



# MIGRATION LAW REVIEW

PROMOTING MIGRATION GOVERNANCE IN ZIMBABWE



GOVERNMENT OF ZIMBABWE



Project funded by  
the European Union

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IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental organization, IOM acts with its partners in the international community to: assist in meeting the operational challenges of migration; advance understanding of migration issues; encourage social and economic development through migration; and uphold the human dignity and well-being of migrants.

Publisher: International Organization for Migration  
4 Duthie Road, Alexandra Park  
Harare  
Zimbabwe  
Tel.: +263 4 704 284/5  
Email: [iomharare@iom.int](mailto:iomharare@iom.int)  
Website: <http://zimbabwe.iom.int>

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# FOREWORD

Globally, the International Organization for Migration (IOM) technically assists Member States in strengthening their institutional capacity on migration management, supports international policy dialogue on migration management, promotes awareness of international migration law, assists governments in the development of national migration legislation and advocates for the integration of migration in development planning and programmes.

From a conceptual and practical perspective, an effective migration governance framework should ideally have laws and policies that strengthen the rights and protection of migrants and consistent with and guaranteed by the supreme law of the land. Zimbabwe hosts different categories of migrants and has some population emigrated to other countries across the world. Zimbabwe has ratified some key migration-related international treaties and conventions, and is progressively making the effort to affirm its commitment to uphold the rights and protection of all migrants.

The global and regional migration discourse has been changing rapidly and in meeting the changing dynamics, it is imperative to assess the extent to which the migration governance legal framework is consistent with the Constitution and migration-related international treaties to recognize the positive contribution of migrants for inclusive growth and the multidimensional reality of migration for national development.

In pursuit of promoting migration legislation that is aligned with regional and international protocols, following Zimbabwe's adoption of a new constitution in 2013 and in line with the alignment of various pieces of legislation to the Constitution. Within the implementation of the migration governance project – titled Promoting Migration Governance in Zimbabwe – funded by the European Union under the Eleventh European Development Fund, IOM worked in collaboration with the Ministry of Justice, Legal and Parliamentary Affairs to support migration legislation gap analysis premised on the need to establish such a strengthened migration governance legal framework. The assessment focused on key and relevant migration laws that were evaluated against standards established by the Constitution and international law and how comparative jurisdictions have strengthened their migration governance frameworks. Relevant stakeholders provided their perspectives on an ideal migration governance legal framework.

It is thus a critical and opportune moment through such an assessment to contribute to the consolidation of appropriate recommendations that can be made to strengthen the country's migration governance legal framework. The participation of key State and non-State actors in the assessment demonstrates national ownership and portrays the confidence of strengthening the country's migration governance legal framework and coordination.

**Mario Lito Malanca**

Chief of Mission  
IOM Zimbabwe

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Any comments to help improve similar gap analysis in the future would be highly appreciated.

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# LIST OF ACRONYMS

<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination against Women
<b>COMESA</b>	Common Market for Eastern and Southern Africa
<b>CRC</b>	Convention on the Rights of the Child
<b>IDP</b>	internally displaced person
<b>ILO</b>	International Labour Organization
<b>KII</b>	key informant interview
<b>MIDSA</b>	Migration Dialogue for Southern Africa
<b>PMGZ</b>	Promoting Migration Governance in Zimbabwe
<b>RCP</b>	regional consultative processes on migration
<b>REC</b>	regional economic community
<b>SADC</b>	Southern African Development Community
<b>UNHCR</b>	United Nations High Commissioner for Human Rights

# EXECUTIVE SUMMARY

In 2017, IOM commissioned a funded research under a project titled Promoting Migration Governance in Zimbabwe (PMGZ). Through the PMGZ project, IOM seeks to contribute in supporting the legislative framework for migration governance in Zimbabwe. By so doing, the project seeks to enhance the role of State and non-State actors in managing migration in a migrant-centred, human rights-centred, gender-sensitive and development-oriented manner. The major thrust of this would be to undertake a comprehensive migration law review. In order to carry out the envisaged task, IOM engaged a consultant to conduct a gap analysis study in respect of migration legislation in Zimbabwe and produce the findings and conclusions in a migration law review.

The main objective of the project is to contribute to the establishment of a migration governance framework (policy, institutional and legislative) in Zimbabwe that supports State actors in managing migration in dialogue with non-State actors and in a migrant-centred, gender-sensitive, rights-based and development-oriented manner. In pursuing its objectives, the project seeks to support the Government of Zimbabwe through the Ministry of Justice, Legal and Parliamentary Affairs, the Ministry of Home Affairs and Cultural Heritage and other relevant line ministries in developing/strengthening the legislative framework that responds to current migration trends and international obligations for enhanced protection of migrants' rights.

## Key findings

Zimbabwe's migration governance consists of a domestic legislative framework that is implemented by various government agencies, departments and other non-State actors. Apart from being influenced by general norms underpinning the national legal, social, political and economic system, the country's migration laws also seek to incorporate standards and principles from both the regional and international legal framework. However, the change of pace in domestic, regional and global migration trends and patterns has not been matched by the pace of legislative reforms in migration.

Key legislation governing migration governance and management suffer from serious weaknesses that impact negatively on migrants. The 2013 Constitution of Zimbabwe appears progressive enough to prop legislative reforms aimed at addressing these gaps. The Government of Zimbabwe – through the Ministry of Justice, Legal and Parliamentary Affairs – is involved in a comprehensive process to align key migration legislation with the progressive and human rights-oriented provisions of the Constitution. This alignment offers serious opportunities to address the gaps and weaknesses in key migration legislation that can be perceived as militating against comprehensive migration governance and management in Zimbabwe.

The migration governance framework has also entailed the involvement of various government institutions and departments in Zimbabwe. Overlaps and duplications among different government departments are a reality, and this has the potential of adversely impacting on the rights of migrants.

## Key recommendations

The Government of Zimbabwe must strive to progressively incorporate the norms and best practices in international and regional legal instruments in the interests of meeting its migration governance framework. A quicker route to incorporating international standards and best practices in domestic law would be for the Government to take advantage of the ongoing national legislative alignment process in enhancing the quality of its legal provisions in relation to migration governance.

Related to this is the need for Zimbabwe to accede and be party to international and regional migration treaty frameworks it is yet to join. This accession provides an opportunity for the Government to interact with regional and international migration institutions. Such an exposure is necessary in that it enhances knowledge-sharing, institutional interactions and more chances for dialogue and engagement between government institutions and relevant supranational agencies.

Legislative reforms must be based on a cross-sectoral or integrated approach. This is because migration needs are interconnected and cuts across different government departments. These different institutions are tasked with implementing different pieces of legislation. To adequately cater for migration needs, all migration-related laws must interrelate and interconnect. This makes migration governance more effective.

## Approach and methodology

A combination of research tools was used in undertaking activities envisaged under each of the two focus areas, which are: (a) assessment of the extent to which existing migration laws are in conformity with the Constitution and international treaties and conventions; and (b) assessment of stakeholders' perspectives on an appropriate migration legal framework for Zimbabwe.

- (a) Key focus area 1: Assessment of the extent to which existing migration laws are in conformity with the Constitution and international treaties and conventions

This assessment analysed the major priorities of existing legislation, the strengths and challenges inherent in the regulatory framework and the major institutions created by such legislation.

- (b) Key focus area 2: Assessment of stakeholders' perspectives on an appropriate migration legal framework for Zimbabwe

Activities under this focus area were aimed at obtaining stakeholder input on challenges faced under the current migration legal framework, as well as their perspectives on an ideal migration legal framework for Zimbabwe. This was done through a field survey undertaken through key informant interviews (KIIs) targeting relevant stakeholders.

## Data collection

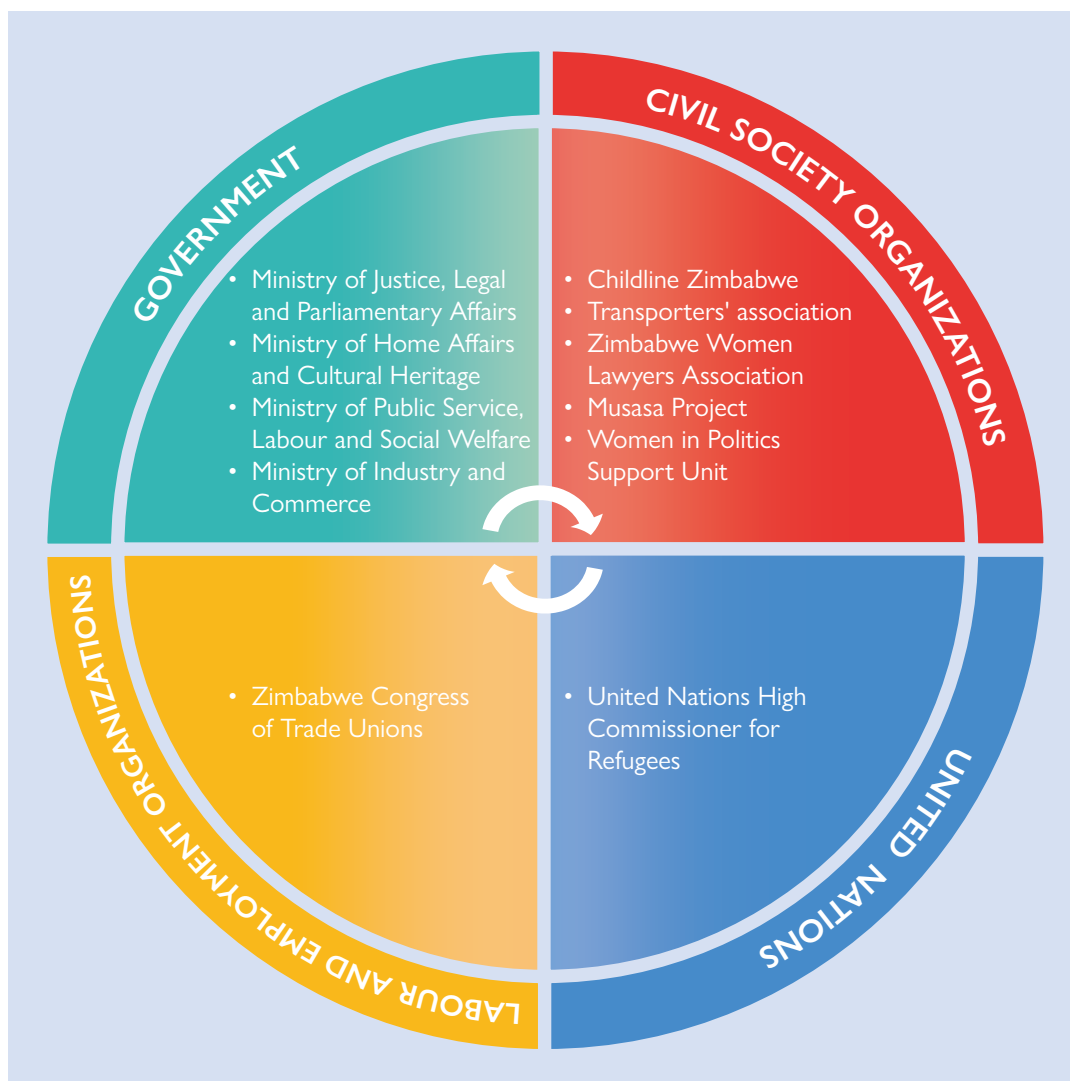
Data was collected from key stakeholders and actors mentioned above through two main methods: (a) questionnaires; and (b) a range of structured and semi-structured questionnaires. A copy of one such questionnaire is attached hereto as Annex 1. The interviews were conducted with relevant government departments, members of the legal civil society organizations, labour and employment organizations and other stakeholders. The nature of data collected was important to enable a qualitative analysis of Zimbabwe's migration governance system and its perceived needs, weaknesses, strengths and other important aspects.



### Interactive and one-on-one discussions

In addition to the questionnaires, interactive discussions were conducted with officials from relevant government ministries and departments, civil society organizations and labour and employment organizations. The thrust of the discussions was on the institutional and administrative structures and processes generally constituting the migration governance framework. The data collected in form of detailed responses is reflected in the Stakeholders' Survey Report. A general presentation of these stakeholders is done below.

Figure 1. Matrix of stakeholders engaged



Note: This figure is developed by the researchers based on the survey responses.



# CHAPTER 1

## 1. INTRODUCTION AND CONTEXT

The call for a comprehensive review and analysis of the regulatory framework governing migration in Zimbabwe is justified by two factors. Firstly, it is justified by the fact that Zimbabwe adopted a new constitution in 2013 with a broader rights framework. The 2013 Constitution establishes several critical institutions and government agencies relevant in the operationalization of a migration governance framework. Accordingly, there is the need to determine how the migration legal framework is impacted by the constitutional framework, especially considering that the legal regime consists of various pieces of legislation that predates the 2013 Constitution.

Secondly, global and regional discourses in migration, security, development, gender and human rights have not been static since the passage of the Immigration Act in 1979. Globally, over 200 million people have either temporarily or permanently moved out of their countries of origin, with at least 1 in every 32 persons in the world is a migrant, with not even one State across the globe able to claim immunity from human mobility (IOM, 2015a:5). In Africa, intra-continental migration has been more prevalent in the last 40 years. However, the increasing outbound migration to Europe, the Americas and Asia continue to gain momentum and cannot be underestimated, despite statistics showing that about two thirds of all-African migration is within the continent itself. Without doubt, these global, regional and local trends and patterns in migration necessitates continual review of applicable regulatory frameworks for purposes of syncing the law to ever-changing realities.

Africa has attempted to respond to the challenges brought by migration at continental level. However, documents such as the African Union's Agenda 2063, United Nations' Sustainable Development Goals and the Global Compact for Safe, Orderly and Regular Migration remain sources of noble normative framework whose implementation is yet to be well crafted. The continental policy framework has a similar malady. For instance, the African Union Migration Policy Framework for Africa – adopted in Banjul in 2006 – identifies nine key priority migration issues. The African Union member States and the regional economic communities (RECs) are encouraged to take the thematic areas and recommendations into consideration for adoption, based on their own national and regional policies and in accordance with their own priorities and resources. However, the document is not binding and constitutes soft law, at best. Key priority areas identified in the African Union Migration Policy Framework are labour migration, border migration, irregular migration, forced displacement, human rights of migrants, internal migration, migration data, migration and development, and inter-State cooperation and partnerships. It can be suggested that for these priority areas to be taken seriously, the RECs must incorporate them in a protocol framework that compels member States to implement these areas through their domestic legislation.

Presently, Zimbabwe contends with several migration challenges, and these include significant brain drain and irregular emigration flows. Although these needs mirror those of other countries in the region, the country has become more a country of origin than a destination point. In some cases, Zimbabwe is identifiable as a transit zone, with migrants aiming to reach other destination countries, particularly South Africa.

The reality of current migration trends in Zimbabwe is in stark contrast to what was the case prior to gaining freedom in 1980. Then, Zimbabwe was one of the major destination countries for migrants from the United Kingdom and the rest of Europe, finding permanent residence in the country, and moving for purposes of employment, tourism and other reasons. At the same time, and in the first decade after independence, Zimbabwe was home to immigrants from Malawi, Mozambique and Zambia, who were usually recruited to work in mines and commercial farms (IOM, 2009:13). By the 1980s, when the country had attained its independence, there was a large number of returning Zimbabweans from other countries (ibid.). Since 2000, there has been a progressive rise in migration patterns, with a significant number to the Southern African region. These patterns are multifaceted, characterized by an increase in informal cross-border movement, exodus of skilled nationals and survival migration of the impoverished.

Throughout these different historical periods, the domestic regulatory framework did not progressively evolve to confront the changing face of migration. The governance framework remained somewhat static, with legal reforms at a very slow pace. This report will interrogate the current migration governance framework and the extent that legal regulation appropriately caters for all migration thematic issues, realities and developments.

## 1.1. MIGRATION GOVERNANCE FRAMEWORK

Migration cuts across various sectors in law and government. It encompasses various government departments, institutions and agencies, applying different laws and policies. Apart from the specific immigration laws, various other legislations directly and indirectly govern aspects of migration. Further, in addition to casting its eyes on the immigrant, migration law necessarily focuses on the emigrant as well. Accordingly, the governance framework for migration must relate to all these interconnected issues.

From a development-centred perspective, migration is now seen as capable of playing a positive role in development. It is now regarded as a development tool, not as a symptom of a developmental crisis. A good question is in what way an affected country (be it country of origin or destination) can harness the opportunities presented by any migration pattern for its developmental benefit. From a governance perspective however, the question is whether the legal, policy and institutional framework for migration in Zimbabwe is adequately strengthened to ensure that migration becomes a development opportunity that is properly harnessed and utilized. To do this, a migration law review can assess whether various laws impacting on migration-related development are in order, such as labour laws, human rights laws, border security laws and tax laws governing education, health, property and investments.

Migration is a domestic issue as much as it is a transnational one. This means that it is not a stand-alone issue, but its very existence connects it to other pertinent cross-border issues. Challenges that are related to migration as either being the catalyst or foundational cause include conflict, environmental emergencies, human rights and their protection, among others (ibid.). However, unlike these issues that have taken centre stage in many international conventions and governance regimes, efforts to develop an effective global governance system whose main objective is to respond to emerging and existing challenges in migration have lagged behind. A possibly direct response to this inadequacy is the move towards adopting the Global Compact for Safe, Orderly and Regular Migration to be implemented by IOM as the Secretariat (United Nations, 2018). On 10–11 December 2018, Member States met in Morocco to adopt the Global Compact for Migration.<sup>1</sup>

<sup>1</sup> The text of the Global Compact for Migration was finalized on 13 July 2018. Member States met on 10–11 December 2018 in Morocco to adopt the Global Compact for Migration.



Other important areas impacted by the migration phenomenon are labour, education and health. A gap analysis of the labour law regime can disclose the degree to which these laws are sensitive to the need to recognize, protect, safeguard and entrench the rights of both outbound<sup>2</sup> and inbound migrant workers. The migration governance framework must thus necessarily ensure non-discriminatory human rights platforms for regular and irregular migrants. Indeed, migrants must enjoy humane treatment at the same level as citizens. The governance framework must enable migrants and their families to enjoy access to both basic and advanced educational amenities, medical institutions and all other basic aspects of life. Their right to property needs similar protection, as do their freedom of movement, assembly, association and all other rights and freedoms in the constitution.<sup>3</sup>

Yet another important area that must characterize any migration law review is gender. The question is in what manner has migration governance incorporated gender inclusivity perspectives? The gender discourse has gained prominence, driven by social realities originating from the patriarchal nature of Zimbabwean society. Owing to her gender and sexual vulnerabilities, the female migrant is more likely to suffer the worst forms of treatment than her male counterpart. Most common manifestations of abuse include sexual harassment by male officials, lack of adequate gender-sensitive facilities at borders and exposure to crimes, such as rape and kidnapping. Inevitably, law and policy frameworks have sought to address the entrenchment of gender inequality in various aspects of life at national and international levels in various ways. These ways include action and strategic plans, treaties and other forms of international instruments, bilateral agreements, constitutional and legislative reforms and other policy approaches aimed at achieving gender balance and gender equality. Without doubt therefore, there is a need to assess the nature of responses offered by the governance framework to issues of gender. The question is therefore whether the migration law and policy framework adequately incorporate gender-sensitive approaches to issues such as border security and control.

Apart from the constitutional and legislative framework, it cannot be doubted that the institutional framework needs to be canvassed. Government departments, institutions and agencies play a significant role in giving effect to the rights, freedoms, entitlements and privileges of migrant persons. An analysis of the institutional framework that is key to the migration governance framework disclose the following key aspects:

- (a) Migration regulation is necessarily cross-sectoral;
- (b) Administrative actions of government institutions and agencies impact on vested rights of migrants;
- (c) Migration governance requires government departments and institutions to play a complementary role;
- (d) Strict immigration law governs a fraction of issues impacting on and impacted by migration;
- (e) Only a holistic, cross-sectoral approach can work in the establishment of a comprehensive migration governance framework.

From these aspects, it is clear that a migration governance consists of laws and policies, the role of government institutions, nature of processes and procedures, as well as the administrative issues related to enforcement, application and implementation of laws and policy. In relation to the law, both domestic law and international law are important. The question is whether there is an adequate set of domestic law that adequately address relevant migration issues. Further, whether domestic law draws sufficiently from standards, benchmarks and practices laid in the international legal regime if any. In

<sup>2</sup> Bilateral labour agreements can be used to cater for outbound migrant workers.

<sup>3</sup> The non-discriminatory position is entrenched in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

relation to policy, this report explores whether any specific migration policy approach exists, and how it relates to the constitutional and legal framework.

For the purposes of this research, international standards shall be explored first, the argument being that the international system often sets a basic threshold of standards and practices that usually guide the substantive and procedural content domestic law. Indeed, the assumption underpinning this is that the international system provides a progressive source for migration legal standards and norms.

## **1.2. MIGRATION GOVERNANCE AND INTERNATIONAL STANDARDS**

Any gap analysis can illuminate whether there are legislative reforms and changes with respect to the current laws. Migration is a phenomenon that is transboundary, but the responses are very domestic and differ from country to country. This is despite existence of a reasonable international legal framework that creates important norms in migration governance and management. States, however, seem to prefer designing their own unique context-specific regulatory frameworks with some guidance from the international normative framework. In addition, States have sought guidance from various standards and norms in general international human rights law when designing their migration governance and management frameworks. The inquiry is to determine what standards are laid down in the international instruments and, secondly, whether these have sufficiently cascaded into domestic legal regime in migration.

International human rights law can be grouped into two distinct categories, namely general and specific instruments. General instruments are not meant to govern migration in specific terms, but remain important nevertheless in view of their value as human rights instruments. These include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. These general instruments provide a blanket protection for everyone as long as they are human beings; they set acceptable standards and norms on the treatment of migrants and thus affect migration management.

The specific instruments target specific issues that impact directly on migration governance frameworks. Examples of these are the International Convention on the Elimination of All Forms of Racial Discrimination, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and instruments that speak to the protection of a specific group of people, such as the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

Table 1 shows a list of important international instruments that regulate or govern migration directly or indirectly.

## 1.3. REGIONAL BENCHMARKS

In the Southern African context, where Zimbabwe is included, there are three main cooperation frameworks that afford attention to migration, and these are as follows: (a) Southern African Development Community (SADC) framework; (b) Common Market for Eastern and Southern Africa (COMESA); and (c) Migration Dialogue for Southern Africa (MIDSA), which is a non-binding regional consultative process (RCP) with IOM as the secretariat. These three are keys in norm and standards setting in migration governance and management.

### 1.3.1. Southern African Development Community

The main objective of the SADC is the promotion of economic development and regional integration. Although the implementation of this goal necessitates the free movement of persons across the region, the development of an efficient migration governance regime has been a long complex process for this region.

The Draft Protocol on the Free Movement of Persons in SADC was formulated in 1996 and submitted to member States for consideration. In as much as the Government of Zimbabwe agreed with the spirit and purport of the protocol, it had to be abandoned at the insistence of Botswana, Namibia and South Africa. The alternative Draft Protocol on the Facilitation of Movement of Persons in SADC was framed, but to date, it has still not received the requisite ratifications for it to be adopted.

The objectives of SADC's Protocol on the Facilitation of Movement of Persons include the following:

- (a) Facilitate the movement of nationals of member States within the region by gradually eliminating obstacles that impede such movement;
- (b) Expand the network of bilateral agreements in this regard;
- (c) Cooperate in preventing irregular migration within and into the region.

It is worth mentioning that the protocol is largely a programmatic document than anything else because it sets ambitious, progressive objectives with minimal constraining provisions. The only exception that some member States have successfully implemented is the entry of SADC nationals into the territories of other member States without a visa for a maximum of 90 days per year, on condition that they possess a valid passport and show that they have sufficient financial means to support themselves during the visit. Apart from this provision of the protocol, there are no set standards in it on how to address other pertinent concerns like labour issues or access to health-care services where migrants are concerned.

Another important instrument is the SADC Labour Migration Policy Framework, crafted in December 2013. The framework is not a binding regional instrument; it is “developed to reflect, contribute to, and refine existing legal frameworks at regional, bilateral and national level, and international and regional legal instruments and obligations relating to migration and labour”.<sup>4</sup> A key principle of the SADC Labour Migration Policy Framework is stated in section 3:1 of the policy framework as the need to “align with regional and international frameworks on labour migration, harmonise respective national, and bilateral policies, and work towards an inclusive labour migration regime balancing international frameworks with the specificities of Southern African economies and labour market dynamics.” Again, this document has reminders to States of what needs to be done in the context of labour migration needs in the SADC region. It lacks detail in implementation and operationalization apart from calling on States to undertake legislative reforms in certain aspects of their migration laws.

<sup>4</sup> See paragraph 2.1.1 thereof (SADC, 2013).

Finally, another SADC document is the SADC Labour Migration Action Plan (2016–2019). This plan follows the expiry of the 2013–2015 Labour Migration Action Plan and renews SADC's commitment to address emerging migration needs in the region. Importantly, the action plan has six outcomes it seeks to achieve. All these outcomes need legislative reforms in one area or the other. Specific outcomes connected to legislative development are as follows: (a) outcome 2, which calls for harmonized labour migration policies and legal frameworks in SADC; (b) outcome 4, which calls for migrant workers to have access to health care across borders and at the workplace; and (c) outcome 6, which requires the strengthening of migrant workers' access to pension and social protection across the SADC region. These objectives are clear and noble and reflect the commitment, at least on paper, by SADC, to enhance the regional migration governance. Not to miss however is the fact that all these documents remain noble soft law and are yet to be reduced to binding status. For purposes of norm-creating importance, the action plan and the policy framework are progressive documents that must be considered.

### **1.3.2. Common Market for Eastern and Southern Africa**

COMESA is a special trading area that was established in 1994. While the geographical coverage of COMESA is significantly larger than that of the SADC, with 19 member States ranging from Libya to Zimbabwe, it does not include all SADC member States. The COMESA Treaty promotes the suppression of obstacles to the free movement of persons, and more importantly, recognizes the right of establishment and residence among member States. The Protocol on Free Movement of Persons, Labour, Services, Right of Establishment and Right of Residence was adopted in 2001, and although it has not yet entered into force, the granting of visas to nationals of member States has greatly improved, resulting in the easier movement of persons between territories of member States. The Government of Zimbabwe has not yet ratified the COMESA Protocol to promote free movement of persons.

### **1.3.3. Migration Dialogue for Southern Africa**

As previously alluded, both SADC and COMESA are formal mechanisms of regional cooperation. In contrast, MIDSA is an example of a less formal cooperation mechanism, specifically a result of an RCP. MIDSA was established in 2000 and includes all SADC member States. Its objectives are as follows:

- (a) Foster cooperation among SADC member States on migration-related issues, enhancing their capacity to manage migration within a regional context;
- (b) Contribute to an increased awareness among SADC officials and policymakers of the role of migration in the social and economic development of the region, and to ensure that orderly migration is perceived and used as a positive factor in the development process;
- (c) Help develop regional institutional capacities to deal with the challenges of migration management and strengthen the capacity of governments to meet these challenges in a cooperative and knowledge-based manner;
- (d) Deliver technical cooperation and training to build capacity for migration management, information-sharing and research and information dissemination activities;
- (e) Enhance the capacity of SADC countries to collectively manage migration, including substantial progress towards harmonized systems of data collection and harmonized immigration policy and legislation.

The objectives of MIDSA are specific and would significantly change the migration governance framework for the better, especially in Southern Africa. However, the consultative process does not result in any binding obligations and duties for member States but is merely a platform for dialogue and knowledge-sharing.

**Table 1. Regional and international instruments relating or impacting on migration and ratification (binding) status for Zimbabwe**

Level of instrument	Name	Signed/ratified by Zimbabwe
<b>United Nations/ International</b>	Universal Declaration of Human Rights (1948)	Non-binding
	International Covenant on Civil and Political Rights	Ratified 13 May 1991
	International Covenant on Economic, Social and Cultural Rights	Ratified 13 May 1991
	Convention on the Rights of the Child	Ratified 11 September 1990
	International Convention on the Elimination of All Forms of Racial Discrimination	Ratified 13 May 1991
	Convention on the Elimination of All Forms of Discrimination against Women	Ratified 13 May 1991
	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Not yet ratified
	International Labour Organization (ILO) C143 – Migrant Workers (Supplementary Provisions) Convention, 1975 (Convention concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers)	Not yet ratified
	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)	Not yet ratified
	Convention relating to the Status of Refugees (1951)	Ratified 25 August 1981
	Convention on the Reduction of Statelessness (1961)	Not yet ratified
	Convention relating to the Status of Stateless Persons (1954)	Succession 1 December 1998
	United Nations Convention against Transnational Organized Crime	Ratified 29 September 2003
	ILO C189 – Domestic Workers Convention, 2011 (Convention concerning Decent Work for Domestic Workers)	Not yet ratified
	ILO C182 – Worst Forms of Child Labour Convention, 1999 (Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Labour)	Not yet ratified
	Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (2000)	Not signed/ratified
	Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (2000)	Ratified 13 December 2013
	Protocol relating to the Status of Refugees (1967)	
	<b>African Union</b>	African Charter on Human and Peoples' Rights
Convention Governing the Specific Aspects of Refugee Problems in Africa		Ratified
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)		Ratified 22 July 2013
African Charter on the Rights and Welfare of the Child		
<b>SADC</b>	SADC Treaty	Ratified
	Community Charter of the Fundamental and Social Rights of Workers	
	Protocol on the Facilitation of Movement of Persons	
	Protocol on Employment and Labour (2014)	Ratified 22 May 2019

Note: Table developed by the researchers from general research.

# CHAPTER 2

## 2. THE CONSTITUTION AND MIGRATION GOVERNANCE

### 2.1. INTRODUCTION

The 2013 Constitution of Zimbabwe establishes a very important platform for the protection, promotion and enforcement of fundamental rights and freedoms. Indeed, the interpretation of these rights will guide the application of legislation related to migration issues. As the supreme law of the nation, it is important to reiterate that provisions of relevant legislation that are inconsistent with the Constitution are invalid to the extent of their inconsistency. This is critical, considering that various pieces of legislation predates the 2013 Constitution, and are in the process of being aligned with the Constitution.

In general, however, the importance of a constitution to any domestic governance framework must be pointed out. Apart from listing various rights and freedoms that may apply to migration issues, the constitution creates or calls for the creation of important State institutions to realize and enforce these rights. Additionally, the spirit and value system underpinning the constitution permeates the interpretation of legislative provisions, and this is important. The human rights agenda is given prominence by the constitution, as is the clarion call for gender equality, protection of children, promotion of national socioeconomic development and the confirmation of the relevance of international law.

Table 2 shows important rights and related legislation that must give effect to the rights as well as relevant institutions.

**Table 2. Basic rights and enabling legislation**

Provision	Constitutional rights available to all persons (citizens and migrants alike)	Implementing legislation
s.48	Right to life	Criminal Procedure and Evidence Act and various other laws
s.49	Right to personal liberty	Various legislation
s.50	Rights of arrested and detained persons	Criminal Procedure and Evidence Act
s.51	Right to human dignity	–
s.52	Right to personal security	–
s.53	Freedom from torture or cruel, inhuman or degrading treatment and punishment	–
s.54	Freedom from slavery and servitude	Labour Act
s.55	Protection from forced or compulsory labour	Labour Act
s.57	Equality and non-discrimination	Various legislation
s.57	Right to privacy	Access to Information and Protection of Privacy Act
s.58	Right of assembly and association	Labour Act; Public Order and Security Act

Provision	Constitutional rights available to all persons (citizens and migrants alike)	Implementing legislation
s.59	Freedom to demonstrate and petition	Labour Act; Public Order and Security Act
s.60	Freedom of conscience	–
s.61	Freedom of expression and freedom of the media	Various legislation
s.63	Language and culture	–
s.64	Freedom of profession, trade or occupation	Labour Act; Copyright Act; various legislation on trades and professions
s.65	Labour rights	Labour Act
s.68	Right to administrative justice	Administrative Justice Act
s.69	Right to a fair hearing	Labour Act; Administrative Justice Act; Criminal Procedure and Evidence Act
s.70	Rights of accused persons	Criminal Procedure and Evidence Act
s.71	Property rights	No primary legislation
s.73	Environmental rights	Environmental Management Act
s.74	Freedom from arbitrary eviction	No primary legislation
s.77	Right to food and water	Water Act; Zimbabwe National Water Authority Act
s.78	Marriage rights	Marriage Act
s.80	Rights of women	Various legislation
s.81	Rights of children	Children's Act
s.82	Rights of the elderly	–
s.83	Rights of persons with disabilities	Disabled Persons Act

Note: Table developed by the researchers from general research.

It must be noted that there are various other laws that implement all rights and freedoms in the Constitution indirectly. This is because some rights and freedoms have no primary implementing legislation. The implementation of these rights and freedoms is through other legislation that cannot be characterized as primary legislation for those rights and freedoms. A clear example of such rights is Property Rights. There is no single legislation protecting all property rights. Conversely, the Disabled Persons Act is the primary legislation that addresses the rights and protection of persons with disabilities.

## 2.2. RIGHTS LIMITED TO CITIZENS AND PERMANENT RESIDENTS

The 2013 Constitution provides for certain rights and freedom whose enjoyment is restricted to citizens and permanent residents only. Non-citizens have very limited, if any at all, entitlements under these rights. Table 3 provides a list of such rights.

**Table 3. Rights containing restrictions to non-citizens and non-residents**

Provision	Constitutional right	Nature of restriction/limitation
s.62	Access to information	<ul style="list-style-type: none"> <li>■ No general right of access to information held by the State.</li> <li>■ Access granted to non-citizens and non-residents only if the information is required for the exercise or protection of their rights.</li> </ul>
s.66	Freedom of movement and residence	<ul style="list-style-type: none"> <li>■ No general right to enter and leave Zimbabwe to all non-citizens.</li> <li>■ No right to travel documents; non-citizens have no immunity from expulsion from Zimbabwe.</li> <li>■ Non-citizens and non-resident persons lawfully in Zimbabwe have a right to the following: <ul style="list-style-type: none"> <li>▪ Move freely within Zimbabwe;</li> <li>▪ Reside in any part of Zimbabwe;</li> <li>▪ Leave Zimbabwe.</li> </ul> </li> </ul>
s.67	Political rights	<ul style="list-style-type: none"> <li>■ Non-citizens have no right to participate in political activities and processes. They cannot vote or be elected into office.</li> </ul>
s.75 s.81	Right to education <ul style="list-style-type: none"> <li>■ For adults</li> <li>■ For children under 18 years</li> </ul>	<ul style="list-style-type: none"> <li>■ Non-citizens and non-residents have no right to the following: <ul style="list-style-type: none"> <li>▪ Basic State-funded education;</li> <li>▪ Further education.</li> </ul> </li> <li>■ Every child under 18 years, however, has the right to education.</li> </ul>
s.76 s.81(1)(f) s.82	Right to health-care services <ul style="list-style-type: none"> <li>■ For adults</li> <li>■ For children</li> <li>■ For the elderly</li> </ul>	<ul style="list-style-type: none"> <li>■ Non-citizens and non-residents have no general right to access to basic health-care services.</li> <li>■ Non-citizens and non-residents have the right only in the following cases: <ul style="list-style-type: none"> <li>▪ If they are living with a chronic illness;</li> <li>▪ In the case of a situation/condition requiring emergency medical treatment.</li> </ul> </li> <li>■ Under this provision, every person under 18 years has the right to health-care services.</li> <li>■ All elderly persons have the right to receive health care and medical assistance from the State.</li> </ul>
s.78	Marriage rights	<ul style="list-style-type: none"> <li>■ Prohibition against same-sex marriages restricts rights and entitlements of immigrants entering the country in same-sex matrimonial relations.</li> </ul>

Note: Table developed by the researchers from general research.



## 2.3. THE CONSTITUTION AND GOVERNANCE SYSTEMS

The constitutional provisions presented illustrate the treatment of migration in the constitutional system. More importantly, the presentation of the constitutional rights discourse illustrates that the Constitution establishes various legal sub-regimes that impact on migration. The major subregimes are as follows:

- (a) Criminal justice system;
- (b) Educational system;
- (c) Health services sector;
- (d) Labour and employment system;
- (e) Human rights system.

### 2.3.1. Criminal justice system

Migration law review must include a review of the criminal justice framework. In general, issues that are pertinent include the list of acts and omissions that are criminalized. The most common debate is on irregular migrants and administrative detention for migration control reasons. Thus, the procedural responses, administrative measures, prosecution and punishment regime for migrants must be analysed. There is a need to determine whether the provisions of the applicable legislation regulate conditions of administrative detention. Another important issue is whether the applicable criminal law creates a discriminatory framework that adversely impacts on migrants.

Importantly also, the provisions of the criminal law and criminal procedures law must meet the expectations in the Constitution in relation to the following:

- (a) Right to personal liberty;
- (b) Rights of arrested and detained persons;
- (c) Right to human dignity;
- (d) Right to personal security;
- (e) Freedom from torture, cruel, inhuman and degrading treatment or punishment;
- (f) Freedom from forced or compulsory labour;
- (g) Right to privacy;
- (h) Freedom of conscience;
- (i) Access to information;
- (j) Right to administrative justice;
- (k) Right to a fair hearing;
- (l) Rights of accused persons.

In relation to the provisions relating to the criminal justice system, it is concluded that the 2013 Constitution goes very far in protecting and safeguarding the rights of all types of migrants. The constitutional framework is plausible in terms of the following:

- (a) Rights and freedoms impacted by the criminal justice system are strongly protected and not easily limited;
- (b) There is no substantive difference in the level of protection granted to citizens and non-citizens;
- (c) The procedural framework for the enforcement of the law by law enforcement authorities is not unduly harsh, or differentiated based on nationality, citizenship or such other distinctions;
- (d) The framework for the enforcement of rights is clear, substantive and accessible to citizens and non-citizens;
- (e) There is a clear framework for the limitation of rights entrenched in section 85 of the 2013 Constitution. Thus, administrative officials, law enforcement authorities and other government institutions have no leeway to limit rights and freedoms outside the given parameters.

### 2.3.2. Education sector

For various reasons, migration for educational purposes has grown since the end of the Second World War. Different countries have approached the issue of migrants' right to education differently. For Zimbabwe, the right to education is provisioned in the Constitution. However, the constitutional provision deals with rights to State-funded education, and this right is available to citizens only. Thus, the right to State-funded education is specifically not available to non-citizens and non-residents.

This limitation can be read to mean that migrants and their families can however access non-State-funded education in Zimbabwe. There is no definition of State-funded education, and it is hoped that it will be interpreted generously, rather than restrictively. This is because children's rights are specially protected,<sup>5</sup> and the CRC pays particular regard to the educational rights of children without distinction.<sup>6</sup> Article 2 of the CRC specifically calls for States to "respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status". Without doubt therefore, there is a need for the position in Zimbabwe's Constitution to change and move towards recognition of the general right to education for all migrants and their families without distinction.

<sup>5</sup> Article 28 of the CRC is emphatic on the rights of children to education. It states as follows:

"1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

- (a) Make primary education compulsory and available free to all;
- (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
- (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
- (d) Make educational and vocational information and guidance available and accessible to all children;
- (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates."

<sup>6</sup> See Article 2 of the CRC.

### 2.3.3. Health services sector

Again, the right to health for migrants is very important. Not only must the health system of a receiving State be accessible to migrants, it must also treat migrants as human beings with rights and not marginalize them. The right to health must be capable of enforcement to migrants. In the 2013 Constitution, the right to have access to basic health-care services accrues to citizens and permanent residents. However, every person living with a chronic disease (this includes migrants) also have the same right, but only with respect to chronic illnesses. Further, all persons, including migrants, have the right to emergency medical treatment in any health-care institution.

To some extent, the right to basic health care is unduly restricted to migrants.<sup>7</sup> With health-care services being mostly private and paid for, there is no adequate justification why the Constitution denies a right to have access to basic health care for all persons including migrants. The implication is that health institutions can choose whether to accommodate migrants. A health sector must not be discriminatory on any grounds unless where health services are offered free of charge, which is not the case. For this reason, the limited right to health-care services for migrants in Zimbabwe is likely to adversely impact on health-care services legislation that gives effect to it. This has a knock-on effect on the rights of migrants to health.

Despite this rather unsatisfactory position, it must be said that in practice, health institutions do not discriminate on the basis of nationality. Health services in Zimbabwe are available to all and sundry who can afford such service. This practical position must however be reflected in the law.

### 2.3.4. Labour and employment system

Section 65 of the 2013 Constitution is the constitutional labour rights clause. It recognizes the right to fair and safe labour practices and standards for every person, citizen or non-citizen. This automatically covers migrant workers, who might be seasonal, and hopefully “irregular” labourers.<sup>8</sup> The right further extends to the payment of a fair and reasonable wage. Migrant employees also have the right to just, equitable and satisfactory conditions of work. Implicit in this right is the fact that there is no prohibition to the employment of migrants. Further, there must be no distinction in general conditions of work between migrants and citizens. Associated with this right therefore is the right of every person “to choose and carry on any profession, trade or occupation” in Zimbabwe (section 64). There is no doubt that the right is plausible and safeguards the labour and employment rights of migrant workers from undue restrictions, unfair and unsafe treatment and unjustified discrimination.

Section 65 of the Constitution must also be explained in light of irregular migration, which is a reality in Zimbabwe. Irregular migration is understood as migration “that occurs outside the regulatory norms of the origin, transit, or destination country”. This encompasses persons who migrate to any country without meeting legal requirements for entry, and those who enter another country legally, but overstays beyond the requirements of their documents. Employing irregular migrants automatically activates the protection in section 65 of the Constitution. These provisions recognize the rights of “every person” to “fair and safe labour practices and standards and to be paid a fair and reasonable wage”. Every person in this instance includes irregular migrants who might have irregular contracts of employment, or those working without such formal contracts at all. Other rights afforded to irregular workers include the right to form and join trade unions and participate in trade union activities.

<sup>7</sup> For migrant children, this exclusion falls foul of the CRC as well.

<sup>8</sup> The Constitution protects every person who fits the definition of employee. It further protects every person’s “right to fair and safe labour practices and standards and to be paid a fair and reasonable wage”.

Section 65 distinguishes between rights of “employees” and rights of every person in the context of employment. It might be for this reason that Zimbabwe has not yet signed the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. Thus, on the face of it, section 65 of the Constitution makes it appear that irregular migrant workers are not afforded rights ordinarily reserved to employees by the Constitution and the Labour Act. There is, however, an argument that the distinction is only academic, and that irregular migrant workers can enjoy the same benefits as employees since denying them those rights would constitute “unfair labour practice and standards” (Tsabora and Kasuso, 2017). This approach has been followed in South Africa, and is progressive (Bosch, 2006; le Roux, 2009; Vettori, 2009). The Zimbabwean position, it is submitted, must be interpreted to mean that irregular migrant workers are also beneficiaries of all rights ordinarily reserved to employees.

### 2.3.5. Human rights system

The 2013 Constitution has, however, introduced various progressive institutions important in the respect, promotion, realization and enforcement of human rights. The true test of the strength of these institutions is their ability to safeguard the right of migrants.

Any human rights system must be able to hold into account State agencies and institutions, in conformity with the law and regardless whether the alleged violation is against a citizen or non-citizen. In Zimbabwe, the Zimbabwe Human Rights Commission stands out as a very important institution that might be able to safeguard the rights of migrants. Other important State institutions include the Gender Commission, Department of Immigration, as well as civil society organizations. Working together, the human rights institutions can guarantee the welfare of migrants and ensure that all their rights are protected.

Having classified the 2013 Constitution as being underpinned by a human rights agenda, it may be necessary to explore whether the human rights enforcement mechanisms are accessible and available to migrants. In relation to this, the following key elements are clear:

- (a) The human rights enforcement mechanisms in section 85 are very inclusive and available to all litigants;
- (b) The *locus standi* provisions do not discriminate against migrant litigants and any obstacles to any person willing to enforce a constitutional right;
- (c) The judicial system is accessible to all, and apart from generally high cost of legal services, presents no other hurdles to any person wishing to approach the courts.

## 2.4. CONSTITUTION AND CITIZENSHIP

In its national development objectives, the Constitution is silent about the contributions of migrants and solely focuses on developing Zimbabwean citizens.<sup>9</sup> The same can be said for provisions relating to employment and the creation of employment. The State is placed under an obligation by the Constitution to ensure that measures are taken to create employment for all Zimbabweans, especially women and children.<sup>10</sup> The fact that whatever benefit is bestowed in the Constitution is dependent on the beneficiary's citizenship portrays a low level of consideration of migration needs in Zimbabwe.

Provisions on citizenship are clearer about Zimbabwe's stance on migration and its impact. Again, the underpinning philosophy is to extend most of the benefits in the Constitution to Zimbabwean citizens.

Citizenship by birth is constitutionally provided in section 36 of the Constitution. Firstly, citizenship is acquired where a person is born in Zimbabwe and at least one parent was a Zimbabwean citizen by birth or descent. Secondly, citizenship is also acquired when a person is born in Zimbabwe and any of a person's grandparents is a Zimbabwean citizen by birth or descent at the time such person is born. Citizenship also extends to persons born outside Zimbabwe. However, the condition is that when such person is born, either of the parents must have been a Zimbabwean citizen and ordinarily a resident in Zimbabwe. Alternatively, either of the parents must have been a Zimbabwean citizen but working outside Zimbabwe for the State or an international organization when the person seeking citizenship was born. Clearly, these provisions are broad enough to cover almost all scenarios of acquiring citizenship by birth.

For those whose destination country is Zimbabwe, citizenship is also possible by registration. Section 38 makes this possible by stating that any person who has been married to a Zimbabwean citizen for at least five years is entitled, upon application, to be registered as Zimbabwean citizen.<sup>11</sup> If citizenship is obtained through marriage, it is not contingent on the subsistence of the marriage. Section 40 provides that citizenship will not be lost due to dissolution of the marriage. Furthermore, a person who has been a resident in Zimbabwe for at least 10 years can also, upon application, be registered as a Zimbabwean citizen. Although these provisions seem accommodative of those who would be living in Zimbabwe as their host country, they ignore the processes through which they would have to go through to remain in the country legally for the requisite amount of time for a citizenship application. The Citizenship and Immigration Board is the institution responsible for granting and revoking citizenship and fixing the terms and conditions for people from other countries to reside and work in Zimbabwe.<sup>12</sup>

<sup>9</sup> Section 13 of the Constitution.

<sup>10</sup> Section 14 of the Constitution.

<sup>11</sup> Section 38 (1) of the Constitution.

<sup>12</sup> Section 41 of the Constitution.

# CHAPTER 3

## 3. THE LEGISLATIVE FRAMEWORK

### 3.1. INTRODUCTION

Efforts to develop a more effective, coherent legislative system for protection of migrants in Zimbabwe have been impeded by several factors. Firstly, Zimbabwe generally perceives migration issues as having potential implications to its sovereignty and security, among other issues. Consequently, the specific protections and remedies available in legislation are usually indirect, anecdotal and originally designed to benefit citizens. In contrast, however, migration law must be designed based on the reality that migration governance can enhance the integrity of borders, enable transboundary social relationships and stimulate economic growth (IOM, 2015a:127). Apart from this, other important spheres of law are improved, such as labour law, human rights law, housing and social services and welfare law.

Secondly, migration is generally regarded as a contested and divisive issue in domestic politics. It is consequently difficult to find a level ground to ensure the development of specific laws regulating migration, apart from that single migration legislation (ibid.). The most important cause for the division and contestation is that some view migration as an opportunity while others view it as a problem. This factor affects legislative development and the quality of legislative provisions in important legislation.

Finally, migration is about people, and there is a presupposition that in formulating the legal regime regulating their presence, activities and other aspects of life need their participation. The notion behind this is that the very people who are to be regulated must be involved in the development of frameworks, institutions and processes that impact their human life. However, including migrants into such a system would prove difficult since it is not always clear who can adequately represent migrants' interests.

The Zimbabwean legal framework for migration has been affected by each of the above factors. An analysis of the important legislation done in the following part is fully alive to this background. Several laws have an impact on migration in Zimbabwe. The primary law is the Immigration Act (Chapter 4:02) and its accompanying regulations,<sup>13</sup> which regulates the entry of persons into and the departure or removal of persons from Zimbabwe.<sup>14</sup> In effect, this law regulates and impacts several migration management thematic areas, including labour migration, human trafficking and smuggling, irregular migration, migration and health, among others.

Apart from the Immigration Act, other laws that impact various migration management aspects are as follows:

- (a) Citizenship of Zimbabwe Act (Chapter 4:01);
- (b) Trafficking in Persons Act (Chapter 9:25);
- (c) Refugees Act (Chapter 4:03);

<sup>13</sup> Statutory Instrument 195/1998.

<sup>14</sup> Preamble to the Immigration Act.

- (d) Domestic Violence Act (Chapter 5:16);
- (e) Labour Act (Chapter 28:01);
- (f) Social Welfare Assistance Act (Chapter 17:06);
- (g) Criminal Law (Codification and Reform) Act (Chapter 9:23);
- (h) Criminal Procedure and Evidence Act (Chapter 9:07);
- (i) Births and Deaths Registry Act (Chapter 5:02).

## 3.2. IMMIGRATION ACT

The Immigration Act establishes a framework governing the entry, stay and departure from Zimbabwe. The Immigration Act has undergone seven amendments, that is, in 1979, 1981, 1983, 1984, 1987, 2000 and 2001. All these amendments were made prior to the enactment of the 2013 Constitution.

Section 3 of the act provides that no one can have a domicile in Zimbabwe unless he/she has lawfully ordinarily resided for a continuous period of 10 years, and this period will not include periods of detention in any prison, reformatory or mental hospital in or outside Zimbabwe. As already alluded to, the Constitution makes provision for citizenship through marriage by the Immigration Act, and explicitly prohibits marriages of convenience for purposes of acquiring citizenship.<sup>15</sup>

Of importance in the act is the need to improve border security and address instances of trafficking, smuggling and illegal entry into the country. To that extent, section 11 makes provision for ports of entry. No person shall enter Zimbabwe from any other place than a designated port of entry unless a person who enters from a place that is not a designated port of entry has been authorized by the minister to do so and has complied with the terms and conditions of such entry.<sup>16</sup> This provision seeks to protect the integrity of ports of entry and improve regulation of individuals entering or exiting the country. Such order can be beneficial to migrants as their entry into or departure from Zimbabwe is noted by relevant authorities. In the same vein, this provision is necessary in border management.

Section 14 provides a list of what constitutes prohibited persons. This is common in migration practice, border management and security, but the persons found on the list differ from county to county. States ordinarily formulate lists of persons who they prohibit from entry into their countries. Such lists usually include habitual convicted felons, individuals who have a tendency of violating visa conditions or individuals with listed diseases.<sup>17</sup> In addition, section 14 seeks to prohibit from entry those who are deemed by the minister to be an undesirable inhabitant of or undesirable visitor to Zimbabwe. Section 17 prohibits the entry of a prohibited person or a potentially prohibited person,<sup>18</sup> while section 18 states that an Immigration Officer may refuse any person leaving to enter Zimbabwe if he/she believes on reasonable grounds that consideration is being, or is about to be, given to deeming or declaring that person to be a prohibited person. Such a person shall have no right to appeal the refusal and will have to leave Zimbabwe immediately. The denial of the right to appeal or review is in itself inconsistent with section 68 of the 2013 Constitution, which grants every person a right to administrative justice. In particular, section 68 (3) (a) of the Constitution requires an Act of Parliament to “provide for the review of administrative conduct by a court, or where appropriate, by an independent and impartial tribunal”. There is therefore a need to reconsider this unsustainable position.

<sup>15</sup> Section 3A of the Immigration Act.

<sup>16</sup> Section 11 (2) (1) (a) of the Immigration Act.

<sup>17</sup> In the Immigration Act, these diseases are identified as “prescribed diseases”.

<sup>18</sup> Section 18 of the Immigration Act.

### 3.2.1. Lack of provision for lawful immigrants

Section 3 of the Immigration Act does not make provision for a person who regularizes one's status to be deemed a lawful immigrant and enjoy the rights that accrue to such person. This contradicts the position in the Constitution that specifies rights accruing to lawful immigrants, such as the right to freedom of movement, to reside in any part of Zimbabwe and to leave Zimbabwe, which are provided for in section 66 (2).

#### Recommendation

It is recommended that section 3 of the Immigration Act must be revisited to provide that foreign nationals who entered the country illegally, but whose status has been regularized, must be considered to be lawfully within the territory. Such persons have a right to receive necessary documents and must be given such documents. Explicit provisions such as this one provides a clear protection regime than working with assumptions, as the current Act does on this issue.

### 3.2.2. Citizenship and the Immigration Board

Section 19 of the Immigration Act provides that the minister will prescribe through regulations and matters relating to the issuance or revocation of the various categories of permits. This has been overtaken by constitutional provisions on citizenship. Section 41 of the Constitution gives this function to the Citizenship and Immigration Board. The role of the minister in this regard is thus at variance with the provisions of the Constitution. The board is yet to be established and operationalized.

#### Recommendation

The Immigration Act must be amended to provide for the Citizenship and Immigration Board. Section 19 must be amended accordingly to remove the role of the minister in the issuance of various permits. By vesting this role in the Citizenship and Immigration Board, compliance with section 41 of the Constitution will have been achieved.

### 3.2.3. Detention

Sections 8 (1) of the Immigration Act provides for the detention of prohibited persons for up to 14 days without trial. This section is unconstitutional in that it contravenes section 50 of the Constitution that limits detention for any person to 48 hours. Section 50 (2) provides that “Any person who is arrested or detained – (a) for the purpose of bringing him or her before a court; or (b) for an alleged offence; and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday.”

#### Recommendation

Sections 8 (1) of the Immigration Act needs to be amended to reduce the maximum period of detention from 14 days to 48 hours, unless a court authorizes further detention beyond the prescribed 48 hours. The Immigration Act should be further amended to give effect to the broader rights of detained persons in section 50 (2) of the Constitution.



### 3.2.4. Immigration rights of citizens and lawful immigrants

The Immigration Act has a narrow focus; it appears to concentrate more on the rights of persons to enter and leave Zimbabwe. It lacks the generally broader focus in section 66 of the Constitution that makes provision for two broad sets of rights: (a) those exclusive to citizens; and (b) those afforded to citizens and persons who are lawfully in Zimbabwe. Analysis of these rights shows the gaps in the Immigration Act.

#### (a) Exclusive rights of citizens

Section 66 (1) of the Constitution affords the following three rights to citizens:

- (i) The right to enter Zimbabwe: This includes the right to return after leaving one's own country and the right to come to a country for the first time if the person was born out of the country.
- (ii) Immunity from expulsion from Zimbabwe;
- (iii) The right to a passport and other travel documents.

#### (b) Rights of citizens and legal immigrants

Section 66 (2) of the Constitution affords both citizens and legal immigrants the following rights:

##### (i) The right to move freely in Zimbabwe

This right relates to free movement to the whole territory of a State. It also includes the right to move from one place to another and establish one's self in a place of choice. This accords with Article 13 of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Civil and Political Rights, which guarantee foreigners' freedom of movement and residence once they are lawfully inside a country.

##### (ii) The right to reside in any part of Zimbabwe

This right includes protection against all forms of forced internal displacements and precludes preventing the entry or stay of persons in a defined part of the country or territory.

##### (iii) The right to leave Zimbabwe

This right includes travelling abroad and departure for permanent emigration. In practice, this right assumes that a person leaving Zimbabwe must have appropriate travel documents. However, it can be argued that in practice, an irregular migrant can seek to return to the country of origin without travel documents.

### Recommendation

The Immigration Act must be amended to fully incorporate the rights and obligations of migrants, as provided for in section 66 of the Constitution outlined above.

### 3.3. IMMIGRATION REGULATIONS (1998)

#### 3.3.1. Labour migration: Measures to limit irregular migration of workers

The Immigration Regulations have several provisions that impact on labour migration. In terms of section 10 of the regulations, the employment of visitors is prohibited unless the visitor has been issued with a permit authorizing such employment. In terms of section 21 of the regulations, no foreigner may enter Zimbabwe for purposes of engaging in temporary employment unless they are in possession of a valid employment permit or other authority. Further, in terms of section 21 (4) of the regulations, a person who breaches this prohibition should leave Zimbabwe forthwith. They also make provision for circumstances under which a temporary employment permit ceases to be valid, that is, where the holder of the permit is:

- (a) Failing to take up employment with, or if they cease to be employed by the employer;
- (b) Failing to engage, or ceasing to be engaged, in the occupation specified in the permit.

In terms of section 22, a prospective employer must apply for a temporary employment permit on behalf of the employee, which can be issued for a period not exceeding five years. A person whose temporary employment permit expires and is not renewed, unless authorized in terms of the Immigration Act or regulations, must leave Zimbabwe forthwith. Section 23 of the regulations further outlines the conditions for the issuance of temporary employment permits, which include the following:

- (a) One should enter and remain in the service of the employer specified in the permit (unless if permitted otherwise by the Chief Immigration Officer);
- (b) That the holder of such permit and all persons authorized to enter Zimbabwe with him/her shall leave Zimbabwe on or before the expiry of the period stated in the permit.

The above provisions of the Immigration Regulations are similar in effect to those of other jurisdictions that are aimed at curbing irregular migration flows for employment purposes. For example, South Africa's Employment Services Act has a number of provisions to that effect. Section 8 (1) of this act prohibits employers from employing foreign nationals who do not hold a valid work permit as required by the Immigration Act. It also requires that employers must only employ foreigners when satisfied that no other person in the country holds the required skills. The United States of America's Immigration Reform and Control Act of 1986 similarly obligates employers to ensure that they employ regular migrants, and recruiting illegal immigrants is an offence in terms of its section 274A.

Section 19 (1) of the South African Immigration Act also provides for different work permits, one of which, the "general" work permits, requires that it be issued only when steps have been taken to ensure that there are no other persons in the country who hold the required qualification and proof to that effect has been adduced. Further, section 38 places duties and obligations on employers in respect of foreigners in their employ, including the duty to ensure that they do not employ irregular migrants or under conditions that are not permissible in terms of their permits.

It is submitted that irregular migrant workers must be recognized and protected in the context of labour rights entrenched in the Constitution. The Constitution recognizes rights of every person in any employment context, and this includes irregular workers with or without proper employment details.

### 3.3.2. Gaps: Provisions undermining administrative justice

In terms of section 24 of the Immigration Regulations, the Chief Immigration Officer is empowered to cancel temporary employment permits without notice, for example, where the holder of the permit fails to comply with any of the conditions under which the permit was issued. This is in contravention of section 68 of the Constitution that provides for the right to administrative justice. This provision of the Constitution provides that any person whose right has been adversely affected by administrative conduct has the right to be given prompt reasons for the conduct in writing. Section 24 (2) of the Immigration Regulations only provides for the issuance of a notice advising of the cancellation of the permit and the date by which the permit holder should have left Zimbabwe. There is no provision for notification of reasons for the cancellation as required by the Constitution, which should form the basis for challenging the decision should one so wish.

Further, section 37 of the Immigration Regulations provides that the Chief Immigration Officer may, for any reason which he/she considers sufficient, including the breach of any condition of the permit, cancel an alien's permit and shall not be obliged to give reasons for the cancellation of a permit. As with the provisions of section 24, a notice issued to the affected person is only to inform them of the decision that has been made and the date on which the person is expected to vacate the country. Section 8 of the South African Immigration Act, on the other hand, provides room for the general notification of any "intended" decision that should be communicated to the affected person within a specified period together with reasons for that intended decision, as well as room for the person to make representations and appeal against the decision if he/she so wishes.

#### **Recommendation**

Sections 24 and 37 (3–4) of the Immigration Act must be amended to fully accommodate the elements of the right to administrative justice for this category of migrants as provided for in section 68 of the Constitution. This would also be in line with the provisions of Article 22 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, which provides that a decision to expel migrant workers from a country shall be communicated to them in a language they understand. Upon their request, where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

Except where a final decision is pronounced by a judicial authority, the person concerned shall have the right to submit the reason he/she should not be expelled and to have his/her case reviewed by the competent authority, unless compelling reasons of national security require otherwise. Pending such review, the person concerned shall have the right to seek suspension of the decision of expulsion. Associated with this right, there must be provision for legal support and translation, if needed and where possible.

### 3.4. NEED TO ADOPT MEASURES TO PROMOTE POSITIVE LABOUR MIGRATION

States ordinarily adopt measures that support their trade and investment policies, such as the ease of doing business. For instance, Section 21 of the Immigration Act of South Africa provides for corporate permits that can be applied for and issued to corporate companies on behalf of foreign employees that they intend to employ in the country. This additional category of work permit is a measure that goes a long way in promoting ease of doing business in the country by foreign companies. Zimbabwe does not have a similar approach in its migration law.

#### Recommendation

The Immigration Act of Zimbabwe needs to continually reflect economic and financial developments that are of benefit to its economic systems, trade relations and other sectors.

### 3.5. RIGHTS OF DISABLED PERSONS

One of the weaknesses of the Immigration Act is its discrimination against persons with disabilities who are prohibited from entering the country, unless they or a person accompanying them or some other person gives security to the satisfaction of the minister for their permanent support in Zimbabwe, or for their removal therefrom whenever required by the minister. As with the Zimbabwean Act, the South African Immigration Act also lists categories of prohibited persons (section 29) and further provides for another category of immigrants who are classified as “undesirable immigrants” (section 30); however, persons with disabilities are not listed as either prohibited or undesirable, indicating that disability is not a ground for the denial of the right to immigrate into that country.

The limitations placed on persons with disabilities by the Zimbabwean Immigration Act are arguably contrary to the provisions of section 56 (3) of the Constitution, which prohibits discrimination on the basis of one’s disability.

#### Recommendation

Section 14 of the Immigration Act must be amended to remove the listing of persons with disabilities as one of the categories of prohibited persons. This position is untenable from a human rights perspective.

### 3.6. BORDER CONTROL AND SECURITY MEASURES

While the Immigration Act places much emphasis on entry and exit in Zimbabwe, it does not adequately provide for measures to strengthen border control. Also, while it empowers Immigration Officers to enter, search and seize anything suspected to be related to an offence, the measures therein, while extensive, are in relation to offences specified in the First Schedule of the Immigration Act that does not include trafficking in persons or migrant smuggling, which is a gap. This gap is not only in terms of this law but also to the extent that it fails to complement other laws such as the Trafficking in Persons Act, which is aimed at curbing crimes through stringent border control measures, among other measures.

Also, while section 14 of the Immigration Act outlines the categories of persons who are prohibited from entering Zimbabwe, these do not include persons convicted of migrant smuggling or trafficking in persons, which is again a gap and a missed opportunity to tighten measures against traffickers and migrant smugglers as well.

### **Recommendation**

The Immigration Act should be amended to include human trafficking and smuggling among the offences specified in the first schedule. These offences mean that a person who would have been convicted of them is a prohibited person. Further, previous offenders for crimes related to, or incidental to human trafficking must find their way onto the list. This measure would not only strengthen border controls but also enhance the complementarity between anti-human trafficking institutions and migration authorities.

## **3.7. EDUCATION ACT (CHAPTER 25:04)**

As already alluded to, the right to education is constitutionally guaranteed, and the main objective of the Education Act is to give effect to furthering the realization of this right. Section 4 (1) of the Education Act declares that every child in Zimbabwe has the right to school education. This section states that no child in Zimbabwe shall be denied the right to education or “be discriminated against by the imposition of onerous terms and conditions in regard to his admission to any school; on the grounds of race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender”.<sup>19</sup> This provision clearly includes the children of persons whose country of origin is not Zimbabwe, and it puts them at equal footing with citizens in making provision for the right to education. Furthermore, whatever condition or term that requires the child or parents of the child to do anything or possess some quality, attribute, asset or property that is not required to be done or possessed by children or parents, as the case may be, of a different race, tribe, place of origin, national or ethnic origin, political opinion, colour, creed or gender will be deemed onerous. These provisions show that regardless of one’s nationality, no child in Zimbabwe shall be refused admission to any school, thereby violating the right to education. Contravention of these provisions is criminalized and warrants a fine not exceeding level six or imprisonment for at least one year or both.

Foundational or primary school education is compulsory,<sup>20</sup> and the Education Act stipulates that the cost of education in Zimbabwe must not be prohibitively expensive but must be at its “lowest possible fees consistent with the maintenance of high standards of education”.<sup>21</sup> This means whether a parent reaps ample financial benefits associated with being a citizen of Zimbabwe or not, the cost of education must be such that everyone affords it. This provision displays a high level of tolerance and foresight of the fact that even if the parents of the child are not citizens and do not enjoy the same financial benefits or opportunities that come with citizenship, they are still provided with quality education at a low price.

Consequently, the Education Act makes provision for the right to education that is enshrined in the Declaration of Rights in the Constitution. The Education Act displays a high level of protection to migrants, especially children who are considered the same way as children born in Zimbabwe are where their rights to education are concerned. Criminalization of any contravention of the provisions shows the seriousness with which Zimbabwe protects and guarantees the right to education to everyone.

<sup>19</sup> Section 4 (2) (a)–(b) of the Education Act.

<sup>20</sup> Section 5 of the Education Act.

<sup>21</sup> Section 6 of the Education Act.

### 3.8. LABOUR ACT (CHAPTER 28:01)

The purpose of the Labour Act is to advance social justice and democracy in the workplace by giving effect to fundamental labour rights, providing a legal framework that encourages the participation of both employers and employees and promoting fair labour standards. The Labour Act is applicable to all employers and employees but does not apply to members of the disciplined forces of Zimbabwe or those of a foreign State in the country on official orders.<sup>22</sup> Section 5 prohibits discrimination of employees on the grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or disability.

The Labour Act embodies several rights and provisions that impact on migrant workers. Labour migration affects both regular migrants and irregular migrants. Accordingly, there is a need to ensure that these two categories of migrants are adequately protected as required in terms of the Constitution and international law. In terms of Article 2 (1) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter referred to as the Migrant Workers Convention), a migrant worker is defined as:

[A] person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.

Provisions that impact on migration in the Labour Act are outlined in part 2, and include the following:

- (a) Employees' entitlement to membership in trade unions and workers' committees;
- (b) Prohibition of forced labour;
- (c) Protection of employees against discrimination;
- (d) Protection of employees' right to fair labour standards;
- (e) Protection of employees' right to democracy in the workplace.<sup>23</sup>

Part 3 of the Labour Act makes provision for prohibited unfair labour practices by the employer and trade union or workers' committees (sections 8 and 9), while part 4 further outlines general conditions of employment, some of which have an impact on labour migration. These include conditions relating to the employment of young persons, duration, particulars and termination of employment contract, remuneration and deductions from remuneration, as well as dismissal and retrenchment.<sup>24</sup>

The general impact of this Labour Act on labour migration is evident from its definition of an "employee", which is well in line with the Constitution in as far as it provides a broad definition that is not limited to citizens only but to every worker. Section 2 of the act defines an employee as:

[A]ny person who performs work or services for another person for remuneration or reward on such terms and conditions that the first-mentioned person is in a position of economic dependence upon or under an obligation to perform duties for the second-mentioned person, and includes a person performing work or services for another person.

<sup>22</sup> Section 3 of the Labour Act.

<sup>23</sup> Section 4, 4A, 5–7 of the Act respectively.

<sup>24</sup> Sections 11, 12 and 12A–12C respectively.

Accordingly, this entails that immigrant employees are also regulated by the Labour Act in the same way it does citizens and permanent residents. This definition further provides protection and equality for migrant workers regardless of their migrant status and is in line with the provisions of section 65 of the Constitution, as well as international law standards such as Article 7 of the Migrant Workers Convention, which implores State parties to:

[R]espect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.

In keeping with the definition of “employee”, the rights and entitlements of employees provided for in the Labour Act therefore accrue with similar import on migrant workers; thus, any need to improve the situation of workers in Zimbabwe has similar application on migrant workers as well.

In keeping with the provisions of sections 53, 54 and 55 of the Constitution that prohibit torture, inhuman treatment or punishment of people, slavery or servitude and forced or compulsory labour, sections 4A and 5 of the Labour Act equally prohibit forced labour and discrimination. Section 5 of the Labour Act states that:

No employer shall discriminate against any employee or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status or, subject to the Disabled Persons Act [Chapter 17:01], any disability referred to in the definition of “disabled person”.

Based on the foregoing, an interpretation of the Labour Act shows that this legislation is not only limited to citizens and permanent residents but also to all employees who fall within the definition. This interpretation is supported by the analysis of section 65 of the Constitution above, which concluded that it would amount to unconstitutional conduct to seek to exclude irregular migrant workers from the protections, benefits and entitlements in the Constitution reserved to employees by the common law.

### 3.9. GAP ANALYSIS AND RECOMMENDATIONS

Despite the protection of workers’ rights that also apply to migrant workers, the Labour Act, however, is deficient in as far as providing for rights and interests peculiar to migrant workers. This includes, for example, measures against unfair labour practices, to ensure social protection and rights to family reunification for migrant workers. The Social Welfare Assistance Act<sup>25</sup> only broadly provides for destitute people and makes no reference to migrant workers. The Refugees Act<sup>26</sup> and the Immigration Act have no specific reference to basic entitlements for migrant workers in respect of family reunification. Revisiting these provisions would go a long way towards complying with the spirit of Article 19 of the SADC Protocol on Employment and Labour (2014), which provides that State parties should ensure that fundamental rights are accorded to non-citizens especially labour and social protection rights. Article 50 of the Migrant Workers Convention requires the State of

<sup>25</sup> Chapter 17:06.

<sup>26</sup> Chapter 4:03.



employment to favourably consider granting an authorization to stay for family members of a migrant worker residing in that State on the basis of family reunion. This noble provision must find its way into immigration legislation.

Article 17 of the SADC Code on Social Security, a non-binding but persuasive instrument that was adopted in 2008, sets out core principles for each category of migrants, such that:

- All legally employed immigrants should be legally entitled to the same forms of social security as citizens of the host country;
- “Illegal residents and undocumented migrants should be provided with basic minimum protection”;
- Member States should uphold their obligations to refugees “in accordance with the provisions of international and regional instruments”.

Section 30 of the Constitution also provides that the State must, within its available resources, provide social security and social care to those in need. This entails that social security and social care should be provided even to migrant workers who maybe in need of such, and this should be reflected in the law.

In other jurisdictions, such as in South Africa, measures are put in place in the country’s labour laws to safeguard the interests of migrant workers in particular, beyond providing for acquisition of permits and the right to work in the country. The Employment Services Act (Act No. 4 of 2014) provides specific measures aimed at safeguarding the rights and interest of migrant workers regardless of their migrant status. Section 8 (4) of this act, for example, provides that employees, including irregular migrant workers, may enforce terms of the contract of employment that they hold, thus their migrant status does not deprive them of contractual entitlements. The section specifically provides that:

An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of any statute or employment relationship against his or her employer or any person who is liable in terms of the law.

Such a provision is critical in ensuring that migrant workers are not deprived of their contractual entitlements once service has been rendered or otherwise exploited on the basis of their migrant status.

Also, as a measure to protect the rights of migrant workers to equal and fair working conditions, Section 19 (2) of the Immigration Act of South Africa<sup>27</sup> requires that before a migrant worker is offered a general work permit, the prospective employer must make an undertaking that they will be employing the person on the same terms and conditions as accruing to citizen workers, including in respect of salaries and benefits. Such measures are lacking in the country’s labour and immigration acts and thus compromising the rights and interests of migrant workers, as well as the viability of Zimbabwe as a possible destination for skilled migrants in particular.

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<sup>27</sup> Act No. 13 of 2002.



### 3.10. REFUGEES ACT

In Zimbabwe, matter relating to refugees are regulated by the Refugees Act (Chapter 4:03), which is administered by the Ministry of Home Affairs and Cultural Heritage. The Refugees Act, among other things, seeks to give effect to the Convention relating to the Status of Refugees, the Protocol relating to Status of Refugees and the Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>28</sup> Accordingly, the Refugees Act adopts principles reflected in the international instruments it seeks to give effect to. The following aspects are positive strides reflected in the Refugees Act:

- The definition for “refugee” is similar to that provided in international and regional instruments;
- Section 13 provides for non-return of refugees and the members of their families to their countries of origin if there is a risk of being persecuted;
- Section 11 makes provision for families of recognized refugees to enter Zimbabwe and remain in the country and to be issued with an identity card.

Despite the ample positive provisions, the Refugees Act has several provisions that require alignment with the Constitution and international law. For instance, sections 19 (2) (b) and (3) of the Constitution implore the State to adopt measures and policies to ensure that children have shelter, basic nutrition, health care and social services. Further, section 30 of the Constitution provides that the State must take all practical measures within the resources available to provide social security and social care to those in need. In terms of section 31, the State is also obligated to take all practical measures within available resources to provide legal representation for those in need and who cannot afford a legal practitioner of choice.

Article 2 of the Convention on the Reduction of Statelessness provides that “a foundling found in the territory of a Contracting State shall, in the absence of proof to the contrary, be considered to have been born within that territory of parents possessing the nationality of that State”. This provision is reflected in section 36 (3) of the Constitution, which states that if a child who appears to be less than 15 years of age is found in Zimbabwe, that child is presumed to be a Zimbabwean citizen by birth. Section 81 of the Constitution provides for children’s rights and seeks to ensure that the best interests of children are protected.<sup>29</sup> Zimbabwe ratified the CRC with no reservations. In terms of Article 22 of the CRC and section 81 of the Constitution, Zimbabwe has an obligation to protect the best interests of the child.<sup>30</sup> The CRC clearly states that signatories to the convention have an obligation to accord such children the same protection as any other child permanently or temporarily deprived of his or her family environment.

For children born by migrants who cannot transfer their nationality, two options are open. Firstly, the child can seek citizenship on the basis of registration. Section 38 of the Constitution enables a person who has been continuously and lawfully resident in Zimbabwe for at least 10 years to apply for citizenship. If one parent is a Zimbabwean citizen, they can apply for citizenship by birth or descent. However, if neither parent is Zimbabwean, and are unable to transfer their nationality to their children, the Zimbabwean Constitution has an interesting answer. Firstly, all children, whether born of irregular or regular migrants, have some special rights and entitlements. These include the right to a birth certificate where the child is born in Zimbabwe, regardless of the circumstances of the parents. There are no rights to citizenship. However, section 47 of the Constitution allows persons to claim rights conferred by any law where such rights are not in the Declaration of Rights. Such law includes international law. What this means is that any child can claim a right to citizenship if it can be proved that such right is available in international law.

<sup>28</sup> Preamble of the Refugees Act.

<sup>29</sup> Section 81 of the 2013 Constitution.

<sup>30</sup> Ibid.

Another important issue relates to the protection of unaccompanied and undocumented children. This issue is not covered in the Refugees Act. The Refugees Act only refers to families of recognized refugees and makes no reference to unaccompanied and undocumented children. The Children's Act defines a "child in need" as a child or young person who is destitute or has been abandoned or both of whose parents are dead or cannot be traced and who has no legal guardian. Unaccompanied and undocumented children can be classified as children in need, and hence are entitled to get protection under the Children's Act.

The Social Welfare Assistance Act defines a destitute or indigent person as any person who lacks means of subsistence. Section 5 of the Social Welfare Assistance Act outlines the different forms of social assistance that can be granted.<sup>31</sup> It is most likely that unaccompanied undocumented children lack means of subsistence and require, inter alia, educational funding assistance. This means that they need to be documented for them to obtain an education. The different forms of social assistance listed in the Social Welfare Assistance Act do not, however, envisage provision of assistance to unaccompanied undocumented children to the extent that they need assistance in being documented.

Despite section 36 (3) of the Constitution stating that children under the age of 15 years whose parents and nationality is not known are presumably Zimbabwean citizens, there is currently no statute that recognizes unaccompanied undocumented children. The Births and Deaths Registry Act does not provide for unaccompanied and undocumented children and how they can become legally documented. More so, there is no legal framework that provides for assisting undocumented and unaccompanied children in obtaining citizenship. Again, this is a weakness of national law; affected persons may have to make use of international human rights law for remedy and relief.<sup>32</sup>

The current migration legal framework therefore does not sufficiently address unaccompanied undocumented children in ensuring that they become documented. In terms of Article 3 of the CRC, the best interests of the child shall be the primary consideration in all actions concerning children undertaken by any entity. The convention also guarantees the right to life, an identity and nationality, as well as a name and family relations.<sup>33</sup>

### 3.10.1. Detention of refugees and protected persons

While section 50 of the Constitution states that a person detained must be brought before a court of law within 48 hours, section 15 of the Refugees Act provides for the expulsion of refugees. A progressive provision, however, is that no proceedings shall be instituted or continued against any person or any member of the family in respect of one's unlawful entry into or unlawful presence within Zimbabwe if that person has applied to be recognized as a refugee.<sup>34</sup> These provisions take precedence over the provisions of the Immigration Act. In addition, there are better protections for refugees than irregular migrants in Zimbabwe, with provisions for family reunification existing in the Refugees Act.

<sup>31</sup> (a) in financial form shall be in such amount as, having regard to the circumstances of the beneficiary, the Director deems reasonable and sufficient, but shall not exceed such rate as may be prescribed;

(b) otherwise than in financial form may take any of the following forms—

- (i) rehabilitation, institutional nursing, boarding or foster home care;
- (ii) counselling services;
- (iii) the provision of orthopaedic and orthoptic appliances;
- (iv) occupational training;
- (v) pauper burials;
- (vi) the supply of food or clothing;
- (vii) any other assistance necessary to relieve destitution.

<sup>32</sup> Again, section 47 of the Constitution may be useful here. Persons can seek to enforce rights and freedoms not in the Bill of Rights if such rights can be sourced from other sources of law in Zimbabwe such as international law.

<sup>33</sup> Articles 6 and 8 of the CRC respectively.

<sup>34</sup> See section 9 of the Refugees Act.

There are, however, a number of worrisome provisions in the Refugees Act. For instance, section 15 provides that the Minister of Home Affairs and Cultural Heritage may order the expulsion from Zimbabwe of any recognized refugee or protected person if he/she considers the expulsion to be necessary or desirable on the grounds of national security or public order. There is no right of appeal available to the affected refugee, although the person can appear and make representations before the minister. The person can also make use of administrative justice provisions in the Constitution and the Administrative Justice Act, which grants protection to every person affected by administrative action.

Section 16 of the Refugees Act provides that once such an expulsion order is made by the minister, an authorized officer may arrest and detain the recognized refugee or protected person whose expulsion has been ordered, pending the completion of arrangements for expulsion from Zimbabwe. The detention can be in a prison or police cells or other such place. There is no requirement of release of such persons within 48 hours as required by the Constitution. This is a blatant violation of international law, particularly the Convention Relating to the Status of Refugees. There is a striking similarity of these provisions with section 8 of the Immigration Act, which states that prohibited persons can be detained for up to 14 days, which is contrary to section 50 of the Constitution.

All in all, there is no doubt that the raft of protections for irregular migrants seeking to benefit from refugee status are outweighed by the arbitrary possibilities of maltreatment in the hands of the State officials. Clearly, these provisions need to be aligned with both the Constitution and relevant provisions of international law. Only such alignment can protect the rights of migrants and enhance migration governance and management frameworks. It has to be said that the provisions of the 2013 Constitution would render the legislative provisions untenable and unconstitutional. From the direct application of constitutional provisions, there is a better regime of protections and entitlements under the Constitution than under relevant legislation.

### **3.11. INTERNALLY DISPLACED PERSONS**

Zimbabwe has an international obligation to protect internally displaced persons (IDPs). This is because Zimbabwe ratified the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), which provides for the protection of IDPs. Further, Zimbabwe is bound by the United Nations Guiding Principles on Internal Displacement (1998).

Section 34 of the Constitution relates to IDPs. It provides that the State must ensure domestication of all international conventions, treaties and agreements. Further, in terms of Article 3 (2)(a) of the Kampala Convention, Zimbabwe has an obligation to incorporate its obligations into domestic law by enacting or amending relevant legislation on the protection and assistance of IDPs.

Currently, there is no legislation that provides for IDPs in Zimbabwe despite constitutional provisions such as section 74, which prohibits evictions of persons from their homes unless there is a court order granted after considering all relevant circumstances. Section 71 (3) of the Constitution also prohibits compulsory deprivation of one's property. Further, section 28 of the Constitution provides that the State also has a duty to enable everyone to have access to adequate shelter. Thus, in the absence of primary legislation, the protections provided in the Constitution can be activated in the interests of regular and irregular migrants.

Further, although there is no law or policy that directly regulates IDPs, there are several issues outlined in the Kampala Convention that need to be reflected in Zimbabwe's domestic laws. Some of the important issues are outlined here below.

### 3.11.1. Prevention of displacement of people

Section 74 of the Constitution prohibits arbitrary evictions and provides additional protections that are in line with international standards, such as the United Nations Committee on Economic, Social and Cultural Rights General Comments 4 and 7. A reading of section 74 of the Constitution entails that evictions can only be done if a court has considered all relevant considerations and issued an order in favour of the eviction. Article 4 of the Kampala Convention provides that:

State Parties shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, so as to prevent and avoid conditions that might lead to arbitrary displacement of persons.

#### Recommendation

There is a need to enact a statute that provides for the protection of and assistance to IDPs with the aim of avoiding and limiting conditions that may lead to arbitrary eviction of persons. The proposed statute must also give effect to Principle 7 of the United Nations Guiding Principles, which states that:

Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

Article 9 of the Kampala Convention further states that member States have an obligation to:

[...] Provide internally displaced persons to the fullest extent practicable and with the least possible delay, with humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services [...]

This must be reflected in provisions of domestic legislation.

# CHAPTER 4

## 4. STAKEHOLDERS' PERSPECTIVES AND RESPONSES

### 4.1. STAKEHOLDERS' PERSPECTIVES ON AN EFFECTIVE MIGRATION FRAMEWORK AND RECOMMENDATIONS

Migration issues are numerous, cross-cutting and complex. They range from challenges in health, environment, education, gender and access to judicial remedies, among others. Stakeholders who were interviewed observed various hurdles in the development of an effective migration framework. These include lack of data collection and management that is imperative to design a successful migration policy, concentration of government efforts only on migration of highly skilled nationals and remittances, and finally the lack of coordination and cooperation between State administrations concerned with migration.

### 4.2. STAKEHOLDERS SURVEY AND DATA COLLECTION

A combination of research tools was used in undertaking activities envisaged under the two focus areas, namely:

- (a) Assessment of the extent to which existing migration laws are in conformity with the Constitution and international treaties and conventions;
- (b) Assessment of stakeholders' perspectives on an appropriate migration legal framework for Zimbabwe.

On the first key focus area, the assessment looked at the strengths, weaknesses and challenges associated with the existing migration legal framework, in particular the 2013 Constitution and international law. This was done through a desk study of the existing migration legal framework.

On the second key focus area, an assessment of stakeholders' perspectives on an appropriate migration legal framework for Zimbabwe was done. Activities under this focus area were aimed at obtaining stakeholder input on challenges faced under the current migration legal framework, as well as their perspectives on an ideal migration legal framework for Zimbabwe. This was done through a field survey undertaken through KIs targeting relevant stakeholders.

The survey sample focused on the following stakeholders: Ministry of Justice, Legal and Parliamentary Affairs, Ministry of Home Affairs and Cultural Heritage, Ministry of Public Service, Labour and Social Welfare, and Ministry of Industry and Commerce, as well as the following civil service organizations: Zimbabwe Women Lawyers Association, Women in Politics Support Unit, Musasa and Childline Zimbabwe. It also included the Zimbabwe Congress of Trade Unions, the United Nations High Commissioner for Refugees, the Transporters' Association of Zimbabwe and the Cross-Border Traders Association.

The views of the stakeholders are captured in the survey report (Table 4).

**Table 4. Stakeholders' survey report**

Institution	Law	Response
<b>Ministry of Justice, Legal and Parliamentary Affairs</b>	Immigration Act	<ul style="list-style-type: none"> <li>■ The Immigration Act prohibits entry of disabled persons into Zimbabwe unless they are accompanied. This must be revisited since it might be contrary to the Constitution.</li> <li>■ The grounds listed in the Immigration Act to deny people entry into Zimbabwe do not reflect reality. This aspect needs to be revisited.</li> <li>■ The Immigration Act has a colonial tone that needs to be addressed.</li> <li>■ The Immigration Act gives Immigration Officers a lot of powers that are ultra vires the Constitution, such as detention of illegal immigrants without being brought into a court of law.</li> <li>■ Criminal cases of illegal immigrants are mostly referred to the magistrates' courts. To ensure court attendance, immigrants are immediately placed in remand prison. This is not advisable as it violates the presumption of innocence. This practice must be revisited so that it is in tandem with the Constitution's right to fair trial, rights of accused persons and right to bail.</li> <li>■ Irregular immigrants must be treated separately from suspected criminals and convicted offenders.</li> <li>■ There is a need for a specialized institution administered by the Immigration Department and focusing on migrants.</li> <li>■ There is a need for enhanced border management systems, such as border security and crime detection.</li> <li>■ Officials at the country's borders lack human rights training. They must be trained more on human rights.</li> <li>■ The brain-drain crisis has affected border management and related issues.</li> </ul>
		<p>General recommendations</p> <ul style="list-style-type: none"> <li>■ There is a need for policy revision to ensure that Zimbabwean migration policies are in line with international best practices.</li> <li>■ Most of the migration laws and policies were set during the colonial era, hence the need to revisit these policies and laws so that they are in line with the ever-evolving global trends.</li> <li>■ The migration law must be made consistent with the Constitution.</li> </ul>
<b>Ministry of Home Affairs and Cultural Heritage</b>	Trafficking in Persons Act	<ul style="list-style-type: none"> <li>■ The ministry is yet to decide on whether the Trafficking in Persons Act should be amended to include a component on smuggling or a separate law on smuggling should be put in place.</li> <li>■ Thus far, aspects of smuggling have been addressed, but there is a need to do more to provide stronger legislative response and mechanisms to combat the scourge.</li> <li>■ In some instances, embassy staff are accomplices in the trafficking of persons, compounding this problem.</li> <li>■ There are also several cases of internal trafficking, but there is a lot of secrecy surrounding this; thus, information is not easily accessible.</li> <li>■ The Trafficking in Persons Act, on the other hand, is silent on internal trafficking, and this poses a challenge in combating this form of trafficking.</li> </ul>
	Immigration Act	<ul style="list-style-type: none"> <li>■ Zimbabwean migration laws were drafted and enacted many years back; hence, they do not take into account contemporary issues on migration. For instance, the Immigration Act is limited to exit and entry, yet there are trade issues that form part of migration.</li> <li>■ The migration policies and laws also do not address issues, such as migration and terrorism.</li> </ul>
	Refugees Act	<ul style="list-style-type: none"> <li>■ At the African Union level, countries are obligated to take an equal burden to address issues affecting refugees, and this should be fully reflected in the refugee law in respect of treatment of refugees.</li> </ul>

Institution	Law	Response
	Other issues	<p>Challenges faced by the ministry in its role in migration governance:</p> <ul style="list-style-type: none"> <li>■ Funding is a major challenge. The ministry has no line budget on migration, as this issue has received low priority in the national budget.</li> <li>■ There is a lack of technical skills due to continuous movement of personnel.</li> <li>■ There is also lack of political will to address migration issues, such as naturalization and citizenship.</li> </ul> <p>General challenge facing Zimbabwe that affect migration governance:</p> <ul style="list-style-type: none"> <li>■ Poverty and lack of financial resources (economic challenges)</li> </ul> <p>Required interventions to improve the ministry's function in migration governance:</p> <ul style="list-style-type: none"> <li>■ There is a need for capacitation in terms of funding and mobility.</li> <li>■ There is a need for continuous training on global trends relating to migration issues.</li> <li>■ There is a need to convince treasury to allocate funding and prioritize migration issues.</li> </ul>
<b>United Nations High Commissioner for Human Rights (UNHCR)</b>	Refugees Act	<ul style="list-style-type: none"> <li>■ The reservations entered by Zimbabwe in respect of the Convention relating to the Status of Refugees pose a huge problem. The reservations in question on the right to freedom of movement, right to education and the right to work. In terms of the Refugees Act, refugees do not enjoy these rights. Usually, employment is offered to local people and the refugees are restricted to refugees' camps.</li> <li>■ These reservations must be lifted since the right to work is granted to everyone by the Constitution.</li> </ul>
	Trafficking in Persons Act	<ul style="list-style-type: none"> <li>■ The Trafficking in Persons Act places much emphasis on external trafficking rather than internal trafficking.</li> <li>■ The current Trafficking in Persons Act does not adequately address the issue of smuggling. It is advisable to deal with smuggling first before venturing to human trafficking.</li> </ul>
	Other issues	<ul style="list-style-type: none"> <li>■ The Immigration Department must operate in a manner that adapts to modern development trends.</li> <li>■ Database systems must be introduced to record all the information about refugees and asylum seekers.</li> <li>■ The question around good governance and corruption within the Immigration Department must be addressed. This entails giving employees enough remuneration in order to curb corrupt tendencies.</li> </ul> <p>Unaccompanied minors:</p> <ul style="list-style-type: none"> <li>■ Unaccompanied children run the risk of child trafficking and rape.</li> <li>■ It is also difficult to distinguish whether these children are just unaccompanied or are being trafficked.</li> </ul>
		<p>Challenges related to refugees:</p> <ul style="list-style-type: none"> <li>■ Lack of asylum facilities is causing unnecessary detention of asylum seekers in the prison system.</li> <li>■ Lack of transport also contributes to detention of asylum seekers in prison system before they are transported to refugees' camps.</li> <li>■ Attitude of authorities – The authorities do not take asylum seekers seriously because historically, foreigners such as Somalians use Zimbabwe as their route to other countries such as South Africa.</li> <li>■ There is a need to balance humanitarian factors with security of the country.</li> </ul>

Institution	Law	Response
Ministry of Foreign Affairs	Immigration Act	<ul style="list-style-type: none"> <li>■ Inadequate data and information on the status of migration in the country hinders migration management.</li> <li>■ Zimbabwe borders are porous, encouraging irregular migration.</li> <li>■ Undocumented citizens also hinder effective tracking of migration trends in Zimbabwe.</li> <li>■ Inadequate coordination with relevant line ministries and stakeholders also hinders effective migration management.</li> <li>■ Lack of a migration policy is also a hindering factor.</li> </ul>
Ministry of Women's Affairs, Gender and Community Development	Trafficking in Persons Act	<ul style="list-style-type: none"> <li>■ More and more women are in poverty, hence, they are vulnerable to trafficking.</li> <li>■ Women migrants are also vulnerable to labour and sexual exploitation.</li> </ul> <p>Challenges faced by the ministry regarding promoting the rights of women relating to migration:</p> <ul style="list-style-type: none"> <li>■ The attitude of the migrants themselves is a barrier. They do not seek any assistance or guidance from the ministry before they migrate. They only look for advice when there is trouble. As a result, the ministry mostly interacts with migrants when a violation has already occurred.</li> <li>■ Although the ministry runs a women development fund, most trafficking survivors are however not willing to take loans from these grants because they have to pay back the loans with interest, which affects their ability to reintegrate in society and build livelihoods.</li> <li>■ The ministry must come up with more favourable loan conditions to assist trafficking victims.</li> <li>■ The community development coordinators responsible for disseminating information need to be capacitated with relevant knowledge relating to trafficking of persons.</li> </ul>
Ministry of Public Service, Labour and Social Welfare	Labour Act	<ul style="list-style-type: none"> <li>■ Employment regulations must be synchronized with anti-trafficking laws so that employment services cannot be used as a conduit for human trafficking.</li> <li>■ Employment service regulations must also have mechanism aimed at reaching/regulating the digital world because most migrant workers are employed online.</li> <li>■ There must also be a link between labour regulations and those that are under the Ministry of Higher and Tertiary Education to cater for foreign students.</li> <li>■ There is a need for one recruitment focal point for all Zimbabweans who work abroad.</li> </ul>
	Other issues	<p>Challenges faced by migrant workers:</p> <ul style="list-style-type: none"> <li>■ Language barriers, as most of the migrant workers, do not speak English.</li> <li>■ Culture barriers – In some cultures, it is acceptable for the employer to harass employees, but in Zimbabwe, this is not acceptable.</li> <li>■ Different working hours.</li> <li>■ Some of the migrants' workers are given wrong legal advice by their legal advisors who are only interested in money.</li> <li>■ Some migrants come without proper paperwork and lack adequate cash reserves.</li> </ul>
	Other issues	<ul style="list-style-type: none"> <li>■ The country's laws relating to trade facilitation do not have regulations that help improve implementation.</li> <li>■ One of the major challenges is lack of funds for the one-stop border facilities that is envisaged to facilitate efficiency, transparency and border management. Such border facilities come with extensive information and communications technology requirements and currently, Zimbabwe has no funds for that.</li> <li>■ The ministry lacks a research capacity to facilitate their understanding of migration issues.</li> </ul>



Institution	Law	Response
	Trafficking in Persons Act	<ul style="list-style-type: none"> <li>■ The Trafficking in Persons Act is a new law, and there is lack of awareness on trafficking issues, particularly on internal trafficking.</li> <li>■ Young women (mostly) are being internally trafficked and forced into unpaid labour, and some end up being lured into prostitution.</li> <li>■ The Trafficking in Persons Act is a positive step that provides mechanisms to prosecute such offenders.</li> <li>■ However, like any other law, the Trafficking in Persons Act can still be strengthened to respond to the current trends that are going on, such as misuse of technology that is currently aiding trafficking.</li> <li>■ Zimbabwe laws are silent on the use of technology to aid trafficking. This is another area that can be addressed by the Trafficking in Persons Act and any other laws.</li> <li>■ The definition for trafficking is not comprehensive.</li> <li>■ There is a need to spell out the duties of the specific duty-bearers because it is a causal chain, as is the case in the Domestic Violence Act. There is a need to clarify duties of duty-bearers in addressing trafficking.</li> <li>■ There is a need to look at the bilateral relations that Zimbabwe has with other countries. For example, there is a need to adequately address migration issues through repatriation of victims that is possible through bilateral relations.</li> <li>■ Victims also want their cases/issues to be confidential.</li> <li>■ The law should also provide for reintegration of trafficking victims.</li> </ul>
	Trafficking in Persons Act	<ul style="list-style-type: none"> <li>■ There are a lot of gaps in the Trafficking in Persons Act as it does not provide for internal trafficking and internal migration.</li> <li>■ Irregular migration is a huge problem, and there is a need to address underlying problems such as non-documentation of people.</li> </ul>
	Immigration Act	Border officials have too wide discretion that some end up misusing by either overcharging cross-border women or asking for sex in exchange of paying for duty; this wide discretion needs to be curbed.
	Births and Deaths Registration Act	<p>Migration challenges facing women:</p> <ul style="list-style-type: none"> <li>■ Women have a challenge of accessing identity documents, and they are largely undocumented especially in border-lying areas. One of the challenges is that there are no centres for birth and identity document registration in some such areas.</li> <li>■ There is a need for decentralization of birth registry areas so that they can easily be accessed by women in remote areas.</li> <li>■ There are also issues to do with accessibility of services. Women cross the border to get access to health-care services and basic socioeconomic services in neighbouring countries. When they give birth in these countries, their children end up being undocumented in Zimbabwe.</li> </ul>
	Other issues	<ul style="list-style-type: none"> <li>■ There is a need for a comprehensive assessment of the current situation before an effective legal framework can be proposed.</li> <li>■ There is a need to empower local authorities more as they also face migrations issues.</li> <li>■ In some instances, access to education is a challenge so children end up dropping out of school and turning to irregular migration to look for other opportunities that will help them sustain their families and themselves.</li> <li>■ It is more important to do an analysis on the legal framework and practicalities (that is, what is happening on the ground).</li> </ul>

Institution	Law	Response
Musasa Project		<ul style="list-style-type: none"> <li>■ The provisions in Trafficking in Persons Act are yet to be fully implemented.</li> <li>■ There is no structure that has been put in place to ensure that trafficked persons have access to counselling or shelter. Instead, the Government relies on organizations such as Musasa to provide these social services.</li> <li>■ The act is not clear on whether the Government has an obligation to repatriate trafficked persons or not.</li> <li>■ Most people are not yet aware of internal trafficking. For examples, there are issues whereby one is forced to migrate from rural to urban to work without payment.</li> <li>■ The definition of trafficking in the act has to be revisited since it is not clear. There is a need to address the issue of smuggling. The definition of trafficking should be revisited to include aspects of smuggling.</li> </ul>
	Immigration Act	<ul style="list-style-type: none"> <li>■ There is a need to strengthen border control to curb corruption. Currently, corruption is occurring at borders without any repercussions to the perpetrators that affects effective migration management at the border.</li> <li>■ The duty-bearers must be educated on issues of trafficking: for example, what is trafficking and how can it be addressed?</li> </ul>
Childline Zimbabwe	Other issues	<p>Common challenges that the country is facing relating to migration governance:</p> <ul style="list-style-type: none"> <li>■ Parents who give birth in South Africa require ZWL 50 for registration, and this hinders documentation of these children as most of the parents cannot afford this money. The fee should perhaps be reduced.</li> <li>■ Reports of cases of sexual abuse of Zimbabwean irregular migrants are rampant. However, when they go to report to a health centre, they are arrested because of being undocumented, which violates the right of access to health care.</li> <li>■ There is a need to consider the waiver of the affidavit requirement when one parent is crossing the border with the child in the absence of the other parent.</li> <li>■ There is a need for governments to discuss with regards to issues of protection, as well as implementation of international and regional laws.</li> <li>■ There is also a need for the Government to have bilateral agreements with other countries since migration is not restricted to one area or country.</li> </ul> <p>Refugees:</p> <ul style="list-style-type: none"> <li>■ Within the Tongogara refugee camp, there is a need to ensure that the environment is safe for children and for everyone's health and well-being.</li> <li>■ There is a need for quicker erection of houses at the camp because currently, refugees are living in tents.</li> <li>■ Refugees have changed their entry points and hence the need to provide transport for them to Tongogara.</li> </ul>

Institution	Law	Response
Zimbabwe Congress of Trade Unions	Labour Act	<p>Challenges relating to labour migration in Zimbabwe:</p> <ul style="list-style-type: none"> <li>■ Irregular migration – where migrants do not use formal channels to migrate and seek employment.</li> <li>■ Non-documentation and classification – labour organizations cannot determine the number of migrants, their sex and ages since some of the migrants go via informal means.</li> <li>■ Uneven competition – In SADC, some countries offer lucrative salaries; hence, this is a pull factor, as migrants go to these places seeking better salaries.</li> <li>■ High victimization of workers – through under- and non-payment of salaries and non-representation of migrant workers.</li> <li>■ Migrant workers face discrimination, arbitrary violation of workers and human rights because they are foreigners.</li> <li>■ Issues of statelessness are also of concern; some countries have legislation that prevents children born from foreigners from being registered as citizens. Since these children grow without any form of documentation, they will be stateless and denied opportunities to go to schools and access basic facilities such as health-care institutions.</li> <li>■ Furthermore, undocumented migrant workers may be denied access to health care and access to financial institutions.</li> <li>■ The greatest challenge in offering support to migrant workers is the issue of accessibility. It is harder to reach out to many people who are located in different countries and also sister organizations, such as the Congress of South African Trade Unions and Botswana Federation of Trade Unions, do not assist as quickly as would have been expected when approached by Zimbabwe migrant workers.</li> <li>■ In some instances, undocumented migrant workers are forced to pay protection fees to have some form of protection from labour and Home Affairs officials.</li> <li>■ There is a need to ratify international conventions with a bearing on labour and migrant workers.</li> <li>■ There is a need to include labour organization whenever the Government negotiates key bilateral agreements; labour organization will then secure the rights of migrant workers in these bilateral negotiations.</li> <li>■ Develop programmes to conscientize and inform migrants and would-be migrant workers on all issues relating to migration and labour.</li> <li>■ There is a need to have a focal person in places of departures, such as Beitbridge border post and Chirundu border post, to offer information and advice.</li> <li>■ Current immigration laws alone are not adequate to address migration challenges.</li> <li>■ There is also a need to finalize the migration policy that has been with the Cabinet for some time.</li> <li>■ For Zimbabwe, labour migration issues are not dually treated well, mainly because Zimbabwe exports labour; the Government is mainly concerned with remittances than any other issues.</li> </ul>

Institution	Law	Response
<b>Transporters Association of Zimbabwe</b>	<p>Customs and Excise Act (Chapter 23:02)</p> <p>Other issues</p>	<ul style="list-style-type: none"> <li>■ The sector generally has no problems with immigration in Zimbabwe for as long as the driver has a passport and other documentation relating to the freight.</li> <li>■ One of the biggest challenges affecting the sector is that there is no recognition or special dispensation for cross-border truck drivers, such as when it comes to applying for passports. Cross-border truck operators also have to queue for passports just as ordinary citizens and similarly wait for the same period as other citizens. This is highly detrimental to the business as it results in the transport operators having to employ other people when their ordinary drivers await passports.</li> <li>■ The customs sector is a big impediment for transporters for a number of reasons that include the officers having too wide discretionary powers.</li> <li>■ It also appears that there are no laid-down procedures for aspects, such as how and under what circumstances they should conduct searches that appear to be largely ad hoc.</li> <li>■ The attitude of customs officials is to treat every transporter as if they were a smuggler, which attitude leads to the poor treatment that customs officials give to cross-border transporters, and this attitude needs to change especially for recognized businesses who have all their paperwork in order.</li> <li>■ There is no separation of traffic at the Zimbabwean borders where commercial transporters, buses and private cars are treated the same. In South Africa, commercial vehicles are treated separately.</li> <li>■ Aside from the above, most challenges faced by this sector relate to what they face across borders and not necessarily within Zimbabwe as follows: <ul style="list-style-type: none"> <li>(a) Freight drivers face challenges where their passports expire or get lost during transiting of goods in a foreign land.</li> <li>(b) Some countries have stricter rules, such as truck drivers are given a very limited number of days to conduct their business, and many a times where one is delayed while transporting goods in that foreign country, the allotted days expire while in the foreign land, creating problems for the truck drivers when they get to the border.</li> <li>(c) The drivers end up being fined for overstaying, which reflects on their personal passports as they are deemed prohibited immigrants.</li> <li>(d) Although Zimbabwe has bilateral agreements with other countries in the region that should serve to facilitate ease of doing business for cross-border transporters, these are mostly too general and their implementation is not effective.</li> <li>(e) In other cases, the bilateral agreements are rejected by other countries on account of being contrary to applicable laws of that country at a given moment.</li> <li>(f) It appears that there is an understanding of issues relating to immigration/customs for cross-border transporters, but it seems that the same does not extend to the border control/Immigration officials who often exhibit a hostile and retrogressive attitude.</li> </ul> </li> </ul> <p>Recommendations:</p> <ul style="list-style-type: none"> <li>■ Online passport applications must also be facilitated especially for such categories of business-related applicants.</li> <li>■ Zimbabwe needs to prioritize having business passports.</li> <li>■ Online passport applications must also be facilitated especially for such categories of business-related applicants.</li> </ul>
<b>Zimbabwe Cross-Border Traders Association</b>	Immigration Act	<ul style="list-style-type: none"> <li>■ Immigration Officers have too wide discretionary powers that result in some abusing their powers to the detriment of cross-border traders.</li> </ul>

Institution	Law	Response
	Customs and Excise Act (Chapter 23:02)	<ul style="list-style-type: none"> <li>■ Zimbabwe Immigration does not pose much challenges for traders but at customs where a bill of entry is required for any goods that are considered “commercial” despite the existence of the COMESA Simplified Trade Regime agreement, which Zimbabwe also signed and recognizes that small-scale traders can move goods of up to USD 1,000 duty free. The Government of Zimbabwe, however, appears not to recognize this concession that negatively impacts small-scale traders.</li> <li>■ Small-scale traders are currently treated just as huge commercial traders especially at customs, which is affecting their profitability and sustenance.</li> <li>■ Excessive taxation promotes splitting of goods by traders to escape tax, thus short-changing the economy.</li> </ul> <p>Recommendations:</p> <ul style="list-style-type: none"> <li>■ While COMESA has a concession that originating goods can be traded duty free within the region, this concession should be extended to non-originating goods. The non-existence of concessions for non-existing goods is ultimately short-changing governments’ revenue collection, including the Government of Zimbabwe, as traders split non-originating goods at the border to avoid paying the required duty.</li> <li>■ The Government must put in place special concessions to ensure that lenient duty costs are in place for non-originating goods. This is key in promoting voluntary compliance with taxation/duty requirements.</li> <li>■ The Government must consider a traders’ licence that also has clear benefits for traders. This is important to enhance their ease of doing business, as well as the Government’s ability to benefit from this sector in terms of revenue.</li> </ul>
	Other issues	<ul style="list-style-type: none"> <li>■ The Government must formally recognize formal cross-border traders including by formulating a law to facilitate their easy and profitable operations.</li> <li>■ The Government must also consider coming up with a business visa that formal cross-border traders can also apply for.</li> <li>■ The COMESA Simplified Trade Regime is also required at the SADC level, including at the immigration level, so that traders can be exempted from the existing 90-day visa framework, which is quite limiting for small-scale traders (that is, the SADC 90-day visa means that one cannot visit a country for more than 90 days cumulatively). The Government needs to take measures to lobby for this.</li> <li>■ There are xenophobic tendencies, especially when traders cross to South Africa.</li> <li>■ Existing channels to appeal against granting of fewer days across the border than required by traders are ineffective. In fact, the channels that ought to be used are rather unclear.</li> </ul>

# CHAPTER 5

## 5. GENERAL FINDINGS AND RECOMMENDATIONS

### 5.1. KEY FINDINGS

A number of key findings have been made in relation to the nature, scope and extent of legislative framework underpinning migration governance in Zimbabwe. The major findings are as follows:

#### 5.1.1. Migration governance and domestic law

Zimbabwe's migration governance is centred on a domestic legislative framework that is subsidiary to the Constitution, which is the supreme law. A number of different governments implements and enforces this legal framework. There is a disjuncture between the vaunted and progressive constitutional provisions as a result of the Constitution post-dating all migration laws. This disconnect presents serious challenges to migration governance and management, and this adversely impacts on the rights, interests, security and integrity of regular and irregular migrants.

#### 5.1.2. Domestic migration governance regime disconnected from international norms

It is clear that Zimbabwean migration laws are, first and foremost, influenced by general norms underpinning the national legal, social, political and economic system. This reality is based on the need to establish a migration governance framework unique to the nation, based on specifically identified migration needs, patterns, data, trends and statistics. Apart from domestically sourced norms and standards, the country's migration laws have been influenced by legal norms and principles from both the regional and international legal framework. This has been possible owing to Zimbabwe's membership to the United Nations, the African Union and SADC.

The pressure and influence exerted by these international institutional frameworks in relation to migration is very significant. However, despite Zimbabwe's membership in, and interaction with these significant norm-creating institutions, there has been a slow pace in relation to international norms cascading to domestic law. Indeed, progressive, qualitative changes in the international, continental and subregional normative framework have not been matched by changes in Zimbabwe's migration law.

#### 5.1.3. Law lags behind global and regional developments

Key legislation governing migration governance and management is outdated, and resultantly, suffer from serious weaknesses that impact negatively on migrants. These laws include the Immigration Act, the Refugees Act and anti-trafficking legislation. Several shortcomings also exist in labour law, employment law and education law. Fortunately, the 2013 Constitution of Zimbabwe appear progressive enough to prop legislative reforms aimed at addressing these gaps in the law. The Government of Zimbabwe, through the Ministry of Justice, Legal and Parliamentary Affairs, is involved in a comprehensive process to align key migration legislation with the progressive and human rights-oriented provisions of the

Constitution. This alignment offers serious opportunities to address the gaps and weaknesses in key migration legislation that can be perceived as militating against comprehensive migration governance and management in Zimbabwe.

#### 5.1.4. Lack of harmonized institutional governance

The migration governance framework has also entailed the involvement of various government institutions and departments in Zimbabwe. Overlaps and duplications among different government departments are a reality, and this has the potential of adversely impacting on the rights of migrants. There is a real opportunity for cooperative governance between these institutions. Further, there is a serious opportunity for a multisectoral approach in the implementation of laws and coordination of the various work of these institutions.

## 5.2. GENERAL RECOMMENDATIONS

Related to the general findings, the general recommendations made can be tabulated as below.

**Table 5. Summary of general recommendations**

<b>Constitutional framework</b>	<ul style="list-style-type: none"> <li>■ The Constitution must spur legislative reforms in migration law. These provisions must be given effect to by equally progressive legislative provisions that can be utilized to improve the protection and promotion of the rights of migrants in Zimbabwe.</li> </ul>
<b>Legislative framework</b>	<ul style="list-style-type: none"> <li>■ The most important immigration laws are outdated and must be updated; they pre-date the 2013 Constitution and lack contemporary international standards and best practices around migration. The issue of updating these laws must be given serious consideration, especially in view of the 2013 Constitution.</li> <li>■ Further, since migration is cross-cutting, the administration of all laws impacting on migration must be based on intergovernmental cooperative governance.</li> <li>■ The cross-sectoral nature of migration issues must characterize relevant provisions and institutions. This would mean that migration governance issues are addressed holistically.</li> <li>■ Standards in primary migration laws must cross-pollinate other relevant laws and regulations.</li> </ul>
<b>Institutional framework</b>	<ul style="list-style-type: none"> <li>■ Institutions such as government agencies and departments that administer migration-related laws and regulations must promote the human rights, among other needs of migrants.</li> <li>■ The practical problems these institutions are confronted with when implementing law and policy must inform legislative amendments and developments.</li> <li>■ The Department of Immigration must be central in the regulation and administration of migration issues. Accordingly, this department must be granted the legal mandate and competence to coordinate all institutional approaches, strategies and efforts in migration issues, working with various other relevant agencies and institutions.</li> </ul>

## 5.3. CONCLUSION

Issues around migration are cross-cutting and complex. This report has identified the gaps that exist in the 2013 Constitution, national legislation and the institutional systems administering migration governance. Most of these gaps are a result of a complex mix of factors, some of which were identified by stakeholders consulted during the research. The research done has illustrated various aspects, including the fact that migration patterns are not stagnant, and so legislation enacted a generation or more ago is likely to be inadequate in addressing ever-evolving migration challenges. Zimbabwe must thus establish an effective migration governance framework that meets its unique domestic challenges while always respecting international and regional standards in migration.

# ANNEX

## QUESTIONNAIRE

### Questions

1. What role does your ministry play in relation to migration in Zimbabwe? [interface]

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2. Which laws or polices, if any, do you administer that relate to or affect aspects of migration?

- a. Are they adequate to expedite your functions?

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3. Issues/challenges raised with the ministry relating to migration

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4. In your perspective, what are the common challenges that the country is facing relating to migration issues?

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5. In your view, what are the key mechanisms and structures that should be at hand to facilitate effective migration?

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6. How adequate are Zimbabwe's laws and policies relating to border management in facilitating an effective migration framework? If there are gaps, which are they and how can these be addressed?

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7. What are some of the challenges that you face as a ministry in relation to migration issues?

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8. What interventions do you think can be adopted to improve on your role/function relating to migration?

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9. What interventions do you think should be put in place to address the challenges that you have raised and strengthen the current migration legal framework?

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10. Any other recommendations?

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11. What are the most common categories of migrants Zimbabwe interfaces with?

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12. What are some of the issues/challenges affecting the different categories of migrants in Zimbabwe?

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13. To what extent are women's rights relating to migration protected at law and in practice?

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14. Is this protection adequate? To what extent, if at all, can the legal and policy framework be enhanced in this regard?

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15. What is your interaction with victims of human trafficking, and to what extent do you render them support?

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16. Do you think the current laws/policies relating to human trafficking/smuggling adequately address the rights and peculiar needs of affected persons? If not, what are the existent gaps?

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17. What challenges, if any, do you face as an institution regarding promoting the rights of women relating to migration?

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18. What interventions do you think can be adopted to improve on your role/function relating to migration?

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19. What interventions do you think should be put in place to address the challenges that you have raised and strengthen the current migration legal framework?

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20. Any other recommendations?

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International Organization for Migration  
4 Duthie Road, Alexandra Park, Harare, Zimbabwe  
Tel.: +263 4 704 284/5 • Email: [iomharare@iom.int](mailto:iomharare@iom.int) • Website: <http://zimbabwe.iom.int>