Legitimising rejection: international refugee law in Southeast Asia* (Martinus Nijhoff Publishers Leiden 2008) 1–21.

De Beijl Introduction

De Beijl R “Introduction,” in de Beijl R (ed) *Documenting discrimination against migrant workers in the labour market: a comparative study of four European countries* (ILO Geneva 2000) 1-11.

DeCenzo, Robbins, & Verhulst The dynamic environment

DeCenzo D, Robbins S, & Verhulst S “The dynamic environment of HRM 1,” in *Fundamentals of human resource management, 12th Edition* (Wiley Hoboken NJ 2016).

De Genova The deportation regime

De Genova N “The deportation regime: Sovereignty, space, and the freedom of movement,” in De Genova N & Peutz N (eds) *The deportation regime: sovereignty, space, and the freedom of movement* (DUP Durham 2010) 33–68.

De Gruchy The South African immigration industry

De Gruchy T “‘Every Tom, Dick and Harry’: understanding the changing role of the South African immigration industry,” in Lacroix T & Desille A (eds) *International migrations and local governance: a global perspective* (Springer Cham 2018) 151-167.

De Haas & Fokkema Transnational return

De Haas H & Fokkema T “Transnational return and pendulum migration strategies of moroccan migrants: intra-household power inequalities, tensions and conflicts of interest,” in Oso L & Ribas-Mateos N (eds) *The international handbook on gender, migration and transnationalism: global and development perspectives* (Edward Elgar Cheltenham 2013) 208-230.

De Haas, Castles & Miller Introduction

De Haas H, Castles S, & Miller M “Introduction”, in De Haas H, Castles S, & Miller M *The age of migration: international population movements in the modern world - sixth edition* (Palgrave MacMillan London 2020) 1-20.

De Haas, Castles & Miller Migration in Africa

De Haas H, Castles S, & Miller M “Migration in Africa and the Middle East,” in De Haas H, Castles S & Miller M *The age of migration: international population movements in the modern world - sixth edition* (Palgrave Macmillan London 2020) 198-224.

DeLaet Domestic politics

DeLaet D “Domestic politics, liberal ideas, and U.S. Immigration Policy,” in DeLaet D L *U.S. immigration policy in an age of rights* (Praeger Westport CT 2000) 1-22.

Delattre Bill

Delattre N “Bill - Improving the readability of the law,” *Report No. 365* (2018-2019) passed by the Senate on 13 March 2019. [Delattre N « Proposition de loi - Améliorer la lisibilité du droit » *Rapport n° 365* (2018-2019) adoptée par le Sénat le 13 mars 2019]. http://www.senat.fr/rap/l18-365/l18-365_mono.html (Date of use: 14 April 2022).

DHA Green Paper

DHA “Green Paper on International Migration in South Africa,” in *Government Gazette No. 40088* (DHA Pretoria June 2016).

Desmond Regularisation

Desmond A “Regularisation in the European Union and the United States: the frequent use of an exceptional measure,” in Arcarazo D & Wiesbrock A (eds) *Global migration: old assumptions, new dynamics [3 volumes]* (ABC-CLIO Santa Barbara CA 2015) 69-99.

De Waal Constitutional law

De Waal J “Constitutional law,” in Van der Merwe C, & Du Plessis J (eds) *Introduction to the law of South Africa* (Kluwer Law International The Hague 2004) 55-106.

De Waal Structural risks

De Waal T “Structural risks of integration requirements,” in De Waal T *Integration requirements for immigrants in Europe: a legal-philosophical inquiry* (Hart Publishing New York 2021) 55-83.

Dewhurst The right of irregular immigrants

Dewhurst E “The right of irregular immigrants to back pay: the spectrum of protection in international, regional and national legal systems,” in Costello C & Freedland M (eds) *Migrants at work: immigration and vulnerability in labour law* (OUP Oxford 2014) 216–238.

Dibwa Quel modèle

Dibwa K “Quel modèle pour la République démocratique du Congo,” in Dibwa K *La justice constitutionnelle en République démocratique du Congo : fondements et modalités d'exercice* [“What model for the Democratic Republic of Congo,” in Dibwa K *Constitutional justice in the Democratic Republic of Congo: foundations and implementation methods*] (Éd. Eucalyptus Kinshasa-Gombe; Academia-l'Harmattan, Louvain-La-Neuve 2013) 261-292.

Docquier & Rapoport Highly-skilled emigration

Docquier F & Rapoport H “Quantifying the impact of highly-skilled emigration on developing countries,” in Boeri T *et al* (eds) *Brain drain and brain gain: the global competition to attract high-skilled migrants* (OUP Oxford 2012) 209-290.

Dodson & Crush Migration governance

Dodson B & Crush J *Migration governance and migrant rights in the Southern African Development Community (SADC): Attempts at harmonisation in a disharmonious region* - Research Paper 2015–3 (UNRISD Geneva October 2015).

Drori The evolution of government policies

Drori I “The evolution of government policies and the migrant labour employment system,” in Drori I *Foreign workers in Israel: global perspectives* (SUNYP Albany 2009) 45–68.

Dubow Graaff Reinet

Dubow S “Graaff Reinet and the colonial state,” in Dubow S *Land, labour and merchant capital in the pre-industrial rural economy of the Cape: the experience of the Graaff-Reinet District (1852-72)* (UCT Cape Town 1982) 31-45.

du Bois Introduction

du Bois F “Introduction: history, system and sources” in Van der Merwe C G, Du Plessis J E (eds) *Introduction to the law of South Africa* (Kluwer Law International The Hague 2004) 1- 53.

Ducanes & Baruah Policies and legislation

Ducanes G & Baruah N “Policies and legislation on recruitment fees and costs in the Asia and Pacific Region,” in ADBI, ILO, OECD *Innovative approaches for the management of labour migration in Asia* (ADBI, ILO, OECD Tokyo Paris 2020) 45-69.

Du Plessis & Smit South Africa’s growth revival

Du Plessis S and Smit B “Accounting for South Africa’s growth revival after 1994,” in Aron J, Kahn B, & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 28-91.

Du Plessis The Dalai Lama saga

Du Plessis M “Shooting Bambi — Reflections on the Dalai Lama saga and the casualty of the rule of law,” in Kidd M & Hoctor S (eds) *Stella Iuris: celebrating 100 years of teaching law in Pietermaritzburg* (Juta Cape Town 2010) 247-274.

Dural & Ertekin Migration

Dural B & Ertekin M “Migration from Bulgaria and Romania to the EU-15,” in Lordoğlu K, Demirer D & Şiriner I (eds) *Labour markets & employment – first edition* (IJOPEC Publication London 2012) 63–81.

Durose, Greasley, & Richardson Conclusion

Durose C, Greasley S, & Richardson L “Conclusion,” in Durose C, Greasley S, & Richardson L (eds) *Changing local governance, changing citizens* (Policy Press Bristol 2009) 211–224.

Du Toit & Roodt Engineering

Du Toit R & Roodt J “Engineering,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 75-112.

Du Toit Constructing an integrated model

Du Toit D “Constructing an integrated model for the regulation and enforcement of domestic workers’ rights,” in D du Toit (ed) *Exploited, undervalued - and essential: domestic workers and the realisation of their rights* (PULP Pretoria 2013) 321-350.

Edwards The meaning of nationality

Edwards A “The meaning of nationality in international law in an era of human rights : Procedural and substantive aspects,” in Edwards A & Van Waas L (eds) *Nationality and statelessness under international law* (Cambridge University Press Cambridge UK 2014) 11-43.

Edwards Trade liberalisation

Edwards L “Trade liberalisation and labour demand in South Africa during the 1990s’,” in Borat H & Kanbur S (eds) *Poverty and policy in post-apartheid South Africa* (HSRC Press Cape Town 2006) 232-261.

Egan Labour mobility

Egan M “Labour mobility and free movement of professionals,” in Egan M *Single markets: economic integration in Europe and the United States* (OUP Oxford 2015) 195-228.

El-Khawas & Ndumbe Africa's brain drain

El-Khawas M and Ndumbe J “Africa's brain drain: The critical role of human resources,” in Wusu O (ed) *Politics and economics of Africa – Volume 6* (Nova Science Publishers New York 2006) 91-104.

El Elphick & Malherbe The Khoisan

Elphick R & Malherbe V “The Khoisan to 1828,” in Elphick R & Giliomee H (eds) *The shaping of South African society, 1652–1840* (WUP Middletown 2014) 3-65.

Ellis South Africa & international migration

Ellis S “South Africa and international migration: the role of skilled labour” in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD No. 38 Paris 2008) 115-133.

Ellis & Segatti The role of skilled labour

Ellis S & Segatti A “The role of skilled labour,” in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 67-79.

Elveren Brain drain

Elveren A “Brain drain: causes and consequences,” in Elveren A *Brain drain and gender inequality in Turkey* (Springer Cham 2018) 7-22.

Engblom, Kountouris, & Ekman Temporary labour migration

Engblom S, Kountouris N & Ekman Å “Temporary labour migration and the trade in services: European and global perspectives in an age of economic integration,” in Howe J & Owens R (eds) *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publishing Oxford 2016) 65-90.

Epstein Frontier issues

Epstein G “Frontier issues of the political economy of migration,” in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham UK & Northampton MA 2013) 411-431.

Erasmus Scarce and critical skills

Erasmus J “Identification of scarce and critical skills in the South African labour market,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 22-33.

Esses, Dietz, & Bhardwaj The role of prejudice

Esses V, Dietz J, & Bhardwaj A "The role of prejudice in the discounting of immigrant skills," in Mahalingam R (ed) *Cultural psychology of immigrants* (Routledge London 2013) 113–130.

Eweka Hostile political communication

Eweka O "Hostile political communication: triadic examples from Africa," in Olukotun A & Omotoso S (eds) *Political communication in Africa* (Springer Cham 2017) 101–120.

Ezenagu & Eze-Ajoku Upgrade of local suppliers

Ezenagu A & Eze-Ajoku C "Upgrade of local suppliers in the global production network: the success or otherwise of local content regimes," in Olawuyi D (ed) *Local content and sustainable development in global energy markets* (CUP Cambridge 2021) 83-104.

Faist Immigration

Faist T "Immigration, integration, and the welfare state: Germany and the USA in comparative perspective," in Bauböck R, Heller A, & Zolberg A (eds) *The challenge of diversity: integration and pluralism in societies of immigration* (Avebury Aldershot UK 1996) 227-258.

Faist citizenship and nationalism

Faist T "Immigration, citizenship and nationalism: internal internationalisation in Germany and Europe," in Roche M & Van Berkel R *European citizenship and social exclusion* (Routledge London 2018) 213-226.

Falola & Aderinto Social history

Falola T & Aderinto S "Social history," in Falola T & Aderinto S *Nigeria, nationalism, and writing history* (Boydell & Brewer, URP Rochester NY; Woodbridge, Suffolk 2010) 68-81.

Farmbry South Africa

Farmbry K “South Africa: aspiration meets human condition,” in Farmbry K *Migration and xenophobia: a three country exploration* (Lexington Books Lanham Boulder New York) 43-63.

Feltes, Musker, & Scholz Regional governance of migration

Feltes T, Musker S, & Scholz P “Regional governance of migration in the Southern African Development Community: Migration regimes and their implications for the experience of refugees and migrants in South Africa,” in Kury H & Redo S (eds) *Refugees and migrants in law and policy: challenges and opportunities for global civic education* (Springer Cham 2018) 555-575.

Felton Aiding refugees

Felton J “Aiding refugees: should the U.N. help more displaced people?” in CQ Researcher (ed) *Issues in peace and conflict studies: selections from CQ Researcher* (SAGE London 2011) 283-316.

Fenger, Steen & Torre Labour migration policies

Fenger M, van der Steen M & van der Torre L (eds) “The responsiveness of labour migration policies,” in Fenger M, van der Steen M & van der Torre L *The responsiveness of social policies in Europe: the Netherlands in comparative perspective* (Policy Press Bistol 2013) 95–134

Fenwick, Kalua, & Landau Labour law

Fenwick C, Kalua E, & Landau I “Labour law: A Southern African perspective,” in Teklè (ed) *Labour law and worker protection in developing countries* (Hart Publishing Oxford and ILO Geneva 2010).

Fombad The separation of powers

Fombad C “An overview of the separation of powers under modern African constitutions,” in Fombad C (ed) *Separation of powers in African constitutionalism (Stellenbosch Handbooks in African Constitutional Law)* (OUP Oxford 2016) 58-92.

Fouberg, Murphy & de Blij Migration

Fouberg E, Murphy A & de Blij H “Migration,” in Fouberg E, Murphy & de Blij H A *Human geography: people, place, and culture* (Wiley Hoboken NJ 2020) 62-96.

Freedland Philosophical foundations of social inclusion

Freedland M “Reinforcing the philosophical foundations of social inclusion: the isolated worker in the isolated state,” in Collins H, Lester G, & Mantouvalou V (eds) *Philosophical foundations of labour law* (OUP Oxford 2018) 322–336.

Freedland & Costello Division of labour law

Freedland M & Costello C “Migrants at work and the division of labour law”, in Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014) 1-26.

Freinkman Executive summary

Freinkman L “Executive summary,” in Freinkman L (ed) *Growth challenges and Government policies in Armenia* (The World Bank Washington DC 2002) 1-18.

Friberg New patterns of labour migration

Friberg J “New patterns of labour migration from Central and Eastern Europe and its impact on labour markets and institutions in Norway: reviewing the evidence,” in Dølvik E & Eldring L (eds) *Labour mobility in the enlarged single European market* (Emerald Limited Bingley 2017) 19-43.

Friðriksdóttir EU Law on labour migration

Friðriksdóttir B “EU Law on labour migration – the compatibility of a sectoral approach to migration management and the right to equal treatment of third-country nationals,” in Friðriksdóttir B *What happened to equality?: the construction of the right to equal treatment of third-country nationals in European Union law on labour migration* (Brill Leiden 2017) 308-355.

Friðriksdóttir Migration management

Friðriksdóttir B “Theories and discourses on migration management,” in Friðriksdóttir B *What happened to equality?: the construction of the right to equal treatment of third-country nationals in European Union law on labour migration* (Brill Nijhoff Leiden 2017) 9-42.

Gabriel & Pellerin Introduction

Gabriel C & Pellerin H “Introduction”, in Gabriel C & Pellerin H (eds) *Governing international labour migration: current issues, challenges and dilemmas* (Routledge London 2008) 1-9.

Galligan Legal theory

Galligan D “Legal theory and empirical research” in Cane P & Kritzer H (eds) *The Oxford handbook of empirical legal research* (OUP Oxford 2010).

Gammage Regionalism in Southern Africa

Gammage C “Regionalism in Southern Africa,” in Gammage C *North-South regional trade agreements as legal regimes: a critical assessment of the EU-SADC economic partnership agreement* (Edward Elgar Pub. Northampton MA 2017) 200-230.

Gansallo Citizenship and naturalisation

Gansallo A “Citizenship and naturalisation,” in Gansallo A *Understanding immigration law and practice* (Wolters Kluwer New York 2017) 600-648.

Gansallo & Bernstein-Baker Asylum

Gansallo A & Bernstein-Baker J “Asylum and other related humanitarian relief,” in Gansallo A & Bernstein-Baker J *Understanding immigration law and practice* (Wolters Kluwer New York 2020) 177-255.

Gansallo & Bernstein-Bake Immigration court practice

Gansallo A & Bernstein-Bake J “Immigration court practice and relief from removal,” in Gansallo A and Bernstein-Baker J *Understanding immigration law and practice* (Wolters Kluwer New York 2020) 519-586.

Giacca Introduction

Giacca G "Introduction," in Giacca G *Economic, social, and cultural rights in armed conflict* (OUP Oxford 2014) 1-23.

Gill & Danna Xenophobia in Africa, Latin America, and the Caribbean

Gill B & Danna G "Xenophobia in Africa, Latin America, and the Caribbean: definitions, theories, and experiences," in Abidde S & Gill B *Africans and the exiled life: migration, culture, and globalisation* (Lexington Books Lanham 2018) 143–160.

Giroux The US university under siege

Giroux H "The US university under siege: confronting academic unfreedom," in Rowe J (ed) *A concise companion to American studies* (Wiley-Blackwell West Sussex 2010) 407-431.

Glenn Against method?

Glenn H "Against method?," in Adams M & Heirbaut D (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Hart Publishing Oxford 2014) 177-188.

Gnamo The Role of the Interahamwe

Gnamo A "The Role of the Interahamwe in the regional conflict: the origins of unrest in Kivu, Zaire," in Adelman H & Rao G (eds) *War and peace in Zaire-Congo: analysing and evaluating intervention, 1996-1997* (AWP Trenton NJ 2004) 85-108.

Godin Moroccan and Congolese migrant organisations

Godin M "Moroccan and Congolese migrant organisations in Belgium," in Portes A & Fernández-Kelly P (eds) *The State and the grassroots: immigrant transnational organisations in four continents* (Berghahn New York 2016) 189-211.

Gold & Nawyn Refugees

Gold S & Nawyn S "Refugees and forced migrants", in Gold S & Nawyn S (eds) *Routledge international handbook of migration studies* (Routledge London 2013) 97-128.

Goldberg & Mourinho The occurrence of discrimination

Goldberg A & Mourinho D "The occurrence of discrimination in Germany," in de Beijl R (ed) *Documenting discrimination against migrant workers in the labour market: a comparative study of four European countries* (ILO Geneva 2000) 53-64.

Good Struggle for freedom

Good R "Africa's unfinished struggle for freedom: the real issues," in Moore C & Dunbar A (eds) *Africa yesterday and today* (Praeger New York 1969) 365-376.

Govindjee Access to social security

Govindjee A "Access to social security for refugees and asylum seekers in South Africa: an analysis of recent developments," in Olivier M, Mpedi L, & Kalula E (eds) *Liber amicorum - essays in honour of Professor Edwell Kaseke and Dr Mathias Nyenti* (African Sun Media & SUN PReSS Stellenbosch 2020) 73–88.

Govindjee Employment protection in South Africa

Govindjee A "Employment protection in South Africa: an analysis of recent labour and social security legislative and policy developments," in Amine S (ed) *Employment protection legislation in emerging economies* (IGI Global Hershey PA 2018) 140-156.

Gqola Echoes, negrophobia, masculinist violence

Gqola P "Echoes, negrophobia, masculinist violence," in Hassim S, Kupe Y, & Worby E (eds) *Go home or die here: violence, xenophobia and the reinvention of difference in South Africa* (Wits University Press Johannesburg 2008) 209–224.

Gray Social work practice

Gray M "Theories of social work practice," in Nicholas L, Rautenbach J, & Maistry M (eds) *Introduction to social work* (Juta Cape Town 2010) 75-102.

Greenbaum History of South African law

Greenbaum L “History of South African law: overview and indigenous law,” in Maisel P & Greenbaum L (eds) *Foundations of South African law: critical issues for law students* (Butterworths Durban 2002) 1-28.

Greve Labour migration

Greve B “Labour migration and labour market integration: causes and challenges,” in Carmel E, Cerami A, & Papadopoulos T (eds) *Migration and welfare in the new Europe: social protection and the challenges of integration* (Policy Press Bristol 2011) 85-101.

Grogan J “Labour relations

Grogan J “Labour relations,” in Currie I & De Waal J, *The Bill of Rights handbook – sixth edition* (Juta Cape Town 2013) 472-515.

Gržinić M Europe’s colonialism

Gržinić M “Europe’s colonialism, decoloniality, and racism,” in Broeck S & Junker C (eds) *Postcoloniality - decoloniality - black critique: joints and fissures* (Campus Verlag Frankfurt 2014) 129-144.

Guild An irregular migrant

Guild E “Who is an irregular migrant?,” in Bogusz B *et al* (eds) *Irregular migration and human rights: theoretical, European and international perspectives* (Martinus Nijhoff Leiden 2004) 3-28.

Guild European labour migration

Guild E “Who is entitled to work and who is in charge? Understanding the legal framework of European labour migration,” in Bigo D & Guild E (eds) *Controlling frontiers: free movement into and within Europe* (Ashgate Hants England & Burlington 2005) 100-139.

Guild & Mantu The appearance of control

Guild E & Mantu S “The appearance of control: examining labour migration regimes with high control claims,” in Mantu S & Guild E (eds) *Constructing and imagining labour migration: perspectives of control from five continents* (Routledge London 2016) 135-136.

Guild & Mantu Introduction

Guild E & Mantu S “Introduction”, in Guild E & Mantu S (eds) *Constructing and imagining labour migration: perspectives of control from five continents* (Routledge London 2016) 1-11.

Guiraudon Citizenship rights

Guiraudon V “Citizenship rights for non-citizens: France, Germany, and The Netherlands,” in Joppke C (ed) *Challenge to the nation-state: immigration in Western Europe and the United States* (OUP Oxford 1998) 272-318.

Gumede Economic development.

Gumede V ‘Economic development,’ in Gumede *Political economy of post-apartheid South Africa* (CODESRIA Dakar 2015) 33-53.

Gumede, Oloruntoba, & Kamga Migration policies in Africa

Gumede V, Oloruntoba S, & Kamga S “Migration policies in Africa,” in Gumede V, Oloruntoba S, & Kamga S *Regional integration and migration in Africa: lessons from Southern and West Africa* (Brill Leiden 2020) 77-96.

Habiyaremye Regional integration

Habiyaremye A “Regional integration and knowledge flows: effect on manufacturing productivity in Southern Africa,” in Oloruntoba S & Muchie M (eds) *Innovation, regional integration, and development in Africa: rethinking theories, institutions, and policies* (Springer Cham 2018) 213-224.

Halm & Sezgin Introduction

Halm D & Sezgin Z “Introduction: interplay between migrant organisations and their environment - conceptual & theoretical framework”, in Halm D & Sezgin Z

(eds) *Migration and organised civil society: rethinking national policy* (Routledge New York 2013) 1-21.

Halpérin French doctrinal writing

Halpérin J “French doctrinal writing,” in Jansen N (ed) *The Development and making of legal doctrine: Volume 6* (CUP Cambridge 2014) 73-95.

Hammar Immigration regulation

Hammar T “Immigration regulation and aliens control,” in Hammar T (ed) *European immigration policy: a comparative study* (CUP Cambridge 1985) 249-262.

Hammar European immigration policy

Hammar T “Introduction to European immigration policy: a comparative study,” in Martiniello M & Rath J (eds) *Selected studies in international migration and immigrant incorporation* (AUP Amsterdam 2010) 45-58.

Hamowy Immigration

Hamowy R “Immigration,” in Hamowy R (ed) *The encyclopedia of libertarianism* (SAGE Los Angeles / London 2008) 235-237.

Harris Xenophobia

Harris B “Xenophobia: a new pathology for a new South Africa?” in Hook D & Eagle G (eds) *Psychopathology and social prejudice* (UCT Press Cape Town 2002) 169-84.

Hathaway Refugees lawfully staying

Hathaway J “Rights of refugees lawfully staying,” in Hathaway J *The rights of refugees under international law* (CUP Cambridge UK 2005) 730-912.

Hathaway Refugees lawfully staying

Hathaway J “Rights of refugees lawfully staying,” in Hathaway J *The rights of refugees under international law - second edition* (CUP Cambridge UK 2021) 925-1127.

Heck & Mu Economics of globalisation

Heck R & Mu X “Economics of globalisation in higher education: current issues in recruiting and serving international students,” in Papa R & English F (eds) *Educational leaders without borders: rising to global challenges to educate all* (Springer Cham 2016) 143-165.

Henama & Sifolo International migration

Henama U & Sifolo P “International migration through the tourism industry: implications, challenges, and contradictions in South Africa,” in Ushakov D (ed) *Urbanisation and migration as factors affecting global economic development* (IGI Global Hershey Penn 2019) 110-127.

Henama & Sifolo Tourism industry

Henama U & Sifolo P, “International migration through the tourism industry: implications, challenges, and contradictions in South Africa,” in Information Resources Management Association *Socio-economic development: concepts, methodologies, tools, and applications* (IGI Global Hershey, Penn 2019) 1489-1507.

Henket Statutes

Henket M “Statutes in common law and civil law: their interpretation and status,” in Kevelson R (ed) *Law and semiotics – vol. 2* (Springer New York 2012) 167-188.

Herderschee, Kai-Alexander, & Samba *An African giant*

Herderschee J, Kai-Alexander K & Samba M *Resilience of an African giant: boosting growth and development in the Democratic Republic of Congo* (World Bank Washington DC 2012).

Horne 21st Century Pan Africanism

Horne D “21st Century Pan Africanism: Legitimising the African Diaspora 6th Region,” in Muchie M, Olorunju P, & Akpor O (eds) *The African Union ten years*

after: solving African problems with Pan-Africanism and the African Renaissance (AISA Pretoria 2013) 424-43.

Hewitt Pan-African brain circulation

Hewitt C “Pan-African brain circulation,” in Patterson R (ed) *African brain circulation : beyond the drain-gain debate* (Brill Leiden 2007) 15-39.

Hoag Fear

Hoag C “Fear, enervation and the systematisation of disorder: Challenges to reforming the Department of Home Affairs,” in Daniel J *et al* (eds) *New South African Review 1: 2010: Development or decline?* (WUP Johannesburg 2010) 205-217.

Hollifield Regulating immigration

Hollifield J “Regulating immigration in the liberal polity,” in Hollifield J *Immigrants, markets, and states: the political economy of postwar Europe* (HUP Cambridge Mass 1992) 3-18.

Horinuki International labour migration

Horinuki K “International labour migration and the Arab Gulf states: trends, institutions, and relations,” in Ishii M *et al* (eds) *Asian migrant workers in the Arab Gulf states: the growing foreign population and their lives* (Brill Leiden 2019) 23–52.

Howe & Owens The regulatory challenges

Howe J & Owens R “Temporary labour migration in the global era: the regulatory challenges,” in Howe J & Owens R (eds) *Temporary labour migration in the global era: the regulatory challenges - Oñati International Series in Law and Society* (Hart Publishing Oxford 2016) 3-42.

Humblet & Plets Protection of working relationships

Humblet P & Pleets I “Protection of working relationships in Belgium,” in Pennings F & Bosse C (eds) *The protection of working relationships: a comparative study* (Kluwer Law International Leiden 2011) 43-59.

Hungwe & Divala Afrophobia

Hungwe J & Divala J “Afrophia in the South African higher education system: a threat to internalisation and global citizenship,” in Waghid Y & Davids N (eds) *African democratic citizenship education revisited* (Palgrave Macmillan Cham 2018) 53-75.

Huskey The US “material support” bar

Huskey K “The US “material support” bar to refugee protection: an expansive approach through a narrow lens,” in Akram S & Syring T (eds) *Still waiting for tomorrow: the law and politics of unresolved refugee crises* (Cambridge Scholars Publishing Newcastle upon Tyne 2014) 219-247.

ILO The migration process

ILO “The migration process,” in ILO *Migrant workers: Report III(1B) Volume 1, Part 2* (ILC 87th session Geneva June 1999) 53-101.

ILO Patterns of discrimination

ILO “Patterns of discrimination at work: Recent developments,” in ILO *Equality at work: tackling the challenges: global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work - 96th Session 2007 Report I(B)* (ILO Geneva 2007) 15-50.

Inaka Congolese middle-class migrants

Inaka S “Congolese middle-class migrants labour market incorporation in Pretoria,” in Nshimbi C & Moyo I (eds) *Migration, cross-border trade and development in Africa: exploring the role on non-state actors in the SADC Region* (Palgrave MacMillan Cham 2017) 63-97.

IOM Migration terminology

IOM "Migration terminology," in IOM *World migration 2008: managing labour mobility in the evolving global economy* (IOM Geneva 2008) 491-501.

Jackson Influences

Jackson P "Influences on commitments to employment and commitment to work," in Bryson A & McKay S (eds) *Is it worth working? factors affecting labour supply* (Policy Studies Institute London 1994).

Jacobsen Livelihoods

Jacobsen K "Livelihoods and forced migration," in Fiddian-Qasmiyeh E *et al* (eds) *The Oxford handbook of refugee and forced migration studies* (OUP Oxford 2014) 99-111.

Jacobsson Labour mobility

Jacobsson J "GATS Mode 4 and labour mobility: the significance of employment market access," in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave McMillan New York 2015) 61-94

Jagland Inclusive societies

Jagland T "Inclusive societies," in Jagland T *State of democracy, human rights and the rule of law: Role of institutions threats to institutions - Report by the Secretary General of the Council of Europe* (Council of Europe Publ. Strasbourg 2018) 81-105.

Jaki Brain gain from emigrant academics

Jaki P "Brain gain from emigrant academics at higher institutions of learning constitutes moral. Restitution," in Ndofirepi A & Gwaravanda E (eds) *Mediating learning in higher education in Africa: from critical thinking to social justice pedagogies* (Brill Leiden 2021) 41-59.

Jalilian & Reyes Migrants of the Mekong

Jalilian H & Reyes G "Migrants of the Mekong: wins and losses," in Jalilian H (ed) *Costs and benefits of cross-country labour migration in the GMS* (ISEAS Publishing Pasir Panjang Singapore 2012) 1-117.

James The politics of normalisation

James W "The politics of normalisation: Mine migrancy in a democratic South Africa," in Crush J & James W (eds) *Crossing boundaries: mine migrancy in a democratic South Africa* (IDASA Cape Town/ IDRC Ottawa 1995) 218-226.

Jandl *Innovative concepts*

Jandl M (ed) *Innovative concepts for alternative migration policies: ten innovative approaches to the challenges of migration in the 21st Century - IMISCOE Reports* (AUP Amsterdam 2007).

Jayaram & Engmann Diagnosing the skill gap

Jayaram S & Engmann M "Diagnosing the skill gap," in Jayaram S *et al* (eds) *Bridging the skills gap : innovations in Africa and Asia* (Springer Cham 2017) 1-14

Jefferys The problems of labour mobility

Jefferys M "The problems of labour mobility," in Jefferys M *Mobility in the labour market: employment changes in Battersea and Dagenham* (Routledge New York 2013) 1-13.

Johnson Thabo Mbeki's African Renaissance.

Johnson D "Migrancy and Thabo Mbeki's African Renaissance," in Gupta S & Omoniyi T (eds) *The cultures of economic migration: international perspectives* (Routledge London 2016) 127-140

Johnson The economic benefits

Johnson K "The economic benefits of liberal migration of labour across borders," in Johnson K *Opening the floodgates: why America needs to rethink its borders and immigration laws* (NYU Press New York 2007) 131-167.

Johnson *et al* U.S. immigration law

Johnson K R *et al* "The future of U.S. immigration law," in Johnson K *et al* *Understanding immigration law* (LexisNexis New Providence NJ 2015) 495-23.

Johnson & Carciotto State of the asylum system

Johnson C & Carciotto S "State of the asylum system in South Africa," in O'Sullivan M & Steven D (eds) *States, the law and access to refugee protection: fortresses and fairness* (Hart Publishing, Oxford 2017) 167-190.

Johnson & Staples The challenges of parenting

Johnson L & Staples R "The challenges of parenting," in Johnson L & Staples R *Black families at the crossroads: challenges and prospects* (Jossey-Bass San Francisco 2005) 212-44.

Johnston Nation-building 20 years on

Johnston A "Nation-building 20 years on," in Johnston A *South Africa: inventing the Nation* (Bloomsbury London 2014) 289–318.

Jones Race, place, and social mobility

Jones T "Race, place, and social mobility of Jamaicans in Toronto," in Frazier J, Darden J, & Henry N (eds) *African Diaspora in the United States and Canada at the Dawn of the 21st Century* (SUNYP Albany 2010) 81-90.

Kahombo Congolese Constitutional Court

Kahombo B "The origin of the Congolese Constitutional Court: organisation and jurisdiction" Hamann H & Kumb J (eds) *Konrad Adenauer Stiftung African Law Study Library - Volume 6* (KAS & RLPSSA 2011) 1-25.

Kalule-Sabiti *et al* Country monographs

Kalule-Sabiti I *et al* "Country monographs: post-apartheid South Africa," in Attias-Donfut C *et al* (eds) *Citizenship, belonging and intergenerational relations in African migration* (Palgrave Macmillan New York 2012) 139-201.

Kamwimbi Workplace gender equality

Kamwimbi TK "Workplace gender equality in the DRC: a critical analysis of existing legislation," paper presented at the *ILERA 8th Africa Regional Congress 2018* held on 7-9 May 2018 in Mauritius.

Kane & Leedy African patterns of migration

Kane A & Leedy H "Introduction - African patterns of migration in a global era new perspectives," in Kane A & Leedy H (eds) *African migrations: patterns and perspectives* (IUP Bloomington 2013) 1-16.

Kassa Keynote speech

Kassa J "President Mobutu Sese Seko's state of the nation address to the National Legislative Council, N'Sele Party City, 30 November 1973" (Discours de politique générale du Président Mobutu Sese Seko devant le Conseil Législatif National, Cité du Parti N'Sele, le 30 novembre 1973) in Kassa J *Analyse socio-économique du développement agricole et ses incidences sur la promotion des milieux ruraux dans les pays en voie de développement: le cas du Congo-Zaïre de 1885 à 1990* (Unpublished doctoral dissertation) ULB, Faculté des sciences sociales, politiques et économiques, Bruxelles 1996) 1011-1021.

Katansi Protection

Katansi L "Protection de la main d'œuvre nationale" (Protection of the national labour force) in Gilombe M *Philosophie africaine: paix-justice-travail: actes de la 10ème semaine philosophique de Kinshasa du 30 novembre au 6 décembre 1986* (African philosophy: peace-justice-work: proceedings of the 10th Philosophical Week in Kinshasa from November 30 to December 6, 1986) (FCK Kinshasa 1988) 193-228.

Kashiwazaki The foreigner category for Koreans in Japan

Kashiwazaki C "The foreigner category for Koreans in Japan: opportunities and constraints," in Ryang S & Lie J (eds) *Diaspora without homeland: being Korean in Japan* (UCP Berkeley LA 2009) 121-146.

Kaur Migration and the refugee regime in Malaysia

Kaur A "Migration and the refugee regime in Malaysia: implications for a regional solution," in Francis A & Maguire R (eds) *Protection of refugees and displaced persons in the Asia Pacific Region* (Routledge London 2016) 95-116.

Kaur A Order (and disorder) at the border

Kaur A "Order (and disorder) at the border: mobility, international labour migration and border controls in Southeast Asia," Kaur A & Metcalfe I (eds) *Mobility, labour migration and border controls in Asia* (Palgrave Macmillan New York 2006) 23-51.

Kelley Rights in the balance

Kelley N "Rights in the balance: non-citizens and state sovereignty under the Charter," in Dyzenhaus D (ed) *The unity of public law* (Hart Publ. Oxford 2004) 253-288.

Keskin Beyond two identities

Keskin T "Beyond two identities: Turkish immigrants in Germany," in Blau J & Frezzo M (eds) *Sociology and human rights: a bill of rights for the twenty-first century* (SAGE London 2012) 179-197.

Khadria South Asian migration

Khadria B "South Asian migration," in Inglis C, Li W, & Khadria B (eds) *The SAGE handbook of international migration* (SAGE Reference London 2020) 262-275.

Khalema, Magidimisha, & Chipungu Regeneration

Khalema N, Magidimisha H, & Chipungu L "Regeneration and integration in Southern Africa: concluding comments on contemporary challenges and possibilities," in Magidimisha H *et al Crisis, identity and migration in post-colonial Southern Africa* (Springer Cham 2018) 225-234.

Khan Identifying migrants

Khan F "Identifying migrants and the rights to which they are entitled," in Khan F (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 3-22.

Khan & Hurt Temporary residence

Khan F & Hurt S “Temporary residence,” in F Khan (ed) *Immigration law in South Africa* (Juta Cape Town 2018) 93-112.

Khunou Traditional leadership

Khunou S “The origin and nature of traditional leadership in South Africa: a precolonial perspective,” in Collier G (ed) *African cultures and literatures: a miscellany* (Rodopi Amsterdam 2013) 293–320.

Kihato Invisible lives

Kihato C “Invisible lives, inaudible voices? the social condition of migrant women in Johannesburg,” in Gasa N (ed) *Women in South African history: Basus’imbokodo, bawel’imilambo / they remove boulders and cross rivers* (HSRC Press Cape Town 2007) 397-419.

King Migration

King R “Migration in a world historical perspective,” in van den Broeck J (ed) *The economics of labour migration* (Edward Elgar Cheltenham 1996) 7–75.

Kingdon & Knight Unemployment

Kingdon G & Knight J “Unemployment: South Africa’s Achilles’ Heel,” in Aron J, Kahn B, & Kingdon G (eds) *South African economic policy under democracy* (OUP Oxford 2009) 300-326.

Kingma Vested interests

Kingma M “Vested interests, inconsistencies, double standards,” in Kingma M *Nurses on the move: Migration and the global health care economy* (CoUP Ithaca NY 2018) 121-40.

Kingma Welcome to globalisation

Kingma M “Welcome to globalisation,” in Kingma M *Nurses on the move: migration and the global health care economy* (CoUP Ithaca NY 2018) 1-8.

Kingston Demographic dilemmas

Kingston J “Demographic dilemmas, women and immigration,” in Kingston J (ed) *Critical issues in contemporary Japan* (Routledge London 2014) 189-200.

Kitimbo Open borders in Southern Africa

Kitimbo A “Is it time for open borders in Southern Africa? The case for free labour movement in SADC,” in McNamee T, Pearson M, & Boer W (eds) *Africans investing in Africa: understanding business and trade, sector by sector* (Palgrave Macmillan London 2015) 85-99.

Kivisto & Faist The State and immigration control

Kivisto P & Faist T “The State and immigration control,” in Kivisto P & Faist T *Beyond a border: the causes and consequences of contemporary immigration* (Pine Forge Press London 2010) 195-224.

Kleyn History

Kleyn T “History, demography, and terminology,” in Kleyn T *Immigration: the ultimate teen guide* (Scarecrow Press Lanham MA 2011) 1-15.

Klotz Apartheid and the dilemma

Klotz A “Apartheid and the dilemma of African citizenship,” in Klotz *Migration and national identity in South Africa, 1860-2010* (CUP Cambridge 2013) 113-169.

Kluth The legal situation of irregular migrants

Kluth W “The legal situation of irregular migrants in Germany and their access to social rights,” in Zanfrini L & Kluth W *Policies on irregular migrants-vol I: Italy and Germany* (Council of Europe Strasbourg 2008).

Kohl Romanist legal systems

Kohl A “Romanist legal systems,” in Cappelletti M *et al* (eds) *International encyclopedia of comparative law - Vol XVI (Civil Procedure) Ch. 6: ordinary proceedings in first instance: under the auspices of the International Association of*

Legal Science (JCB Mohr Paul Siebeck Tübingen Martinus Nijhoff Publishers The Hague 1986).

Kok et al Literature review

Kok P *et al* "Literature review," in Kok P *et al Post-apartheid patterns of internal migration in South Africa* (HSRC Publishers Cape Town 2003) 8-32.

Kok, Gelderblom, & Van Zyl Introduction

Kok P, Gelderblom D & Van Zyl J "Introduction", in Kok P *et al* (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 1-24.

Koser Migration

Koser K "Migration and development," in Koser K *International migration: a very short introduction - second edition* (OUP Oxford 2016) 37-47.

Koser Who is a migrant?

Koser K "Who is a migrant?," in Koser K *International migration: a very short introduction* (Oxford University Press Oxford 2007) 16-27.

Kraak HRD and the skills crisis

Kraak A "HRD and the skills crisis," in Kraak A *An overview of South African human resources development* (HSRC Press Cape Town 2004) 65-87.

Kropiwnicki Obligations and agency

Kropiwnicki Z "Obligations and agency in post-apartheid South Africa," in Kropiwnicki Z *Exile identity, agency and belonging in South Africa: The Masupatsela Generation* (Palgrave Macmillan Cham 2017) 265-81.

Kuczera Delivering high level training

Kuczera M "Delivering high level training in a changing world – post-secondary vocational education and training in context," in Puukka J (ed) *Post-secondary*

vocational education and training: pathways and partnerships, higher education in regional and city development (OECD Paris 2012) 37-66.

Kuption & Pang Introduction

Kuption C & Pang E "Introduction," in Kuption C & Pang E (eds) *Competing for global talent* (ILO & ILS Geneve 2006) 1-8.

Landau Introducing the demons

Landau L "Introducing the demons," in Landau L (ed) *Exorcising the demons within: xenophobia, violence and statecraft in contemporary South Africa* (WUP Johannesburg 2012) 1-25.

Landau & Segatti The Southern crossroads

Landau L & Segatti A "The Southern crossroads: human mobility, governance and development in South Africa," in Cortina J & Ochoa-Reza E (eds) *New perspectives on international migration and development* (CUP New York 2013) 196–228.

Landsberg decision-making architecture

Landsberg C "The Southern African Development Community's decision-making architecture," in Saunders C, Dzinesa G, & Nagar D (eds) *Region-building in Southern Africa: progress, problems, and prospects* (Zed Books, WUP London; Johannesburg 2013) 63-77.

Langa Legal visions

Langa P "Legal visions – South Africa in the 21st century," in Anghie A & Sturgess G (eds) *Legal visions of the 21st century: essays in honour of Judge Christopher Weeramantry* (Kluwer Law International The Hague 2004) 99-122.

Layton-Henry Citizenship

Layton-Henry Z "Citizenship and migrant workers in Western Europe," in Moran M & Vogel U (eds) *The frontiers of citizenship* (Palgrave Macmillan Basingstoke 1991) 107-124.

Lee The lawyer's position

Lee G "The lawyer's position in society," in Fuller H (ed) *The Green Bag: an entertaining magazine for lawyers - volume 8* (The Boston Book Boston, Mass. 1896) 246-251.

Lemmens Comparative law

Lemmens K "Comparative law as an act of modesty: a pragmatic and realistic approach to comparative legal scholarship," in Adams M & Bomhoff J (eds) *Practice and theory in comparative law* (CUP Cambridge 2012) 302–325.

Levy An introduction to employment

Levy A "An introduction to employment," in A Levy *Labour law in practice: a guide for South African employers* (Zebra Press Cape Town 2021).

Leyro Fear of deportation

Leyro S "Fear of deportation as a barrier to immigrant integration," in Brotherton D & Kretsedemas P (eds) *Immigration policy in the age of punishment: detention, deportation, and border control* (COLUP New York 2017) 203-221.

Leyro Repatriation

Leyro S "Repatriation," in Martinez R, Hollis M, & Stowell J (eds) *The handbook of race, ethnicity, crime, and justice* (Wiley Blackwell Hoboken NJ 2020) 509-526.

Lillie et al Migration

Lillie N et al "Migration and human resource management," in Lucio M (ed) *International human resource management: an employment relations perspective* (SAGE Publications London 2013) 220-37.

Liu China's refugee legislation

Liu G "The experience of building the international refugee legal system and China's refugee legislation," in Liu G *Chinese refugee law* (Brill Nijhoff Leiden 2020) 473-511.

Lucas International migration

Lucas R "International migration to the high-income countries: some consequences for economic development in the sending countries," in Bourguignon F, Pleskovic B & Sapir A (eds) *Are we on track to achieve the Millennium Development Goals?* (World Bank / OUP Washington DC / Oxford 2005) 127-162.

Mabee Global migration

Mabee B "Global migration, security and citizenship," in Mabee B *The Globalisation of security: state power, security provision and legitimacy* (Palgrave Macmillan Basingstoke 2009) 113-140.

Macdonald Access to civil justice

Macdonald R "Access to civil justice," in Cane P & Kritzer H (eds) *The Oxford handbook of empirical legal research* (OUP Oxford 2012) 492-521.

Madubuike Law, traditional

Madubuike S "Law, traditional," in Stanton A (ed) *Cultural sociology of the Middle East, Asia, and Africa: an encyclopedia* (SAGE London DC 2012) 164-66.

Malit & Oliver Labour migration

Malit F & Oliver T "Labour migration and deskilling in the United Arab Emirates impacts on Cameroonian labour migrants," in Gross Z (ed) *Migrants and comparative education: call to re/engagement* (Brill Leiden 2020) 125-142.

Makochekanwa & Kambarami Zimbabwe skilled migrants

Makochekanwa A & Kambarami P (eds) "Zimbabwe skilled migrants in Botswana: what are the impacts?", in Bariagaber A (ed) *International migration and development in Eastern and Southern Africa* (OSSREA Addis Ababa 2014) 17-53.

Mbabane Managers

Mbabane L “Managers,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 34-55.

Mantouvalou Legal construction

Mantouvalou V “Legal construction of structures of exploitation,” in Collins, H Lester G, & Mantouvalou V (eds) *Philosophical foundations of labour law* (OUP Oxford 2018) 188-204.

Markesinis & Fedtke South Africa

Markesinis B & Fedtke J “South Africa,” in Markesinis B & Fedtke J *Engaging with foreign law* (Hart Publishing Oxford 2009) 127–161.

Marks South Africa

Marks J “South Africa: Evolving diaspora, promising initiatives,” in Y Kuznetsov (ed) *Diaspora networks and the international migration of skills: How countries can draw on their talent abroad* (The World Bank Washington DC 2006) 171-186.

Martin Guest worker policies

Martin P “Guest worker policies: an international survey,” in Bernstein A & Weiner M (eds) *Migration and refugee policies: an overview* (Continuum New York 2001) 45-83.

Martin, Abella, & Kuptsch Global migration patterns

Martin P, Abella M, & Kuptsch C “Global migration patterns and issues,” in Martin P, Abella M, & Kuptsch C *Managing labour migration in the twenty-first century* (YUP New Haven 2006) 14-54.

Martin Low-skilled labour migration

Martin P “Low-skilled labour migration and free trade agreements,” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave McMillan New York 2015) 205-230.

Martin, Martin, & Weil Migration

Martin S, Martin P, & Weil P "Migration and economic development: the 3 R's," in Martin S, Martin P, & Weil P *Managing migration: the promise of cooperation* (Lexington Books Lanham 2006) 27-56.

Mattes & Mniki Restless minds

Mattes R & Mniki N "Restless minds: South African students and the brain drain," in Crush J & Frayne B (eds) *Surviving on the move: migration, poverty and development in Southern Africa* (SAMP Cape Town 2010) 25-49.

Mattes, Crush, & Richmond Legal immigration

Mattes R, Crush J, & Richmond W "The brain gain: legal immigration to post-apartheid South Africa," in McDonald D & Crush J (eds) *Destinations unknown: perspectives on the brain drain in Southern Africa* (AISA SAMP Pretoria 2002) 113-137.

Mayombe Vocational skills training

Mayombe C "Vocational skills training for youth in eThekweni municipality," in *Vocational education and training in Sub-Saharan Africa* (Palgrave Macmillan Cham 2021) 33-105.

McCarthy Legal research

McCarthy M "Legal research: tensions involving student expression rights," in Hoy W & DiPaola M (eds) *Analysing school contexts: influences of principals and teachers in the service of students* (Information Age Pub. Charlotte NC 2010) 229-253.

Mcgregor *et al* Exclusive protection

Mcgregor M *et al* "Exclusive protection for employees in terms of legislation," in Mcgregor M *et al Labour law rules! second edition* (Siber Ink Cape Town 2014) 19-50.

McNeil-Walsh Migrant nurses

McNeil-Walsh C “Migrant nurses and the experience of skill: South African nurses in the UK health care sector,” in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 129-146.

McQuoid-Mason Mixed legal jurisdictions

McQuoid-Mason D “Mixed legal jurisdictions and clinical legal education: latest trends” in Palmer V, Mattar M & Koppel A (eds) *Mixed legal systems, East and West* (Routledge London 2016) 279-91.

Millard & Kuschke General Introduction

2017 *SAMP Migration Policy Series No. 77*

Millard D & Kuschke B “General Introduction,” in Millard D & Kuschke B *Insurance law in South Africa* (Kluwer Law International The Hague 2018).

Miller & Meinzinger Legal research and analysis

Miller R & Meinzinger M “Legal research and analysis,” in Miller R & Meinzinger M *Paralegal today: the legal team at work – seventh edition* (Delmar Cengage Learning New York 2016) 174-214.

Millns Comparative legal studies

Millns S “Making the case for European comparative legal studies in public law,” in Adams M & Heirbaut D (eds) *The method and culture of comparative law: essays in honour of Mark Van Hoecke* (Hart Publ. Oxford 2014) 283–300.

Minderhoud Regulation of migration

Minderhoud P “Regulation of migration: introduction,” in Böcker A *et al* (eds) *Regulation of migration: international experiences* (Het Spinhuis Publishers Amsterdam 1998) 7–24.

Mkwanzani Youth migration and education

Mkwanzani F “Contextualising youth migration and education,” in Mkwanzani F *Higher education, youth and migration in contexts of disadvantage: understanding aspirations and capabilities* (Palgrave Macmillan Cham 2019) 1-29.

Mohapatra & Ratha Migrant remittances

Mohapatra S & Ratha D “Migrant remittances in Africa: an overview,” in Mohapatra S & Ratha D (eds) *Remittance markets in Africa: directions in development - finance* (World Bank Washington DC 2011) 3-70.

Molodikova Eurasian migration

Molodikova I “Eurasian migration towards Russia: regional dynamics in the era of globalisation,” in Triandafyllidou A (ed) *Handbook of globalisation and migration* (Edward Elgar Cheltenham UK 2018) 334-58.

Mondesir Time-bomb

Mondesir S “Time-bomb in the Gulf,” in *ARR: Arab Report and Record* (Economic Features London 1978) 612-613.

Moorman & Grady Legal research

Moorman A & Grady J “Legal research,” in Andrew D, Pedersen P M & MacEvoy C *Research methods and design in sport management* (Human Kinetics Champaign IL 2011) 173–200.

Morris Introduction of free movement of people

Morris F “Introduction of free movement of people in the Caribbean,” in Nita S *et al* (eds) *Migration, free movement and regional integration* (UNESCO – UNU-CRIS Paris Brugge 2017) 263-284.

Mousourakis The sources of Roman law

Mousourakis G “The sources of Roman law,” in Mousourakis G *Roman law and the origins of the civil law tradition* (Springer Cham 2015) 27-94.

Moyo Historical perspectives

Moyo I “Historical perspectives on migration and the xenophobia discourse,” in Moyo I *African immigrant traders in Inner City Johannesburg: deconstructing the threatening ‘other’* (Palgrave Macmillan New York 2017) 73-96.

Mualaba La troisième République

Mualaba C « La troisième République, » in Mualaba C *République Démocratique du Congo, tout est à refaire: À qui la faute ?* [“The Third Republic,” in Mualaba C *Democratic Republic of Congo, everything needs to be rebuilt: Whose fault is it?*] (Publibook Paris 2008) 415-452.

Mubiala International humanitarian law

Mubiala M “International humanitarian law in the African context,” in Juma M & Suhrke A (eds) *Eroding local capacity: international humanitarian action in Africa* (NAI Uppsala 2002) 35-59.

Mukora Artisans

Mukora J “Artisans,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 219-245.

Müller Migration, dual labour markets

Müller T “Migration, dual labour markets and social welfare in a small open economy,” in Faini R, de Melo J, & Zimmermann Klau (eds) *Migration: the controversies and the evidence* (CUP Cambridge 1999) 151-184.

Musoni Apartheid

Musoni F “Apartheid, African liberation struggles, and the securitisation of Cross-Limpopo mobility,” in Musoni F *Border jumping and migration control in Southern Africa* (IUP Bloomington IN 2020) 107-134.

Naufal The Economics of migration

Naufal G “The Economics of migration in the Gulf Cooperation Council Countries,” in Chiswick B and Miller P (eds) *Handbook of the economics of international migration, Volume 1A - 1st edition* (Elsevier Oxford 2015) 1597-1640.

Ndletanya & Muzondidya Municipal capacity

Ndletanya M & Muzondidya M ‘Reviewing municipal capacity in the context of local government reform: 1994–2009,’ in Jackson P *et al* (eds) *South African*

governance in review: Anti-corruption, local government, traditional leadership (HSRC Press Cape Town 2009) 21-38.

Ndlovu-Gatsheni Decolonising borders

Ndlovu-Gatsheni S “Decolonising borders, decriminalising migration and rethinking citizenship,” in Magidimisha H *et al Crisis, identity and migration in post-colonial Southern Africa* (Springer Cham 2018) 23-37.

Ndlovu-Gatsheni Subjection

Ndlovu-Gatsheni S “Subjection and subjectivity in South Africa,” in Ndlovu-Gatsheni S *Empire, global coloniality and African subjectivity* (Berghahn Books New York 2013) 132-155.

Nhemachena & Mabale Conjugating materialities and symbols

Nhemachena A & Mabale D “Conjugating materialities and symbols in Contemporary Africa? The case of the statue of King Ngunghunyani, South Africa,” in Nhemachena A, Kangira J & Mlambo N (eds) *Decolonisation of materialities or materialisation of (re-)colonisation: symbolisms, languages, ecocriticism and (non)representationalism in 21st Century Africa* (Langaa RPCIG Bamenda 2018) 121-150.

Neocosmos Strangers at the cattle post

Neocosmos M “Strangers at the cattle post: state nationalism and migrant identity in Post-apartheid South Africa”, in Palmberg M (ed) *National identity and democracy in Africa* (HSRC & Mayibuye Centre Cape Town 1999) 287-326.

Ngwane & Nyamndi Strategies for African Union

Ngwane G & Nyamndi G “Strategies for African Union,” in Ngwane G & Nyamndi G *Way forward for Africa* (Design Publishing House Limbe Ngwane 2004) 66-81.

Noll International law

Noll G “International law and extraterritorial protection,” in Noll G *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection* (Martinus Nijhoff The Hague 2000) 353-391.

Noll The asylum system

Noll G “The asylum system, migrant networks and the Informal labour market,” in Bull T and Cramér P (eds) *Swedish studies in European Law - Volume 2, 2007* (Hart Publishing Oxford 2008) 1-16.

Noorani & Law Federal policy

Noorani A & Law A “Federal policy versus decentralised policy,” in Gans J, Replogle E, & Tichenor D (eds) *Debates on U.S. Immigration* (SAGE London DC 2012) 128-143.

Nshimbi & Moyo Cross-border movements and trade in the SADC region

Nshimbi C & Moyo I “History, trends and dynamics of cross-border movements and trade in the SADC region,” in Nshimbi C & Moyo I (eds) *Migration, cross-border trade and development in Africa: exploring the role on non-state actors in the SADC Region* (Palgrave MacMillan Cham 2017) 1–13.

Nshimbi & Moyo Informal immigrant traders

Nshimbi C & Moyo I “Informal immigrant traders in Johannesburg: the scorned cornerstone in the Southern African Development Community integration project,” in Adeniran A & Ikuteyijo L (eds) *Africa now!: emerging issues and alternative perspectives* (Palgrave Macmillan New York 2018) 387-413.

Nzongola-Ntalaja The struggle

Nzongola-Ntalaja G “The struggle for multiparty democracy,” in Nzongola-Ntalaja G *The Congo from Leopold to Kabila: a people’s history* (Zed Books London 2002) 171-213.

OECD Permanent labour migration

OECD “Permanent labour migration,” in OECD *Recruiting immigrant workers: Canada 2019, recruiting immigrant workers* (OECD Publishing Paris 2019) 65-122.

OECD Capturing the ephemeral

OECD “Capturing the ephemeral: How much labour do temporary migrants contribute in OECD countries?” in OECD *International Migration Outlook 2019* (OECD Publishing Paris 2019) 117-165.

OECD Key issue

OECD “Key issue in the legal and administrative framework,” in OECD *Recruiting immigrant workers: Germany* (OECD Publishing Paris 2013) 81-118.

OECD Knowledge diffusion

OECD “Knowledge diffusion and impacts of international mobility,” in OECD *The global competition for talent: mobility of the highly skilled* (OECD Publishing Paris 2008) 21-66.

OECD Skills imbalances in South Africa

OECD “Policies addressing skills imbalances in South Africa,” in OECD *Getting skills right: South Africa* (OECD Publishing Paris 2017) 39-55.

OECD The Dominican Republic’s migration landscape

OECD “The Dominican Republic’s migration landscape,” in OECD *Interrelations between public policies, migration and development in the Dominican Republic* (OECD Publishing Paris 2017) 37-55.

OECD/ILO Immigrants’ contribution

OECD/ILO “Immigrants’ contribution to developing countries’ economies: Overview and policy recommendations”, in OECD/ILO *How immigrants contribute to developing countries’ economies* (OECD Publishing Paris 2018) 17-46.

OECD & SOPEMI Migration policy development

OECD & SOPEMI "Migration policy development in OECD Countries," in OECD & SOPEMI *International Migration Outlook 2010* (OECD Publ. Paris 2011) 54-82.

Office of Technology Assessment Patterns

Office of Technology Assessment "Patterns in technology transfer: impacts and experiences," in Office of Technology Assessment *Technology transfer to the Middle East* (US Congress Washington DC 1984) 403-421.

Ogot The struggle

Ogot B "The struggle for international trade and its implications for Africa," in Ogot B (ed) *General history of Africa - V: Africa from the sixteenth to the eighteenth century* (UNESCO / New Africa Books Glosderry 2003) 1-12.

Oğuz The European policy approach

Oğuz G "The European policy approach to the labour migration problem," in Oğuz G *Labour migration in the European Union: the policy-making process* (Palgrave Macmillan Cham 2020) 49-77.

Olivier Dimensions of access

Olivier M "Political and regulatory dimensions of access, portability and exclusion: social security for migrants, with an emphasis on migrants in Southern Africa," in Sabates-Wheeler R & Feldman R (eds) *Migration and social protection: claiming social rights beyond borders* (Palgrave London 2011) 117-139.

Olivier A right to democracy

Olivier M "The emergence of a right to democracy—an African perspective," in Panara C & Wilson G (eds) *The Arab spring: new patterns for democracy and international law* (Martinus Nijhoff Publishers Leiden 2013) 29-52.

Olwig & Sørensen Mobile livelihoods

Olwig K & Sørensen N "Mobile livelihoods: making a living in the world," in Sørensen N & Olwig K (eds) *Work and migration: life and livelihoods in a globalising world* (Routledge London 2003) 1-19.

Omeje & Kwaja Exploring the conflicts

Omeje K & Kwaja C “Exploring the conflicts between traditionalism and modernity in postcolonial Africa,” in Omeje K (ed) *The crises of postcoloniality in Africa* (CODESRIA Dakar 2017).

Omelaniuk The connections

Omelaniuk I “Introduction: making the connections between migration and development,” in Omelaniuk I (ed) *Global perspectives on migration and development: GFMD Puerto Vallarta and beyond* (Springer London 2012) 1-25.

Omelaniuk et al Migrants

Omelaniuk I et al “Migrants in an enlarged Europe,” in Omelaniuk I et al *World migration 2005: costs and benefits of international migration, volume 3 – IOM World Migration Report Series* (IOM Geneva 2005) 139-159.

Omelaniuk et al Economic effects

Omelaniuk I et al “Economic effects of international migration: a synoptic overview,” in Omelaniuk I et al (eds) *World migration 2005: costs and benefits of international migration, volume 3 – IOM World Migration Report Series* (IOM Geneva 2005) 163-183.

Omoniyi Outsourcing

Omoniyi T “Outsourcing and migrational anxieties in discourse perspectives” in Gupta S & Omoniyi T (eds) *The cultures of economic migration: international perspectives* (Routledge London 2016) 37-52.

Ong Primitivist modernism

Ong J “Primitivist modernism, anti-imperialism and the story of an African farm,” in Ong J *Olive Schreiner and African modernism: allegory, empire and postcolonial writing* (Routledge London 2018).

Ong & Yeoh The place of migrant workers

Ong F & Yeoh B “The place of migrant workers in Singapore: between State multiracialism and everyday (un)cosmopolitanisms,” in Eng L, Collins F, & Yeoh B (eds) *Migration and diversity in Asian contexts* (ISEAS Singapore 2013) 83-106.

Ontiveros Migrant labour in the United States

Ontiveros M “Migrant labour in the United States: working beneath the floor for free labour?”, in Costello C & Freedland M (eds) *Migrants at work: immigration & vulnerability in labour law* (OUP Oxford 2014)180-192.

Oosterik From brain drain to brain circulation

Oosterik S “From brain drain to brain circulation: attracting high skilled migrants back: The improvement of human capital from brain circulation” *Master’s dissertation in Science* (University of Twente, Enschede The Netherlands 2016) 25. https://essay.utwente.nl/69931/1/Oosterik_MA_EuropeanStudies.pdf (Date of use: 04 July 2022).

Oppong, Woodruff, & Gritzner The Congo today

Oppong J, Woodruff T, & Gritzner C “Living in the Congo today,” in Oppong J, Woodruff T, & Gritzner C *Democratic Republic of the Congo (Modern World Nations)* (Chelsea House New York 2007) 73-82.

Orrenius & Zavodny Undocumented immigration

Orrenius P & Zavodny M “Undocumented immigration and human trafficking,” in Chiswick B & Miller P (eds) *Handbook of the economics of international migration, Volume 1A - 1st edition* (Elsevier Oxford 2015) 659–716.

Oso, Kaczmarczyk & Salamońska Labour migration

Oso L, Kaczmarczyk P, & Salamońska J “Labour migration,” in Scholten P (ed) *Introduction to migration studies: an interactive guide to the literatures on migration and diversity* (Springer Cham 2022) 117-135.

Oucho Cross-border

Oucho J “Cross-border migration and regional initiatives in managing migration in southern Africa,” in Kok P *et al* (eds) *Migration in South and Southern Africa* (HSRC Press Pretoria 2006) 47–70.

Panizzon *et al* Introduction

Panizzon M *et al* “Introduction: conceptualising a pluralist framework for labour migration” in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave MacMillan New York 2015) 1-14.

Papadopoulou-Kourkoula Introduction

Papadopoulou-Kourkoula A “Introduction,” in Papadopoulou-Kourkoula A *Transit migration: the missing link between emigration and settlement* (Palgrave Macmillan Basingstoke Hampshire 2008) 1-14.

Parisi & Fon Optimal specificity

Parisi F & Fon V “Optimal specificity of laws: rules versus standards,” in Parisi F & Fon V *The economics of lawmaking* (OUP Oxford 2009) 9-30.

Patel, Savchenko & Vella Occupational sorting

Patel K, Savchenko Y & Vella F “Occupational sorting of ethnic groups,” in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham 2013) 227-241.

Patterson Historic changes

Patterson R “Historic changes underway in African migration policies: From muddling through to organised brain circulation,” in Kane A & Leedy H (eds) *African migrations: patterns and perspectives* (IUP Bloomington 2013) 78-89.

Patterson Introduction

Patterson R “Introduction,” in Patterson R (ed) *African brain circulation beyond the drain-gain debate* (Brill Leiden 2007) 1-14.

Pauwels Female Filipino migrants

Pauwels F "Female Filipino migrants in Belgium: a qualitative analysis of trends and practices," in Timmerman C *et al* *New dynamics in female migration and integration* (Routledge New York 2015) 102-124.

Peberdy & Crush Rooted in racism

Peberdy S & Crush J "Rooted in racism: the origins of the Aliens Control Act," in Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998) 18-36.

Peczenik The Dilemma

Peczenik A "The Dilemma of legal reasoning: moral evaluation or description of the law?," in Peczenik A *On law and reason* (Kluwer Academic Publishers Dordrecht 1989) 17-46.

Pedersen, Røed, & Wadensjö Mobility

Pedersen P J, Røed M, & Wadensjö E "The extent of mobility", in Pedersen P J., Røed M, & Wadensjö E *The common Nordic labour market at 50* (TemaNord Copenhagen 2008) 43-71.

Peires Kaffir relief

Peires J "Kaffir relief," in J Peires *The dead will arise: Nongqawuse and the Great Xhosa Cattle-Killing Movement of 1856-7* (Jonathan Ball Johannesburg & Cape Town 2003) 241-291.

Peires Exchanges and innovations

Peires J "Exchanges and innovations," in Peires J *The house of Phalo: a history of the Xhosa people in the days of their independence* (UCP Berkeley 1982) 95-109.

Peires Ngqika's peace

Peires J "From Ngqika's peace to Maqoma's war (1820-1835)," in Peires J *The house of Phalo: a history of the Xhosa people in the days of their independence* (UCP Berkeley 1982) 79-94.

Pena & Shulman Economics of migration

Pena A & Shulman S "Economics of migration," in Free R *21st Century economics: a reference handbook* (SAGE London 2010) 697-706.

Pichelmann EU enlargement

Pichelmann K "EU enlargement, migration and the labour market: a tentative assessment", in Addison J & Welfens P (eds) *Labour markets and social security: issues and policy options in the U.S. and Europe – 2nd edition* (Springer New York 2003) 35-56.

Pieterse Marginal struggles

Pieterse M "Marginal struggles: equality, public presence and livelihood," in Pieterse M *Rights-based litigation, urban governance and social justice in South Africa: the right to Joburg* (Routledge London 2017) 117-143.

Pilat *et al* Global innovation networks

Pilat D *et al* "The development of global innovation networks and the transfer of knowledge," in Chandra V *et al Innovation and growth chasing a moving frontier: chasing a moving frontier* (The World Bank/ OECD Paris & Washington DC 2009) 85-105.

Piller Linguistic diversity

Piller I "Linguistic diversity at work," in Piller I *Linguistic diversity and social justice: An introduction to applied sociolinguistics* (OUP Oxford 2016) 63-97.

Podolskaya Migration policy

Podolskaya T "Migration policy and problems of ensuring economic security of countries," in Ushakov D (ed) *Migration and urbanisation: local solutions for global economic challenges* (IGI Global Hershey PA 2019) 63-80.

Pol & Thomas International and internal migration

Pol L & Thomas R "International and internal migration," in Pol L & Thomas R *The demography of health and health care* (Plenum Press New York 1992) 219-249.

Pophiwa & Ntombela Green economy readiness

Pophiwa N & Ntombela N "Green economy readiness in South Africa: A review of skills and the immigration regime," in Nhamo G & Mjimba V (eds) *Sustainability, climate change and the green economy* (AISA Pretoria 2016) 52-66.

Raitio Legal certainty

Raitio J "Legal certainty as an element of objectivity in law," in Husa J & Van Hoecke M (eds) *Objectivity in law and legal reasoning* (Hart Publishing Oxford 2013) 85-108.

Ramli Transnational advocacy networks

Ramli R "Transnational advocacy networks: the examples of APWLD and NCWO: comment on the Indian case study from a Malayan perspective," in Schwarzer B *et al* (eds) *Transnational social work and social welfare challenges for the social work profession* (Routledge London 2016) 200-204.

Ratha, Yi, & Yousefi Migration

Ratha D, Yi S, & Yousefi S "Migration and development: the Asian experience," in Triandafyllidou A *Routledge handbook of immigration and refugee studies* (Routledge London 2016) 260-277.

Ratuva Black empowerment policies

Ratuva S "'Black empowerment' policies: Dilemmas of affirmative action in South Africa," in Ratuva S *Politics of preferential development: Trans-global study of affirmative action and ethnic conflict in Fiji, Malaysia and South Africa* (ANU E Press Canberra 2013) 219-240.

Rautenbach Legal recognition of traditional courts

Rautenbach C "South Africa: legal recognition of traditional courts — legal pluralism in action," in Kötter M *et al* (eds) *Non-state justice institutions and the law : decision-making at the interface of tradition, religion and the state* (Palgrave Macmillan London 2015) 121–151.

Rautenbach The contribution of the courts

Rautenbach C “The contribution of the courts in the integration of Muslim law into the mixed fabric of South African law,” in Palmer V, Mattar M & Koppel A (eds) *Mixed legal systems, East and West* (Ashgate Surrey UK 2015) 225-254.

Redclift Spatial formations of exclusion

Redclift V “Spatial formations of exclusion,” in Redclift V *Statelessness and citizenship: camps and the creation of political space* (Routledge London 2013) 32-56.

Rehman Minorities

Rehman R “Minorities and the right to equality and non-discrimination in international law,” in Rehman R *The weaknesses in the international protection of minority rights* (Kluwer Law International The Hague 2000) 104-132.

Rinne The evaluation of immigration policies

Rinne U “The evaluation of immigration policies,” in Constant A & Zimmermann K (eds) *International handbook on the economics of migration* (Edward Elgar Cheltenham 2013) 530-51.

Rizvi “Brain drain

Rizvi F “Brain drain and the potential of professional diasporic networks,” in Giannoccolo P *The brain drain: a survey of the literature, working paper No. 2006-03-02* (Università degli Studi di Milano-Bicocca, Department of Statistics 2006).

Roberts & Heydon Trade in services

Roberts C & Heydon K “Trade in services,” in Heydon K & Woolcock S *The Ashgate research companion to international trade policy* (Routledge London 2017) 167-185.

Robin & Barros Review and evaluation

Robin S & Barros L “Review and evaluation of the measures implemented in OECD Member Countries,” in OECD *Combating the illegal employment of foreign workers* (OECD Publishing Paris 2000) 81-100.

Robinson & Carson The globalisation of agriculture

Robinson G M and Carson D A “The globalisation of agriculture: introducing the Handbook,” in Robinson G & Carson D *Handbook on the globalisation of agriculture* (Edward Elgar Cheltenham UK 2015) 1-29.

Rogerson & Crush South African health care professionals

Rogerson C & Crush J “The recruiting of South African health care professionals,” in Connell J (ed) *The international migration of health workers* (Routledge London 2008) 199-224.

Roodt & Paterson ICT professionals

Roodt J & Paterson A “ICT professionals,” in Erasmus J & Breier M (eds) *Skills shortages in South Africa: case studies of key professions* (HSRC Press Cape Town 2010) 176-198.

Rosenblum & Cornelius Immigration policy

Rosenblum M & Cornelius W “Dimensions of immigration policy,” in Rosenblum M & Tichenor D (eds) *The Oxford handbook of the politics of international migration* (OUP Oxford 2012) 245–273.

Rosenzweig & Stark Introduction

Rosenzweig M & Stark O “Introduction: population and family economics,” in Rosenzweig M & Stark O (eds) *Handbook of population and family economics, volume 1, part A* (Elsevier Oxford 1997) 1-17.

Ross State crime

Ross J “State crime,” in Ross J *An introduction to political crime* (The Policy Press Bristol 2012) 73-83.

Rossi Managed diversity

Rossi N "Managed diversity," in Giddens A (ed) *The progressive manifesto: new ideas for the centre-left* (Polity Cambridge 2003) 120-136.

Roux Economic challenges

Roux A "Economic challenges in South Africa," in Roux A *Everyone's guide to the South African economy 12th edition* (Zebra Press Cape Town 2017).

Ruhs Labour market protectionism

Ruhs M "Immigration and labour market protectionism: protecting local workers' preferential access to the national labour market", in Costello C & Freedland M (eds) *Migrants at work: immigration and vulnerability in labour law* (OUP Oxford 2014) 60-78.

Ruhs The ethics of labour immigration policy

Ruhs M "The ethics of labour immigration policy," in Ruhs M *The price of rights: regulating international labour migration* (PUP Princeton 2013) 154-186.

Ruhs Migrant workers

Ruhs M "Who needs migrant workers? The potential role of an independent expert commission in future EU labour immigration policy," in Karlsson J & Pelling L (eds) *Moving beyond demographics: perspectives for a common European migration policy* (Global Utmaning Stockholm 2011) 57-68.

Ruhs & Anderson Introduction

Ruhs M & Anderson B "Introduction," in Ruhs M & Anderson B (eds) *Who needs migrant workers? - Labour shortages, immigration, and public policy* (OUP Oxford 2010) 1-14.

Ruhs & Anderson Migrant workers

Ruhs M & Anderson B "Migrant workers: Who needs them? A framework for the analysis of shortages, immigration, and public policy," in Ruhs M & Anderson B

(eds) *Who needs migrant workers? - Labour shortages, immigration, and public policy* (OUP Oxford 2010) 15-56.

Sall Migration

Sall B "Migration, remittances and economic initiatives in Sub-Saharan Africa," in OECD *The development dimension: migration, remittances and development* (OECD Publishing Paris 2005) 265-278.

Sarkin Human rights in South Africa

Sarkin J "Implementation of human rights in South Africa: constitutional and Pan-African aspects," in Lanotte J, Sarkin J & Haeck Y (eds) *The principle of equality: a South African and a Belgian perspective* (Maklu Publishers Antwerp-Apeldoorn 2001) 89-118.

Saul, Kinley, & Mowbray Article 6

Saul B, Kinley D, & Mowbray J "Article 6: the right to work," in Saul B, Kinley D, & Mowbray J *The International Covenant on Economic, Social and Cultural Rights: commentary, cases, and materials* (OUP Oxford 2014) 271-391.

Savage The Democratic Republic of the Congo

Savage T "The Democratic Republic of the Congo: inchoate transition, interlocking conflicts," in Doxtader E & Villa-Vicencio C (eds) *Through fire with water: the roots of division and the potential for reconciliation in Africa* (IJR Cape Town 2003) 129-152.

Savage & Vanspauwen The conflict in the DR Congo

Savage T & Vanspauwen K "The conflict in the DR Congo: a story of failed transitions and interlocking conflicts," in Aertsen I *et al* (eds) *Restoring justice after large-scale violent conflicts: Kosovo, DR Congo and the Israeli-Palestinian case* (Willan Cullompton 2008) 323-335.

Saxenian Cluster dynamics

Saxenian A "Cluster dynamics and regional networks: New Argonauts, Silicon Valley, and Route 128," in Oqubay A & Lin J (eds) *The Oxford handbook of industrial hubs and economic development* (OUP Oxford 2020) 206-226.

Schmidtke Introduction

Schmidtke O "Introduction: national closure and beyond," in Schmidtke O & Ozcurumez S (eds) *Of states, rights, and social closure: governing migration and citizenship* (Palgrave Macmillan New York 2008) 1-14.

Schmidtke Justice

Schmidtke O "Justice, freedom, and security," in Brunet-Jailly E, Hurrelmann A, & Verdun A (eds) *European Union governance and policy making: a Canadian perspective* (UTP Toronto 2018) 155-175.

Schmidtke National closure

Schmidtke O "National closure and beyond," in Schmidtke O & Ozcurumez S (eds) *Of states, rights, and social closure: governing migration and citizenship* (Palgrave MacMillan New York 2008) 1- 14.

Schoorl Determinants of international migration

Schoorl J "Determinants of international migration: theoretical approaches and implications for survey research," in Van der Erf R & Heering L (eds) *Causes of international migration: proceedings of a workshop Luxembourg, 14-16 December 1994* (Eurostat Brussels 1995).

Schoumaker *et al* Congolese migrants' economic trajectories

Schoumaker B *et al* "Congolese migrants' economic trajectories in Europe and after return," in Beauchemin C *Migration between Africa and Europe* (Springer Cham 2018) 217-238.

Schoumaker, Flahaux, & Mangalu Congolese migration

Schoumaker B, Flahaux M, & Mangalu J “Congoese migration in times of political and economic crisis,” in Beauchemin C (eds) *Migration between Africa and Europe* (Springer Cham 2018) 189-215.

Schrover Labour migration

Schrover M “Labour migration,” in Hofmeester K & van der Linden M (eds) *Handbook global history of work* (Walter de Gruyter GmbH Berlin 2018) 433–68.

Segatti & Landau Annexes

Segatti A & Landau L “Annexes,” in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: challenges and questions to policy-makers* (AFD No. 38 Paris 2008) 213-228.

Segatti Explaining the impasse

Segatti A “Explaining the impasse of circular migration in Southern Africa from the migrant labour system to deregulation,” in Solé C *et al* (eds) *Impact of circular migration on human, political and civil rights: a global perspective* (Springer Switzerland 2016) 85-108.

Segatti Migration to South Africa

Segatti A “Migration to South Africa: regional challenges versus national instruments and interests” in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 9-29.

Segatti The Southern African Development Community

Segatti A “The Southern African Development Community: a walk away from the free movement of persons?”, in Nita S *et al* (eds) *Migration, free movement and regional integration* (UNESCO & UNU-CRIS Paris 2017) 47-94.

Segatti Reforming South African immigration policy

Segatti A “Reforming South African immigration policy in the post-apartheid period (1990-2010)” in Segatti A & Landau L (eds) *Contemporary migration to South*

Africa: a regional development issue - Africa development forum (World Bank Washington DC 2011) 31-66.

Segatti Immigration policy in the post-apartheid period

Segatti A “Reforming South African immigration policy in the post-apartheid period (1990-2006): what it means and what it takes,” in Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (AFD No. 38 Paris 2008) 55-113.

Segatti & Landau Executive summary

Segatti A & Landau L “Executive summary” in Wa Kabwe-Segatti A & Landau L (eds) *Migration in post-apartheid South Africa: Challenges and questions to policy-makers* (AFD No. 38 Paris 2008) 29-45.

Segatti & Landau Migration data collection issues

Segatti A & Landau L “Appendix B - How many are they? Migration data collection issues”, in Segatti A & Landau L (eds) *Contemporary migration to South Africa: a regional development issue - Africa development forum* (World Bank Washington DC 2011) 149.

Semenza & Mori New self-employment

Semenza R & Mori A “New self-employment as theoretical matter,” in Semenza R & Pichault F (eds) *The challenges of self-employment in Europe* (Edward Elgar Publishing Cheltenham UK 2019) 20-46.

Sen Turkish migration

Sen F “The economic, social and political impact of Turkish migration,” in Spencer S (ed) *Immigration as an economic asset: the German experience* (IPPR / Trentham Books London 1994) 93-106.

Shelley African colonial States

Sharkey H "African colonial States," in Parker J & Reid R (eds) *The Oxford handbook of modern African history* (OUP Oxford 2013) 151-170.

Shelley Impacts

Shelley T "Impacts," in Shelley T *Exploited: migrant labour in the new global economy* (Zed Books London 2007) 121-137.

Shizha Globalising education

Shizha E "Globalising education for globalised labour markets: brain drain or gain for Africa?", in Shizha E & Diallo L (eds) *Africa in the age of globalisation: perceptions, misperceptions and realities* (Ashgate Surrey 2015) 235-252.

Shuto Labour migration

Shuto M "Labour migration and human security in East and Southeast Asia," in Kleinschmidt H (ed) *Migration, regional integration and human security: the formation and maintenance of transnational spaces* (Routledge London 2006) 205-225.

Sidun Traffickers

Sidun N "Traffickers: who are they?" in Walker L, Gaviria G, & Gopal K (eds) *Handbook of sex trafficking: feminist transnational perspectives* (Springer Cham 2018) 99-110.

Sihlongonyane The economic drivers

Sihlongonyane M "The economic drivers of urban change in the Gauteng City-Region: past, present, and future," in Cheruiyot K (ed) *The changing space economy of city-regions : the Gauteng city-region, South Africa* (Springer Cham 2018) 25-62.

Singh Skilled human migration from India

Singh L "Rethinking development through dynamics of skilled human migration from India," in Sahoo S & Pattanaik B (eds) *Global diasporas and development: socioeconomic, cultural, and policy perspectives* (Springer London 2014) 157-170.

Song The right to control immigration

Song S “Why does the State have the right to control immigration?”, in Knight J (ed) *Immigration, emigration, and migration: NOMOS LVII* (NYU Press New York 2017) 3-50.

Sonia, Markova, & Paraskevopoulou Controlling undocumented migration

Sonia M, Markova E, & Paraskevopoulou A “Controlling undocumented migration at EU level,” in Sonia M, Markova E, & Paraskevopoulou A *Undocumented Workers’ transitions: legal status, migration, and work in Europe* (Routledge London 2011) 58-74.

SOPEMI Main trends

SOPEMI “Main trends in international migration,” in SOPEMI *Trends in international migration - annual report 2003 edition* (OECD Paris 2003) 21-87.

Spillman Realism

Spillman D “Realism and realia in colonial Southern Africa,” Spillman D *British colonial realism in Africa: inalienable objects, contested domains* (Palgrave Macmillan London 2012) 123-174.

Spring Global workforce

Spring J “A Global workforce: migration and the talent auction,” in Spring J *Globalisation of education: an introduction - second edition* (Routledge London 2015) 188-211.

Ssenyonjo The domestic protection

Ssenyonjo M “The domestic protection of economic, social and cultural rights,” in Ssenyonjo M *Economic, social and cultural rights in international law* (Hart Publishing Oxford 2009) 149-202.

Staring Smuggling aliens

Staring R “Smuggling aliens toward the Netherlands: the role of human smugglers and transnational networks,” in Siegel D, Bunt H, & Zaitch D (eds) *Global organised crime: trends and developments* (Springer Dordrecht 2012) 105-116.

Stasilius Revisiting

Stasilius D “Revisiting the permanent–temporary labour migration dichotomy,” in Gabriel C & Pellerin H (eds) *Governing international labour migration: current issues, challenges and dilemmas* (Routledge London 2008) 95-111.

Stephenson & Hufbauer Labour mobility

Stephenson S & Hufbauer G “Labour mobility,” in Chauffour J & Maur J (eds) *Preferential trade agreement policies for development: a handbook* (World Bank Washington DC 2011) 275-306.

Steyn Millenarian tragedies

Steyn C “Millenarian tragedies in South Africa: The Xhosa cattle-killing movement and the Bulhoek massacre,” in Wessinger C (ed) *Millennialism, persecution, and violence: historical cases* (SUP Syracuse NY 2000) 185-204.

Ström Labour and migrant labour

Ström G “Labour and migrant labour in destabilised and future Southern Africa,” in Odén B & Othman H (eds) *Regional cooperation in Southern Africa: a post-apartheid perspective* (SIAS Uppsala 1989) 63-76.

Tafira Xenophobia

Tafira H “Is xenophobia racism?,” in Tafira H *Xenophobia in South Africa - a history: African histories and modernities* (Palgrave Macmillan Cham 2018) 15–33.

Takawira Incorporating customary law

Takawira M “Incorporating customary law and indigenous knowledge in forest management: the case of Kabompo forest in the north-western province of Zambia,” in Machena C & Banda G (eds) *Community, farmers’ and breeders’*

rights in southern Africa: towards a framework for a sui generis policy and legislation (IUCN-ROSA Harare 2002) 3-24.

Tati Working on South African mines

Tati G “Working on South African mines in a changing regional labour market: a reference to cross-border migrants from Swaziland,” in Gallo-Mosala S (ed) *Migrants’ experiences within the South African labour market* (Scalabrini Centre Cape Town 2009) 83-101.

Te Pemako L’histoire constitutionnelle

Te Pemako V “L’histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005),” in Liber Amicorum Marcel Antoine Lihau *Pour l’épanouissement de la pensée juridique congolaise* (Bruylant Bruxelles & PUK Kinshasa 2006) 269-315.

Teferra International academics in Africa

Teferra D “International academics in Africa: the South African experience,” in Yudkevich M, Altbach P, & Rumbley L (eds) *International faculty in higher education: comparative perspectives on recruitment, integration, and impact* (Routledge London 2017) 240-66.

Testaverde Migration policy

Testaverde M “Migration policy in receiving countries,” in Testaverde M *et al Migrating to opportunity: overcoming barriers to labour mobility in Southeast Asia* (World Bank Washington DC 2017) 171-202.

Tham, Campbell & Boese Labour protection

Tham J, Campbell I & Boese M “Why is labour protection for temporary migrant workers so fraught? a perspective from Australia,” in Howe J & Owens R (eds) *Temporary labour migration in the global era: regulatory challenges* (Hart Publishing 2016) 173-200.

Theal South African history

Theal G “South African history and geography,” in Theal G *Compendium of South African history and geography – third edition* (Lovedale South Africa / Edward Stanford London 1878) 1-208.

Theodore Temporary worker

Theodore N “Temporary worker programmes,” in Gans J *et al* (eds) *Debates on U.S. immigration* (Sage Publications Los Angeles 2012) 285-92.

The Presidency Launch of JIPSA

The Presidency “Mlambo-Ngcuka: Launch of Joint Initiative for Priority Skills Acquisition,” *Address delivered by the Deputy President, Phumzile Mlambo-Ngcuka, at the launch of the Joint Initiative for Priority Skills Acquisition (JIPSA)*, (Presidential Guest House, Pretoria 27 March 2006). <https://www.gov.za/p-mlambo-ngcuka-launch-joint-initiative-priority-skills-acquisition> (Date of use: 19 July 2022).

Tiburcio The treatment of aliens

Tiburcio C “Development of the treatment of aliens from diplomatic protection to human rights,” in Tiburcio C *The human rights of aliens under international and comparative law* (Martinus Nijhoff Publishers The Hague 2001) 35-55.

Toulmin From feudal serfs

Toulmin S “From feudal serfs to free agents: the future of ‘employment’,” in Holmer J & Karlsson J (eds) *Work: quo vadis?: re-thinking the question of work* (Routledge London 2020) 15-28.

Trémolières Glossary

Trémolières M “Glossary,” in Trémolières M (ed) *Regional challenges of West African migration: African and European perspectives* (OECD Paris 2009) 245-49.

Trémolières A few questions

Trémolières M “A few questions for the Foreign and Commonwealth Office (FCO) - Interview with the FCO,” in Trémolières M (ed) *Regional challenges of West*

African migration: African and European perspectives (OECD/SWAC OECD Publishing Paris 2009) 225-237.

Triandafyllidou Globalisation and migration

Triandafyllidou A “Globalisation and migration: an introduction,” in Triandafyllidou A (ed) *Handbook of globalisation and migration* (Edward Elgar Cheltenham UK 2018) 1-16.

Taylor Aboriginal labour migration

Taylor J “Aboriginal labour migration for employment: the evidence,” in Altman J (ed) *Aboriginal employment equity by the year 2000 - Research Monograph No. 2* (Australian National University Canberra 1991) 65-77.

Theobald Migrant carers

Theobald H “Migrant carers in elder care provision: interaction of policy fields,” in Pfau-Effinger B & Rostgaard T (eds) *Care between work and welfare in European societies: work and welfare in Europe* (Palgrave Macmillan London 2011) 155-76.

Ukah Re-imagining the religious field

Ukah A “Re-imagining the religious field: the rhetoric of Nigerian Pentecostal pastors in South Africa,” in Echtler M & Ukah A *Bourdieu in Africa: exploring the dynamics of religious fields* (Koninklijke Brill NV Leiden 2016) 70-95.

Ukpokodu Diaspora migrations

Ukpokodu O “Diaspora migrations: brain drain or symbioses,” in Abidogun J & Falola T (eds) *The Palgrave Handbook of African education and indigenous knowledge* (Palgrave Macmillan Cham 2020) 761-786.

United States Supreme Court Cases argued

United States Supreme Court “Cases argued and determined in the United States Supreme Court October term 1891,” in *The Supreme Court Reporter - Volume 12* (West Publishing St. Paul 1892) 336-340.

Vlassenroot Land and conflict

Vlassenroot K "Land and conflict: the case of Masisi," in Vlassenroot K *et al* (eds) *Conflict and social transformation in Eastern DR Congo* (Academia Press Gent 2004) 81-102.

Vlassenroot & Huggins Conflict in eastern DRC

Vlassenroot K & Huggins C "Land, migration and conflict in eastern DRC," in Huggins C & Clover J (eds) *From the ground up: land rights, conflict and peace in Sub-Saharan Africa* (ISS Pretoria 2005) 115-94.

Vosko Multilateral framework on migration

Vosko L "Out of the Shadows? The non-binding multilateral framework on migration (2006) and prospects for using international labour regulation to forge global labour market membership," in Davidov G & Langille B (eds) *The idea of labour law* (OUP Oxford 2011) 365-384.

Te Pemako L'histoire constitutionnelle

Te Pemako V "L'histoire constitutionnelle des actes ayant force de loi au Congo-Zaïre (1885-2005)," in Liber Amicorum Marcel Antoine Lihau *Pour l'épanouissement de la pensée juridique congolaise* (Bruylant & PUK Bruxelles & Kinshasa 2006) 269-315.

Tshiswaka L'immigration étrangère

Tshiswaka L « L'immigration étrangère au zaïre (1970-1984) : historique, évolution récente et facteurs explicatifs » [Foreign immigration to Zaire (1970-1984): history, recent developments and explanatory factors], in AIDELF *Les migrations internationales : problèmes de mesure, évolutions récentes et efficacité des politiques - Séminaire de Calabre (8-10 septembre 1986)* [International migration: measurement issues, recent developments and policy effectiveness - Calabria seminar (8-10 September 1986)] (AIDELF Paris 1988) 235–241.

Urzi Global citizenship

Urzi D “Global citizenship: the need for dignity and respect for migrants,” in Craig G *et al* (eds) *Vulnerability, exploitation and migrants: insecure work in a globalised economy* (Palgrave Macmillan London 2015) 215-229.

Ushakov & Rubinskaya Reforming of the State immigration policy

Ushakov D & Rubinskaya E “Reforming of the State immigration policy in the context of globalisation: on the example of Russia,” in IRMA (ed) *Immigration and the current social, political, and economic climate: breakthroughs in research and practice* (IGI Global Hershey 2019) 625-643.

Ushakov & Rubinskaya the State immigration policy

Ushakov D & Rubinskaya E “Reforming of the State immigration policy in the context of globalisation: on the example of Russia,” in Ushakov D *Economic reforms for global competitiveness* (IGI Global Hershey 2017) 230-249.

Van Rensburg & Lamarche The right to social security

Van Rensburg L & Lamarche L “The right to social security and assistance,” in Brand D & Heyns C *Socio-economic rights in South Africa* (PULP Pretoria 2005) 209-248.

Vansina Introduction

Vansina J “Introduction,” in Vansina J *Being colonised: the Kuba experience in rural Congo, 1880–1960* (UWP Madison 2010) 3-9.

Wa-Dondo La législation

Wa-Dondo K « La législation et la protection des réfugiés en République du Zaïre » [Legislation and refugee protection in the Republic of Zaire], in Veiter T *Entwurzelung und Integration: rechtliche, soziale und politische Probleme von Flüchtlingen und Emigranten* [Uprooting & Integration: legal, social & political challenges faced by refugees & emigrants] (Wilhelm Braumüller Wien 1979) 31-43.

Walters Deportation

Walters W “Deportation, expulsion, and the international police of aliens,” in De Genova N & Peutz N (eds) *The deportation regime: sovereignty, space, and the freedom of movement* (DUP Durham 2010) 69-100.

Waylen Imperialism

Waylen G “Imperialism,” in Kramarae C & Spender D *Routledge international encyclopedia of women: global women’s issues and knowledge – volume 2* (Routledge London 2000) 1126-1129.

Watanabe International migration

Watanabe E “International migration: a development practitioner’s perspective,” in Kleinschmidt H (ed) *Migration, regional integration and human security: the formation and maintenance of transnational spaces* (Routledge London 2006) 21-44.

Watts Diplomatic relations

Watts A “Diplomatic relations,” in Watts A (ed) *The International Law Commission 1949-1998: Volume I: The Treaties* (Clarendon Press 1999) 225-339.

Wehrs Cognitive imperialism

Wehrs D “The ordeal of cognitive imperialism in Tutuola’s early fiction,” in Wehrs D *Pre-colonial Africa in colonial African narratives: from Ethiopia unbound to things fall apart, 1911–1958* (Ashgate Hampshire 2008) 101-132.

Weigel South African immigration law

Weigel M “South African immigration law: an international perspective,” in Crush J (ed) *Beyond control: immigration and human rights in a democratic South Africa* (SAMP Cape Town 1998) 92-122.

Weiss The protection of minorities

Weiss N “The protection of minorities in a Federal State: the case of Germany,” in Tarr G, Williams R, & Marko J (eds) *Federalism, subnational constitutions, and minority rights* (Praeger London 2004) 73-88.

Welz The roles of the African Union

Welz M "The roles of the African Union and its Member States in managing migration across the Mediterranean," in Ippolito F & Trevisan S (eds) *Migration in the Mediterranean: mechanisms of international cooperation* (CUP Cambridge 2016) 94-114.

Wenzel The promise of failure

Wenzel J "The promise of failure: memory, prophecy, and temporal disjunctures of the South African twentieth century," in Wenzel J *Bulletproof: afterlives of anticolonial prophecy in South Africa and beyond* (UChicago Chicago 2010) 113-156.

Wentzel & Tlabela Historical background

Wentzel M & Tlabela K "Historical background to South African migration," in Kok P *et al* (eds) *Migration in South and Southern Africa: dynamics and determinants* (HSRC Press Cape Town 2006) 71-95.

West Adjudication

West R "Adjudication is not interpretation," in West R *Narrative, authority, and law* (UMP Ann Arbor MI 2004) 89-176.

Wickramasekara Globalisation

Wickramasekara P "Globalisation, international labour migration and the rights of migrant workers," in Munck R (ed) *Globalisation and migration: new issues, new politics* (Routledge London 2013) 21-38.

Wickramasekara Migration regimes

Wickramasekara P "Migration regimes and their linkages for family unity, integrity and development," in Panizzon M, Zürcher G, & Fornalé E (eds) *The Palgrave handbook of international labour migration: law and policy perspectives* (Palgrave Macmillan New York 2015) 146-180.

Wilsher International law and immigration detention

Wilsher D “International law and immigration detention: between territorial sovereignty and emerging human rights norms,” in Wilsher D *Immigration detention: law, history, politics* (CUP Cambridge 2012) 119-170.

Winters *et al* Current policies

Winters L *et al* “Current policies and proposals on temporary movement,” in Winters L *et al Liberalising labour mobility under the GATS, Economic Paper, No. 53* (Commonwealth Secretariat London 2002) 33-46.

Witt social history

Witt J “A social history of international law: historical commentary, 1861-1900,” in Sloss D, Ramsey M, & Dodge WS (eds) *International law in the U.S. Supreme Court: continuity and change* (CUP Cambridge 2011) 164–189.

Wong Conclusion

Wong T “Conclusion: migrants, agency, and the future of immigration control,” in Wong T *Rights, deportation, and detention in the age of immigration control* (STUP Stanford Cal. 2015) 166-174.

World Bank High-skilled migration

World Bank “High-skilled migration,” in World Bank *Moving for prosperity: global migration and labour markets - Policy Research Report* (World Bank Washington DC 2018) 233-277.

World Bank Overview

World Bank “Overview,” in World Bank *Moving for prosperity: global migration and labour markets - Policy Research Report* (World Bank Washington DC 2018) 1-38.

Yeates & Pillinger Bilateral agreements

Yeates N & Pillinger J “Bilateral agreements: a resurgent feature of global policy,” in Yeates N & Pillinger J *International health worker migration and recruitment: global governance, politics and policy* (Routledge London 2019) 141-173.

Yenisey The rights of migrant workers

Yenisey K “Safeguarding the rights of migrant workers: another challenge for labour law?”, in Casale G & Treu T (eds) *Transformations of work: challenges for the institutions and social actors* (Wolters Kluwer Alphen aan den Rijn 2019).

Yıldırım The guest

Yıldırım A ““The guest doesn’t like another guest, and the host likes neither”: Somali refugees forgotten in a satellite town,” in Bulut M & Şahin K (eds) *Anthropological perspectives on transnational encounters in Turkey: war, migration and experiences of coexistence* (TP London 2019) 43-58.

Young & Turner “Zairianisation

Young C & Turner T “Zairianisation and radicalisation: anatomy of a disaster,” in Young C & Turner T *The rise and decline of the Zairian State* (UWP Madison Wisconsin 1985) 326-362.

Yue Demographic change.

Yue C “Demographic change and international labour mobility in Southeast Asia – issues, policies and implications for cooperation,” in Hugo G & Young S (eds) *Labour mobility in the Asia-Pacific region: dynamics, issues and a new APEC agenda* (ISEAS Publishing Pasir Panjang, Singapore 2008) 93-130.

Zaccaron Equality as a principle

Zaccaron G “Equality as a principle,” in Zaccaron G *Equality and non-discrimination in the EU: the foundations of the EU legal order* (Edward Elgar Publishing Cheltenham UK 2021) 40-110.

Zimmermann Locatio conductio II

Zimmermann R “Locatio conductio,” in Zimmermann R *The law of obligations: roman foundations of the civilian tradition* (Juta Cape Town 1996) 384-412.

Zimmermann & Visser South Africa law

Zimmermann R & Visser D P “Introduction: South Africa law as mixed legal system,” in Zimmermann R & Visser D *Southern cross: civil law and common law in South Africa* (Juta & Co Ltd Cape Town 1996) 1-30.

Zou Migrant precarity

Zou M “Migrant precarity under China’s new immigration” in Jørgensen M & Schierup C (eds) *Politics of precarity: migrant conditions, struggles and experiences* (Koninklijke Brill NV Leiden 2017) 160-178.

Zuberi & Sibanda Migration

Zuberi T & Sibanda A “Migration and employment,” in Zuberi T, Sibanda A & Udjo E (eds) *The demography of South Africa* (Routledge New York 2005) 266-296.

11.3.3 Journal articles and lecture material

Abebe 2017 *Africa Report*

Abebe T “Migration policy frameworks in Africa” 2017 *Africa Report 2* (ISS Pretoria).

Abdurazakova 2011 *APPJ* vol. 26(3)

Abdurazakova D “Social impact of international migration and remittances in Central Asia” 2011 *APPJ* vol. 26(3) September 29-54.

Adepoju 2007 *GFMD*

Adepoju A “Highly skilled migration: balancing interests and responsibilities and tackling” 2007 *GFMD*.

Aghababyan 2012 *CASAS CARIM-East Research Report*

Aghababyan P “Legal aspects of labour migration governance in the Republic of Armenia” 2012/03 *CARIM-East Research Report*, Migration Policy Centre.

Amadi & Lenaghan 2020 *Speculum Juris* 34(1)

Amadi V & Lenaghan P “Advancing regional integration through the free movement of persons in the SADC” 2020 *Speculum Juris* 34(1) 51-67.

Aglotsson & Klaaren 2003 *Migration Policy Brief No. 14*

Aglotsson E & Klaaren J “Policing migration: Immigration enforcement and human rights in South Africa” 2003 *Migration Policy Brief No. 14* (Southern African Migration Project Cape Town).

Arnold & Lewinsohn 2010 *Med J Aust* 192 (5)

Arnold P & Lewinsohn D “Motives for migration of South African doctors to Australia since 1948” 2010 *Med J Aust* 192 (5) 288-90.

AU & JLMP 2020 *Policy Brief*

AU & JLMP “Africa labour migration outlook in the post COVID-19 era” 2020 *Policy Brief* (November).

Batog 2005 *Loy U Chi Int'l L Rev* 3(1) 117

Batog K “Immigration policy v. labour policy: an analysis of the application of domestic labour laws to unauthorised foreign workers” 2005 *Loy U Chi Int'l L Rev* 3(1) 117-134.

Beine, Docquier & Rapoport 2008 *EJ* vol. 118 (528)

Beine M, Docquier F & Rapoport H “Brain drain and human capital formation in developing countries: winners and losers” 2008 *EJ* vol. 118 (528) 631–652.

Belvedere 2007 *Refuge* 24 (1).

Belvedere M F “Insiders but outsiders: the struggle for the inclusion of asylum seekers and refugees in South Africa” 2007 *Refuge: Canada's Journal on Refugees* 24(1) 57-70.

Bertossi 2008 *Politique étrangère* 5.

Bertossi C “The regulation of migration: a global challenge” 2008 *Politique étrangère* 5 (Hors série) 189-202.

Berwouts 2009 *EURAC* 56.

Berwouts K “Libre circulation des personnes et des biens au sein de la CEPGL” – Synthèse de l’actualité (Free movement of people and goods within the CEPGL - News Brief) 2009 *EURAC* (56) 2-4.

Beschle 1988 *ILJ* vol. 63 (3).

Beschle D “Uniformity in constitutional interpretation and the background right to effective democratic governance,” 1988 *ILJ* vol. 63 (3) 539-570.

Black & Gregersen 1999 *International Business*

Black S & Gregersen H “The right way to manage expats” 1999 *International Business* March–April. <https://hbr.org/1999/03/the-right-way-to-manage-expats> (Date of use: 04 February 2022).

Brassey 1990 *ILJ* vol. 11

Brassey M “The nature of employment” 1990 *ILJ* vol. 11, 889.

Brittle R & Desmet 2020 *IjCR* 28

Brittle R & Desmet E “Thirty years of research on children’s rights in the context of migration: towards increased visibility and recognition of some children, but not all?” 2020 *IjCR* 28, 36-65.

Budlender & Davis 1984 *Acta Juridica*.

Budlender G & Davis D M “Labour law, influx control and citizenship: the emerging policy conflict,” 1984 *Acta Juridica* 141-72.

Bukasa 2010 *JCFS* vol. 41(2).

Bukasa P “Transnational family ties, remittance motives, and social death among Congolese migrants: a socio-anthropological analysis” 2010 *JCFS* vol. 41(2) Introduction: transnational Families in the South (Spring) 225-43.

Byrnes A *et al* 2007 *Handbook for Parliamentarians* (No. 14)

Byrnes A *et al* "From exclusion to equality: realising the rights of persons with disabilities" 2007 *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol* (No. 14).

Carciotto 2018 *AHMR* Vol. 4(1).

Carciotto S "The regularisation of Zimbabwean migrants: a case of permanent temporariness" 2018 *AHMR* Vol. 4(1) 1101-1116.

CDE 2007 *CDE Focus* (No. 12).

Centre for Development and Enterprise "The South African skills crisis: a report from the corporate coalface" 2007 *CDE Focus* (No. 12) 1-13.

CEPAS 1993 *Zaire-Afrique (Issues 271-280)*.

CEPAS « Les travaux en commissions, » (Centre for Studies for Social Action "Committee sessions") 1993 *Zaire-Afrique (Issues 271-280)* 155-94.

Chang 1997 *GLJ* 85(7).

Chang H "Immigration policy, liberal principles, and the Republican tradition" (1997) *GLJ* 85(7) 2105-2120.

Chaskalson 1984 *Acta Juridica* 33

Chaskalson A "The right of black persons to seek employment and be employed in the Republic of South Africa," 1984 *Acta Juridica* 33.

Chiorazzi 2015 *The Harvard Gazette*.

Chiorazzi A "The spirituality of Africa" *The Harvard Gazette* (6 October 2015) <https://news.harvard.edu/gazette/story/2015/10/the-spirituality-of-africa/> (Date of use: 25 April 2022).

Clarence-Smith 1983 *AEH* (No. 12).

Clarence-Smith W "Business empires in Equatorial Africa," in 1983 *AEH* (No. 12) 3-11.

Cole 2012 *AJS* Vol. 117 (4).

Cole W "Human rights as myth and ceremony? reevaluating the effectiveness of human rights treaties, 1981–2007," 2012 *AJS* Vol. 117 (No. 4) 1131-1171.

Crush 1996 *Democracy in Action* Vol. 10(2).

Crush J "Apartheid's last Act?" 1996 *Democracy in Action* Vol. 10(2) 12-13.

Crush 2000 *International Migration* 38(6)

Crush J "The dark side of democracy: migration, xenophobia and human rights in South Africa" 2000 *International Migration* 38(6) 103–120.

Crush 2011 *SAMP Policy Brief - No. 25*

Crush J "Complex movements, confused responses: labour migration in South Africa" 2011 *SAMP Policy Brief - No. 25* (SAMP Waterloo, ON) 1-27.

Crush *et al* 2017 *SAMP Migration Policy Series No. 77*

Crush J *et al* "Living with xenophobia: Zimbabwean informal enterprise in South Africa," 2017 *SAMP Migration Policy Series No. 77* (Southern African Migration Programme - SAMP Waterloo).

Crush & Dodson 2007 *TESG* Vol. 98(4).

Crush J & Dodson B "Another lost decade: the failures of South Africa's post-apartheid migration policy" 2007 *TESG* Vol. 98(4) 436–454.

Crush & McDonald 2001 *Africa Today* Vol. 48 (3)

Crush J & McDonald D "Introduction to special issue: evaluating South African immigration policy after Apartheid" 2001 *Africa Today* Vol. 48 (3) 1-13.

Crush & Tshitereke 2001 *Africa Today* Vol 48(3)

Crush J & Tshitereke C "Contesting migrancy: the foreign labour debate in post-1994 South Africa" 2001 *Africa Today* Vol 48(3) 49-70.

Crush & Williams 2010 *SAMP Policy Brief No. 23*

Crush J & Williams V “Labour migration trends and policies in Southern Africa,” 2010 *SAMP Policy Brief No. 23*.

Crush, Skinner & Stulgaitis 2017 *SAMP Migration Policy Series No. 79*.

Crush J, Skinner C & Stulgaitis M “Rendering South Africa undesirable: a critique of refugee and informal sector policy,” 2017 *SAMP Migration Policy Series No. 79* (SAMP Waterloo).

Czaika & de Haas 2013 *PDR Vol. 39* (3).

Czaika M & de Haas H “The effectiveness of immigration policies,” 2013 *PDR Vol. 39* (3) 487-508.

Dauvergne 2004 *MLR Vol. 67*(4).

Dauvergne C “Sovereignty, migration and the rule of law in global times,” 2004 *MLR Vol. 67*(4) 588-615.

Davies & Head 1995 *JSAS Vol. 21*(3)

Davies R & Head J “The future of mine migrancy in the context of broader trends in migration in Southern Africa” 1995 *JSAS Vol. 21*(3) 439-450.

De Bruyn & Wets 2006 *IOM Migration Research Series, No. 25*.

De Bruyn T & Wets J “Remittances in the Great Lakes Region” 2006 *IOM Migration Research Series, No. 25*.

Dewhurst 2014 *CLLPJ 35*(2)

Dewhurst E “Models of protection of the right of irregular immigrants to back pay: the impact of the interconnection between immigration law and labour law” 2014 *CLLPJ 35*(2) May 1.

Dube 2019 *NEP Vol 25*(2)

Dube G “Black South Africans’ attitudes toward African Immigrants between 2008 and 2016” 2019 *NEP Vol 25*(2) 191-210.

Ehman & Sullivan 2001 *CMAJ* 164 (3).

Ehman A & Sullivan P "South Africa appeals to Canada to stop recruiting its MDs" 2001 *CMAJ* 164 (3) 387-388.

Englebert 2000 *PRQ* Vol. 53 (1)

Englebert P "Pre-colonial institutions, post-colonial states, and economic development in tropical Africa" 2000 *PRQ* Vol. 53 (1) 7-36.

Eylemer & Şemşit 2007 *Perceptions: JIA* Vol 12(2-3).

Eylemer S & Şemşit S "Migration-security nexus in the Euro-Mediterranean relations" 2007 *Perceptions: JIA*, vol 12(2-3) 49-70.

Freeman 1992 *IMR* Vol. 26 (No. 4).

Freeman G "Migration policy and politics in the receiving states," 1992 *IMR* Vol. 26 (No. 4) 1144-1167.

Gamielidien & van Niekerk 2017 *SAJOT* 47(1)

Gamielidien F & van Niekerk L "Street vending in South Africa: an entrepreneurial occupation" 2017 *SAJOT* 47(1) 24-29.

Garcia 2003 *U. Mich. J. L. Reform* Vol 36

Garcia R "Ghost workers in an interconnected world: Going beyond the dichotomies of domestic immigration and labour laws" 2003 *U. Mich. J. L. Reform* Vol 36, 737-765.

Georges 1986 *Western Folklore* Vol. 45 (1).

Georges R "The Folklorist as comparatist" 1986 *Western Folklore* Vol. 45 (1) 1-20.

Ginsburg 1977 *ABA Journal* Vol (63).

Ginsburg R "Let's have E.R.A. as a signal," in Hunt H (ed) Ruth Bader Ginsburg: In Her Own Words, 1977 *ABA Journal* Vol (63) 70-73.

Griffith 2012 *JLPP* Vol 21(3)

Griffith K “Undocumented workers: crossing the borders of immigration and workplace law,” 2012 *JLPP*, Vol 21(3) Article 4, 611- 640.

Hammett 2014 *International Migration* 52(4) 41-52.

Hammett D “Physician migration in the global south between Cuba and South Africa” 2014 *International Migration* 52(4) 41-52.

Harvey 1990 *AJCL* Vol. 38(1)

Harvey R “Equal treatment of men and women in the workplace: the implementation of the European Community’s equal treatment legislation in the Federal Republic of Germany” 1990 *AJCL* Vol. 38(1) 31-71.

Howe & Reilly (2015) *FLR* 43(2)

Howe J & Reilly A “Meeting Australia’s labour needs: the case for a low skill work visa” (2015) *FLR* 43(2).

Husa 2005 *NJIL* Vol 74 (1).

Husa J “Melodies on comparative law: a review Essay” 2005 *NJIL: Acta Scandinavica Juris Gentium* Vol 74 (1) 161–174.

Ilunga 1971 *Revue juridique du Congo* n° 1.

Ilunga K « Le travailleur étranger en République Démocratique du Congo », (Foreign Workers in the Democratic Republic of Congo) in *Revue juridique du Congo* (Congo Law Review) n° 1 (1971) 14-19.

Jacobsen 2007 *FFWA* 31(1).

Jacobsen K “Migration within Africa: the view from South Africa” 2007 *FFWA* 31(1) 203-214.

Jansson 2011 *Occasional Paper No. 97*

Jansson J “The Sicomines Agreement: change and continuity in the Democratic Republic of Congo’s international relations” 2011 *Occasional Paper No. 97* (SAIIA Johannesburg).

Kahombo 2011 *KAS law study library* (vol 6).

Kahombo B 'The origin of the Congolese Constitutional Court: organisation and jurisdiction,' in Hamann H & Kumbu J (eds) *Rule of law programme for Sub-Saharan Africa* in 2011 *KAS law study library* (vol 6) 1-26.

Kamwimbi *et al OIDA IJSD* Vol. 01 (05) 67

Kamwimbi TK *et al* "Violation of human rights of disadvantaged and vulnerable refugees – victims of xenophobic attacks in South Africa" 2010 *OIDA IJSD* Vol. 01 (05) 67-83.

Karlen & Arsel 1960 *AJCL* Vol. 9 (2).

Karlen D & Arsel I "Civil litigation in Turkey," 1960 *AJCL* Vol. 9 (2) 308-311.

Kim 1991 *Korea News Review* Vol. 20(35).

Kim Y "Foreign workers for Korea," 1991 *Korea News Review* Vol. 20(35).

Kitimbo 2014 *Brenthurst Discussion Paper 4/2014*.

Kitimbo A "Is it time for open borders in Southern Africa? : The case for free labour movement in SADC" 2014 *Brenthurst Discussion Paper 4/2014* (August).

Klaaren 2010 *IJCL*, vol. 8 (1).

Klaaren J "Constitutional citizenship in South Africa" 2010 *IJCL*, vol. 8 (1) 94-110.

Klaaren & Ramji 2001 *Africa Today* Vol. 48 (3).

Klaaren J & Ramji J "Inside illegality: migration policing in South Africa after Apartheid," 2001 *Africa Today* Vol. 48 (3) Evaluating South African immigration policy after apartheid 35-47.

Köser-Akçapar 2006 *REMI* 22(3)

Köser-Akçapar S "Do Brains really going down the drain? highly skilled Turkish Migrants in the USA and the «brain drain» debate in Turkey" 2006 *REMI* 22(3) 79.

Labonté *et al* 2015 *Hum Resour Health* 13, 92.

Labonté R *et al* "Health worker migration from South Africa: causes, consequences and policy responses" 2015 *Hum Resour Health* 13, 92. <https://human-resources-health.biomedcentral.com/articles/10.1186/s12960-015-0093-4#citeas> (Date of use: 26 July 2022).

Landau 2006 *JRS* 19 (3).

Landau L "Protection and dignity in Johannesburg: shortcomings of South Africa's urban refugee policy" 2006 *JRS* 19 (3) 308–327.

Landau, Polzer & Segatti 2010 *NSAR* 1.

Landau L, Polzer T, & Segatti A "The mobile nation: how migration continues to shape South Africa," in Daniel J *et al* (eds) 2010 *NSAR 1: Development or decline?* 218-235.

Langalanga 2019 *SAIIA Occasional Paper* 296.

Langalanga A "A tale of two continents: comparing migration experiences in South Africa & Germany", 2019 *SAIIA Occasional Paper* 296.

Langevoort 1987 *MLR* 85.

Langevoort D C "Statutory obsolescence and the judicial process: the revisionist role of the courts in federal banking regulation" 1987 *MLR* 85: 672–733.

Le Roux & Hungwe 2011 *CILSA* Vol. 44 (2).

Le Roux W & Hungwe S "In search of alternatives to pre-emptive immigration detention (or not): a review of recent South African case law" 2011 *CILSA*, Vol. 44 (2) 139-167.

Lim 2013 *CLR* Vol. 101 (4).

Lim J "Immigration, asylum, and citizenship: a more holistic approach" 2013 *CLR* Vol. 101 (4) 1013-1077.

Lunda 2018 *Ohadata D-18-20*

Lunda J “La protection de la main d’œuvre nationale en RDC face aux ambitions intégrationnistes de l’OHADA” 2018 *Ohadata* D-18-20. <http://www.ohada.com/doctrine/ohadata/D-18-20.html> (Date of use: 30 March 2022).

Lututala 2014 *Dounia Review* No.7.

Lututala B “Les migrants Congolais en Belgique et en Grande-Bretagne: entre rêves et frustrations” [Congolese migrants in Belgium and Great Britain: between dreams and frustrations], in Emina J & Shapiro D Population and development challenges in Sub-Saharan Africa, 2014 *Dounia Review* No.7 (L’Harmattan RDC & CISRI Kinshasa-Bruxelles-Paris) 127-146.

Makgetla 2010 *NSAR* 1.

Makgetla N “The international economic crisis and employment in South Africa,” in Daniel J *et al* (eds) 2010 *NSAR 1: Development or decline?* 65-86.

Mangalu 2014 *Dounia Review* No.7.

Mangalu M “Migrant’s remittances and living conditions of households of origin. evidence from Kinshasa,” in Emina J & Shapiro D Population and development challenges in Sub-Saharan Africa, 2014 *Dounia Review* No.7 (L’Harmattan RDC & CISRI Kinshasa-Bruxelles-Paris) 99-126.

Marysse & Geenen 2009 *JMAS* 47(3).

Marysse S & Geenen S “Win-win or unequal exchange ? The case of the Sino-Congolese cooperation agreements” 2009 *JMAS* 47(3) 371–96.

Massey 1988 *PDR* 14

Massey D “Economic development and international migration in comparative perspective” 1988 *PDR* 14.

Massey *et al* 1993 *PDR* vol. 19(3)

Massey D *et al* “Theories of international migration: a review and appraisal” 1993 *PDR* vol. 19(3).

Milej 2019 *ZaöRV* (79)

Milej T Legal framework for free movement of people within Africa – a view from the East African Community (EAC) 2019 *ZaöRV* (79) 935-970.

Mtumane 2017 *IJARS* Vol 12 (2).

Mtumane Z “The practice of Ubuntu with regard to amaMfengu among amaXhosa as depicted in S. E. K. Mqhayi's *Ityala Lamawele*” 2017 *IJARS* Vol 12 (2) 68–80.

Mulenga & van Lill 2007 *SAJHRM* vol 5(3)

Mulenga C & van Lill B “Recruitment and selection of foreign professionals in the south african job market: procedures and processes,” 2007 *SAJHRM* vol 5 (3) 30.

Ne-Wembo 1977 *ISSR* vol. 30 (3).

Ne-Wembo L “Social security in the Republic of Zaire,” 1977 *ISSR* vol. 30 (3) 368.

Nlandu 2012 *IDS Research Report Research* vol (71)

Nlandu T “Mapping police services in the Democratic Republic of Congo: institutional interactions at central, provincial and local levels” 2012 *IDS Research Report Research* vol (71) 1-103.

Noto 1966 *AAPSS* Vol. 367

Noto M “Travel and domestic controls” 1966 *AAPSS* vol. 367, *The New Immigration* 73–84.

Nshimbi & Fioramonti *MiWORC Report No.1*.

Nshimbi C & Fioramonti L “A region without borders? Policy frameworks for regional labour migration towards South Africa” (2013) *MiWORC Report No.1*.

Nshimbi & Fioramonti 2014 *ADR* 26.

Nshimbi C & Fioramonti L “The Will to Integrate: South Africa's Responses to Regional Migration from the SADC Region,” 2014 *ADR*, AfDB, vol. 26 (S1) 52-63.

Nzongola-Ntalaja 2004 *Current African* (No. 28)

Nzongola-Ntalaja G "From Zaire to the Democratic Republic of the Congo - second and revised edition" 2004 *Current African* (No. 28) 7-12.

Ojwan 1980 *ICLQ* 29 (2 & 3)

Ojwan J "The residue of legislative power in English and French-Speaking Africa – a comparative study of Kenya and the Ivory Coast," 1980 *ICLQ* 29 (2 & 3) 296-326.

Oliver 2009 *SP Discussion Paper No. 0908*, May

Olivier M "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)" 2009 *SP Discussion Paper No. 0908*, May (The World Bank Washington DC).

Olowu 2006 *ISILYBIHRL* (No. 6)

Olowu D "Refugees, asylum-seekers and the legal obligations of States for their protection: critical reflections on the South African approach" 2006 *ISILYBIHRL* (No. 6) 233-250.

Oucho 2007 *ISS Occasional Paper 157*.

Oucho J "Migration in Southern Africa: Migration management initiatives for SADC member states" 2007 *ISS Occasional Paper 157* (ISS Pretoria).

Oucho & Crush 2001 *Africa Today* vol 48(3).

Oucho J & Crush J "Contra free movement: South Africa and the SADC migration protocols" 2001 *Africa Today* Vol 48(3) 139–58.

Panofsky 1963 *JMAS*, Vol. 1 (4).

Panofsky H "Migratory labour in Africa-A bibliographical note" 1963 *JMAS*, Vol. 1 (No. 4) 521-529.

Parshotam & Ncube 2017 *SAIIA Occasional Paper 265*.

Parshotam A & Ncube C “Managing economic migration in South Africa” September 2017 *SAIIA Occasional Paper* 265.

Pauwels 1973 *JAL*, Vol. 17 (2).

Pauwels J “La Réforme du droit civil au Zaïre - comment concilier tradition et développement?” [The reform of civil law in Zaire - how to reconcile tradition and development?] 1973 *JAL*, Vol. 17 (2) 216-226.

Peberdy 2001 *Africa Today* Vol. 48 (3).

Peberdy S “Imagining immigration: inclusive identities and exclusive policies in Post-1994 South Africa,” 2001 *Africa Today* Vol. 48 (3) Evaluating South African Immigration Policy after Apartheid 15-32.

Peires 1984 *JSAS* Vol. 10 (2)

Peires J “Sir George Grey versus the Kaffir Relief Committee” 1984 *JSAS* Vol. 10 (2) 145-69.

Pendleton *et al* 2006 *Migration Policy Series No. 44*.

Pendleton W *et al* “Migration, remittances and development in Southern Africa” 2006 *Migration Policy Series No. 44* (Southern African Migration Project (SAMP) Cape Town).

Peberdy 2017 *SAMP Migration Policy Series No. 75*

Peberdy S “Competition or co-operation? South African and migrant entrepreneurs in Johannesburg,” 2017 *SAMP Migration Policy Series No. 75*, Southern African Migration Programme (SAMP).

Polonsky, Scott, & Suchard 1989 *IMR* 23(4)

Polonsky M, Scott D, & Suchard H “A profile of emigrants from South Africa: the Australian case” 1989 *IMR* Vol. 23(4) 933-944.

Posel & Casale 2003 *SAJE* 71(3)

Posel D & Casale D What has been happening to internal labour migration in South Africa, 1993–1999? 2003 *SAJE* 71(3): 455-79.

Prothero 1974 *IMR* vol. 8(3).

Prothero R “Foreign migrant labour for South Africa” 1974 *IMR* vol. 8(3) 383-394.

Prothero 1977 *Revue Tiers Monde* Vol. 18(69).

Prothero R “Le recrutement des travailleurs étrangers par l’Afrique du Sud,” [South Africa's recruitment of foreign workers] 1977 *Revue Tiers Monde* Vol. 18(69) *Migrations et développement* 101-113.

Puente 1942 *AJIL* vol. 36(2).

Puente J “Exclusion and expulsion of aliens in Latin America” 1942 *AJIL* vol. 36(2) 252-270.

Rasool & Botha 2014 *SSJ* 39(2)

Rasool F & Botha C J “Developing a competitive skills immigration policy for South Africa,” 2014 *SSJ* 39(2) 225-234.

Reilly 2014 *ALR* (35) 189

Reilly A “Review: the price of rights” 2014 *ALR* (35) 189.

Reed & Torres 2008 *MEDICC Rev.* 10:1.

Reed G & Torres J “Training and retaining more rural doctors for South Africa” 2008 *MEDICC Rev.* 10:1.

Rosenblum 2012 *American Behavioral Scientist* 56(8)

Rosenblum M R “Alternatives to migration in the United States: policy issues and economic impact” 2012 *American Behavioral Scientist* 56(8) 1101–1122.

Rubbers 2019 *Development and Change*

Rubbers B “Mining boom, labour market segmentation and social inequality in the Congolese Copperbelt” 2019 *Development and Change* 1-21.

Ryan 2016 *JBR* Vol. 69(5)

Ryan J “Old knowledge for new impacts: Equity theory and workforce nationalisation” 2016 *JBR* Vol. 69(5) 1587-1592.

SAHRC 1999 *SAJHR* vol. 15 (1)

SAHRC “South African Human Rights Commission’s Braamfontein Statement on racism and xenophobia” 1999 *SAJHR* vol. 15 (1) 131-136.

SAICA 2009 *International Tax-1717*, Issue 115.

SAICA “Tax for expatriates” 2009 *International Tax-1717*, Issue 115
https://www.saica.co.za/integritax/2009/1717_Tax_for_expatriates.htm (Date of use: 11 March 2022).

Schatzberg 1982 *African Affairs* Vol. 81 (324).

Schatzberg M ““Le mal zairois”: why policy fails in Zaire,” 1982 *African Affairs* Vol. 81 (324) 337-348.

Schatzberg 1980 *CJAS* Vol. 14 (2).

Schatzberg M “The State and the economy: the “Radicalisation of the Revolution” in Mobutu’s Zaire,” 1980 *CJAS* Vol. 14 (2) 239-257.

Schiff 2005 *Discussion Paper No. 1599*

Schiff M “Brain gain: claims about its size and impact on welfare and growth are greatly exaggerated” 2005 *Discussion Paper No. 1599* (IZA Bonn May).

Senga 2008 *RDSPG* (No. 5)

Senga W “La définition des actes législatifs dans l’arrêt de la CSJ N° R.CONST. 51/TSR du 31 juillet 2007 à l’épreuve de la Constitution du 18 février 2006” (Definition of legislative acts as provided in the Supreme Court judgment N° R.CONST. 51/TSR of 31 July 2007 in the light of the Constitution of 18 February 2006) 2008 *RDSPG* (No. 5).

Sidley 2004 *BMJ* 329.

Sidley P "South Africa and Britain reach agreement to curb poaching of healthcare staff" 2004 *BMJ* 329.

Simanovsky *et al* 1996 *Current Politics & Economics of Russia* Vol. 6 (1).

Simanovsky S, Strepetova M, & Naido Y "'Brain drain" global problem of the present-day world" 1996 *Current Politics & Economics of Russia* Vol. 6 (1) 49-77.

Stapleton 1996 *IJAHS* Vol. 29 (2)

Stapleton T "The Expansion of a pseudo-ethnicity in the Eastern Cape: reconsidering the Fingo "Exodus" of 1865" 1996 *IJAHS* Vol. 29 (2) 233-250.

Starr 1911 *JRD* Vol. 1(4).

Starr F "The Congo Free State and Congo Belge" 1911 *JRD* vol. 1(4) 383-399.

Sullivan 1999 *CMAJ* 160(11).

Sullivan P "Canada a prime destination as MDs flee South Africa" 1999 *CMAJ* 160(11) 1615.

Sumata 2002 *ROAPE* Vol. 29 (No. 93/94)

Sumata C "Migradollars & poverty alleviation strategy issues in Congo (DRC)," 2002 *ROAPE* Vol. 29 (No. 93/94) *State failure in the Congo: perceptions & realities* (Le Congo entre Crise et Régénération) 619-628.

Sumata & Cohen 2018 *Remittances Review* 3(2).

Sumata C & Cohen J "The Congolese diaspora and the politics of remittances," 2018 *Remittances Review* 3(2):95-108.

Tafira 2011 *Anthropology Southern Africa* 34(3 & 4)

Tafira H "Is xenophobia racism?," 2011 *Anthropology Southern Africa* 34(3 & 4) 114–121.

Tati 2008 *Géopolitique et populations* (3).

Tati G “The Immigration issues in the Post-Apartheid South Africa: discourses, policies and social repercussions” 2008 *Géopolitique et populations* (3) 423–440.

Trimikliniotis, Gordon, & Zondo 2008 *TWQ*, Vol. 29 (7).

Trimikliniotis N, Gordon S, & Zondo B “Globalisation and migrant labour in a ‘Rainbow Nation’: a fortress South Africa?” 2008 *TWQ*, Vol. 29 (7) *Globalisation and migration: new issues, new politics?* 1323-1339.

Wa-Dondo 1976 *A.W.R. Bulletin, No.4, Volumes 23 à 24*

Wa-Dondo K « La législation et la protection des réfugiés en République du Zaïre » [Legislation and refugee protection in the Republic of Zaire], in Association for the Study of the World Refugee Problem *A.W.R. Bulletin, No.4, Volumes 23 à 24* (Wilhelm Braumüller, Wien 1976) 223-234.

Usanov *et al* 2013 *HCSS No. 20 (03)(13)*.

Usanov A *et al* “Coltan, Congo and conflict: polinares case Study” 2013 *HCSS No. 20 (03)(13)*.

Van Eck & Snyman (2015) *JAL* 59(2).

Van Eck B & Snyman F “Social protection afforded to irregular migrant workers: thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)” 2015 *JAL* 59(2) 294–316.

Van Themaat & Petersmann 1984 *Law & Politics in Africa, Asia & Latin America* Vol. 17 (4)

Van Themaat P & Petersmann E “The Changing Structure of International Economic Law,” 4. Quartal 1984 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* Vol. 17 (4) 503-22.

Vlassenroot & Huggins 2004 *Eco-Conflicts* Vol 3(4).

Vlassenroot K & Huggins C “Land, migration and conflict in eastern DR Congo” 2004 *Eco-Conflicts* Vol 3(4) 1-4.

West 1987 *Tennessee Law Rev.* (Vol 54).

West R “Adjudication is not interpretation: some reservations about the LawAsLiterature Movement,” 1987 *Tennessee Law Rev.* (Vol 54) 203-278.

Wickramasekara 2008 *TWQ* Vol. 29(7)

Wickramasekara P “Globalisation, international labour migration and the rights of migrant workers” 2008 *Third World Quarterly* Vol. 29(7) 1247-1264

Wöcke & Klein 2002 *DSA* Vol 19(4).

Wöcke A & Klein S “The implications of South Africa’s skills migration policy for country competitiveness” 2002 *DSA* Vol 19(4) 441-54.

Yamauchi F *et al* 2018 *IFPRI Discussion Paper 1744*.

Yamauchi F *et al* “Can German vocational training combat skill shortages in developing countries? Evidence from dual training system in the Philippines,” 2018 *IFPRI Discussion Paper 1744* (IFPRI Washington DC).

11.3.4 Newspaper reports

BBC News 2019 *BBC News* 5 September

BBC News “South Africa closes embassy in Nigeria after xenophobic violence” 2019 *BBC News* 5 September. <https://www.bbc.com/news/world-africa-49593030> (Date of use: 08 February 2022).

Blaser 2013 *Swissfuture*

Blaser T “Africa and the future: an interview with Achille Mbembe, including on the consequences of global capitalism on the continent” 2013 *Swissfuture* March.

<https://africasacountry.com/2013/11/africa-and-the-future-an-interview-with-achille-mbembe> (Date of use: 15 May 2022).

Boyle 2006 *The Sunday Times*

Boyle B “Sorry state of affairs” 2006 *The Sunday Times*.

Brothwell 2020 *BusinessTech* 6 March

Brothwell R “South Africans with matric certificates will be able to move to the UK under the new points-system” 2020 *BusinessTech* 6 March
<https://businesstech.co.za/news/lifestyle/378241/south-africans-with-matric-certificates-will-be-able-to-move-to-the-uk-under-the-new-points-system/> (Date of use: 18 April 2022).

BusinessMap SA 2001 *BusinessMap SA*

BusinessMap SA “SA country risk rating: June 2001” 2001 *BusinessMap SA*.

Business Insider SA 2022 *Business Insider SA* 07 February

Business Insider SA “The 101 jobs so critical in South Africa that foreigners should be allowed to do them” 2022 *Business Insider SA* 07 February.
<https://www.businessinsider.co.za/critical-skills-list-for-work-visas-and-permanent-residence-in-south-africa-2022-2> (Date of use: 18 February 2022).

Cele 2022 *Bloomberg* 8 February

Cele S “South Africa plans employment quotas for foreign nationals” 2022 *Bloomberg* 8 February. <https://www.bloomberg.com/news/articles/2022-02-08/south-africa-plans-employment-quotas-for-foreign-nationals> (Date of use: 16 February 2022).

CKS/Yes 17 August 2019 *Digital Congo*

CKS/Yes “DRC imposes residence visa on Rwandans working in Goma” 2019 *Digital Congo* 17 August. <https://www.digitalcongo.net/article-en/5d57c6ff421f420004b5bd2c/> (Date of use: 12 February 2022).

Dugger 2004 *New York Times* 12 July

Dugger C “In Africa, an exodus of nurses” 2004 *New York Times* 12 July.

Dunn 2020 *Sable International* 24 February

Dunn J “How South Africans stand to benefit from Britain’s new points-based immigration system” 2020 *Sable International* 24 February
<https://www.sableinternational.com/blog/benefit-from-britain-s-new-points-based-immigration-system> (Date of use: 18 April 2022).

Ebrahim 2022 *ENSAfrica* 26 February

Ebrahim Z “Qualifying Angolan nationals will soon be able to apply for an exemption permit to live and work in South Africa” 2022 *ENSAfrica* 26 February.
<https://www.ensafrika.com/news/detail/4621/qualifying-angolan-nationals-will-soon-be-abl> (Date of use: 26 February 2022).

Elela 2021 *ID4D* 17 June

Elela N “Vocational training in the DRC: a tool for peace and development” 2021 *ID4D Sustainable Development News* 17 June.
<https://ideas4development.org/en/vocational-training-drc-tool-peace-development/>
(Date of use: 04 February 2022).

ENCA 2013 *eNCA* 8 October

eNCA “Four ANN7 staff ordered to leave SA” 2013 *eNCA* 8 October.
<https://www.enca.com/south-africa/four-ann7-staff-ordered-leave-sa> (Date of use: 07 March 2022).

eNCA 2022 *eNCA* 19 January

eNCA “We need quotas on foreign workers – Nxesi” 2022 *eNCA* 19 January.
<https://www.enca.com/videos/watch-we-need-quotas-foreign-workers-nxesi> (Date of use: 16 February 2022).

Ferreira 2022 *Mail & Guardian* 3 March

Ferreira E “Ban on foreigners practising law ‘is unconstitutional’” 2022 *Mail & Guardian* 3 March. <https://mg.co.za/top-six/2022-03-03-ban-on-foreigners-practising-law-is-unconstitutional/> (Date of use: 10 May 2022).

Grootes 2022 *Daily Maverick* 02 March

Grootes S “Government’s plan to introduce foreign labour quotas is unjust and impossible to enforce” 2022 *Daily Maverick* 02 March. <https://www.dailymaverick.co.za/article/2022-03-02-governments-plan-to-introduce-foreign-labour-quotas-is-unjust-and-impossible-to-enforce/> (Date of use: 19 October 2022).

Gumede 2021 *Business Day* 30 December

Gumede M “Court dismisses urgent application by permit holding Zimbabweans for visas” 2021 *Business Day* 30 December. <https://www.businesslive.co.za/bd/national/2021-12-30-high-court-dismisses-urgent-application-by-zep-holders-for-visas/#> (Date of use: 18 February 2022).

Holmes 2019 *The Washington Post* 9 September

Holmes C “What’s behind South Africa’s xenophobic violence last week? - Violence against immigrants has sparked a diplomatic crisis” 2019 *The Washington Post* 9 September. <https://www.washingtonpost.com/politics/2019/09/09/whats-behind-south-africas-xenophobic-violence-last-week/> (Date of use: 08 February 2022).

Karombo 2019 *Business Report* 28 January

Karombo T “62% rise in African migrants” *Business Report*, Harare (28 January 2019). <https://www.iol.co.za/business-report/economy/62-rise-in-african-migrants-19004740> ((Date of use: 14 April 2022).

Kating 2016 *Jeune Afrique* 18 January

Kating P « RDC : Est-ce la diaspora qui sauvera le Congo ou l'inverse ? » (DRC: Will the diaspora save the Congo or the other way round?) 2016 *Jeune Afrique* 18

January. <https://www.jeuneafrique.com/294671/societe/rdc-diaspora-sauvera-congo-linverse/> (Date of use: 05 August 2022).

Kempton Express 2019 *Kempton Express* 4 November.
Kempton Express “Government outlines laws on hiring of foreigners” 2019
Kempton Express 4 November.
<https://kemptonexpress.co.za/Inn/833857/government-outlines-laws-hiring-foreigners/> (Date of use: 27 February 2022).

Khumalo 2020 *Fin* 24 12 February.
Khumalo S “90% of Huawei SA’s staff are foreigners - govt wants to send ‘strong message’” 2022 *Fin* 24 (12 February).
<https://www.news24.com/fin24/companies/90-of-huawei-sas-staff-are-foreigners-govt-wants-to-send-strong-message-20220212> (Date of use: 07 March 2022).

Krippahl 2019 *Deutsche Welle* 03 September
Krippahl C “Xenophobia in South Africa strains international relations,” 2019
Deutsche Welle 03 September <https://www.dw.com/en/xenophobia-in-south-africa-strains-international-relations/a-50275526> (Date of use: 08 February 2022).

Louw 2001 *Business Day*, 27 June.
Louw I “South Africa: challenge to train the unemployed,” 2001 *Business Day* 27 June.

Malu-Malu & Malu-Malu 2019 *Jeune Afrique* 12 November
Malu-Malu A & Malu-Malu M « RDC: les ambitions de la diaspora congolaise,»
(DRC: the Congolese diaspora’s ambitions) 2019 *Jeune Afrique* 12 November.
<https://www.jeuneafrique.com/mag/832229/economie/rdc-les-ambitions-de-la-diaspora-congolaise/> (Date of use: 05 August 2022).

Makwea 2022 *The Citizen* 12 March

Makwea R “Saps arrests more than 200 foreigners without permits” 2022 *The Citizen* 12 March. <https://www.citizen.co.za/news/south-africa/3047838/saps-arrests-more-than-200-foreigners/> (Date of use: 12 March 2022).

Masamuna 2021 *ZoomEco* 3 June

Masamuna M « RDC: plusieurs étrangers en situation irrégulière expulsés par la DGM à Kinshasa » (“RDC : Several foreign nationals in an illegal situation expelled by the DGM in Kinshasa”) 2021 *ZoomEco* 3 June. <https://zoom-eco.net/a-la-une/rdc-plusieurs-etrangers-en-situation-irreguliere-expulses-par-la-dgm-a-kinshasa/> (Date of use: 08 March 2022).

Masilela 2022 *IOL* 11 February

Masilela B “Huawei SA faces court action over hiring too many foreign workers” 2022 *IOL* 11 February. <https://www.iol.co.za/news/south-africa/gauteng/huawei-sa-faces-court-action-over-hiring-too-many-foreign-workers-cafaba24-4bd9-4cf4-8049-35f9a07d959c> (Date of use: 07 March 2022).

Media Congo 2017 *Media Congo* August 21

Media Congo “Carte de travail pour étrangers: le ministère du Travail contrôle dès ce 21 août (Foreign nationals’ work permit: The Ministry of Labour to control as of August 21)” 2017 *Media Congo* 15 August. <https://www.mediacongo.net/article-actualite-29537-carte-de-travail-pour-etrangers-le-ministere-du-travail-controle-des-ce-21-aout.html> (Date of use: 07 March 2022).

Moodley 2021 *SABC News* 30 December

Moodley P “Motsoaledi welcomes decision by court to strike the ZEP matter off the roll” 2021 *SABC News* 30 December. <https://www.sabcnews.com/sabcnews/motsoaledi-welcomes-decision-by-court-to-strike-the-zep-matter-off-the-roll/> (Date of use: 18 February 2022).

Naidoo 2021 *Bloomberg* 24 August

Naidoo P “South Africa’s unemployment rate is now highest in the world” 2021 *Bloomberg* 24 August. <https://www.aljazeera.com/economy/2021/8/24/south-africas-unemployment-rate-is-now-the-worlds-highest> (Date of use: 07 February 2022).

Ngcobo 2022 *SABC News* 7 February

Ngcobo N “Barring foreign nationals from certain jobs in SA could diminish quality of jobs, exacerbate skills shortage: analysts” 2022 *SABC News* 7 February. at <https://www.sabcnews.com/sabcnews/barring-foreign-nationals-from-certain-jobs-in-sa-could-diminish-quality-of-jobs-exacerbate-shortage-of-skills-analysts/> (Date of use: 09 February 2022).

Nkanjeni 2022 *Sunday Times* 26 January

Nkanjeni U “From quotas to critical skills exchange — four changes proposed for foreign workers in SA” 2022 *Sunday Times* 26 January. <https://www.timeslive.co.za/news/south-africa/2022-01-26-from-quotas-to-critical-skills-exchange-four-changes-proposed-for-foreign-workers-in-sa/> (Date of use: 16 February 2022).

Ntshidi 2019 *Eyewitness News* 8 November

Ntshidi E “Hawks raid JHB factories accused of flouting labour laws” 2019 *Eyewitness News*, Johannesburg 8 November. <https://ewn.co.za/2019/11/27/hawks-raid-jhb-factories-accused-of-flouting-labour-laws> (Date of use: 07 March 2022).

Peberdy 1997 *The Sunday Independent* 22 June

Peberdy S “Ignoring the history of undocumented migration is akin to ignoring those who have helped build South Africa” 1997 *The Sunday Independent* 22 June.

Qin 2019 *Xinhua* 03 September

Qin W “AU condemns xenophobic attacks in South Africa” 2019 *Xinhua* 03 September. http://www.xinhuanet.com/english/africa/2019-09/03/c_138362394.htm (Date of use: 08 February 2022).

RFI 2019 *RFI* 25 May

RFI “RDC: la DGM lance une opération de contrôle des étrangers » (DRC: DGM launches an operation to check foreign nationals)” 2019 *RFI* 25 May. <https://www.rfi.fr/fr/afrique/20190525-rdc-migrations-operation-controle-etrangers-roland-kashwantale-chihoza> (Date of use: 07 March 2022).

Writer 2020 *Businessstech* 08 May

Writer S “South Africa to introduce new quotas around hiring foreign workers” 2020 *Businessstech* 08 May. <https://businessstech.co.za/news/business/396317/south-africa-to-introduce-new-quotas-around-hiring-foreign-workers/> (Date of use: 11 May 2022).

Writer 2022 *Businessstech* 11 February

Staff Writer “Government takes Huawei South Africa to court over employment equity violations” 2022 *Businessstech* 11 February. <https://businessstech.co.za/news/technology/557498/government-takes-huawei-south-africa-to-court-over-employment-equity-violations/> (Date of use: 07 March 2022).

Shuma 14 December 2021 *SABC News*

Shuma P “Lawyers representing Zimbabweans in SA seek interdict to prevent government from terminating exemption permits” 2021 *SABC News* 14 December. <https://www.sabcnews.com/sabcnews/lawyers-representing-zimbabweans-in-sa-seek-interdict-to-prevent-government-from-terminating-over-180-000-permits/> (Date of use: 18 February 2022).

Shumba 2019 *The Chronicle* 05 September.

Shumba P “SADC condemns xenophobic attacks and calls for lasting solutions,” 2019 *The Chronicle* 05 September. <https://www.chronicle.co.zw/just-in-sadc->

condemns-xenophobic-attacks-and-calls-for-lasting-solutions/ (Date of use: 08 February 2022).

Radio Okapi 2015 *Radio Okapi* 15 August

Radio Okapi "CEPGL: trois documents pour circuler librement dans les pays membres," (CEPGL: three documents required for free movement between Member States) 2015 *Radio Okapi* 07 August. <https://www.radiookapi.net/sans-categorie/2009/06/11/cep-gl-trois-documents-pour-circuler-librement-dans-les-pays-membres> (Date of use: 01 February 2022).

Radio Okapi 2016 *Radio Okapi* 05 June

Radio Okapi "Exploitation minière en Ituri: Martin Kabwelulu décide d'expulser les expatriés non en règle" ("Mining in Ituri: Martin Kabwelulu decides to expel illegal expatriates") 2016 *Radio Okapi* 05 June. <https://www.radiookapi.net/2016/06/06/actualite/economie/exploitation-miniere-en-ituri-martin-kabwelulu-decide-dexpulser-les> (Date of use: 08 March 2022).

Radio Okapi 2015 *Radio Okapi* 07 August.

Radio Okapi « RDC-Rwanda: la DGM impose un visa de séjour aux travailleurs rwandais » 2019 *Radio Okapi*, 15/08/ (Radio Okapi "RDC-Rwanda: the DGM imposes a residence visa on Rwandan workers" 2019 *Radio Okapi*, 15 August <https://www.radiookapi.net/2019/08/15/actualite/societe/rdc-rwanda-la-dgm-impose-un-visa-de-sejour-aux-travailleurs-rwandais> (Date of use: 15 August 2022).

Ramkissoon 2013 *Sunday Times* 23 August

Ramkissoon N "The Gupta goofs: ANN7 news channel fumbles through launch" 2013 *Sunday Times* 23 August. <https://www.timeslive.co.za/tshisa-live/tshisa-live/2013-08-23-the-gupta-goofs-ann7-news-channel-fumbles-through-launch/> (Date of use: 07 March 2022).

RFI 2019 *RFI* 25 May

RFI "DRC: DGM launches a control operation on foreigners" 2019 *RFI*, 25 May [RFI "RDC: la DGM lance une opération de contrôle des étrangers" 2019 *RFI* 25

mai]. www.rfi.fr/afrique/20190525-rdc-migrations-operation-controle-etrangers-roland-kashwantale-chihoza (Date of use: 15 August 2022).

Riddle 2022 *The South African* 11 March

Riddle S “Operation Restore: Police arrest over 200 foreigners in Gauteng raids” 2022 *The South African* 11 March. <https://www.thesouthafrican.com/news/police-kick-off-operation-restore-gauteng/> (Date of use: 12 March 2022).

SADC 2021 *SADC News* 11 January

SADC “SADC adopts new Labour Migration Action Plan to promote skills transfer and match labour supply and demand for regional integration,” *SADC News* (11 January 2021). <https://www.sadc.int/news-events/news/sadc-adopts-new-labour-migration-action-plan-promote-skills-transfer-and-match-labour-supply-and-demand-regional-integration/> (Date of use: 21 July 2022).

SAnews 2019 *SAnews* 19 September

SAnews “Government dealing with illegal immigration” 2019 *SAnews* 19 September <https://www.sanews.gov.za/south-africa/government-dealing-illegal-immigration> (Date of use: 12 August 2022).

SAnews 2022 *SAnews* 25 January

SAnews “Labour expresses concern at illegal recruitment practices” 2022 *SAnews* 25 January. <https://www.sanews.gov.za/south-africa/labour-expresses-concern-illegal-recruitment-practices> (Date of use: 03 March 2022).

SAnews 2019 *SAnews* 8 November

SAnews “Labour inspectors, Hawks raid illegal factories” 2019 *SAnews* 8 November. <https://www.sanews.gov.za/south-africa/labour-inspectors-hawks-raid-illegal-factories> (Date of use: 07 March 2022).

Sapa 2001 Sapa Ottawa

Sapa “Canada ‘looting’ SA doctors” 2001 *Sapa* Ottawa 14 February
<https://www.news24.com/news24/canada-looting-sa-doctors-20010214> (Date of use: 08 August 2022).

Sapa 2013 Sapa 8 October

Sapa “Foreign ANN7 employees ordered to leave SA” 2013 *Sapa* 8 October.
<https://mg.co.za/article/2013-10-08-foreign-ann7-employees-ordered-to-leave-sa/>
(Date of use: 07 March 2022).

Squazzin 2019 *Bloomberg* 19 November

Squazzin A “South Africa’s Epidemic of Hate” 2019 *Bloomberg* 19 November.
<https://www.bloomberg.com/news/articles/2019-11-19/south-africa-s-epidemic-of-hate-scapegoats-immigrants?srnd=economics-vp> (Date of use: 08 February 2022).

Sidimba 2020 *IOL* 13 December

Sidimba L “Plan to bar foreigners from working in certain sectors” 2020 *IOL* 13 December. <https://www.iol.co.za/news/politics/plan-to-bar-foreigners-from-working-in-certain-sectors-0566276b-f1fa-4637-bcba-f00900d02ab0> (Date of use: 04 February 2022).

Singh 2022 *Business Day* 07 January

Singh O “Zimbabwean exemption permit extended to end-2022” 2022 *Business Day* 07 January. <https://www.businesslive.co.za/bd/national/2022-01-07-zimbabwean-exemption-permit-extended-to-end-2022/> (Date of use: 10 February 2022).

Sokutu 2019 *The Citizen* 4 November

Sokutu B “Government outlines laws on hiring of foreigners” 2019 *The Citizen* 4 November. <https://www.citizen.co.za/news/2199740/government-outlines-laws-on-hiring-of-foreigners/> (Date of use: 27 February 2022).

Staff Reporter 2014 *Mail & Guardian* 20 October.

Staff Reporter “Expats lose out over scramble for local talent in Africa” 2014 *Mail & Guardian* 20 October. <https://mg.co.za/article/2014-10-20-expats-lose-out-over-scramble-for-local-talent-in-africa/> (Date of use: 04 February 2022).

Staff Reporter 2017 *Mail & Guardian* 21 August

Staff Reporter “Guptas sell The New Age and ANN7 to Mzwanele Manyi for R450m” 2017 *Mail & Guardian* 21 August. <https://mg.co.za/article/2017-08-21-oakbay-sells-the-new-age-and-ann7-to-mzwanele-manyi-for-r450-million/> (Date of use: 07 March 2022).

Staff Writer 2019 *The Chronicles* 16 August.

Staff Writer “DR Congo imposes visa restrictions on Rwandans” 2019 *The Chronicles* 16 August. <https://www.chronicles.rw/2019/08/16/dr-congo-imposes-visa-restrictions-on-rwandans/> (Date of use: 12 February 2022).

Staff Writer 2020 *Business Tech* 28 September

Staff Writer “Gauteng’s plans to restrict jobs for foreign workers – what you need to know” 2020 *Business Tech* 28 September. <https://businesstech.co.za/news/business/436219/gautengs-plans-to-restrict-jobs-for-foreign-workers-what-you-need-to-know/> (Date of use: 04 February 2022).

Staff Writer 2021 *Business Tech* 25 June

Staff Writer “Government wants to block foreigners from taking certain jobs in South Africa – including Uber drivers” 2021 *Business Tech* 25 June. <https://businesstech.co.za/news/business/501217/government-wants-to-block-foreigners-from-taking-certain-jobs-in-south-africa-including-uber-drivers/> (Date of use: 16 February 2022).

Staff Writer 2020 *Business Tech* 11 December

Staff Writer “New bill aims to limit the hiring of foreign workers in South Africa” 2020 *Business Tech* 11 December. <https://businesstech.co.za/news/business/456450/new-bill-aims-to-limit-the-hiring-of-foreign-workers-in-south-africa/> (Date of use: 04 February 2022).

Staff Writer 2021 *Business Tech* 30 November

Staff Writer “New migrant worker rules planned for South Africa” 2021 *Business Tech* 30 November. <https://businesstech.co.za/news/business/542852/new-migrant-worker-rules-planned-for-south-africa/> (Date of use: 04 February 2022).

Staff Writer 2022 *Business Tech* 25 January

Staff Writer “New rules planned for foreign workers in South Africa” 2022 *Business Tech* 25 January. <https://businesstech.co.za/news/business/552948/new-rules-planned-for-foreign-workers-in-south-africa/> (Date of use: 16 February 2022).

Staff Writer 2021 *Business Tech* 7 March

Staff Writer “The skills and jobs that can’t be filled in South Africa” 2021 *Business Tech* 7 March. <https://businesstech.co.za/news/business/469582/the-skills-and-jobs-that-cant-be-filled-in-south-africa/> (Date of use: 04 February 2022).

Staff Writer 2022 *ITWeb* 11 February

Staff Writer “Huawei accused of breaching employment equity policy in SA” 2022 *ITWeb* 11 February. <https://www.itweb.co.za/content/WnpNgM2KEwBqVrGd> (Date of use: 07 March 2022).

Tshabalala 2015 *Quartz Africa*

Tshabalala S “Why black South Africans are attacking foreign Africans but not foreign whites,” 2015 *Quartz Africa* 15 April. <https://qz.com/384041/why-black-south-africans-are-only-attacking-foreign-africans-but-not-foreign-whites/> (Date of use: 07 August 2022).

Vanek 2021 *Bloomberg* 30 November

Vanek M “South Africa’s jobless rate rises to new high in third quarter” 2021 *Bloomberg* 30 November. <https://www.bloomberg.com/news/articles/2022-02-07/cooking-oils-surge-is-sign-food-inflation-can-go-even-higher> (Date of use: 07 February 2022).

Wong 2014 *New York Times* 5 Sept

Wong E “Dalai Lama said to be denied South African visa” 2014 *New York Times* 5 Sept. <https://www.nytimes.com/2014/09/06/world/asia/dalai-lama-said-to-be-denied-south-african-visa.html> (Date of use: 20 April 2022).

Writer 2019 *BusinessTech* 26 September

Writer S “New law to block foreigners from working in certain sectors in South Africa” 2019 *BusinessTech* 26 September. <https://businesstech.co.za/news/business/343169/new-law-to-block-foreigners-from-working-in-certain-sectors-in-south-africa/> (Date of use: 11 October 2022)

11.3.5 Internet source

Useful legal websites, which are relevant for the study:

<http://www.journalofficiel.cd> (Date of use: 25 March 2021)

<http://www.droitcongolais.info> (Date of use: 25 March 2022)

<http://www.leganet.cd> (Date of use: 25 March 2022)

<http://droitcongolais.be> (Date of use: 25 March 2022)

<http://www.droit-afrique.com/pays/rdc> (Date of use: 25 March 2022)

<http://presidentrdc.cd> (Date of use: 25 March 2022)

<https://www.primature.cd> (Date of use: 25 March 2022)

<http://www.assemblee-nationale.cd> (Date of use: 25 March 2021)

<http://www.senat.cd> (Date of use: 25 March 2021)

<https://www.mines-rdc.cd> (Date of use: 25 March 2021)

<http://www.mineconomie.gouv.cd> (Date of use: 25 March 2021)

<https://www.ilo.org> (Date of use: 25 March 2022)