Optimising the legal regulation of circular labour migration between South Africa, Lesotho and Zimbabwe

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Abstract

Circular labour migration is steadily gaining prominence the world over, primarily due to the benefits it offers to the migrants, to the sending country, and to the receiving country – the so-called "triple-win" benefits.

In order to enhance the benefits of circular labour migration, both the International Labour Organisation and the International Organisation for Migration recommend that adequate instruments of governance should be utilised. From the outset, this thesis recognises bilateral labour arrangements as the ideal instruments for enhancing the potential benefits that circular labour migration offers to the stakeholders involved in the process.

As far as could be established, there has been no comprehensive research that seeks to provide insights on how the selected countries in the Southern Africa Development Community (South Africa, Lesotho and Zimbabwe) could optimise the benefits of circular labour migration for all stakeholders, primarily through the use of bilateral labour arrangements. The need for these insights in Southern Africa is pertinent due to the absence of a contemporary and clear framework regulating circular labour migration in the region.

Based on the foregoing, this thesis advances the proposition that the guidelines provided by international law and standards of labour migration, and the best practices in Spain and New Zealand, can provide significant insights on how South Africa, Lesotho and Zimbabwe can enhance the regulation of circular labour migration to provide optimised benefits for all stakeholders.

Proceeding from the above premise, this thesis makes a number of findings. These include the affirmation that bilateral labour arrangements are indeed the key regulatory instruments for promoting the triple-win benefits that circular labour migration offers; that circular labour migration, if managed well, plays an instrumental role in development in both the sending countries and the receiving countries; and that three key areas should be addressed in bilateral labour arrangements in order to effectively promote triple-win benefits. The three key areas that need to be addressed in bilateral labour arrangements in order to enhance the benefits for all stakeholders

are linking migration with development, migration governance, and the protection of the rights of migrant workers. This thesis outlines the various principles that are necessary to give effect to these three key areas.

This thesis finds that, based on the guidelines provided by international law and standards, it is essential that bilateral labour arrangements, at the minimum, incorporate provisions that facilitate skills training, the return and reintegration of migrants, the transfer of remittances, and the promotion of human resources development. In this regard, this study finds that the bilateral labour arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, fall short of the guidelines provided by international law and standards on labour migration and by the best practices in New Zealand and Spain.

The original contribution of this study lies in it being the first study to comprehensively explore the legal measures that South Africa, Lesotho and Zimbabwe could utilise to optimise the regulation of circular labour migration to South Africa as the main receiving country in SADC. This study makes recommendations on how the labour migration legal framework between the three countries can be improved, based on lessons learned from international law and standards on labour migration and best practices from selected countries.

Key words: circular labour migration, bilateral arrangements, remittances, development, migrant workers

Sirkulêre arbeidsmigrasie raak internasionaal toenemend vernaam, hoofsaaklik weens die voordele wat dit kan bied aan arbeidsmigrante, die versendende land en die resipiërende land – die sogenaamde "drievoudige-wen voordele".

Ten einde die voordele van sirkulêre arbeidsmigrasie te verhef, beveel beide die Internasionale Arbeidsorganisasie en die Internasionale Organisasie vir Migrasie aan dat van afdoende reguleringsinstrumente gebruik gemaak moet word. Uit die staanspoor erken hierdie tesis dat bilaterale arbeidsakkoorde die ideale instrumente is vir die verheffing van die potensiële voordele wat sirkulêre arbeidsmigrasie vir die belanghebbendes kan inhou.

So ver vasgestel kon word, is voorheen geen omvattende navorsing gedoen vir die voorsien van dieper insig in hoe geselekteerde lande in die *Southern Africa Development Community* (Suid-Afrika, Lesotho en Zimbabwe), die voordele van sirkulêre arbeidsmigrasie vir die betrokke belanghebbendes kan optimaliseer nie – allereers by wyse van vermelde bilaterale arbeidsakkoorde. Die behoefte aan sodanige insig in Suider-Afrika is opmerklik, weens die afwesigheid van 'n hedendaagse en duidelike raamwerk wat sirkulêre arbeidsmigrasie in hierdie streek reguleer.

Gebaseer op die hierbovermelde, maak hierdie tesis die voorstel dat die riglyne gebied deur internasionale reg en standaarde, asook beste praktyke van Spanje en Nieu-Seeland, sinryke insig kan voorsien in hoe Suid-Afrika, Lesotho en Zimbabwe die regulasie van sirkulêre arbeidsmigrasie wat onderling plaasvind, kan aanvul en versterk om optimale voordele vir alle belanghebbendes te voorsien.

Voorspruitend uit die genoemde uitgangspunt, maak hierdie tesis 'n aantal bevindings. Dit sluit in: die bevestiging dat bilaterale arbeidsakkoorde inderdaad die sleutelreguleringsinstrumente is vir die bevordering van drievoudige-wen voordele wat sirkulêre arbeidsmigrasie bied; dat sirkulêre arbeidsmigrasie, indien behoorlik bestuur, 'n instrumentele rol kan speel in die ontwikkeling van albei die versendende en resipiërende land, en dat drie sleutelareas in die bilaterale arbeidsakkoorde gedek moet word ten einde die drievoudige-wen voordele effektief te bevorder. Die drie

sleutelareas wat in die bilaterale arbeidsakkoorde gedek moet word om voordele vir alle belanghebbendes te verhef, behels om migrasie by ontwikkeling aan te haak, te fokus op bestuur van die migrasie self, en die beskerming van die regte van die arbeidsmigrante. Die tesis sit die onderskeie beginsels uiteen wat nodig is om effek te gee aan hierdie drie sleutelareas.

Die tesis bevind dat, gebaseer op die riglyne van die internasionale reg en standaarde, is dit wesenlik dat bilaterale arbeidsakkoorde, ten minste, bepalings moet bevat wat vaardigheidsontwikkeling, die terugkeer en herintegrasie van migrante, die oordrag van oorgemaakte bedrae en die bevordering van mensehulpbronontwikkeling fasiliteer. In hierdie opsig word in hierdie studie gevind dat die bilaterale arbeidsakkoorde tussen Suid-Afrika en haar bure, Lesotho en Zimbabwe, nie die riglyne deur internasionale reg en standaarde haal nie, en tekortskiet in vergelyking met die beste praktyke in Nieu-Seeland en Spanje.

Die oorsponklike bydrae van hierdie studie berus daarin dat dit die eerste studie is wat 'n omvattende ondersoek doen in die regstappe wat Suid-Afrika, Lesotho en Zimbabwe kan aanwend om die regulasie van sirkulêre arbeidsmigrasie na Suid-Afrika, as die hoofresipiërende land in die SADC, te optimaliseer. Hierdie studie maak aanbevelings oor hoe die arbeidsmigrasie regsraamwerk tussen die drie lande verbeter kan word, gebaseer op lesse geleer vanaf internasionale reg en standaarde oor arbeidsmigrasie, en beste praktyke van geselekteerde lande.

Sleutelwoorde: sirkulêre arbeidsmigrasie, bilaterale akkoorde, oorgemaakte bedrae, ontwikkeling, arbeidsmigrante

List of abbreviations

ATR	Agreement to Recruit
AU	African Union
CEDAW	*Convention on the Elimination of All Forms of Discrimination Against Women*
DHA	Department of Home Affairs
EMN	European Migration Network
EU	European Union
GCIM	Global Commission on International Migration
GDP	Gross Domestic Product
IAU	Inter-Agency Understanding
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organisation
IOM	International Organisation for Migration
JPCC	Joint Permanent Commissions of Cooperation
LRA	Labour Relations Act
MOU	Memoranda of Understanding
OECD	Organisation for Economic Cooperation and Development
REC	Regional Economic Community
RSE	Recognised Seasonal Employer scheme
SADC	Southern African Development Community
SME	Small-Medium Enterprise
TCLM	Temporary and Circular Labour Migration
TEBA	The Employment Bureau of Africa
UNDP	United Nations Development Programme
UP	Unio de Pagesos
WINZ	Work and Income New Zealand
ZDP	Zimbabwe Documentation Process
ZEP	Zimbabwe Exemption Permit

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Chapter 1

Introduction

1.1 Background

Circular labour migration[1] is increasingly becoming a critical issue in the management of international labour migration.[2] This growing importance occurs mainly as the result of various economic and developmental benefits that circular labour migration offers to migrants and to both the sending countries (the countries where the individuals originate) and the receiving countries (the countries to which individuals are travelling for work).[3] Circular labour migration has also become topical because it has the potential to lead to the greater globalisation of the labour market.[4]

Currently, circular labour migration is promoted by various economic and political agents, including the International Organisation for Migration (IOM) and the Global Commission on International Migration (GCIM). All these organisations provide their own specific definition of circular labour migration. Notwithstanding these various definitions, circular labour migration, generally speaking, refers to the temporary, recurrent movement of people between a sending country and a receiving country, primarily for purposes of work.

The Global Forum for Migration and Development (GFMD)[5] regards the promotion of circular labour migration as an essential means of increasing the contribution of migration to economic development in both the sending countries and the receiving countries.[6] In developed countries, circular labour migration helps to increase the workforce to be used for various industrialisation purposes, while in the developing and least developed countries, circular labour migration facilitates development and

1 To be described below.
2 Privarova and Privara 2016 *International Journal of Environment & Science Education* 12909.
3 Garcia and Montijano 2009 *UPF Working Paper Series* 10.
4 ILO *et al* "The Contribution of Labour Mobility to Economic Growth" 31.
5 The GMFD is a "voluntary, informal, non-binding and government-led process open to all States Members and Observers of the United Nations (UN), to advance understanding and cooperation on the mutually reinforcing relationship between migration and development" See Anon date unknown https://gfmd.org/process.
6 Anon date unknown https://gfmd.org/process.

helps to reduce unemployment and population pressures.[7] In this regard, all parties involved in the circular labour migration process are expected to benefit from the experience in some way or form. Where circular labour migration is involved, the approach has been to create a partnership between countries, where both the receiving country and the country of origin obtain substantial gains from the relationship, in addition to the many work and financial benefits that are due to the worker.[8]

Circular labour migration, therefore, is said to have a potential triple benefit effect: the receiving country receives the requisite labour to address labour shortages, the migrant worker receives extra income and possibly new skills, while the country of origin benefits from the remittances sent home, which can be used for various purposes and could enhance the livelihoods of communities in the sending country.[9]

The International Labour Organisation (ILO),[10] the specialised agency of the UN on labour-related matters, suggests that in order for this triple win to be successful in practice, there must be adequate instruments of governance regulating circular labour migration, which will ensure that migrant workers receive "a fair share of the prosperity" that migration helps to create.[11] Additionally, these instruments should also ensure that both the receiving countries and the sending countries are "able to gain benefits from the circular labour migration experience".[12]

The ILO has adopted various standards on migration over the last century, providing tools for both the sending country and the receiving country to manage migration

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7 Migration helps to reduce pressures in areas where significantly large numbers of people compete over limited resources. When people from these areas migrate, particularly for labour purposes, they decrease the pressure on the limited resources in the sending country. ILO *et al* "The Contribution of Labour Mobility to Economic Growth" 31.

8 The various benefits of circular labour migration will be discussed in chapter 2 of this thesis. See Newland *Global Governance* 331.

9 There is growing evidence that remittances sent by migrants to their homes is used to send children to schools and also to improve their health, thus helping them to remain in school longer and complete their studies. See Adams 1991 *International Food Policy Research Institute* 3; Newland *Global Governance* 332.

10 The ILO is an agency of the United Nations whose mandate is to advance socio-economic justice through the setting of international labour standards. ILO 1996 https://www.ilo.org/global/about-the-ilo/lang--en/index.htm.

11 Howe and Owens *Temporary Labour Migration in the Global Era* 20.

12 ILO 2014 *Report of the Director General to the International Labour Conference* 4.

flows and ensure adequate protection for vulnerable migrant workers.[13] Furthermore, in order to address the challenges facing migrant labour such as human trafficking, the increased irregular migration of people, and the exploitation of migrants, in 2005 the ILO adopted the ILO Multilateral Framework on Labour Migration.[14] This instrument consists of non-binding principles and guidelines that provide a practical guide and set of actions to encourage governments, workers and employers' organisations to develop and formulate labour migration policies and practices at the national, regional and international levels.[15] Ultimately, this multilateral framework aims to assist parties involved in labour migration to address some of the above-mentioned challenges and to simultaneously maximise the benefits of migration. Repeated reference will be made to this framework in this thesis due to its importance and relevance for proper labour migration regulation.

Given labour migration's transnational nature, it is unsurprising that the regulation of labour migration falls mainly within the ambit of international law.[16] Accordingly, international instruments regulate this type of mobility. In 1945 and 1975 respectively, the ILO adopted two conventions specific to migrant workers.[17] Furthermore, in 1990 the UN adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families A.RES/45/158* which entered into force on 1 July 2003 (ICRMW), which is regarded by authors such as Bosniak[18] and Chetail[19] as the most comprehensive convention in the field of labour migration. The convention provides a succinct restatement of a range of labour, social and civil rights available to all migrant workers and their families, which includes both documented and

13 The relevance of the instruments containing these standards, including the *Migration for Employment Convention (Revised)*, 1949 (97) and the *Migrant Workers (Supplementary Provisions) Convention,* 1975 (143), will be discussed in detail in chapter 3 of this thesis.

14 ILO *Multilateral Framework on Labour Migration: Non-Binding Principles and Guides for a Rights-Based Approach*.

15 ILO *Multilateral Framework on Labour Migration: Non-Binding Principles and Guides for a Rights-Based Approach*.

16 Chetail *International Law and Migration* 17.

17 *Migration for Employment Convention (Revised)*, 1949 (97) and *Migrant Workers (Supplementary Provisions) Convention,* 1975 (143). All the countries that are the focus of this thesis (South Africa, Zimbabwe and Lesotho) have ratified neither Convention 97 nor Convention 143. See ILO 1975 https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288.

18 Bosniak 1991 *International Migration Review* 737.

19 Chetail *International Law and Migration* 17.

undocumented migrant workers.[20] However, under the convention, a range of additional rights are also granted specifically to documented workers. These rights include the rights to form associations and unions, freedom of movement, and equality of treatment with nationals of the receiving country regarding housing, health and education-related services.[21] The convention furthermore expressly grants state parties the autonomy to establish the criteria governing the admission of migrant workers and members of their families.[22] Despite this liberty granted to member states, the convention has notably received few ratifications to date.[23]

Regardless of such a poor ratification record, the above migrant workers conventions, originating from both the ILO and the UN, will be the main focus in this thesis as they play a significant role as part of the international law and standards on labour migration. As will be shown, these conventions ultimately provide an international benchmark for the requirements for the prudent governance of labour migration, against which the governance of labour migration between South Africa and its neighbours, Lesotho and Zimbabwe, can be mapped.[24]

Moving to the more specific, it is crucial to note that the ILO recognises in its instruments the particular importance of bilateral arrangements as good practice in the governance of labour migration flows between countries.[25] The ILO also recognises the importance of these instruments in contributing to the protection of migrant workers. The ILO's *Migration for Employment Convention*,[26] for instance, recommends the conclusion of agreements between countries to regulate migration for employment among them, whenever necessary or desirable in cases where the number of migrants is sufficiently large. There are many such numbers of labour migrants in the Southern African Development Community (SADC) region. The large

20 Bosniak 1991 *International Migration Review* 737; Chetail *International Law and Migration* 17.
21 See arts 28 and 55.
22 Article 79.
23 The convention has received only 55 ratifications from member states. Lesotho is the only country of the three countries that are the focus of this study which has done so. See United Nations 1999 https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-13&src=TREATY.
24 See chapter 3 below.
25 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 1.
26 Article 10.

number of labour migrants in the SADC region is evinced by a study conducted in Swaziland, Mozambique, Botswana, Lesotho and Zimbabwe, which revealed that 57% of the respondents in those countries had worked in another foreign country in Southern Africa.[27] South Africa is the prime destination of a large number of these migrants. A study by the IOM reveals that there are more than two million migrants in South Africa originating from Southern African countries.[28] This statistical data suggests that the use of bilateral arrangements as recognised by the ILO might very well be suitable, applicable and useful for sending and receiving countries in the SADC region.

In order to assist countries to conclude mutually beneficial agreements, the ILO's *Migration for Employment Recommendation (Revised)*, 1949 (Recommendation 86)[29] contains a model agreement for temporary and permanent employment, which has influenced several bilateral labour arrangements across the world (Model Treaty).[30] Moreover, the ILO Tripartite Meeting held in Geneva in November 2013 further recognised the potential of bilateral arrangements as a good practice in regulating labour flows between sending countries and receiving countries and in contributing to the protection of the rights of migrant workers.[31] This meeting called upon the ILO to assist governments and social partners to negotiate and effectively implement bilateral or other international arrangements on labour migration to enhance benefits for the migrant worker, the country of origin, and the receiving country.[32]

Furthermore, within the Southern African context, the SADC Labour Migration Action Plan (LMAP) (2020-2025)[33] specifically outlines the objective to "strengthen labour

27 Crush and Williams 2010 *SAMP Policy Brief* 2.

28 IOM 2020 https://www.iom.int/southern-africa#:~:text=By%20far%20the%20largest%20number,)%20and%20Zimbabwe%20(361%2C000).

29 Recommendation No 86 of 1949.

30 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 32.

31 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 1.

32 ILO 2013 https://www.ilo.org/global/topics/labour-migration/events-training/WCMS_221809/lang--en/index.htm.

33 LMAP is s a new initiative by SADC Member States to promote safe and regular movement of workers in the SADC region as an integral component towards the realisation of SADC vision 2050. See SADC 2020 https://www.sadc.int/opportunities/procurement/closed-opportuniti/scoping-labour-migration-policies-and-strategies/.

migration policies and regulatory systems for better labour migration governance". In line with the foregoing objective, this thesis is intended to provide more nuanced solutions and is premised on the narrative that bilateral labour arrangements are ideal tools towards guiding migration policy and regulatory systems for better labour migration governance.

This thesis seeks to serve as a comprehensive and original study to inform the pursuit to guide governments in concluding such bilateral arrangements. To this end, this thesis seeks to provide insights on how selected countries in the SADC region could optimise the efficiency of circular labour migration primarily through bilateral arrangements to provide enhanced benefits for the stakeholders involved.

In order to achieve the above goal, this thesis will use, in addition to the ILO standards, *inter alia* various publications from the IOM for guidance. The IOM is an intergovernmental organisation that primarily works with various international partners to eradicate the operational challenges of migration, to uphold the human dignity of migrants, and to encourage social and economic development through migration.[34] Based on the scope of its work, it follows, therefore, that publications from the IOM may provide invaluable insights on the provisions that are necessary in ideal bilateral arrangements that provide enhanced benefits for the stakeholders involved.

The bilateral arrangements relevant in this instance are bilateral labour agreements and memoranda of understanding (MOUs). Bilateral labour agreements are agreements that control the conditions under which sending countries send temporary migrant workers to receiving countries.[35] Bilateral labour agreements are diverse in nature, but they contain many common elements.[36] Under bilateral labour agreements, sending countries are often obliged to control the flow of migration by

34 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community* 1.

35 Trachtman 2009 *Upjohn Institute of Employment Research* 8.

36 These elements will be discussed in chapter 2 of this thesis.

screening migrant workers, and receiving countries are usually required to provide legal protection against abuses of migrants by employers.[37]

A grey area still exists in relation to the enforcement mechanisms that could be implemented against a country that fails to comply with its obligations under a bilateral labour agreement. This grey area is particularly prevalent in the Southern African context where some bilateral arrangements are outdated and rights under such arrangements are as far as could be established, largely unenforced.[38]

However, the answer to this grey area, Plotnikova[39] suggests, lies in the fact that bilateral labour agreements are mutually beneficial to the countries involved, and therefore few would want to default on their obligations. As indicated above, bilateral labour agreements are attractive to receiving countries because they help them to control the flow of migrants into their country. To achieve this goal, receiving countries secure assistance from sending countries in screening migrant workers so as to prevent terrorists and criminals from entering the receiving country under the false pretext of seeking work.[40] Sending countries, on the other hand, seek to ensure that receiving countries will protect migrants from abusive employers, will grant them access to public resources, and will facilitate the return of remittances to the sending country. Therefore, this mutually beneficial relationship will discourage the countries involved from breaching the provisions of the bilateral labour agreements.

For the purposes of this study, it is imperative to distinguish between bilateral labour agreements and bilateral MOUs. While bilateral agreements are formal instruments that create rights and obligations for the parties, MOUs, on the other hand, are less formal instruments that do not create rights and obligations. Instead, MOUs often outline operational arrangements under an international framework agreement. They are also used for the regulation of technical or detailed matters.[41] These instruments are usually non-binding and involve generally agreed upon principles of cooperation

37 Costa and Martin 2018 https://www.epi.org/files/pdf/152373.pdf.
38 For a discussion on the primitiveness of some of these arrangements see 1.3 below.
39 Plotnikova *Recruiting Foreign Nurses for the UK: The Role of Bilateral Labour Agreements* 122.
40 Chilton and Posner *Coase-Sandor Institute for Law and Economics Working Paper* 1.
41 UN 1999 http://untreaty.un.org/English/guide.asp .

that describe broad concepts of mutual understanding and plans shared by the parties.[42]

The main difference between bilateral labour agreements and MOUs appears to be with regard to their binding nature. Bilateral labour agreements are more formal, specific and action-oriented than MOUs and, as a result, bilateral labour agreements are generally closer to binding treaty status.[43] MOUs, on the other hand, have more of a technical character and are not subject to ratification, and are therefore not binding as such.

A number of other forms of bilateral labour arrangements are applicable to labour migration.[44] This thesis, however, will predominantly focus on bilateral labour agreements as, informed by an IOM study, they are the most relevant and binding instruments for circular labour migration.[45]

Properly designed bilateral labour arrangements between sending countries and receiving countries have the potential to optimise the benefits that circular labour migration has to offer.[46] Research by Martin[47] has revealed numerous benefits of circular labour migration and affirms that over and above the traditional economic and political benefits of circular labour migration to the migrant and both the sending countries and the receiving countries, circular labour migration can also be used as a strategy to reduce vulnerability in areas experiencing, or that are likely to experience, environmental disruptions. More specifically, Rimon and Kagan[48] suggest that circular

42 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 13.

43 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 13.

44 This list includes Multilateral Labour Agreements(MLAs), Memorandums of Agreement (MOAs), Framework Agreements, and Cross-Border Worker Agreements. See ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 14.

45 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* iii.

46 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 14.

47 Martin 2013 *Migration Policy Institute* 4; Tacoli 2009 *International Institute for Environment and Development* 515; Brown 2008 *Migration Research Series* 6; Jakobeit 2017 *Centre for Research on the Environment and Development* 5.

48 Rimon and Kagan 2015 https://devpolicy.org/climate-change-and-displacement-can-labour-migration-be-part-of-the-solution-20151028/.

labour migration could be used as a tool to increase resilience to climate change. It could achieve this by providing households in vulnerable areas with diverse sources of income in the form of remittances and it could decrease the strain on dwindling resources in the affected areas by reducing the population. These and other related advantages of circular labour migration will, however, not receive much attention in this thesis. The focus will be on the economic advantages of this type of mobility.

Given the increased topicality of circular labour migration and the advantages of regulating it through bilateral arrangements, there is an increased need to evaluate the policies and regulatory frameworks that aim to facilitate circular labour migration.[49] This need is especially heightened in the Southern African region, where no contemporary or clear framework regulating circular labour migration exists. The porous borders in the region create problems for the effective regulation of circular labour migration as migrants participate in irregular migration with relative ease.[50] The Southern African region will, therefore, be the focal point of this study and South Africa, as the primary migrant-receiving country in the region, will receive the most attention.[51]

The difficulty of regulating circular labour migration is exacerbated by the various challenges that are associated with the nature of circular labour migration. Circular labour migration is not a single event, but rather comprises a series of events that occur between two countries over a specific period.[52] Therefore, clear guidelines are needed to regulate these repeated cross-border movements. In order to optimise the benefits and minimise the challenges of circular labour migration, clear standards and policies regulating circular labour migration are necessary and need to be explicitly outlined in bilateral labour arrangements.[53]

49 Task Force on Measuring Circular Migration 2016 "Defining and Measuring Circular Migration" 1.

50 Masi 2019 https://www.timeslive.co.za/news/south-africa/2019-08-14-porous-borders-biggest-threat-to-domestic-security-in-sa-new-spy-boss .

51 Beremauro "Victimising Victims" 4.

52 Nshimbi and Fioramonti 2014 *African Development Review* 55.

53 Nshimbi and Fioramonti 2014 *African Development Review* 55.

The foregoing must be understood within the context of bilateralism,[54] which governs migration in the Southern African region.[55] Nshimbi and Fioramonti[56] believe that, typically, this form of bilateralism forces countries to compete with each other and primarily produces benefits for only the receiving country or the sending country. The authors suggest a regional policy framework as a solution to these challenges. This policy framework would *inter alia* highlight the integrated elements of labour migration and create possibilities for a more mutually beneficial system of management between the sending country and the receiving country.

The present study appreciates the importance of the regional framework suggested by Nshimbi and Fioramonti, but believes that the existing system of bilateralism could rather be enhanced to provide the above-mentioned benefits of a regional framework, as well as to provide triple-win benefits for the migrant and for both the receiving country and the sending country involved in circular labour migration in the region. Betts,[57] despite being an advocate for the regional regulation of semi-skilled migrants, also concedes that bilateral arrangements are preferable to regional agreements in the case of the regulation of the movement of labour migrants, mainly because the international and regional framework for labour migration is ineffective and fragmented.

In light of the foregoing sentiments, this thesis is premised on the idea that international law and standards on labour migration and global best practices of bilateral regulation of circular labour migration may provide additional lessons on how to enhance bilateral labour arrangements to realise the desired triple-win benefits for stakeholders involved in regional circular labour migration to South Africa. These examples of best practices can contribute to providing comprehensive insights on how to strengthen the rights of migrants and make circular labour migration more

54 Bilateralism in labour migration involves formal or informal agreements between two states: generally, the sending country and the receiving country for the same cohort of migrants. See Williams and Crush 2010 *SAMP Policy Brief* 23.
55 Nshimbi and Fioramonti 2013 *MIWORC Policy Brief* 1.
56 Nshimbi and Fioramonti 2014 *African Development Review* 55.
57 Betts "Introduction: Global Migration Governance" 30.

economically and socially beneficial for both the sending country and the receiving country.

1.2 Problem statement

As noted above, migration in Southern Africa is of significant magnitude. As such, it has tremendous implications for socio-economic development and integration in the region and therefore cannot be ignored.[58] Nonetheless, the majority of countries in the SADC region tend to view migration as a threat and not as an opportunity.[59] Oucho and Crush[60] indicate that, generally, the primary migrant-receiving countries in the SADC region have systematically opposed the free movement of migrants. This negative view of migration has resulted in the countries creating policies that focus on strict influx control and exclusion. This anti-immigration stance has *inter alia* resulted in the rise of irregular migration[61] to receiving countries in the region.[62] The impact of the negative attitude to migration has become prevalent specifically in South Africa as the prime destination for migrant labour in Southern Africa.[63] South Africa assumes this status in the region primarily due to the perceived economic opportunities it offers to labour migrants.[64] As a result of its status, South Africa has experienced problems associated with it being the prime migrant-receiving country. These problems include a worrying increase in xenophobia, on the one hand, and, on the other hand, the exorbitant fees incurred by the government of South Africa in repeatedly having to deport undocumented migrants back to their home countries.[65]

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58 Mudungwe 2014 *African Diaspora Policy Centre* 29.

59 Crush *et al Migration Policy Brief* 17*.*

60 Oucho and Crush 2001 *Africa Today* 139.

61 Irregular migration is a term commonly used to refer to the migration of people to a sending country outside of the regulatory norms of the receiving country. See Migration Data Portal date unknown https://migrationdataportal.org/themes/irregular-migration.

62 Mudungwe 2014 *African Diaspora Policy Centre* 29.

63 Mudungwe 2014 *African Diaspora Policy Centre* 29.

54 Botswana and Namibia are the other top migrant-receiving countries in the SADC region. See Oucho 2006 "Cross-Border Migration and Regional Initiatives in Managing Migration in Southern Africa" 48; Waller 2006 *SAMP Policy Brief No 19*.

65 South Africa's post-apartheid deportation scheme is said to be one of the largest in the world. Between 1988 and 2010, South Africa deported about 2.5 million migrants who mostly originate from the Southern African region. See Segatti 2011"Reforming South African Immigration Policy in the Post-Apartheid Period (1990–2010)" 31-66; Segatti 2015 "Labour Migration, Regional Integration and Bilateral Labour Agreements" 32; see also Mudungwe 2014 *African Diaspora Policy Centre* 48.

Notably, the apprehension about immigration to South Africa prevails despite migrant labour having contributed significantly to South Africa's current status as an economic powerhouse in the region.[66] Migrant labour was instrumental in building South Africa's mining industry, which grew to become the foundation for the growth and development of South Africa's main economic province of Gauteng (Place of Gold). The labour involved was largely unskilled.[67] However, today the discourse has changed, the labour involved in now notably more skilled as the labour market in South Africa has undergone considerable changes since the country became a constitutional democracy in 1994.[68] These changes have occurred mainly because the government has implemented various policies aimed at reducing the injustices of the past and increasing competitiveness as the country progressively integrates into the global economy.[69]

In South Africa, the *Constitution of South Africa,* 1996,[70] the *Immigration Act*[71] and the *Refugee Act*[72] are the main legal instruments regulating migration in general and labour migration in particular.[73] Nonetheless, these instruments do not address circular labour migration, despite it being one of the most common forms of migration to South Africa.[74]

Upon scrutiny, it appears that the existing arrangements regulating migration in general and labour migration in particular between South Africa and its neighbours similarly do not expressly address circular labour migration and its role in increasing development in both the sending country and the receiving country.[75] Studies by the IOM portray that modern bilateral labour arrangements regulating circular labour migration should comprehensively cover three basic areas. The bilateral labour arrangements should address issues of governance of labour migration, protection of

66 Bhorat and Oosthuizen *Development Policy Research Unit Working Paper* 6.
67 Harrington *et al* 2004 *The Journal of the South African Institute of Mining and Metallurgy* 65.
68 Bhorat and Oosthuizen *Development Policy Research Unit Working Paper* 6.
69 Festus *et al* 2015 *Economic Research South Africa Working Paper* 493.
70 *Constitution of the Republic of South Africa*, 1996 ("the *Constitution*").
71 13 of 2002.
72 130 of 1998.
63 Ngandwe 2013 *PER* 526.
74 Kok *et al Migration in South and Southern Africa: Dynamics and Determinants* 10.
75 For discussions on specific arrangements regulating migration between South Africa, Lesotho and Zimbabwe, see 4.6 and 4.7 below respectively.

the rights of migrant workers and linkages between labour migration and development.[76]

Bilateral agreements between South Africa and its neighbours govern migration in Southern Africa. These agreements are normally concluded under the auspices of the Joint Permanent Commissions of Cooperation (JPCC). These commissions serve two basic functions: they facilitate contact between the public and private sectors of the cooperating countries, and they provide a channel for promoting and enhancing cooperation between the various sectors of the governments of the two cooperating countries.[77] These JPCCs furthermore provide the framework that entrenches bilateral cooperation and strengthens cultural, social and economic bilateral cooperation between South Africa and its bilateral partners. South Africa holds JPCCs with both the Southern African countries selected for this thesis, Lesotho and Zimbabwe.

The JPCC between South Africa and Lesotho, one of the primary migrant-sending countries,[78] stipulates that the facilitation of the movement of people, goods and services between the two countries is one of its objectives. In view of Lesotho's unique geographical location – being completely surrounded by South Africa – the JPCC has facilitated the signing of a *MOU on Cooperation in the Field of Labour*.[79] This MOU outlines five areas of operation concerning labour between these two countries.[80] One of these areas is the review of the 1973 Labour Agreement between Lesotho and South Africa.

76 See Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 1.

77 See JBCC 2013 http://www.foreign.gov.ls/news/PRESS_RELEASE-18_Apr_2013.php#:~:text=The%20JBCC%20Agreement%20is%20the,countries%20to%20a%20Strategic%20Partnership.&text=The%20highest%20level%20is%20that,Government%20of%20the%20two%20countries.

78 The AFP reports that around 400 000 Lesotho citizens migrate temporarily to South Africa annually. See AFP *Daily Nation* 2.

79 *Memorandum of Understanding in the Field of Labour* Entry into Force: 30 October 2006.

80 The areas are dispute resolution mechanisms and institutions, social dialogue mechanisms and institutions, compensation in the case of occupational diseases and injuries to citizens of both countries working in either of the two countries, social security, and the review of the 1973 labour agreement.

The 1973 Labour Agreement[81] remains the main instrument regulating labour migration between the two countries. Some scholars, such as Poku[82] and Lerotholi,[83] regard this agreement as archaic and unsupportive of mutual benefits for the bilateral parties. This agreement fails to provide an up-to-date and appropriate framework and sufficient guarantees in relation to migration-related matters in South Africa and Lesotho, including the critical issue of development in Lesotho.[84] Any mention of circular labour migration is also absent from the agreement.

Regarding Lesotho specifically, the United Nations Development Programme (UNDP) published a report as far back as 1995 which suggested that Lesotho should redefine its relationship with South Africa:

> Lesotho must renegotiate its economic and political relationship with South Africa as a matter of urgency. Lesotho manifests a high degree of functional integration with the South African economy. Negotiations with the South African economy should start sooner rather than later at all levels. It is vital that Lesotho acts quickly in order to avoid being marginalised. Unless Lesotho at the very least negotiates access to the South African labour market, the mountain kingdom will end up suffering the same kind of economic stagnation as the homeland areas suffered under the old apartheid regime.[85]

To date, however, the relationship between Lesotho and South Africa under the 1973 Labour Agreement has not been redefined to grant the Basotho sufficient access to the South African labour market. In reality, the converse is true. For example, scores of Basotho have been retrenched from South African mines since South Africa became a constitutional democracy in 1994, thus negatively affecting their livelihoods.[86] In addition, this agreement makes no linkages between labour migration and development, does not provide clear guidelines for the facilitation and management of labour migration, and provides little protection for the rights of migrant workers.[87]

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81 Treaty No 1/1973 Date of entry into force: 24 August 1973.
82 Poku *Security and Development in Southern Africa* 90.
83 Lerotholi 2018 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/presentation/wcms_422407.pdf.
84 Vallentgoed *Legal Protection of the Rights of Migrant Workers in South Africa* 32.
85 UNDP *et al* 1995 *Mimeo*.
86 Mensah "Dwindling Opportunities for External Migration: Impact on Rural Household Income in Lesotho" 1.
87 Pamu 2014 *International Labour Migration* 19.

Zimbabwe is another country that sends many migrants to South Africa, and this thesis will also focus on Zimbabwe. The pool of retrenched mineworkers from South Africa referred to above also includes migrants from Zimbabwe.[88] As in the case of Lesotho, the retrenchment of these migrants has negatively affected the livelihoods of many migrant workers since migration to South Africa is a key survival strategy for a significant number of Zimbabweans.[89]

Despite the retrenchments from the South African mines, migration from Zimbabwe to South Africa increased sharply after the fairly recent economic and political crisis in Zimbabwe.[90] The crisis precipitated the exodus of a variety of migrants from Zimbabwe, including skilled and highly skilled professionals.[91] Statistics indicate that nearly 42% of Zimbabwean migrants in South Africa arrived during the peak of the Zimbabwean crisis between 2000 and 2010.[92] A further 32% migrated to South Africa after 2010. A significant number of these workers earn a living from being hawkers in the informal economy.[93]

Furthermore, statistics indicate that a large number of migrants from Zimbabwe have migrated to South Africa illegally.[94] This has prompted various attempts by the South African government to either deport or regularise the stay of illegal Zimbabweans in South Africa.[95] The South African Department of Home Affairs (DHA)[96] reported that in 2011 it achieved 58 825 deportations instead of the intended 224 000. The implementation of the Zimbabwe Documentation Process (ZDP) is the prime reason

88 Mwareya 2017 *Groundup* 1.
89 Mwareya 2017 *Groundup* 1.
90 This crisis arose in 2008 as citizens fled a brutal crackdown on the political opponents of Robert Mugabe, following the harmonised elections of 2008. See Sachikonye *When a State Turns on its Citizens* 3.
91 Nshimbi and Fioramonti 2013 *MIWORC Policy Brief* 1.
92 International Centre for Migration Policy Development 2017 https://reliefweb.int/report/zimbabwe/migrants-countries-crisis-micic-south-africa-case-study-double-crisis-mass-migration.
93 International Centre for Migration Policy Development 2017 https://reliefweb.int/report/zimbabwe/migrants-countries-crisis-micic-south-africa-case-study-double-crisis-mass-migration.
94 International Centre for Migration Policy Development 2017 https://reliefweb.int/report/zimbabwe/migrants-countries-crisis-micic-south-africa-case-study-double-crisis-mass-migration.
95 De Jager and Musuva *Africa Review* 15.
96 DHA 2011 *Department of Home Affairs Annual Report 2010/2011*.

provided by the DHA for this decline.[97] The ZDP sought to legalise the stay of undocumented Zimbabweans who were, until then, studying without proper documents or unlawfully operating business ventures in South Africa.[98]

Despite the implementation of the ZDP, a significantly large number of illegal Zimbabwean migrants still reside in South Africa and face deportation. In 2015, over 15 000 illegal migrants were deported by the government of South Africa.[99] The ongoing large deportations of illegal migrants support a key hypothesis of this thesis, namely, that more cooperation between the governments of South Africa and Zimbabwe is necessary to address the situation of Zimbabwean migrants through proper regulation and monitoring. The optimised regulation of circular labour migration could possibly better facilitate the legal entry of labour migrants into South Africa.

Unlike the JPCC between Lesotho and South Africa, the Zimbabwe–South Africa Joint Commission for Economic, Social, Scientific, Technical and Cultural Cooperation[100] does not categorically state that migration or the facilitation of movement of people is an objective or a common area of interest. This omission exists despite the scope of the commission which provides the framework in terms of which Zimbabwe and South Africa have concluded a *MOU on Employment and Labour and on Cooperation and Mutual Assistance on Immigration Matters*.[101] Given its scope of operation, the commission seems ideally positioned to address matters of migration generally, and those of circular migration specifically. Regrettably, currently the commission seems not to address either of these issues. It therefore becomes clear that there is no clear framework governing circular migration between South Africa and Zimbabwe.[102] Hence, this thesis *inter alia* seeks to make recommendations that could inform the improvement and/or development of current bilateral labour arrangements that help to facilitate the effective regulation of circular labour migration between South Africa

97 DHA 2011 *Department of Home Affairs Annual Report 2010/2011*.
98 DHA 2011 *Department of Home Affairs Annual Report 2010/2011.*
99 Hiropolous *APCOF Policy Paper* 18.
100 Agreement for the Joint Commission for Economic, Social, Scientific, Technical and Cultural Cooperation Date of Entry into Force on 2 March 1995.
101 Government of South Africa www.dirco.gov.za.
102 Mudungwe 2014 *African Diaspora Policy Centre* 29.

and two of its SADC neighbours, Lesotho and Zimbabwe. If the development of such labour arrangements is done properly, it would in turn enhance the triple-win benefits that circular labour migration offers to all the parties involved.

1.3 Contextual overview

Bilateral labour arrangements are essential in the context of the mentioned Southern African countries due to the migration dynamics in this region. Southern Africa is a porous region characterised by mass labour migration to South Africa as the economic hub of the region.[103] The absence of a clear regional framework on labour migration generally, and on circular labour migration specifically, as mentioned above, limits South Africa's ability to effectively manage the influx of labour migrants.[104] This absence creates a gap that could be filled by optimised bilateral labour arrangements that are specifically tailored to achieve triple-win benefits for all the key stakeholders involved. The presence of one or more arrangements that could serve as a policy or framework that regulates and encourages legal migration to South Africa could go a long way towards optimising triple-win benefits for the sending country, the migrant, and the receiving country. For the receiving country, in particular, this agreement may also help to reduce the costs associated with the deportation and forced repatriation of illegal migrants.

1.3.1 Circular labour migration to and from South Africa

South Africa has several MOUs with its seven neighbouring countries that address labour issues.[105] More specifically, South Africa has drafted MOUs about the facilitation of migration with several countries in Southern Africa, and has identical labour migration-related MOUs with Botswana, Swaziland, Mozambique and Lesotho.[106] The MOUs establish labour representative offices of the governments of the neighbouring countries in South Africa. These offices address, among others, employment-related

103 Mudungwe 2014 *African Diaspora Policy Centre* 29.
104 Nshimbi and Fioramonti 2014 *African Development Review* 55.
105 Botswana, Lesotho, Malawi, Mozambique, Namibia, Swaziland and Zimbabwe.
106 Minaar "Illegal Aliens/Migrants in Zimbabwe" 2.

matters of the nationals of the Southern African countries in South Africa, such as the administration of taxes, deferred pay, remittances and workers' welfare funds.[107]

The MOUs also address the compliance, documentation and identification requirements of the labour migrants from the respective countries.[108] These agreements were initially signed to provide labour to South African mines.[109] Today, circular labour migrants working in South African mines still constitute a significant portion of international migrants in Southern Africa.[110] This is the case even though migration patterns have changed and there has been an influx of various new types of workers, including domestic workers, into the South African labour market.[111] It is therefore pertinent to re-negotiate the old MOUs that were tailored around migration to the mining sector in order to address the modern-day dynamics of labour migration in Southern Africa. Moreover, even the more recent MOU between South Africa and Zimbabwe fails to adequately address labour migration; cooperation with regard to labour migration is only implied in the MOU between South Africa and Zimbabwe.[112] Thus, despite being a fairly recent instrument, the MOU between South Africa and Zimbabwe also requires significant review.

In this study it is essential to investigate the circular labour migration relationship between South Africa and Lesotho, and between South Africa and Zimbabwe. This study focuses on the labour migration relationship between South Africa and its neighbours, Lesotho and Zimbabwe, mainly due to the large number of labour migrants involved in the circular labour migration process between South Africa and these two countries. As previously indicated, today Lesotho and Zimbabwe are two of the countries with the largest numbers of migrant workers in South Africa;[113]

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107 Nshimbi and Fioramonti 2013 *MIWORC Policy Brief* 1.

108 Art III Republic of South Africa Treaty Series No. 3. (1973) Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana relating to the establishment of an office for a Botswana Government Labour Representative in South Africa.

109 Minaar "Illegal Aliens/Migrants in Zimbabwe" 2.

110 Kok *et al Migration in South and Southern Africa: Dynamics and Determinants* 1.

111 Makoro *The Construction of Illegality: Basotho Migrant Domestic Workers' Experiences* 3.

112 Article 1 *Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe in the Fields of Employment and Labour* 2009.

113 McDonald *et al* 2000 *The International Migration Review* 814.

therefore, the optimised regulation of circular labour migration to promote triple-win benefits is most needed between these countries and South Africa.

The current legal and policy framework in this respect will be scrutinised to ultimately identify where legal development is needed and how the relationships pertaining to circular labour migration can be improved to enhance the benefits for all stakeholders.

1.3.2 Circular labour migration from Lesotho

Geographically, Lesotho is one of the smallest countries in Africa, with a population of around 1,88 million people and a total land area of 30 355 square kilometres.[114] Lesotho is one of only three enclaves in the world.[115] It is completely surrounded by South Africa and this means that the country's development strategies, investments and trade policies are largely influenced by South Africa.[116] Lesotho's peculiar geographical location has traditionally compelled the Basotho people to try to gain access to South African products and labour markets. As a result, the Basotho have customarily opted to migrate periodically to South Africa for better work opportunities.[117] Remittances obtained from this migration contribute significantly to Lesotho's gross domestic product (GDP). In 2015, for instance, remittances from labour migrants made up 14,8% of Lesotho's GDP.[118] This heavy reliance on remittances from South Africa makes Lesotho one of the most migrant remittance reliant countries in the world.[119]

Remittances from South Africa have, however, been decreasing since the 1990s due to various factors. These factors include illegal and irregular cross-border migration between Lesotho and South Africa and the declining legal work opportunities for

114 APR 2010 *African Peer Review Mechanism* 12.

115 Enclaves are land-locked countries that are completely surrounded by one country. The other two countries are San Marino (completely surrounded by Italy) and the Vatican City (completely surrounded by the city of Rome). See https://www.geolounge.com/landlockedcountries.

116 Hadebe 2015 *South Africa's Post-Apartheid Foreign Policy towards Southern Africa 1994–2014* 8.

117 Segatti 2015 "Labour Migration, Regional Integration and Bilateral Labour Agreements" 24.

118 Lesotho Economic Indicators Unknown https://www.theglobaleconomy.com/Lesotho/remittances-percent-GDP.

119 Statistics released by the World Bank in 2009 indicate that Lesotho ranks number 3 in the top ten countries receiving the most remittances in the world. See Crush *et al* 2010 *Southern African Migration Programme*.

Basotho men in South African mines.[120] The illegal migrants working in South Africa typically earn less money than legal migrants. This occurs largely because undocumented workers tend to accept lower wages, compared to documented migrants.[121] Consequently, remittances sent back home by illegal migrants will invariably be lower than those sent by legal migrants.[122] These reduced remittances have adverse impacts on many households in Lesotho because the remittances are crucial to household survival in Lesotho.[123]

Moreover, the illegal migration that the Basotho participate in exposes them to severe exploitation, such as the lower wages and poor working conditions often experienced by irregular workers in South Africa.[124] On the other hand, South Africa as the receiving country incurs exorbitant costs in trying to keep illegal migrants out of the country.[125] Circular labour migration thus becomes unfavourable to both the receiving country and the migrant. It therefore becomes clear that the manner in which circular labour migration in this context is regulated needs to promote benefits for all the stakeholders involved in the process.

1.3.3 Circular labour migration from Zimbabwe

Research conducted by Truen[126] indicates that remittances to Zimbabwe have increased from comprising 2,4% of the country's GDP in 2002 to 7,2% in 2007, and then increased further to 12,5% in 2015. However, these remittance figures do not include remittances flowing into Zimbabwe through irregular channels.[127] The value of

120 Crush *et al* 2010 *Southern African Migration Programme* 1.
121 Bowers and Chand 2018 *Journal on Migration and Human Security* 182.
122 Orrenius and Zavodny 2015 *Handbook of the Economics of International Migration* 3.
123 Spiegel "Rural Differentiation and the Diffusion of Migrant Labour Remittances in Lesotho" 110-111.
124 Basotho migrant workers who migrate illegally to South Africa remain as hidden as possible in order to evade arrest by South African police. This often leads to workers seeking refuge in illegal mines or in the homes of their employers. These employers invariably exploit this situation by offering the migrant workers less remuneration than legal migrants and exposing them to inferior working conditions. Crush *et al* 2010 *Southern African Migration Programme*; Griffin *Border Work: Illegality, Unbounded Labour and the Lives of Basotho Migrant Women* 1.
125 Segatti 2011 "Reforming South African Immigration Policy in the Post-apartheid Period (1990–2010)" 31-66.
126 Truen *et al* 2016 *Finmark Trust* 87.
127 Truen *et al* 2016 *Finmark Trust* 87.

remittances flowing into Zimbabwe through irregular channels cannot be determined with certainty.

In 2013, it was estimated that between one million and three million Zimbabwean nationals in total were working abroad.[128] Recently, similar numbers were projected to be working in South Africa alone.[129] South Africa consequently appears to be the preferred destination for the majority of these Zimbabwean workers.[130] Determining the precise figure of Zimbabwean workers in South Africa is, however, a near impossible task, because a significant number of these workers use informal channels to work in South Africa and are often undocumented, hence no records accurately reflect the current true numbers of these migrants.[131] Nonetheless, available research indicates that Zimbabwe contributes the largest number of immigrants to South Africa.[132] A survey conducted in 2014 revealed that 19% of all temporary permits granted by the South African government were granted to Zimbabweans.[133]

Furthermore, a study conducted in Zimbabwe indicates that 69% of respondent households in a study area in the south-western part of Zimbabwe had at least one member working in South Africa.[134] These workers are able to raise household income in Zimbabwe by regularly sending remittances back home. According to an IOM study, remittances contribute almost 50% of the household income in south-western Zimbabwe, thus constituting a major contributor to the alleviation of poverty.[135]

It is important to note that the influx of migrants from Zimbabwe and other Southern African countries into South Africa creates myriad problems for South African immigration policy and labour governance. These foreign migrants tend to engage in atypical work where they face exploitative conditions and evade South African

128 Idemudia 2013 *J Inj Violence Res* 18.
129 Chiumia 2013 https://africacheck.org/reports/how-many-zimbabweans-live-in-south-africa-the-numbers-are-unreliable/.
130 Kiwanuka and Monson 2009 *Forced Migration Studies Program* 10.
131 Idemudia 2013 *J Inj Violence Res* 18.
132 *News24* 2014 https://www.news24.com/News24/Most-immigrants-to-SA-from-Zimbabwe-20140715.
133 *News24* 2014 https://www.news24.com/News24/Most-immigrants-to-SA-from-Zimbabwe-20140715.
134 Maphosa 2005 *University of Witwatersrand* 13.
135 IOM 2007 *Baseline and Feasibility Study Report* 9.

immigration officials with increased ease.[136] In response to the problems caused by the influx of undocumented migrants from Zimbabwe, the South African government approved the ZDP, intended to allow Zimbabwean migrants holding the permit to temporarily study, work or conduct business in South Africa.[137]

In 2014, prior to the expiration of the ZDP, the South African DHA implemented the new Zimbabwean Special Dispensation Permit (ZSP), which allowed Zimbabwean permit holders to study, work or conduct business in South Africa for a further three years. In 2017, the DHA announced the launch of the Zimbabwean Exemption Permit (ZEP), which allowed holders of the ZSP to study, work or conduct business in South Africa for a further four years.[138]

Carciotto[139] notes that the then South African Minister of Home Affairs, Hlengiwe Mkhize, suggested in 2017 that the ZEP was a part of efforts aligned with the White Paper on International Migration Policy of 2017, which is meant to strategically address the inflow of low-skilled labour migrants from SADC countries into South Africa. This indicates that the South African government is cognisant of the great need for arrangements that will reduce the illegal entry of Zimbabweans into South Africa. The continued extension of the special dispensations suggests that more long-term arrangements are necessary. This forms part of the hypothesis in this thesis that optimised bilateral labour arrangements can and should form part of the solution for curbing problems caused by the rapid influx of undocumented labour migrants into South Africa.

Against this backdrop, this thesis identifies good practice guidelines from international law and standards of labour migration, from which South Africa may learn lessons on how to address the migration challenges facing the country. The idea in this instance is to simultaneously optimise the benefits of circular labour migration for all stakeholders involved in the circular labour migration process. In this manner, this thesis contributes to the elaboration of good practices of bilateral labour arrangements

136 Jinnah 2017 *South African Review of Sociology* 53.

137 In 2010, when the ZDP was launched, the Department of Home Affairs projected that there were about 1,5 million undocumented Zimbabweans in South Africa. See Carciotto 2018 https://cmsny.org/publications/2018smsc-sihma-zimbabwe-regularization/.

138 Carciotto 2018 https://cmsny.org/publications/2018smsc-sihma-zimbabwe-regularization/.

139 Carciotto 2018 https://cmsny.org/publications/2018smsc-sihma-zimbabwe-regularization/.

identified by the ILO. The conclusions of the Tripartite Meeting on Migration in 2013 implored the ILO to "create a repository of good practices on bilateral and other international cooperation on labour migration".[140]

Similarly, Wickramasekara[141] points out that good practices or provisions of bilateral arrangements cannot replace or be a substitute for the ratification of and compliance with binding international conventions on migrant workers. The conventions are part of international law and standards of migration governance and migrant protection. Therefore, this thesis will also discuss the international instruments that serve as the international law and standards for labour migration. Ideally, the prime focus in this regard should be placed on instruments to which countries relevant to this thesis are signatories. However, holistically, an attempt will be made in this thesis to outline the various relevant provisions prevalent in the international law and standards of labour migration that may be included in bilateral labour arrangements intended for triple-win benefits. These laws and standards include:

- eight fundamental ILO conventions enshrined in the 1999 ILO Declaration on Fundamental Principles and Rights at Work;
- nine universal human rights instruments and associated protocols;
- three international conventions dealing specifically with migrant workers;
- all other labour standards which apply to all workers in the workplace, including migrant workers; and
- non-binding normative frameworks such as the ILO Multilateral Framework on Labour Migration and the General Principles and Operational Guidelines for Fair Recruitment.

Moreover, Wickramasekara, in various studies conducted for the ILO, identifies examples of countries implementing best practices of ideal bilateral arrangements.[142]

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140 ILO 2013 https://www.ilo.org/global/topics/labour-migration/events-training/WCMS_221809/lang--en/index.htm.

141 Wickramasekara 2018 *Assessment Guide for Bilateral Agreements and Memoranda of Understanding on Labour Migration, with a Special Focus on Bangladesh* 8.

142 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding*; Wickramasekara 2018 *Assessment Guide for Bilateral Agreements and Memoranda of Understanding on Labour Migration, with a Special Focus on Bangladesh*; ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*.

In several of these studies, he recognises bilateral labour arrangements concluded by countries such as Spain and New Zealand as best practices. Additionally, with a view to learning valuable lessons and making recommendations for the enhanced regulation of circular labour migration between South Africa, Lesotho and Zimbabwe, a brief investigation into the best practices will be undertaken. This investigation will include an exposition of the role that the IOM plays in assisting these countries to effectively implement the bilateral labour arrangements for the benefit of all stakeholders involved. This process will culminate in a discussion of the Temporary and Circular Labour Migration (TCLM) programme between Spain and Colombia and the Recognised Seasonal Employer (RSE) scheme between New Zealand and the Pacific Island countries, which are the main programmes used to facilitate circular labour migration in these countries.

1.3.4 Circular migration between Colombia and Spain

The TCLM programme is an innovative bilateral project initiated in Spain in the late 1990s by *Unio de Pagesos*.[143] This programme facilitates the circular labour migration of migrants from Colombia to Spain to work for a limited duration of time.[144] The TCLM is identified by numerous international organisations such as the OECD, the European Union (EU), and the IOM as an innovative tool for regulating the flow of adequately trained migrants and for preventing irregular migration to Europe.[145]

At the 24th OSCE Economic and Environmental Forum,[146] the TCLM was highlighted as an ideal illustration of the effective regulation of circular labour migration. This is because the TCLM portrays features of effective regulation of circular labour migration as identified by the IOM. These features include:

i) labour market analysis in countries of origin and destination;
ii) offer of incentives to returning migrants;
iii) information dissemination and training of migrant workers;

143 Unio de Pagesos is a farmers' association that includes 70% of all agricultural businesses in Catalonia. See https://www.uniodepagesos.com.
144 Barrerro *et al* 2009 *Gritim Working Paper Series* 9.
145 Barrerro *et al* 2009 *Gritim Working Paper Series* 9.
146 Lanneau 2016 "Strengthening Stability and Security through Co-operation on Good Governance" 8.

iv) flexible work and stay/residence permits;

v) skills upgrading and transfer of competences;

vi) portability of social benefits and pensions;

vii) permission to have dual nationality; and

viii) cooperation between the countries of origin and countries of destination.[147]

The 24th OSCE Economic and Environmental Forum also identified bilateral labour agreements as a principal means for regulating circular labour migration. The TCLM is chosen as a best practice model for the purposes of this thesis because research indicates that the TCLM has been effective in creating a triple-win situation for all the parties involved.[148]

The *Ley Organica* (Organic Law) on Rights and Freedoms of Foreigners in Spain and their Interaction in Spain covers the legal basis for the TCLM in this country.[149] The Organic Law complemented by the *Reglamento do Extranjeria* (Immigration Rules) legally regulates the flow of migration to Spain, which is the receiving country, and by so doing fills the gap in Spain's labour market without having to accommodate permanent migrants.[150] In this manner, the programme contributes to the growth of the host country without forcing it to receive an influx of permanent migrants into the country who will compete with the country's nationals for resources. This focus on co-development between the country of origin and the receiving country makes Spain's position on circular labour migration more advanced than that of other countries in the EU.[151] This perspective motivates the use of Spain's regulation of the TCLM in this thesis as a best practice that could provide valuable lessons for South Africa in this respect.

147 Lanneau 2016 "Strengthening Stability and Security through Co-operation on Good Governance" 8.

148 Rinke 2011 *The State of Environmental Migration Study* 6.

149 Spanish legislation is primarily written in Spanish, the official language of the country, but English translations were used in this thesis. See Ley Orgánica 4/2000 de enro sobre derechos y libertades de los extranjeros en Espanay su integracion social (Organic Law 4/2000 on the Rights and Freedoms of Aliens in Spain and Their Social Integration).

150 Shade and Fast 2011 *COMCAD Working* Paper 101.

151 Rinke 2011 *The State of Environmental Migration Study* 25.

Furthermore, research on the TCLM indicates that the migrants also benefit from the new skills and knowledge that they acquire in the receiving country, which they may use to expand their income-generating ventures upon their return home.[152] The programme positively affects the migrants themselves, as they are able to earn a livelihood abroad and send remittances back to their families. These remittances help increase the resilience of the communities back home and reduce their vulnerability to a host of factors, such as future environmental disruptions.[153] This programme also specifically targets vulnerable communities, with the purpose of relocating them from areas that are at a high risk of environmental disasters.[154] This allows the migrants to earn a living while the affected regions in Colombia recover.

It is therefore useful to include the TCLM in this thesis in order to analyse the key aspects of the effective regulation of circular labour migration applied in the programme. South Africa has no legislation or circular labour migration programme similar to the TCLM that specifically aims to enhance the triple-win benefits of circular labour migration for all stakeholders. The benefits that labour migrants specifically obtained from similar regulatory arrangements to the TCLM may encourage migrants in the Southern African context to engage in more regular circular labour migration. Ideas formulated from the analysis of the TCLM will hence provide an additional baseline for recommendations on how South Africa and its Southern African neighbours can optimise the regulation of circular labour migration.

1.3.5 Recognised Seasonal Employer (RSE) scheme

The RSE scheme was developed following previous practices where horticulturalists and viticulturists in New Zealand were heavily reliant on illegal migrant workers. In 2000, it was estimated that there were 17 000 illegal workers in New Zealand's horticulture and viticulture industries.[155] These workers were welcomed by New Zealand's employers who sought to increase output as illegal workers could be paid

152 Rinke 2011 *The State of Environmental Migration Study* 25.
153 Shade and Fast 2011 *COMCAD Working Paper* 101.
154 Shade and Fast 2011 *COMCAD Working Paper* 101.
155 Bedford 2013 *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 80.

lower wages and were willing to work longer hours.[156] However, despite the financial benefits they received, employers in the horticulture and viticulture industries became increasingly worried that overseas consumers would refrain from buying produce from New Zealand upon discovering that illegal workers were exploited in producing such products.[157] In order to safeguard against this possible eventuality, the New Zealand government, in association with employers, designed a new policy framework: the RSE.

Generally, New Zealand has bilateral arrangements with a number of countries that wish to facilitate the labour migration of their nationals to New Zealand. Unlike the bilateral arrangements that South Africa has with its neighbours, the bilateral labour arrangements between New Zealand and numerous Pacific Island countries are not silent about the regulation of circular labour migration. These agreements between New Zealand and Pacific Island countries form the basis for the RSE.[158] The RSE is a circular or temporary labour migration policy launched in 2007 to enable Pacific Island migrants to temporarily work in New Zealand, planting, harvesting and maintaining crops in the viticulture and horticulture sectors.[159] This employment occurs only once measures to employ local New Zealanders have been exhausted.[160] Lessons on how New Zealand manages to identify areas where circular migrants will not negatively affect job opportunities for New Zealanders will be vital in the South African context.[161]

Furthermore, it is important to include New Zealand and its regulation of circular labour migration as a best practice in this thesis because the RSE, while allowing

156 Rawlinson 2014 *Faculty of Agribusiness and Commerce Working Paper* 16.

157 Rawlinson 2014 *Faculty of Agribusiness and Commerce Working Paper* 16.

158 Bedford 2013 *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 83.

159 Viticulture is the cultivation of grapevines and grapes predominantly for wine making, while horticulture is the gardening and cultivation of plants to enhance the living environment and human diets. Bailey 2009 *Unfree Labour? Ni Vanuatu Workers in New Zealand's Recognized Seasonal Employer Scheme*.

160 Bedford 2013 *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities*; Ramasamy *et al* "The Recognised Seasonal Employer Policy: Seeking the Elusive Triple Wins for Development through International Migration" *Pacific Economic Bulletin* 23.

161 Many South Africans have a negative attitude towards foreign migrants, resulting in xenophobia, because they believe that labour migrants compete against South Africans for job opportunities that should be reserved solely for South Africans; see Durofika and Ijeoma 2017 *African Population Studies* 3296.

horticulturalists and vineyard owners from New Zealand to employ up to 8 000 workers annually from the Pacific Islands, also promotes the importance of having triple-win benefits for employers, employees and governments.[162] To ensure that all stakeholders reap benefits from the migration process, the RSE engages multiple stakeholders at all stages of design, implementation and ongoing management.[163] The ILO identifies this feature as the "best practice" feature of the RSE.[164] South Africa, on the other hand, does not expressly promote triple-win benefits for all stakeholders involved in the circular labour migration process, hence academics contend that the bilateralism practised by South Africa is largely exclusive and benefits only one country.[165] The analysis of the RSE in this thesis could therefore provide insights on how South Africa can improve its bilateral labour arrangements to provide triple-win benefits.

The RSE is also important for purposes of this thesis because there have been a multitude of cases about the illegal permanent settlement of foreign migrant workers in South Africa.[166] The RSE, on the other hand, has been successful in its efforts to prevent overstaying due to the implementation of coherent policies by key stakeholders such as employers, recruiters, government officials and the sending communities.[167] This indicates that South Africa can learn valuable lessons from the regulation of circular labour migration under the RSE.

In order to provide comprehensive recommendations, this thesis will also briefly investigate the bilateral labour arrangement between New Zealand and Vanuatu, the largest sender of circular migrants to New Zealand under the RSE. Vanuatu now sends around 3 000 workers annually to New Zealand.[168] Academic studies conducted in Vanuatu have revealed the beneficial impacts of the RSE on workers from Vanuatu

162 Ramsey *et al* 2008 *Pacific Economic Bulletin* 171.
163 Hugo 2009 "Migration, Labour Mobility and Poverty".
164 ILO 2009 https://www.ilo.org/dyn/migpractice/migmain.listPractices?p_lang=en.
165 Nshimbi and Fioramonti 2013 *MIWORC Policy Brief*.
166 Ferrer and Visser 2015 *Farm Workers' Living Conditions in South Africa: Key Trends, Emergent Issues and Underlying and Structural Problems*.
167 Bedford 2013 *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 81.
168 Kumar 2012 *Migration and Development: The Development Impacts of Short-Term Migration of Ni Vanuatu Workers to New Zealand* 3.

and their sending country.[169] These benefits include the acquisition of skills such as shoot thinning, leaf plucking, nailing, pruning and harvesting that are taught to migrants who are part of the RSE, before they are employed in the receiving country. RSE workers are also offered training in English literacy, numeracy and financial literacy.[170] Circular migrants have successfully implemented these skills that they acquired in New Zealand in their own home country, Vanuatu.[171]

It is therefore useful to undertake a desktop analysis of the provisions of the bilateral agreement facilitating migration from Vanuatu to New Zealand under the RSE. This may assist with making comprehensive recommendations on how South Africa can optimise the regulation of circular labour migration in order to encourage a triple-win situation for the sending country, the receiving country, and the migrants.

In light of the above, the central hypothesis in this thesis is that *international law and standards of labour migration and best practices from selected foreign countries can provide comprehensive guidance in enhancing the regulation of circular labour migration between South Africa, Lesotho and Zimbabwe to provide optimised benefits for all stakeholders.*

Flowing from this hypothesis, this thesis seeks to answer the following central research question, which determines and guides the overall study: *What guidance can international law and standards of labour migration and best practices from selected foreign countries provide for enhancing the regulation of circular labour migration between South Africa, Lesotho and Zimbabwe to provide optimised benefits for all stakeholders*?

Subsequent related sub-questions have been formulated around each individual chapter of this thesis, including:

i) What does circular migration entail and what are the key aspects and issues relevant to the concept of circular labour migration?

153 Cameron *Social Development Outcomes of Participation in the New Zealand Recognised Seasonal Employer (RSE) Scheme for Ni Vanuatu Seasonal Migrant Workers* 91.
170 Roorda 2011 *Evalue Research*.
171 Tipples and Rawlinson 2014 *Lincoln University Faculty of Agribusiness and Commerce Working Paper* 16.

ii) What are the respective international and regional positions of the ILO, the IOM, the AU and SADC on the regulation of labour migration in general, and more specifically on circular labour migration and the proper use of bilateral labour arrangements? With reference to foreign law, how do Spain and New Zealand utilise bilateral labour arrangements?

iii) Which areas in the bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, require development to provide enhanced benefits for all the key stakeholders involved in the labour migration process?

iv) Against the conceptual foundations of circular labour migration, good practice guidelines and the best practices in New Zealand and Spain, what lessons can be learned about how South Africa could optimise regulation of circular labour migration between itself, Zimbabwe and Lesotho?

1.4 Assumptions

This study is based on the following assumptions:

1.4.1 Labour migration in Southern Africa is centred on South Africa as the prime migrant-receiving country.

1.4.2 Circular labour migration enhances development in both migrant-sending and migrant-receiving countries.

1.4.3 The optimisation of bilateral labour arrangements can allow for the regulation of the movement of both semi-skilled and non-skilled workers to South Africa.

1.4.4 The enhanced regulation of circular labour migration through bilateral labour arrangements can provide lucrative incentives for labour migrants to engage in more legal circular labour migration to South Africa.

1.4.5 The international law and standards of labour migration provide comprehensive guidelines that promote triple-win benefits for all stakeholders involved in the circular labour migration process.

1.4.6 The IOM provides essential assistance to countries seeking to conclude and effectively implement bilateral labour arrangements to provide triple-win benefits.

1.4.7 New Zealand and Spain exhibit progressive approaches to the regulation of circular labour migration to provide mutual benefits to stakeholders involved in the process.

1.4.8 The proper regulation of circular labour migration between South Africa and its Southern African neighbours, especially Lesotho and Zimbabwe, could promote the achievement of triple-win benefits for the sending country, the receiving country and the migrants.

1.5 Objectives of the study

The primary aim of this study is to determine how and to what extent international law and standards of labour migration could assist in enhancing the regulation of circular labour migration between South Africa and its neighbours, Lesotho and Zimbabwe, to provide triple-win benefits through optimised bilateral labour arrangements. Circular labour migration arrangements will be appraised as tools for addressing labour migration and development needs, protecting the rights of migrant workers and limiting irregular migration flows. The specific aims of the study are:

1.5.1 To establish a general working definition for migration to be operative in this thesis:

1.5.1.1 To define what bilateral labour arrangements are and the purpose that they seek to achieve and to elaborate upon how they are put into practice. In this process, it becomes vital to outline the reasons why countries would find the use of bilateral arrangements attractive. Flowing from this, an exposition of the various advantages that circular labour migration offers also becomes necessary (chapter 2).

1.5.2 To discuss the role played by the IOM to facilitate the implementation of bilateral labour arrangements intended to achieve triple-win benefits. This study will maintain a consistent view that the governance of labour migration

provided by the ILO is quintessential to the promotion of triple-win benefits among the stakeholders involved in the process. It is therefore important to discuss the relevant standards of the ILO in this thesis as a yardstick against which the sending and receiving countries could and should formulate agreements to address circular labour migration (chapter 3).

1.5.2.1 To identify key elements of the effective regulation of circular labour migration from countries such as New Zealand and Spain. The ILO identifies both New Zealand and Spain as countries practising the best regulation of circular labour migration to provide triple-win benefits.

1.5.3 To discuss the current dispensation regulating circular labour migration in South Africa. It is necessary to discuss the range of rights currently available and unavailable to circular labour migrants in South Africa. The intention in this instance is to expose the need for regulatory instruments that promote the benefits of circular labour migration in order to encourage migrants to use legal channels of access into South Africa (chapter 4).

1.5.4. Finally, against the conceptual foundations of circular labour migration and bilateral labour arrangements, recommendations for improving the approach to circular labour migration between South Africa and its neighbours, Zimbabwe and Lesotho, will be made. These recommendations will principally be made against the background of guidelines provided by the international law and standards of labour migration and partly from the brief investigation made into the manner in which Spain and New Zealand regulate circular labour migration (chapter 5).

1.6 Research methodology

The research design used is an analytical literature study and is desktop-based. This study seeks to analyse the literature, which includes relevant textbooks, authoritative electronic material, journals, and conventions, declarations and recommendations of international organisations such as the ILO and the IOM, whose scope of work is directly related to the regulation of circular labour migration. The theoretical grounding

of the concept of circular labour migration will form the basis on which the extent to which the migration framework in Southern Africa facilitates circular labour migration between South Africa and its neighbours is assessed. The regional and sub-regional instruments relevant to circular labour migration emanating from the AU and SADC, respectively, will be discussed primarily to portray the additional need for improved governance of circular labour migration between South Africa and its neighbours, Lesotho and Zimbabwe.

Furthermore, an analytical literature study approach will be followed to analyse the existing bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe. The intention is primarily to determine if further improvements should be made with regard to the countries' circular labour migration arrangements. A similar approach will be followed in order to determine how the provisions of various instruments that make up the international law and standards of labour migration could be used to improve the regulation of circular labour migration between the selected Southern African countries. In a bid to develop more concrete lessons from the guidelines provided by the international law and standards, this thesis will attempt to analyse the legal framework in countries that exhibit best practices of the regulation of circular labour migration. The intention is to observe how the chosen countries, Spain and New Zealand, use provisions fundamentally derived from the international law and standards of labour migration to derive triple-win benefits from bilateral labour arrangements. In this regard, analysing the enabling legislation in the foreign countries may also provide significant lessons on how to develop labour migration laws in the Southern African context.

The aim is not to blindly transplant the lessons from the other jurisdictions into the Southern African context. However, using these best practice models and international law and standards of labour migration as binding tools is justified under the *Constitution of the Republic of South Africa*, 1996. The *Constitution* is the supreme law of the land in South Africa.[172] The *Constitution* provides that international labour standards directly influence South Africa's formulation of labour policies.[173] Firstly,

172 Section 2 of the Constitution.
173 Aletter 2016 https://islssl.org/wp-content/uploads/2015/10/SouthAfrica-CandiceAletter.pdf.

section 232 of the *Constitution* makes customary international law the law in South Africa unless it is inconsistent with the *Constitution*.

Secondly, section 233 asserts that when interpreting legislation, courts must consider reasonable interpretations of the legislation that are consistent with international law over any other interpretations that are inconsistent with international law.[174] To clarify the position with regard to international law, the courts have stated that international law does not only refer to international standards to which South Africa has assented or has ratified. The Constitutional Court in *S v Makwanyane*[175] held that both binding and non-binding international instruments are to be used as interpretive guides in South Africa.[176] This ruling is particularly relevant to this thesis because South Africa has not ratified some of the migrant labour-specific conventions that form part of the international law and standards of labour migration that will be discussed in this thesis.

Additionally, the *Labour Relations Act* (LRA)[177] and other key labour statutes in South Africa, such as the *Basic Conditions of Employment Act*,[178] further confirm the importance of international standards in South Africa by providing that one of the basic objectives of the labour legislation is to give effect to the obligations of the country which it has incurred by virtue of being a member of the ILO.[179] These statutes provide that the provisions of the labour laws must be interpreted in accordance with the public international law obligations of the country.[180] The court in *Murray v Minister of Defence*[181] further highlighted the importance of the influence of the instruments of the ILO in the drafting and wording of legislation in South Africa.

Therefore, the international law and standards of labour migration will be used to establish the minimum standards expected of bilateral labour arrangements that seek to create triple-win benefits for South Africa, its neighbours Lesotho and Zimbabwe,

174 Dugard notes that the constitutionalisation of the common-law rule on customary international law ensures that customary international law is not subject to subordinate legislation in South Africa. See Dugard 1997 *EJIL* 79.
175 1995 3 SA 391 (CC) para 329.
176 Para 35.
177 66 of 1995.
178 See preamble to the *Basic Conditions of Employment Act* 75 of 1997.
179 Section 1*(b)* of the LRA.
180 Section 3 of the LRA.
181 2006 11 BCLR 1357 (C) para 23.

as well as circular labour migrants themselves. Subsequently, considering the international position on the regulation of circular labour migration through bilateral labour agreements could play a key role in the development of the Southern African position in this regard.

1.8 Outline of the study

Chapter 2 forms the theoretical basis for this thesis. It unpacks the concept of circular labour migration by first describing, generally, the concept of migration and labour migration as a form of migration. The chapter then provides a historical background to the concept of circular migration in order to lay the foundation for the subsequent analysis of the current prevalence of circular labour migration in the various jurisdictions that are key in this thesis. The intention is to discuss the reasons for circular labour migration, the benefits associated with it, and the disadvantages that may be reduced or eradicated through proper regulation. The argument underpinning this chapter is that robust regulation of circular labour migration can help harness the benefits that it presents and reduce and/or eradicate the disadvantages of circular labour migration.

Following this, chapter 3 provides an international and regional perspective on the concept of labour migration. The position of the ILO, the IOM, the AU and SADC generally on the regulation of labour migration is central to the discussion in this chapter. The chapter also analyses relevant instruments that provide international law and standards on the regulation of circular labour migration. The rationale for this chapter is to outline the good practice guidelines that international instruments provide for the effective regulation of circular labour migration that enhances the benefits of this type of migration. In light of the foregoing, in order to provide further insights on how international law and standards of circular labour migration can guide triple-win benefits in bilateral arrangements, the regulation of circular labour migration in Spain and New Zealand will be analysed in this chapter.

Chapter 4 provides a critical investigation of the circular labour migration relationship between South Africa and its Southern African neighbours, Zimbabwe and Lesotho. This chapter provides a historical perspective on circular labour migration to South

Africa. The goal is to explore the reasons why and how circular labour migration became a prevalent phenomenon in Southern Africa. This chapter also critically discusses the existing bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, respectively. The intention is to provide a generalised discussion that identifies areas in these bilateral arrangements where development is required.

Accordingly, chapter 5 reaches a conclusion and offers possible means that South Africa and its Southern African neighbours, Lesotho and Zimbabwe, can use to optimise the use of bilateral labour arrangements to enhance the benefits of circular labour migration for the three stakeholders involved.

Chapter 2

Understanding the practice of circular labour migration

2.1 Introduction

In the modern world, the old paradigm of permanent migration settlement is gradually giving way to temporary and circular migration.[1] Circular labour migration, specifically, has become a fundamental course of action that is promoted by various political and economic agents. International organisations such as the ILO and the IOM have recommended the practice of circular labour migration due to the benefits that circular human mobility presents.[2] These organisations promote circular labour migration because of the triple-win benefits it may present if properly regulated.[3]

The main idea in this instance is that circular labour migration primarily helps to meet labour market shortages in the receiving country, provides remittances for development in the sending country, and provides benefits for the migrants by offering employment and essential financial income.[4]

Recently, there have been more nuanced views that circular labour migration offers more benefits than traditionally envisaged. Costa and Martin[5] argue that circular labour migration is preferred by migrants because a significant number of migrants wish to return home to their countries of origin after working abroad. Furthermore, academic evidence now indicates that circular labour migration is an imperative adaptation response to socio-economic problems and even various forms of environmental degradation caused by climate change.[6]

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1 Barrerro *et al* 2009 *Gritim Working Paper Series* 9.

2 Vertovec 2007 *International Migration Institute Working Paper* 4.

3 The roles that the organisations play in promoting circular labour migration will become evident in the discussions below.

4 Castles and Ozkul 2014 "Circular Labour Migration: Triple Win or a New Label for Temporary Migration?".

5 Costa and Martin 2018 https://www.epi.org/files/pdf/152373.pdf.

6 Migration is not only a response to environmental change, but is recognised, whether temporarily or in the long term, as a vital coping strategy for communities affected by climate change. For instance, climate change contributes to a drastic increase in weather-related events and natural disasters, causing people to flee their homes in pursuit of a more accommodating environment. However, when people move owing to climatic or environmental change, their mobility could also serve as an adaptation strategy that enables them to minimise the harm

Nonetheless, the potential of circular labour migration to achieve the desired benefits mentioned above is usually hampered by a variety of factors. These include the restrictive immigration policies of destination countries, irregular migration, and the overstaying of migrant workers in receiving countries, which interrupt circular labour migration patterns and prevent the high development potential of migration from being realised.[7]

De Haas[8] says that the key to harnessing the potential benefits of circular labour migration lies in implementing specific policies that encourage circular migration. It is submitted that implementing such policies is the ideal initiative as opposed to the futile exercise of trying to prevent inevitable migration.

Therefore, immigration policies, as well as other supportive instruments that permit freer circulation, can increase migration control and enhance the contribution of migrants to the development of their home countries. In this regard, Zimmerman[9] argues that supportive tools for freer circulation include dual citizenship, permanent residence permits, and bilateral labour arrangements between the sending and receiving countries.

This chapter seeks to unpack the concept of circular labour migration by first describing, generally, the concept of migration, followed by a discussion of labour migration as a specific form of migration. It is essential to point out that there is no single universal definition of circular migration, but there is considerable literature on the various definitions of the concept of circular migration.[10] While it is impossible to discuss all the extant definitions here, some of the definitions by prominent authors will be discussed in this chapter.

In order to lay the foundation for subsequent discussions and the analysis of the current prevalence of circular migration in the various jurisdictions chosen in this

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and improve their lives. See Fatorić 2014 *Center for Climate and Security Briefer* 3; Ionesco and Chazalnoel 2015 http://weblog.iom.int/migration-adaptation-strategy-climate-change.

7 De Haas 2005 *Third Word Quarterly* 1269.

8 De Haas 2005 *Third Word Quarterly* 1269.

9 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.

10 Task Force on Measuring Circular Migration 2016 "Defining and Measuring Circular Migration" 1.

thesis, this chapter will briefly provide a general historical background to the concept of circular migration. The chapter will then proceed to discuss the reasons for circular labour migration and the benefits associated with it. Discussing the reasons and benefits in this manner should serve as a foundation for the arguments for the regulation of circular labour migration for triple-win benefits. Through the said regulation, governments should also be able to reduce or eradicate any impediments to circular migration.

In this chapter, bilateral labour arrangements, specifically bilateral labour agreements, will be appraised as the ideal instruments to facilitate circular labour migration that provides optimised benefits for the stakeholders involved. Consequently, the central question investigated in this chapter, which feeds into the main research question, is: What does circular migration entail and what are the key aspects and issues relevant to the concept of circular labour migration? The primary argument in this chapter is that the optimised regulation of circular labour migration enhances the benefits of circular migration to provide triple-win benefits for all stakeholders involved.

2.2 Migration: Key concepts

In 1975, Shaw[11] defined migration as "the relatively permanent movement of persons over a significant distance". However, the inclusion of the qualifiers "relatively" and "significant" in the formulation indicates a larger definitional problem than envisaged. Kok[12] states that apart from the "distance" dimension mentioned above, migration also involves "time", which is missing from Shaw's definition. Kok further states that the inclusion of the "time" dimension inadvertently replaces the "permanence" factor highlighted by Shaw.[13]

Clark,[14] on the other hand, believes that "there is no unanimity over the meaning of migration", and that migration cannot be defined perfectly as it involves a wide range of elements at various stages of the migration process. These begin with the impetus

11 Shaw 1975 *Migration Theory and Fact* 5.
12 Kok 1999 *Journal of Demography* 19.
13 Kok 1999 *Journal of Demography* 19.
14 Clark *Population Geography* 123.

for migration, moving through the various stages of travel and entry, settlement and/or return, integration and reintegration into sending and receiving countries, and eventually, in some instances, culminating in the acquisition of nationality.[15]

Even though no universally applied definition currently exists, some scholars generally understand migration to involve the movement of people over some distance which results in a change of residence.[16]

Notably, this broad definition conceptualises migration as a permanent or semi-permanent change of residence, but not necessarily the legal status of residence, which places no restriction upon the voluntary or involuntary nature of the act and makes no distinction between voluntary and involuntary migration.[17]

The main difference between voluntary and involuntary migration is the reason migrants decide to leave their homes, in other words, the driver behind migration. Voluntary migration typically involves the movement of people because they are seeking better economic and social conditions than are available in their home communities – the choice to migrate was therefore exercised.

Conversely, involuntary migration involves the movement of people who have been forcibly displaced from their homes or have been coerced into moving.[18] However, as this study focuses primarily on the voluntary migration of people for purposes of work, this form of migration is not relevant to this thesis.

The IOM has developed a comprehensive definition of migration that is often used in migration research. The IOM regards migration as:

> The movement of persons or a group of persons either across an international border, or within a state. It is a population movement, encompassing any kind of movement by people, whatever its length, composition and causes; it

15 IOM *Essentials for Migration Management* 1.
16 Sinha 2005 *Foldrajzi Ertesito* 403-414; Clark *Population Geography* 123.
17 Demko and Shnell *Population Geography: A Reader* 286.
18 Some people do not have the freedom to consent to migration. Human trafficking and slavery victims lack this freedom. See Eltis *Coerced and Free Migrations: Global Perspectives* 2. http://www.copafs.org/UserFiles/file/seminars/methodology_and_data_quality/Involuntary%20and%20Voluntary%20Migarant%20Estimates.pdf.

includes migration of refugees, displaced persons, economic migrants, and persons moving for other purposes, including family reunification.[19]

This definition rejects the assertion that time is an essential component, as maintained by Kok above. The definition by the IOM expressly highlights that the length of the movement by persons is irrelevant in determining whether it can be classified as migration or not. Sinha[20] also highlights that there is no perfect definition of migration that can be free of any sort of question. However, it appears that the IOM's definition is significantly more comprehensive because it recognises that migration occurs for a variety of purposes and it also identifies certain types of migrants, such as refugees, displaced persons and economic migrants. These types of migrants are also recognised by the UN.[21]

Nonetheless, the IOM's definition can also not be regarded as perfect because it does not refer to the three broadly recognised categories of migrants: those migrating for a *long term* and a *short term* respectively, and *returning migrants.* These categories are recognised by the OECD.[22]

A long-term migrant is defined as a person who moves to a country other than his or her usual residence, regardless of the reasons, for a period of at least 12 months.[23] Ultimately, the country of destination effectively becomes his or her country of new residence. The sending country will regard the person as a long-term migrant and the receiving country will regard the person as a long-term immigrant.[24]

A short-term migrant, on the other hand, is a person who moves to a country other than his or her usual residence for a period of at least 3 months.[25] This period is ordinarily less than 12 months, except in situations where the movement to that

19 IOM date unknown https://www.iom.int/key-migration-terms.
20 Sinha 2005 *Foldrajzi Ertesito* 183.
21 UN 2011 http://unstatss.un.org/unsd/publication/SeriesM/SeriesM_58rev/E.pdf.
22 OECD date unknown https://www.oecd.org/migration/.
23 UN Data 1998 http://data.un.org/Glossary.aspx?q=long-term+migrant. See also European Commission date unknown https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/irregular-migration_en.
24 United Nations 2011 http://unstatss.un.org/unsd/publication/SeriesM/SeriesM_58rev/E.pdf.
25 European Commission Unknown https://ec.europa.eu/home-affairs/content/short-term-migrant_en.

country is for purposes of recreation, holiday, to visit friends or relatives, business, medical treatment or religious pilgrimage.[26]

Lastly, a returning migrant is a person returning to his or her country of citizenship after having been an international migrant (whether short- or long-term) and who does not intend to stay in his or her home country for at least one year.[27]

Recent research indicates that there is some academic consensus on the existence of a fourth type of migrant, a circular migrant. This type of migrant is yet to be defined by UN recommendations.[28] However, the term "circular migrant" is generally used to refer to a migrant who engages in back and forth movement between the sending country and the receiving country (or circular migration).[29] Various definitions of circular migration by scholars have existed from as far back as the mid-1970s.[30] These definitions and the historical background to circular migration will be discussed below.

2.3 Circular migration history and definitions

As asserted in the previous chapter, circular migration is rapidly becoming a popular phenomenon in the management of international labour migration.[31] This is mainly because it leads to the greater globalisation of the labour market.[32] Additionally, circular migration is increasingly being presented as the ideal form of migration which, if well managed, may contribute to the balancing of the demand and supply of labour at the international level and thus may contribute to the enhanced distribution of available resources and to economic growth.[33] Consequently, the old trends of permanent migration are progressively giving way to temporary and circular

26 OECD 2001 https://stats.oecd.org/glossary/detail.asp?ID=2349.
27 OECD 2001 https://stats.oecd.org/glossary/detail.asp?ID=2349.
28 United Nations Economic Commission for Europe 2016 https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/bur/2016/February/14-Add1_Circular_migration.pdf.
29 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
30 Privarova and Privara 2016 *International Journal of Environmental & Science Education* 12909-12917.
31 See para 1.1 above.
32 Ushakov and Zhmykhova 2015 *Actual Problems of Economics* 8.
33 European Commission 2007 https://eur- lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:52007DC0248.

migration.[34] In this context, a study of the United Nations Economic Commission for Europe indicates that circular migration is usually repetitive temporary migration.[35] Both circular migration and temporary migration have become topical because the modern era exhibits unprecedented global mobility where labour flexibility drives workers to travel across borders for economic purposes and consequently to engage in temporary and circular migration.[36]

In a 1974 study,[37] Bovenkerk defined circular migration as "[t]he movement to and from between two places that include[s] more than one return to the place of origin". This definition suggests that circular migration involves the repetition of movement to the home country. If this movement involves only one movement from the sending country to the receiving country, this migration would be temporary and not circular.[38]

The European Migration Network (EMN)[39] also defines circular migration as "a repetition of legal migration by the same person between two or more countries". The EMN thus draws a clear distinction between temporary migration and circular migration: the first-mentioned type is used in reference to a back and forth movement with a limited stay in the receiving country, while the latter is regarded as a form of temporary migration in which a temporary stay in the receiving country is repeated.[40]

Various authors provide their own definitions of circular migration which can enhance a broader, more encompassing approach to circular migration. Mendoza and Newland[41] provide a useful matrix that identifies four broad types of circular migration:

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34 GCIM 2005 https://www.refworld.org/pdfid/435f81814.pdf.

35 United Nations Economic Commission for Europe 2016 https://www.unece.org/fileadmin/DAM/stats/documents/ece/ces/bur/2016/February/14-Add1Circular_migration.pdf.

36 Hugo 2003 https://www.migrationpolicy.org/article/circular-migration-keeping-development-rolling; Vertovec 2007 *International Migration Institute Working Paper* 9.

37 Bovenkerk *The Sociology of Return Migration* 2.

38 Privarova and Privara 2016 *International Journal of Environmental & Science Education* 12909-12917.

39 European Migration Network 2011 https://ec.europa.eu/home-affairs/sites/homeaffairs/files/whatwedo/networks/european_migration_network/reports/docs/emnstudies/circularmigration/0a_emn_synthesis_report_temporary_circular_migration_final_sept_2011_en.pdf.

40 This is the definition of circular migration that will be used throughout the thesis.

41 Mendoza and Newland 2007 https://www.migrationpolicy.org/research/circular-migration-and-development-trends-policy-routes-and-ways-forward.

(i) *Permanent migration and permanent return*. With this type of circular migration, migrants spend a lengthy period abroad and then return to stay in their home country.

(ii) *Permanent migration and temporary return*. Migrants have emigrated permanently but return to their home country for temporary stays.

(iii) *Temporary migration and permanent return*. Migrants stay in the receiving countries only temporarily and then return to stay permanently in their home country.

(iv) *Temporary migration and temporary return*. Migrants move back and forth between sending and receiving countries.

This broad and inclusive conceptualisation suggests that all forms of migration that provide at least two cross-border movements could be categorised as circular migration.[42] Fargues[43] provides minimum conditions for the classification of circular *labour* migration. He suggests that migration can be classified as circular only if it meets the following criteria:

(i) protection of migrants' rights;

(ii) the satisfaction of the temporary demand for labour in the receiving country;

(iii) freedom of movement between the sending and receiving countries for migrants during their employment (circularity);

(iv) the legality of stay;

(v) temporary residence;

(vi) renewal option that enables multiple entries of migrants into receiving countries; and

(vii) temporary permits for migrant workers.

42 Task Force on Measuring Circular Migration 2016 "Defining and Measuring Circular Migration".
43 Fargues 2008 https://cadmus.eui.eu/handle/1814/8391.

In contrast to the varying perspectives on the definition of migration and the role of time in the general migration process highlighted earlier in this chapter, there is little dispute that time is an essential factor in circular migration. To illustrate the foregoing, Triandafyllidou[44] includes time as one of the four dimensions that qualify circular migration. These are: *space* (pertaining to the crossing of a border), *time* (involving stays of limited duration), *repetition* (involving back and forth movement between the country of origin and the receiving country), and *scope* (as stated earlier, circular migration is done primarily for economic reasons such as employment, trade and investment).[45]

Based on the varying foregoing approaches, it is evident that there are common traits that define circular migration. The movement to the receiving country and back to the sending country is repetitive, temporary and done for economic reasons which often tend to be labour-related. This, therefore, motivates the definition of circular migration to be used in this thesis as the repetitive, temporary mobility of people primarily for economic reasons. Ordinarily, the economic reasons tend to be labour-related.[46] Therefore, the term *circular labour migration* will be used throughout this thesis.

Furthermore, in this thesis, circular labour migration is defined as the repetitive, temporary mobility of people between two countries purely for work purposes. This definition of circular labour migration will primarily be applied in this thesis in the context of *regular* migration that occurs between mutually consenting countries. Irregular migration will predominantly be highlighted as a problem which the proper regulation of circular labour migration could address. Circular labour migration has been advanced as an innovative solution for preventing the flow of irregular migration.[47] This is because agreements that facilitate circular labour migration between two countries tend to address the pertinent issue of the protection of the rights of migrants, thus encouraging irregular migrants to engage in more regular migration.

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44 Triandafyllidou 2010 https://cadmus.eui.eu/handle/1814/19716.

45 Some other reasons for circular migration, such as adaptation to climate change, do exist, but to a lesser extent. See Fatorić 2014 *Center for Climate and Security Briefer* 3.

46 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.

47 Barrerro *et al* 2009 *Gritim Working Paper Series* 110.

Olivier and Govindjee[48] note that recent bilateral labour agreements, globally, lean towards extending core protection in terms of labour law to lawfully employed migrants. Additionally, bilateral labour agreements regulating the export of labour migrants between mutually consenting countries expressly guarantee the protection of the labour rights of migrants in the receiving country. In this respect, undertakings by the receiving country to protect the labour rights of the migrants influence the migrants to engage in regular circular migration which provides safeguards for the protection of their rights.

It is useful to note that there is no clear, universally accepted definition of irregular migration.[49] The term can be viewed from two perspectives. From the perspective of the receiving country, it is used to refer to the entry of, work by, or stay of persons without the appropriate documentation required under the immigration laws of the country. From the perspective of the sending country, the irregularity occurs when the migrant leaves the sending country and crosses an international border without using a passport or does not fulfil the administrative requirements for leaving the country.[50]

Irregular migration limits the efficiency of triple-win benefits for circular migration, particularly from the migrant's perspective, because it exposes irregular migrants to less favourable employment conditions than those enjoyed by the natives of the receiving country. These conditions include less pay and longer working hours.[51] Furthermore, as will be shown in chapter 3 of this thesis, the ILO's conventions and recommendations offer increased protection to regular migrants and minimal protection to irregular migrants, thereby leaving them vulnerable to rights abuses in the receiving country.[52] This therefore suggests that irregular migrants who seek to increase the benefits of the protection of national laws promulgated to give effect to

48 Olivier and Govindjee 2013 "Labour Rights and Social Protection of Migrant Workers: In Search of a Coordinated Legal Response".
49 Van Eck and Snyman 2015 *Journal of African Law* 294-301.
50 IOM date unknown https://www.iom.int/key-migration-terms.
51 Van Eck and Snyman 2015 *Journal for African Law* 294-316.
52 Protection of the rights of migrant workers provided by the ILO's convention will be discussed in chapter 3. See also Dodson and Crush 2015 *United Nations Research Institute for Social Development Research Paper* 3.

ILO standards should opt for more legal methods of gaining access to the labour market of the receiving country.

Notably, even though this thesis focuses primarily on optimising the benefits of regular migration, it is important to observe that circular migration can take various other forms. Cassarino[53] identifies three distinct types of circular migration.

First, *hindered circular migration* occurs where circular migration is hindered by major obstacles such as border conflicts, geographical distance and restrictive immigration controls. As a result of these hindrances, the fluid circulation of people across borders is ultimately severely restricted.[54]

The second type can be identified as *regulated circular migration*, which occurs where mobility is managed and regulated by institutional mechanisms that determine the number of admitted migrants, monitor their temporary stay abroad, and select their profiles and skills.[55] Wickramasekara[56] uses the EU circular labour migration schemes and mobility partnerships as examples of regulated circular migration.

The third type of circular migration recognised by Cassarino is *embedded circular migration*, which occurs where there are frequent circular movements and interaction between countries in one geographical area. Mobility in this regard is often unmanaged and regularly applies to countries with intricate relations, such as Lebanon and Syria, and also India and Nepal.[57]

Triandafyllidou *et al*[58] also identified additional types and reasons for circular migration. These are *long-term migration* (involving migrants who circulate due to unemployment and informal work),[59] and *spontaneous seasonal migration* (defined

53 Cassarino 2009 *CARIM Analytic and Synthetic Notes* 11.
54 Cassarino 2009 *CARIM Analytic and Synthetic Notes* 11.
55 Cassarino 2009 *CARIM Analytic and Synthetic Notes* 11.
56 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 11.
57 Cassarino 2009 *CARIM Analytic and Synthetic Notes* 11.
58 Triandafyllidou *et al Circular Labour Migration between Europe and its Neighbourhood: Chance or Necessity?* 10.
59 This is work characterised by poor working conditions such as low remuneration and ineffective enforcement of labour standards. Examples of these workers are street vendors and shoeshine workers in large cities. Avirgan *et al Good Jobs, Bad Jobs, No Jobs* 3.

below). However, Trifan[60] points out that this classification of circular migration by Triandafyllidou could be misleading because the process of circular migration appears to be more fluid than he suggests. Circular migration involves more repetitive movements than those described by Triandafyllidou.

Trifan[61] instead identifies four other types of circular migrants. First, he identifies circular migration for elites, involving the mobility of elites,[62] including civil servants, entrepreneurs and politicians, for a limited time. Migration in this instance takes place not for economic reasons, but to acquire more knowledge, to fulfil a certain task or to upgrade skills. This is mainly because the economic position of the elites in their home country is above average and they migrate primarily to increase their social status back home.[63]

Secondly, he identifies circular migration for winter job farmers, which involves farmers leaving their farms in wintertime after harvesting crops to work as seasonal workers in less seasonal agri-businesses or factories. The farmers then return to their farms in springtime to start preparing their fields. Working in these winter jobs helps farmers to improve their standard of living and also to build capital for their farms. This form of circular migration is more prevalent inside the borders of the EU.[64]

Thirdly, the circular migration of expatriates is identified. This involves the migration of highly skilled employees, mainly from developed countries. These employees are sent by their corporate employers to work in various places across the world. The corporate workers become expatriates, moving to fulfil various tasks in the grand scheme of corporate global operations.[65]

60 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.
61 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.
62 These are people who enjoy a high social status in developing countries and hence have little incentive to migrate permanently.
63 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.
64 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.
65 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.

Lastly, Trifan recognises the circular migration of pensioners, which involves the migration of pensioners to areas where there is enough freedom of movement and less strict labour markets. Many of these pensioners are still able to work but have very meagre pensions, which means they migrate to supplement their revenue. The number of pensioners who engage in this type of migration is relatively low, hence these pensioners are able to fill low-skilled, less attractive jobs in the receiving country.[66]

It is worth noting that circular labour migration is not as prominent in the Southern African context as it is in other parts of the world, such as Europe.[67] As a result, the above types of circular migration may not occur frequently in the region. However, because these are universally practised types of circular labour migration, it is essential to discuss them in this part in order to lay the foundation for a wider conceptualisation of circular labour migration. The broader understanding formulated here may play a significant role in the bid to improve the regulation of the practice of circular labour migration in the selected countries in the Southern African context.

Furthermore, an analysis of the various types of circular migration identified by Cassarino, Trifan and Triandafyllidou indicates that circular migration can be classified into two categories that are relevant to labour migration. The above definitions reveal that circular labour migration can be either spontaneous or managed. Consequently, in this thesis, spontaneous circular migration and managed or regulated circular migration are recognised as the two primary categories of circular labour migration.

Spontaneous circular migration occurs both at a local level and an international level. This type of circular labour migration is particularly relevant to the Southern African context as it occurs mainly in the context of labour migration to and within South Africa.[68] This form of migration often involves the movement of rural workers to urban areas and their return to their homes. For instance, in China it was found in 2011 that between 125 and 150 million workers migrated circularly from rural areas to urban

66 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.
67 Segatti "Explaining the Impasse of Circular Labour Migration in Southern Africa" 85-108.
68 Segatti "Explaining the Impasse of Circular Labour Migration in Southern Africa" 85-108.

cities.[69] Wickramasekara[70] says seasonal worker programmes are examples of spontaneous circular migration.[71] Similarly, transnational entrepreneurs and scientific diaspora also engage in spontaneous circular migration. The defining quality of this type of migration appears to be the lack of regulation and management of migration.[72] As a result, this type of migration can also be referred to as informal circular migration.

Managed or regulated circular migration, on the other hand, is a type of migration that involves the use of managed circular labour migration programmes. A managed circular labour migration programme is one that is governed by either the sending country or the receiving country alone, or it can be managed by both countries through bilateral agreements or MOUs.[73] This type of mobility often involves frequent temporary stays by the same group of migrants in the receiving country. The management of mobility in this instance is based on sophisticated mechanisms that are aimed at selectively organising the mobility of foreign workers from the sending country and also securing their return to their homes.[74]

This thesis identifies the prevalent gap with regard to the adequacy of these managed, circular labour migration programmes in Southern Africa, if they are present at all. However, in the global narrative, regulating circular migration in the above manner is not a new phenomenon. It may seem relatively new because circular migration has only recently become widely recognised as an essential mechanism for strategically managing international labour migration.[75]

Temporary or circular labour migration is said to have started after World War I.[76] As Europe industrialised between 1870 and 1914, the demand for labour grew exponentially. Consequently, a number of countries, including Germany, Switzerland and France, designed temporary work programmes to obtain workers from countries

69 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 10.
70 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 10.
71 European guest worker programmes contained elements of spontaneous circular migration because migrants would migrate from their home countries and stay in receiving countries for the duration of their contracts, then go back to their home countries until the next contract came along. See Fargues 2008 https://cadmus.eui.eu/handle/1814/8391.
72 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 10.
73 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 10.
74 Cassarino 2009 *CARIM Analytic and Synthetic Notes* 11.
75 Privarova and Privara 2016 *International Journal of Environmental & Science Education* 12910.
73 Howe and Owens 2016 http://www.iisj.net/sites/default/files/9781509906284Introduction.

such as British Malaysia, the Dutch East Indies, the West Indies and China.[77] These temporary and/or circular migrants were also instrumental in helping countries in the West to rebuild after the world wars.[78] For example, Britain, through its "European Worker Scheme", aimed to recruit about 90 000 temporary workers from a pool of refugees affected by the world wars.[79] Germany, also in the 1950s and 1960s, actively recruited low-skilled workers from countries in Southern Europe. Migrants from Yugoslavia, Greece, Turkey and Spain were recruited into Germany but were required to return home permanently after the 1973 oil crisis.[80]

In North America, too, temporary workers were used to a greater extent. Between 1942 and 1965, North America's Bracero Work Program oversaw the entry of over 100 000 temporary workers from Mexico into the United States.[81] However, over four decades ago, these programmes ceased to operate due to a decrease in the demand for migrant labour caused by recessions in the nascent new global economy.[82] At the time the Bracero Work Program ended, a number of work restrictions and border control measures were introduced.[83] These measures changed the situation drastically and, as a result, in 1979, the number of undocumented migrants from Mexico in the United States soared to 429 000.[84] This meant that the measures that were put in place to reduce labour migration had failed and had transformed a successful migration programme into a flow of undocumented migrants who largely tended to become permanent migrants in the United States.[85]

77 Connell 2010 *Economic and Labour Relations Review* 111.
78 OECD *International Migration Outlook* 16.
79 Castle *International Migration Review* 761.
80 This crisis occurred after the Arab–Israeli war of 1973, after the Arab members of the Organization of Petroleum Exporting Countries imposed an embargo against the US in retaliation for the decision of the US to re-supply the Israeli military and gain leverage on post-war negotiations. This embargo introduced cuts in oil production and banned petroleum exports to targeted nations. See Office of the Historian Date Unknown https://history.state.gov/milestones/1969-1976/oil-embargo.
81 Livi-Bacci *A Short History of Migration* 114.
82 Castles 1986 *International Migration Review* 761.
83 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
84 Massey and Pren 2012 *Population and Development Review* 1-29.
85 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.

Nonetheless, despite having fallen out of favour, regulated circular labour migration has once again become popular amongst policy makers, due to its tendency to produce triple-win advantages for stakeholders involved in the migration process.[86] In Africa, circular labour migration has gained popularity due to a growing youthful population and a decrease in available jobs.[87] Historically, the origins of the practice of circular labour migration in Southern Africa can be traced to the labour mobility that was necessary to keep the mining industry afloat during the apartheid era in South Africa.[88] This historical background will be discussed in chapter 4 of this thesis.

In Southern Africa today, circular labour migration has increasingly become popular due to its positive impact on development by primarily providing jobs for unemployed people from the rural areas, in the process helping them to provide essential services such as healthcare and education for their families.[89] However, circular labour migration remains inadequately regulated in the region.[90] In order to address this concern, some scholars agree that bilateral labour arrangements are key regulatory tools to enhance the benefits that circular labour migration provides.[91]

2.4 Bilateral labour arrangements and facilitation of circular labour migration

Bilateral labour arrangements, generally, are dispensations that control the conditions under which sending countries send labour migrants to receiving countries.[92] These arrangements are typically entered into by countries with large differences in wealth and political regimes.[93] The arrangements normally help the wealthier receiving countries to achieve a flow of labour that meets the needs of its industrial sectors and that of employers in crucial sectors of the economy. For the sending countries, these

86 Castles and Ozkul "Circular Migration: Triple Win, or a New Label for Temporary Migration?" 27-49.
87 Beremauro "Victimising Victims" 2.
88 Beremauro "Victimising Victims" 3.
89 Gibson *et al* 2014 Development Impacts of Seasonal and Temporary Migration https://ideas.repec.org/p/een/appswp/201412.html.
90 IOM 2016 *Regional Guide to Facilitate South–South Labour Mobility in Southern Africa* 11.
91 Martin *The Price of Rights: Regulating International Labour Migration* 10; Weyl 2018 *The Economic Journal* 31-36.
92 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
93 Trachtman 2009 *Upjohn Institute of Employment Research* 8.

arrangements help to ensure continued access to foreign labour markets and help to promote the protection and welfare of their workers in foreign countries.[94] Under these arrangements, both countries mutually agree to monitor the workers, keep records of migrants, share information regarding migration processes, and engage in other good governance practices.[95]

As part of the arrangements, particularly in bilateral labour agreements, the sending country is obliged to control the flow of migrants to the receiving country and agrees to accept the returning workers back in the sending country.[96] This significantly helps to reduce both the overstaying of the migrants in the receiving country and the entry of undesired migrants like criminals into the receiving countries.[97] The receiving countries, on the other hand, usually provide legal protection for migrant workers against abuses from employers, facilitate the return of remittances to the sending country, and provide valuable information and health access to the migrants.[98]

It is unclear why receiving countries would be keen to enter into bilateral labour arrangements allowing foreign workers access to their territory. This is because the receiving country can unilaterally impose any regime that they wish on migrant workers, without entering into any agreement that guarantees legal rights to the migrants.[99] To shed light on this grey area, Plotnikova[100] suggests that bilateral labour agreements are particularly attractive to receiving countries because, under the agreements, receiving countries secure assistance from the sending country to screen migrant workers in order to exclude undesirable migrants such as terrorists and criminals.

Moreover, receiving countries may enter into bilateral labour agreements with sending countries in order to obtain benefits that are not specifically related to migration from

94 Trachtman 2009 *Upjohn Institute of Employment Research* 8.
95 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community* 1.
96 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
97 Chapters 3 and 5 have more in-depth discussions on measures used to control the flow of migrants.
98 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
99 OECD *Migration for Employment: Bilateral Agreements Crossroads* 2.
100 Plotnikova *Recruiting Foreign Nurses for the UK: The Role of Bilateral Labour Agreements* 51.

the sending country.[101] For instance, it has become common practice that receiving countries receive general political benefits from entering into a treaty with another country.[102] A study by Posner and Chilton[103] reveals that receiving countries have received favourable political benefits from countries with whom they share bilateral labour agreements. This practice has been prevalent since bilateral labour agreements first gained the attention of the ILO in the 1920s.[104] According to Posner and Chilton,[105] the first bilateral labour agreement was apparently signed in 1904, but the practice of signing bilateral labour agreements became common only after World War II.

In the period 1945 to 1979, bilateral labour agreements were mostly used by European countries which sought migrant labour from Eastern and Western Europe and also from North Africa. Following this period, relatively few bilateral labour agreements were signed during the period 1974 to 1989, due to the prevalent economic stagnation of the 1970s.[106] Between the 1990s and the 2000s, bilateral labour agreements became prominent again as countries in the Middle East played more important roles as senders and receivers of migrants.[107]

In Southern Africa, bilateral labour arrangements were formalised in the 1970s in order to meet the labour demands of the South African and Zimbabwean mining industries and farming sectors.[108] This period saw the professionalisation of the migrant labour system and was characterised by the signing of a number of MOUs between South Africa and Zimbabwe as the main receiving countries and their neighbours as the sending countries.[109] Internationally, in the 1990s, bilateral labour agreements became prominent once more and were used as part of the general global trend towards shorter schemes based on shorter contracts with limited benefits

101 Sykes 2013 *University of Chicago Law Review* 315-340.
102 Aisbett and Skovgaard Poulsen 2016 *Journal of International Dispute Settlement* 25.
103 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
104 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
105 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1.
106 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 17.
107 Chilton and Posner 2017 *Coase-Sandor Institute for Law and Economics Working Paper* 1. Chapter 4 of this thesis has a detailed analysis of circular migration in Southern Africa.
108 Williams and Crush 2010 *SAMP Policy Brief* 23.
109 SADC 2016 *Regional Guidelines for the Development of Bilateral Labour Arrangements (BLAs) in the Southern African Development Community (SADC)* 4.

(circular migration schemes).[110] During this period, sector-specific agreements were also entered into, primarily between developing countries.[111]

Today, although bilateral labour arrangements have regained popularity among governments, some authors assert that such arrangements contribute little to migrant rights, migrant flows and other relevant outcomes.[112] In contrast, other authors believe that bilateral labour agreements adequately facilitate labour migration and help to generate significant welfare gains for some of the world's most impoverished people.[113] Despite the contrasting views, it appears that, in practice, bilateral labour agreements, if properly constructed, have a tremendous potential to adequately facilitate circular labour migration.[114] This is primarily because these agreements significantly promote the advantages of a bilateral relationship and allow countries to tailor their legal obligations to their own needs.

110 Wickramasekara 2011 *Global Union Research Network Discussion Paper* 11.

111 Wickramasekara 2015 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_385582.pdf.

112 Chi 2008 *International Law and Politics* 527-530; Hars 2003 *Budapest Working Papers on the Labor Market*.

113 Martin *The Price of Rights: Regulating International Labour Migration* 12; Weyl 2018 *The Economic Journal* 31-36.

114 Dodson and Crush 2015 *United Nations Research Institute for Social Development Research Paper* 3.

Today, the ILO promotes bilateral labour agreements to facilitate optimised triple-win benefits for all stakeholders involved in circular labour migration.[115] Moreover, the IOM considers bilateral labour agreements to be ideal tools for the facilitation of labour migration because they create freer movement.[116] Freer mobility is likely to create more benefits for all stakeholders in the migration process, as opposed to imposing immigration restrictions, which may have more negative consequences.[117]

2.4.1 Consequences of restrictive immigration policies

Immigration has a significant impact on the culture, politics, demography and economy of a state.[118] Consequently, immigration policy is essential in any country.[119] Immigration policy consists of two elements. Firstly, it comprises the conditions afforded to resident immigrants including educational opportunities, welfare provisions, and housing and work conditions. Secondly, it comprises immigration regulation, which consists of the rules and procedures that attempt to restrict illegal immigration and govern the selection and admission of foreign nationals. These foreign nationals include permanent immigrants, temporary migrant workers and refugees.[120]

Notably, the pivotal role that immigration plays in the culture, politics and sovereignty of a country motivates countries to pay less attention to foreign pressures with regard to immigration. In this context, the fact that most receiving countries are economically and politically stronger than sending countries makes the receiving countries more immune to external pressures to relax immigration policies.[121]

115 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 1; Dodson and Crush 2015 *United Nations Research Institute for Social Development Research Paper* 3.
116 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community*.
117 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
118 Meyers 2000 *The International Migration Review* 1245-1282.
119 Zolberg 1989 *International Migration Review* 403-430.
120 Meyers 2000 *The International Migration Review* 1245-1282.
121 Munz and Weiner 1997 *Third World Quarterly* 25-51.

However, scholarly research indicates that imposing immigration restrictions in the receiving country often has a converse end result to the intended restriction.[122] Zimmerman[123] observes that imposing legal measures to restrict immigration in order to reduce the number of migrants can, in practice, increase the number of migrants who stay in the receiving country instead of reducing the number. Endemic poverty and the resulting pursuit of employment motivate migrants from economically challenged countries to use all possible avenues to access labour markets in more economically flourishing receiving countries.

Tightening immigration policies at borders in the receiving countries leads to intensified efforts by migrants to enter the receiving country illegally.[124] Faced with immigration restrictions that limit their options to enter the receiving country legally, migrant workers who are highly motivated to find work in the receiving country often resort to illegal means to access the labour market in the receiving country.[125] Once these migrants have gained access to the receiving country, they are rarely motivated to leave, because leaving will involve another illegal crossing of borders back into the sending country, thus risking being arrested at the borders where immigration officials are more prevalent. If they are arrested, migrants may officially be classified as "undesirable migrants" in the receiving country, permanently denying them future entry into the country.[126]

When migrants overstay in the receiving country in this manner, migration does not become circular but rather becomes permanent and irregular.[127] This permanent irregular migration forces migrants to work in low-skilled, poor conditions and low-wage jobs in the receiving country with no prospects for personal development.[128] As

122 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
123 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
124 Austin *The Guardian* 3.
125 Martin 2003 *IOM Migration Research Series.*
126 Bolhuis *et al* 2017 *Refugee Survey Quarterly* 61-64.
127 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
128 Mulley *et al* 2011 https://migration.etuc.org/en/docs_en/6%20The%20impacts%20of%20irregular%20migration.pdf.

a means of creating a greater chance of making migration circular rather than permanent, Hugo[129] suggests that receiving countries should develop policies that facilitate interaction between migrant workers and their home country. It therefore seems that permanent migration to the receiving country can be avoided by signing appropriate bilateral labour agreements and legislating appropriate immigration laws that support these agreements. This is essential because, under these instruments, migrants are guaranteed legal residence in the receiving country while they are employed as circular migrants.[130] Hence, immigration laws and bilateral labour agreements have to complement each other. Furthermore, due to the minimum risk of exploitation of the migrants that could be presented by the bilateral labour agreements, the agreements might also encourage the migrants to use a legal means of entry into the receiving country and to return home when they are legally required to do so.

Ultimately, bilateral labour agreements present a more viable option than strict immigration rules which may fail and have a result contrary to the intended purpose. The failure of strict immigration policies was observed in Spain after the economic boom of the 1990s, which led to Spain becoming one of the major destination countries for seasonal agricultural workers from North Africa.[131] Following the economic recession of the early 2000s, Spain implemented a number of restrictive policies, including asylum policies, immigration quotas and tighter border controls. These restrictive policies failed and instead resulted in illegal overstaying, irregular entry, shifting immigration routes and hazardous migration. As a result, migrants were left exposed to ruthless smugglers and human trafficking organisations.[132]

Given the negative consequences of restricting immigration as observed above, it is essential to discuss the advantages that circular labour migration regulated by bilateral labour agreements could present to the stakeholders involved.

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129 Hugo 2003 https://www.migrationpolicy.org/article/circular-migration-keeping-development-rolling.

130 Chilton and Posner *Coase-Sandor Institute for Law and Economics Working Paper* 48.

131 López-Sala 2013 *Migraciones Internacionales* 39-69.

132 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.

2.5 Advantages of circular labour migration

It should be noted that 193 members of the UN, including the Southern African countries relevant to this study, adopted Agenda 2030 for Sustainable Development in 2015.[133] This Agenda *inter alia* highlights the positive contribution of migrants for "inclusive growth and sustainable development". Part II of the Agenda argues that:

> International migration is a multi-dimensional reality of major relevance for the development of countries of origin, transit, and destination, which requires coherent and comprehensive responses and ... underlines the right of migrants to return to their country of citizenship.[134]

More importantly, in Agenda 2030, UN members pledge to take action to facilitate orderly, safe, regular and responsible migration. This pledge includes the implementation of planned and well-managed migration policies, the reduction of the transaction costs of migrant remittances to less than 3%, and the elimination of remittance corridors with costs higher than 5%.[135] This indicates that parties, without expressly mentioning "circular migration", do acknowledge the benefits of this type of migration as it is the type of migration that commonly involves the transfer of remittances to the sending country. This means that restrictive immigration policies that limit the facilitation of safe and regular migration are against the benefits of circular migration that Agenda 2030 envisions.

Essentially, several advantages of circular migration support the view that circular migration has the potential to become a solution to emerging problems such as environmental, demographic and economic changes.[136]

Circular labour migration particularly reflects the desire of destination countries to bring labour within their borders to address labour shortages in certain sectors of their

133 In 2015, at a UN Summit, world leaders adopted 17 Sustainable Development Goals that will apply universally to all. Countries will mobilise efforts to end all forms of poverty, fight inequalities and fight climate change. See https://www.un.org/sustainabledevelopment/development-agenda/.

134 UN 2015 https://sustainabledevelopment.un.org/post2015/transformingourworld.

135 Goal 10.7.

136 Trifan "The Contribution of Circular Migration to Economic Growth in Developing Countries" 241-250.

economy.[137] Traditionally, migration scholars have recognised the advantages of circular labour migration for both receiving countries and sending countries.[138] It is often seen as a win-win situation that provides benefits for both the sending countries and the receiving countries.[139] Primarily, in the receiving country, circular labour migration alleviates labour needs and increases economic production. This means that receiving countries that do not manifest immediate requirements for labour may benefit from the increased economic production associated with circular labour migration. In the sending country, it could relieve unemployment, minimise population loss due to emigration, and provide financial and human capital.[140]

Against this backdrop, circular labour migration is recognised as a form of migration which, if well managed, could help match the international supply and demand for labour, in the process contributing to the more efficient allocation of resources and economic growth.[141]

Clemens[142] states that migration researchers' initial focus was on remittances as an advantage of circular migration, but now they emphasise the complex link between migration, skills development and economic growth. Circular labour migration is no longer primarily seen as beneficial to only the sending and receiving countries. Circular migration is now increasingly becoming essential due to the perceived advantages for all key parties involved in the migration process: sending countries, receiving countries and the migrants themselves. Individual migrants could benefit from increased income, work experience and the development of human capital.[143] Regulated circular labour migration helps to move migrants from irregular employment and the dangers

137 Wickramasekara 2012 https://www.globalmigrationpolicy.org/articles/activities/Circular%20and%20Temporary%20Migration%20Regimes%20and%20Their%20Implications%20for%20Family%20-%20by%20piyasiri%20wickramasekara%201%20May%202012.pdf.

138 Zapata-Barrero *et al* 2012 *International Journal of Population Research* 1-13.

139 Task Force on Measuring Circular Migration "Defining and Measuring Circular Migration" United Nations Economic Commission for Europe Conference of European Statisticians (9-10 February 2016).

140 Mayer "Migration as a Sustainable Adaptation Strategy" 6.

141 Task Force on Measuring Circular Migration "Defining and Measuring Circular Migration" 3.

142 Clemens *et al* 2014 *World Development* 121-124.

143 Mayer "Migration as a Sustainable Adaptation Strategy" 6.

of that type of employment to more regular forms of employment.[144] Circular labour migration also grants migrant workers repeated access to the labour market of the receiving country, which inadvertently helps to provide the migrants with regular streams of income. Lastly, the temporary nature of circular labour migration helps mitigate the negative social and emotional impacts of the long-term removal of migrants from their family members and the social networks in their homes in general.[145] As a result of these additional benefits to migrants, the reference to a "triple win" is now the common narrative in circular labour migration research.[146]

2.5.1 Circular labour migration and development

Research indicates that if managed correctly, circular labour migration becomes the preferred strategy for economic prosperity among migrants and has positive developmental outcomes for both the sending country and the receiving country.[147] The "balanced growth" that occurs during circular labour migration when labour is re-allocated from rural, agricultural areas to urban, more industrial areas either within or across borders is considered a prerequisite for economic growth, and hence becomes an integral part of the development process.[148]

As part of the development process, migrants are seen as important agents of change and innovation. This is due to the fact that, in the circular labour migration process, circular labour migrants bring money, new ideas, knowledge and entrepreneurial attitudes back with them to the sending countries.[149] Therefore, migrants play a prominent role in speeding up modernisation in the sending countries by contributing to development. De Haas[150] states that this analogy is influenced by the historical experience of emigration from Europe to North America following World War II. During

144 Some of these dangers include exploitation, human trafficking and poor working conditions. See Koser *et al* "Maximising the Benefits of Circular Migration for the Benefit of the Netherlands in Response to the Migration and Development Debate" 23.
145 Koser *et al* "Maximising the Benefits of Circular Migration for the Benefit of the Netherlands in Response to the Migration and Development Debate" 23.
146 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.
147 Hugo 2013 *Migration Policy Institute* 5.
148 Todaro 1969 *American Economic Review* 138-148.
149 De Haas 2010 *International Migration Review* 227-264.
150 De Haas 2010 *International Migration Review* 231.

this time, recently decolonised countries were expected to become modernised, industrialised and economically healthy, like most Western countries.

To achieve the desired expectations, the development approach supporters assumed that large-scale capital transfer to poorer countries would be essential. International circular labour migration, therefore, became the ideal vehicle to transfer capital (through remittances). During this period, governments in both the European and the decolonised countries actively promoted circular labour migration because of the perceived developmental benefits.[151]

More recently, governments, particularly in the Pacific and Asian regions, still regard international circular labour migration as an essential tool for national development.[152] A significant number of countries still expect a combination of migration, remittances and aid to contribute to the economic prosperity of developing countries.[153] This expectation is influenced largely by recent studies conducted by the IOM that have revealed that a collaborative approach to the management of labour migration increases the likelihood of all stakeholders benefiting from the labour migration process.[154] This is a perspective that has evolved from the traditional belief that migration policy is the prerogative of the receiving country.

Additional to the benefits of circular labour migration in the context of development, various international and regional organisations recognise more advantages of circular labour migration.[155] The IOM proposes that increased circular labour migration could benefit developing countries more than developed countries as it could help to address labour shortages in certain sectors of their economies and thereby strengthen the economy itself.[156] To ensure this, the IOM advocates that receiving countries should open up avenues for regular, repetitive labour migration and in the process provide

151 Adler 1981 *ILO* 10; Penninx 1982 *International Migration Review* 781-818.
152 Bertram 1999 *Contemporary Pacific* 105-138; Fraenkel 2006 *Asia Pacific Viewpoint* 15-30.
153 Hayes 1991 *The Contemporary Pacific* 1-58.
154 IOM 2010 *Making Global Mobility a Catalyst for Development* 3.
155 Chapter 3 covers the positions of these regional and international organisations more extensively.
156 IOM 2005 "World Migration Costs and Benefits of International Migration" 15.

incentives for migrants by offering to them options to return in the future to do the same job.[157]

The European Commission, through its Communication on Migration and Development,[158] and its Communication on Circular Migration and Mobility Partnerships, also suggests that circular migration could play an important role in transferring valuable skills to developing countries.[159] According to Nunez, this type of migration is now increasingly being regarded as an ideal solution to the perennial "brain drain" problem.[160] "Brain drain" is a term used to refer to the long-term departure of highly skilled workers from a country in pursuit of better work opportunities abroad. Africa, in particular, has been vulnerable to the mass exodus of these skilled workers to more developed Western countries.[161]

A 2003 ILO report[162] estimated that 75% of Africans who migrated to Canada, the US and OECD countries had completed university education or a similar level of training. The concern therefore is that, as a result of Africa losing its most skilled workers, development in Africa is derailed since these migrants to the West have the necessary skills to assist various development initiatives in Africa. Furthermore, the countries of origin of these migrants also lose their investment in the training of these migrants and lose out on revenue that they would have otherwise collected in the form of income tax from the migrants.[163]

Be that as it may, circular labour migration is now recognised for its contribution to reducing the negative effects of brain drain on sending countries and encouraging the circulation of skills and knowledge.[164] When circular labour migrants return home, they return equipped with the knowledge and ideas that they gained in the receiving

157 Zapata-Barrero *et al* 2012 *International Journal of Population Research* 6.
158 Commission of the European Communities 2005 https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52005DC0390.
159 Duany 2002 *International Migration Review* 355-388.
160 Nunez 2009 *Working Paper Series* 13.
161 Cali and Cantore 2010 *Overseas Development Institute* 7.
162 ILO 2003 *Tenth African Regional Meeting.*
163 Lucas "Migration and Economic Development in Africa: A Review of Evidence" 6.
164 Zimmerman 2014 https://docplayer.net/89393881-Circular-migration-why-restricting-labor-mobility-can-be-counterproductive.html.

country. These can be used to foster innovation, which further inspires development in the sending country.[165]

It is essential to note that the benefits of circular labour migration outlined above were conventionally envisioned as existing only between developing and developed countries. However, this thesis hypothesises that similar benefits can exist between developing countries and the least developed countries, mainly due to the significant disparity between the levels of development in developing countries and least developed countries.[166] These benefits can therefore be contextualised between South Africa and its neighbours, Lesotho and Zimbabwe, as a developing country and least developed countries respectively. This form of migration can be categorised under the now more prominent form of migration: South–South labour migration.

2.5.2 South–South labour migration

Current migration patterns indicate that many countries in the global South, particularly emerging economies, are no longer only primarily migrant-sending countries, but are now also migrant-receiving countries.[167] Evidence shows that the magnitude of South–South migration (82,3 million migrants worldwide) has gradually surpassed South–North migration (81,9 million).[168] A significant portion of this number moves towards countries such as Malaysia, Taiwan, Singapore, Hong Kong and South Africa.[169] South–South migration hence, is now commonly regarded as a relatively new phenomenon that addresses various emerging migration dynamics such as ageing workforces and economic crises.[170]

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165 Nunez 2009 *Working Paper Series* 13.

166 Least Developed Countries are countries designated as such by the UN, thus entitling them to aid, preferential market access and preferential technical assistance, among other concessions.

167 The three most commonly used methods of defining "North" and "South" were developed by the United Nations Department of Economic and Social Affairs, the World Bank and the United Nations Development Programme (UNDP). This thesis adopts the classification of the World Bank, which indicates that the South comprises upper-middle-income, lower-middle-income and low-income countries and the North comprises high-income countries. Ratha and Shaw 2007 https://openknowledge.worldbank.org/handle/10986/6733.

168 United Nations Department of Social and Economic Affairs, Trends in International Migrant Stock: The 2013 Revision http://esa.un.org/unmigration/wallchart2013.htm.

169 Clemens 2006 *Centre for Global Development*; Assal 2010 *CARIM* 13.

170 IOM 2014 https://www.iom.int/files/live/sites/iom/files/What-We-Do/idm/workshops/South-South-Migration-2014/Background-paper-en.pdf.

South–South migration is generally used to refer to migration that occurs between developing countries.[171] Ratha and Shaw[172] indicate that migrants involved in this type of migration tend to integrate easily in neighbouring countries as there are few cultural and linguistic differences. The authors also highlight that migrants are now attracted to this form of migration as opposed to South–North migration. This is because the costs of migration, such as the exorbitant fees that are normally charged for travel documents and high remittance transfer costs, are significantly reduced in the case of South–South migration.[173] The reduced fees could help to avoid additional financial strain on migrants engaging in South–South migration as they do not have to pay the high costs associated with migration to the North.

Furthermore, recognition of academic qualifications for skilled workers in the receiving country is much easier for skilled labour migrants engaged in South–South migration because countries in the same regions generally share the same educational systems.[174] For instance, by virtue of being in the same region and having all been colonised by Britain, the education systems in South Africa, Zimbabwe and Lesotho are largely similar.[175]

Although circular labour migration presents various advantages to the stakeholders involved, this type of migration has some disadvantages too. It is, however, submitted that the disadvantages of circular migration are to a great extent conditional on the regularity of the mobility by the migrants and the duration of the migration.[176] Through proper regulation, such disadvantages can be avoided.

2.6 Potential disadvantages of circular labour migration

Bilateral labour arrangements have customarily played a significant role in reducing irregular migration and regulating the recruitment of workers from sending countries. This regulated migration has been shown to be beneficial to all stakeholders

171 Faccini *et al* 2013 https://www.cgdev.org/sites/default/files/FacchiniMaydaMendola.pdf.
172 Ratha and Shaw 2007 https://openknowledge.worldbank.org/handle/10986/6733.
173 Ratha and Shaw 2007 https://openknowledge.worldbank.org/handle/10986/6733.
174 Murrugarra *et al Migration and Poverty: Towards Better Opportunities for the Poor* 10.
175 Kamwendo 2009 *Language Matters* 4-17.
176 Task Force on Measuring Circular Migration "Defining and Measuring Circular Migration" 13.

involved.[177] The converse(unregulated migration), however, is disadvantageous to the stakeholders. It is particularly disadvantageous to the receiving country and the migrant workers. The influx of illegal migrants into the receiving countries makes it increasingly difficult to control the number of migrant workers in those countries, especially since illegal migrants will try to remain hidden from authorities in the receiving countries.[178] Similarly, when migrants move informally and irregularly, they expose themselves to the risk of labour exploitation, human trafficking and receiving less money than initially expected.[179] This is contrary to the benefits that regular migrants may receive because, customarily, regularly employed labour migrants find it easier to enforce their labour rights.[180]

Irregular migrants, on the other hand, are particularly vulnerable, predominantly because they are not officially recognised by the receiving country, and therefore will not receive adequate legal protection. Furthermore, as migrants continue working in receiving countries for extended periods of time, they may decide to bring their families to the receiving country as well. This act, in a similar manner to strict immigration rules in the receiving country, turns circular migration into a more permanent form of migration, like permanent resettlement.[181] This long-term settlement is undesirable to the receiving country because it increases population pressure.[182] This permanent resettlement would also inadvertently have negative effects on the sending countries as they would cease to derive any economic advantage from the migration. The remittances that were initially sent back to receiving countries and which served various economic purposes will likely cease, as the migrants and their families will now be permanently situated in the receiving country.[183]

177 Zapata-Barrero *et al* 2012 https://www.hindawi.com/journals/ijpr/2012/498158/.
178 Jinnah 2009 *ACMS Research Report* 7.
179 Guild and Mantu *Constructing and Imagining Labour Migration* 110.
180 Olivier and Govindjee "Labour Rights and Social Protection of Migrant Workers: In Search of a Coordinated Legal Response" 2.
181 Refer to para 2.4.1 above for a discussion of the consequences of strict immigration rules.
182 Permanent resettlement is regarded as the most extreme migration solution as it depicts a collective decision to migrate to another place.
183 Amuedo-Dorantes 2014 https://wol.iza.org/ articles/good-and-bad-in-remittance-flows.

Additionally, the research indicates that the downside to circular labour migration is that circular migrants involved in the process may start losing contact with their home families, start new families in the receiving countries, and cease to send remittances back home. This leads to the escalated social costs of migration such as "abandoned families" and "families left behind".[184] Therefore, ideally, it is imperative that bilateral labour agreements should address mechanisms to facilitate regular contact between circular labour migrants and their families. Moreover, in terms of the agreements, the duration of the stay of the migrants in the receiving country could be efficiently monitored and their legal stay limited. In this way, migrants who adhere to the requirements of temporary stay in the receiving country may qualify to return to the receiving country again for future work. This practice would establish genuine circular labour migration and contribute significantly to the reduction of permanent resettlement.

Another potential problem posed by circular labour migration is that, despite its positive role in offsetting brain drain, circular labour migration may lead to an increasing shortage of labour in the sending country. The sending country could lose a substantial number of its youngest, most socially and economically active members, leading to the diminishing of its social and economic capital.[185] Additionally, these circular migrants who leave their homes run the risk of remaining stuck in low-skilled jobs in the receiving country. This is because receiving countries generally prefer employing circular labour migrants for low-skilled jobs which are looked down upon by residents of the receiving country.[186] Compared to local workers, circular labour migrants are usually willing to accept lower wages and poor working conditions because their frame of reference regarding pay and working conditions is their country of origin.[187]

184 Task Force on Measuring Circular Migration "Defining and Measuring Circular Migration" 13.
185 Hugo 2009 "Migration, Labour Mobility and Poverty" 18.
186 Munz *et al* 2007 *Hamburg Institute of International Politics* 10.
187 Piore *Birds of Passage: Migrant Labour and Industrial Societies* 33.

2.7 Conclusion

This chapter sought to provide a theoretical background to the concept of circular migration and also to investigate whether the robust regulation of circular labour migration could enhance the benefits of circular migration to provide triple-win benefits for all stakeholders involved. This chapter established a working definition of circular migration that will be used throughout this thesis. Circular migration is the repetitive, temporary mobility of people primarily for economic reasons. Circular labour migration, on the other hand, is the repetitive, temporary mobility of people primarily for labour-related reasons. Recently, circular labour migration has been promoted as a triple-win solution that presents benefits to sending countries, receiving countries and the migrants themselves. This is a shift from the traditional perspective that circular labour migration benefits only the receiving country.[188]

Circular labour migration is now receiving increased attention in the labour mobility domain, mainly because it is associated with a range of economic and social benefits for stakeholders involved in the process. This chapter found that besides its positive effects on development in both the sending and receiving countries, circular labour migration presents exponential benefits for the labour markets in both countries. As highlighted earlier in this chapter, when circular labour migration is linked with the labour needs of both the sending and receiving countries, it can be beneficial to all stakeholders involved.[189] Linking migration with labour needs will not only assist receiving countries in responding to specific labour needs, but will also help the sending countries to significantly reduce the unemployment rate in the country by granting more people the opportunity to become temporarily employed abroad. In this process, the migrants themselves benefit from gaining access to the labour market in the receiving countries, which inadvertently helps them to maintain transnational links and acquire new skills and resources.[190]

This chapter observed that in order to harness the above benefits, it is essential for migration policy to encourage the temporary nature of circular labour migration. It

188 See para 2.3 above.
189 See para 2.5 above.
190 See para 2.5 above.

appears that circular labour migration represents a dynamic migration policy solution because it primarily offers the receiving country a way to bring temporary labour into the country to perform essential functions without becoming a permanent part of the population. By the same token, the sending country will not permanently lose some of its potent workforce to the receiving country as the labour migrants circulate back to the sending country, and implement the skills they acquired in the receiving country for various developmental purposes in their home countries. Therefore, this chapter concludes that bilateral labour arrangements are the ideal tools to manage circular labour migration because they comprehensively facilitate the return and the reintegration of circular labour migrants back in their sending country.

This chapter provided a critical analysis of circular labour migration and its advantages, and observed the importance of the robust regulation of circular labour migration for reducing the potential disadvantages. The next chapter analyses the position of relevant international and regional organisations on circular labour migration and its proposed regulation. The chapter will also examine foreign jurisdictions to identify the best practices of circular labour migration regulation.

Chapter 3

Regional and international perspectives on the regulation of circular labour migration

3.1 Introduction

In a fast-developing world, international migration has become a phenomenon that positively impacts all parts of the world in terms of development.[1] The UN estimates that there are around 272 million international migrants across the world,[2] which total is estimated by the ILO to include approximately 164 million migrant workers.[3]

The above statistics indicate that a significant number of international migrants move in pursuit of work opportunities.[4] In recent times, labour migration and specifically circular labour migration have been recognised by international organisations such as the ILO and the IOM, the leading international organisation for migration,[5] for the increased benefits they offer. These organisations recognise these types of mobility particularly for their contribution to sustainable economic growth and development in both the sending countries and the receiving countries and for the employment benefits that they offer to the migrant.[6] These advantages were alluded to in the previous chapter.[7]

Moreover, according to Rinke,[8] circular migration, when supported by appropriate policies, is increasingly being recognised for its significant contribution to providing benefits for all stakeholders involved in the labour migration process. In this context, the ILO and the IOM suggest that bilateral labour arrangements between the relevant countries is a good practice

1 UN Department of Economic and Social Affairs 2019 https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.
2 UN Department of Economic and Social Affairs 2019 https://www.un.org/development/desa/en/news/population/international-migrant-stock-2019.
3 ILO 2018 https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_652001.pdf.
4 OECD 2017 https://www.oecd-ilibrary.org/economics/how-s-life-2017_how_life-2017-en.
5 The IOM is the leading international organisation for migration. It was established in 1951 to help ensure the orderly and humane management of migration, to promote international cooperation on migration issues, to assist in the search for practical solutions to migration problems, and to provide humanitarian assistance to migrants in need, including refugees and internally displaced people. See IOM https://www.iom.int/about-iom.
6 Garcia and Montijano 2009 *UPF Working Paper Series* 9.
7 See paras 2.1 and 2.5 above.
8 Rinke 2011 *State of Environmental Migration Study* 6.

in the governance of labour migration flows between the countries.[9] In light of the foregoing, this chapter seeks to investigate the international and regional aspects and laws relevant to and regulating circular labour migration.

In order to reach the foregoing objective, this chapter will undertake a three-pronged approach. Firstly, the chapter will analyse relevant instruments that provide international law and standards on the regulation of circular labour migration. Secondly, using the international law and standards of labour migration discussed, the chapter will outline the good practice guidelines recommended primarily by the ILO and the IOM as important areas that need to be considered in bilateral labour arrangements. These guidelines will be quintessential to recommendations that will be made in subsequent chapters on optimising the regulation of circular labour migration in the Southern African context through appropriate bilateral arrangements. It is important to note that in line with the objectives of the thesis, this chapter will predominantly focus on the good practice guidelines relevant for legal, regular migration.

Thirdly, in an effort to observe how good practice guidelines distilled from the international law and standards of labour migration referred to above can be effectively implemented, this chapter will then conduct an analysis of the regulation of circular labour migration by countries recognised for portraying best practices. Both the ILO and the IOM identify arrangements involving countries such as New Zealand and Spain as best practices.[10] The RSE scheme in New Zealand, which is a circular labour migration programme that involves the recruitment of thousands of low-skilled Pacific Island workers to New Zealand's horticulture and viticulture industries, has been recognised by various scholars for its success in providing triple-win benefits.[11] The RSE is delivered through a system of collaboration between migrant workers, employers and a range of government agencies in a variety of Pacific Island countries.[12] The RSE has exhibited positive results in addressing labour

9 ILO 2016 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_453898.pdf; See also IOM 2008 "Analytical Paper" 10.

10 ILO 2015 *Bilateral Labour Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 25. See also IOM 2010 *IOM Series of Research into Migration* II.

11 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 11.

12 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 1.

shortages in New Zealand, providing employment to a significant number of Pacific Island workers, and contributing to development in the various Pacific Island countries.

Similarly, the TCLM, which facilitates the temporary migration of low-skilled workers between Spain and Colombia, has been recognised for its success in creating triple-win benefits. The TCLM has been raised by institutions such as the EU, the IOM and the OECD as an innovative model for regulating the flow of migrants and reducing irregular migration to Europe.[13] The above considerations are necessary for the purposes of addressing the supplemental research questions in this particular chapter of the thesis. These are: What are the respective international and regional positions of the ILO, the IOM, the AU and SADC on the regulation of labour migration in general, and more specifically on circular labour migration and the proper use of bilateral labour arrangements? With reference to foreign law, how do Spain and New Zealand use bilateral labour arrangements?

To set the scene, this chapter will commence with general introductions to the IOM and the ILO and a brief discussion of their respective functions. The intention is to help establish a baseline understanding of the role that these organisations could play in facilitating circular labour migration intended to benefit the three main stakeholders involved.

3.2 The role of the IOM

As highlighted in chapter 1, the IOM is an intergovernmental organisation established in 1951 with the mandate to facilitate humane and orderly migration that benefits both migrants and society.[14]

In furtherance of its mandate, the IOM has established more than 448 field offices in 138 countries, including Zimbabwe and South Africa.[15] In the Southern African region, the IOM has established its regional office in Pretoria, South Africa.[16] The various field offices assist the IOM with efficiently reacting to developments in the migration area and stay in contact with local authorities, national governments and regional authorities in order to effectively promote humane and orderly migration for all.[17] This regular contact equips the IOM with

13 Lanneau 2016 "Strengthening Stability and Security through Co-operation on Good Governance" 8.
14 See para 1.1 above. See also Kunz *et al Multi-layered Migration Governance* 2.
15 IOM date Unknown https://www.iom.int/about-iom.
16 IOM 2019 https://ropretoria.iom.int/.
17 Kunz *et al Multi-layered Migration Governance* 2.

essential information that enables it to have expertise in areas such as border management, legal migration and the dissemination of vital information relevant to migration opportunities and awareness of migratory flows.[18]

The IOM regularly disseminates the information it collects to the governments of its 173 member states.[19] The purpose of this dissemination is to enhance the management of labour migration and human resource development in the respective member states.[20] With specific regard to labour migration, the IOM attempts to build capacity in the management of labour migration by *inter alia*: advising member states on technical and policy matters; supporting member states to develop policies and laws and to establish administrative structures that promote effective labour migration flows; facilitating the recruitment process of workers, including the training of such workers; and promoting the integration of migrant workers into new workplaces in receiving countries.[21] The IOM particularly recognises South Africa as the destination of choice for most migrants in the Southern African region.[22] As a result, the IOM office in South Africa *inter alia* seeks to assist the government of South Africa with migration policy research.[23]

The above functions of the IOM indicate that the organisation is arguably well equipped, at least on paper, to provide essential advice and support to countries in Southern Africa seeking to enhance the regulation of circular labour migration. Similarly, the ILO is ideally placed to provide pertinent guidance to the Southern African countries seeking to optimise the regulation of circular labour migration. The ILO's role in the governance of labour migration will now receive attention.

3.3 The ILO's role in the governance of labour migration

The ILO is a specialised agency of the UN dedicated to improving global living standards and labour conditions.[24] Established in 1919 in terms of the Treaty of Versailles, the ILO is

18 Pecoud 2018 *Journal of Ethnic and Migration Studies* 1621-1638.
19 All the selected countries in this thesis are members of the IOM. See in this regard IOM date unknown https://www.iom.int/about-iom.
20 IOM date uknown https://www.iom.int/about-iom.
21 IOM date unknown https://www.iom.int/about-iom.
22 IOM date unknown https://www.iom.int/countries/south-africa.
23 IOM date uknown https://www.iom.int/countries/south-africa.
24 ILO 2020 https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm.

one of the oldest multilateral regimes in the world with near-universal membership.[25] The ILO's main task is to develop, promote and monitor international labour standards.[26] These labour standards are considered by the OECD[27] as "norms and rules that govern working conditions and industrial relations" and are embodied in a multitude of conventions, recommendations and protocols. In addition to these instruments, various ILO declarations and codes of practice are similarly relevant for the maintenance of proper international labour standards.[28] Along with the use of conventions, the ILO uses recommendations to set standards on labour migration. These recommendations merely serve as guidelines for the national policies and conduct of the member states, particularly with regard to the implementation of labour standards on a specific topic that has not yet been considered by the ILO to be serious enough to warrant the adoption of a binding convention.[29] The recommendations also provide guidance on the implementation of a corresponding convention.[30]

ILO conventions, on the other hand, have a more binding effect. Member states (including South Africa, Lesotho and Zimbabwe) who ratify the conventions of the ILO have an obligation to uphold the standards set by the ratified ILO conventions and subsequently incorporate the prescribed minimum labour standards contained in the conventions into their national laws.[31] In order to encourage the implementation of ratified conventions, member states have to submit reports to the ILO regarding their compliance with such conventions.[32] It is worth noting that member states themselves at times hold each other accountable where the submission of reports is concerned.[33] In 1964, the ILO requested South Africa to provide annual reports regarding the position of its domestic legislation on

25 Pahle 2014 *Labour History* 466.
26 ILO 2020 https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm.
27 OECD 1996 *OECD* 25.
28 By ratifying an ILO convention, states commit to applying the convention in national law and practice and to submitting reports to the ILO at regular intervals regarding its application. Consequently, the degree to which members are bound by international labour law may vary significantly from one country to another, depending on the conventions that specific countries ratify. See https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm.
29 Conradie *Critical Analysis of the Right to Fair Labour Practices* 39.
30 Conradie *Critical Analysis of the Right to Fair Labour Practices* 39.
31 Article 19(5) of the *ILO Constitution* 1919.
32 Baccini and Archibugi 2011 *Political Science and Political Economy Working Paper* 2.
33 Article 22 read with art 26 of *ILO Constitution* 1919.

ILO conventions and recommendations dealing with freedom of association, the abolition of forced labour, and the elimination of discrimination in employment.[34] The ILO's intention was to attempt to contribute towards the elimination of apartheid in labour matters in South Africa.[35] South Africa's failure to provide the requested reports led to mounting pressure from member states to have South Africa expelled from the ILO as a member state.[36] As a result of this mounting pressure, South Africa withdrew from the ILO on 11 March 1964.[37] Following the establishing of a democratic dispensation in South Africa, the country was re-admitted as a member of the ILO on 26 March 1994.[38]

Despite the foregoing, it should be noted that the failure to ratify the conventions of the ILO does not mean that the conventions cannot still find application in the law of each individual member state. The courts in the member states are not precluded from directly applying the standards of the ILO if a particular convention was not ratified, because the standards of the ILO are universally valid and can be used to develop the common law.[39] For instance, even though South Africa has not ratified the conventions relating to migrant workers, the principles contained in the conventions are significant references to facilitate the domestic interpretation of the law governing migrant workers.[40] The decision in *Discovery Health Ltd v CCMA*[41] affirmed that the courts in South Africa, when dealing with issues concerning migrant workers, will prefer the interpretation that is consistent with international law. Van Nierkerk AJ, in concluding in this matter that foreign nationals who are employed despite lacking valid work permits acquire employee status and the necessary labour rights that emanate from such status, considered the norms in the relevant ILO conventions.[42]

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34 United States Department of Labor *International Labor* 8.
35 United States Department of Labor *International Labor* 8.
36 Conradie *Critical Analysis of the Right to Fair Labour Practices* 39.
37 ILO 2015 https://www.ilo.org/legacy/english/lib/century/content/1964.htm.
38 Department of International Relations and Cooperation 2004 http://www.dirco.gov.za/foreign/Multilateral/inter/ilo.htm.
39 ILO date unknown https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm.
40 Section 233 of the Constitution of the Republic of South Africa asserts that "[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law".
41 *Discovery Heath Ltd v CCMA* 2008 29 *ILJ* 1480 (LC).
42 2008 29 *ILJ* 1480 (LC) paras 46 and 47.

The ratification of conventions primarily means that the standards contained in conventions will subsequently be incorporated into national laws of the individual ratifying member states.[43] These standards, which become mandatory, must and should include sanctions by the state for non-compliance.[44] It is worth noting that, in South Africa, conventions only become binding when enacted into law by national legislation

Amongst the various conventions of the ILO, the governing body of the International Labour Office[45] has identified eight conventions as fundamental to the rights of human beings at work. These conventions contain principles that must be observed regardless of the level of development of the individual member states.[46] These principles must also be observed regardless of whether the conventions relevant to the core standards were ratified. This obligation on member states stems simply from being a member state of the ILO.[47] These principles, which are regarded as core labour principles and are set out in the ILO Declaration on Fundamental Principles and Rights at Work,[48] are:

i) freedom of association and the effective recognition of the right to collective bargaining;
ii) elimination of all forms of forced or compulsory labour;
iii) elimination of discrimination in respect of employment and occupation; and
iv) effective abolition of child labour.

The above principles are also embedded in the ILO Constitution and have been developed in the form of rights and obligations in the eight conventions that are regarded as fundamental by the ILO and member states.[49] These eight conventions are:

i) the Freedom of Association and Protection of the Right to Organise Convention;[50]

43 The obligations of member states where the ratification of conventions is concerned are covered in art 19(5) of the *ILO Constitution* 1944.
44 Luinstra 2004 "Labor Standards and Trade" 3.
45 This is the executive body of the ILO. See https://www.ilo.org/gb/about-governing-body/lang--en/index.htm.
46 ILO 2003 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_095895.pdf.
47 Feys 1999 *ILJ* 1446.
48 ILO *Declaration on Fundamental Principles and Rights at Work* 1998.
49 ILO 2003 https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_095895.pdf.
50 *Freedom of Association and Protection of the Right to Organise Convention* 1948 (87).

ii) the Right to Organise and Collective Bargaining Convention;[51]

iii) the Forced Labour Convention;[52]

iv) the Abolition of Forced Labour Convention;[53]

v) the Minimum Age Convention;[54]

vi) the Worst Forms of Child Labour Convention;[55]

vii) the Equal Remuneration Convention;[56] and

viii) the Discrimination (Employment and Occupation) Convention.[57]

In principle, all the above conventions which cover the core labour standards are applicable to all migrant workers.[58] Moreover, the ILO has two migrant-specific conventions[59] and related recommendations[60] on labour migration. These conventions primarily contain the provisions that regulate the conditions under which labour migration occurs.[61] The key provisions of these conventions and recommendations that may be considered when formulating bilateral labour agreements with optimised benefits will now be discussed.

3.3.1 Migration for Employment Convention[62]

This convention was adopted in 1949 and represents an elaborate set of standards that provide a more flexible response to the needs of migrant workers.[63] This convention contains provisions of a general character and three optional annexes regarding the recruitment,

51 *Right to Organise and Collective Bargaining Convention* 1949 (98).
52 *Forced Labour Convention* 1930 (29).
53 *Abolition of Forced Labour Convention* 1957 (105).
54 *Minimum Age Convention* 1973 (138).
55 *Worst Forms of Child Labour Convention* 1999 (182).
56 *Equal Remuneration Convention* 1951 (100).
57 *Discrimination (Employment and Occupation) Convention* 1958 (111).
58 Wickramasekara *Good Practices and Provisions in Multilateral and Bilateral Agreements and Memoranda of Understanding* 16.
59 *ILO Migration for Employment Convention (Revised)* 1949 (97) and the *Migration for Employment Recommendation (Revised)* 1949 (86) (with Model Treaty).
60 *Migration for Employment Recommendation (Revised)* 1949 (Recommendation 86) and *Migrant Workers Recommendation* 1975 (Recommendation 151).
61 ILO and IOM 2019 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_722208.pdf.
62 *ILO Migration for Employment Convention (Revised)* 1949 (97).
63 Hasenau 1991 *The International Migration Review* 687-697.

placing and conditions of work of migrant workers,[64] government-sponsored arrangements for group transfer,[65] and exemption from custom duties.[66]

To date, the convention has received few ratifications despite the fact that it advocates range of rights that benefit migrant workers.[67] This convention expressly highlights the obligation on ratifying member states to provide free services to migrants in order to assist with employment in the receiving country and provide migrants with accurate information regarding emigration and immigration. Article 2 advocates the maintenance of adequate and free services by the governments to assist migrants in the labour migration process. These services include the provision of accurate information, primarily pertaining to conditions in the receiving country, to migrants in order to enable them to make informed decisions. Furthermore, the convention advocates measures to facilitate the departure, journey and reception of migrants in the receiving country.[68] Article 3(1), in addition, makes it mandatory for the member states ratifying the convention to take positive steps against misleading information relating to emigration and immigration. Providing misleading information to migrants may lead to undesired migrants being stuck in the receiving country without any employment.[69]

The convention clearly provides for the equal treatment of migrants with citizens. It advocates the equal treatment of all workers in the receiving country in areas such as employment taxes, membership of trade unions, housing, access to justice and social security.[70] Additional to these benefits for migrants, the convention advocates the establishment of mechanisms to facilitate the transfer of remittances and savings of the migrants back to the sending country.[71] More importantly for the purposes of this study, this convention asserts that bilateral labour agreements are the ideal tools to be used to regulate matters of common concern amongst the stakeholders where large numbers of

64 Annex 1.1.
65 Annex II.
66 Annex III.
67 All the countries relevant to this thesis, Lesotho, Zimbabwe and South Africa, have not ratified this convention. Currently, only 50 countries have ratified the convention. See ILO https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312242.
68 Article 4.
69 McKay *et al* 2009 *Undocumented Worker Transitions* 33.
70 Article 6.
71 Article 9.

migrants are concerned.[72] This feeds into one of the main themes in this study, which is that bilateral labour agreements are the ideal tools to facilitate circular labour migration for triple-win benefits. The main provisions of the *Migration for Employment Convention* that could be considered as good practice provisions and that should therefore be included in ideal bilateral labour arrangements will be discussed later in this chapter.[73]

The *Migration for Employment Recommendation*[74] provides further guidance on the provisions of the *Migration for Employment Convention.* This recommendation supplements the *Migration for Employment Convention* by providing guidance on, among other matters, the provision of free services to assist migrants in the labour migration process and the types of assistance that migrants should be provided with.[75] The recommendation further outlines the type of information that member states should make available to the ILO and provides for the regulation of intermediaries who recruit and place migrants for employment.[76] The recommendation further calls for:

i) the facilitation of migration through measures such as access to vocational training and access to schools;
ii) the adoption of mechanisms to permit family reunification;[77] and
iii) the equality of the working conditions of legal migrant workers to those of the nationals of the receiving country.[78]

Stoyanova[79] states that the above areas advocated for in the recommendation indicate that, in brief, the recommendation concerns "the provision of assistance and information to migrants for employment, the recruitment of the same, equality of treatment, and the return to country of nationality". He makes this statement because the recommendation encourages regular migration. It does this by including provisions requiring member states to refrain from deporting migrants who entered the country through regular means immediately in instances where the migrants lose employment due to changes in the labour

72 Article 10.
73 See para 3.5 below.
74 *Migration for Employment Recommendation (Revised)* 1949 (Recommendation 86).
75 Paragraph 5.
76 Paragraphs 13-14.
77 Paragraph 18.
78 Paragraph 16.
79 Stoyanova *Migrant Workers as Subjects of Human Rights* 28.

market.[80] However, an exception to the foregoing requirement occurs in situations where an existing bilateral agreement between the sending and the receiving country provides for the removal of the migrant.[81]

It is important to note that recommendations are not binding, impose no obligations on the member states, and by their nature cannot be ratified.[82] Nonetheless, the *Migration for Employment Recommendation* specifically provides imperative guidance in the regulation of circular labour migration. This recommendation contains a model agreement ("Model Treaty") intended to serve as a guide for countries seeking to conclude appropriate bilateral agreements to facilitate labour migration.[83]

The Model Treaty was designed to help member states to design rights-based bilateral labour arrangements that take into consideration the concerns of the three main parties involved in the labour migration process.[84] In line with the foregoing objective, the Model Treaty sets a number of key criteria for the optimised protection of the rights of migrant workers, based on the fundamental principles and standards contained in UN and ILO conventions. The main provisions of the Model Treaty that serve as good practice guidelines for effective regulation of circular labour migration specifically will be discussed later in this chapter.

3.3.2 Migrant Workers Convention

This convention was adopted in 1975 with the primary aim of eliminating illegal migration and the illegal employment of migrants.[85] The convention consists of two parts. Part I deals with migration in the event of abusive circumstances, while Part II deals with equality of opportunity and treatment. It is worth noting that with regard to the foregoing, the

80 Paragraph 18(1).
81 Paragraph 18(1).
82 Feys 1999 *ILJ* 1469.
83 *Model Agreement on Temporary and Permanent Migration for Employment, including Migration of Refugees and Displaced Persons* 1949.
84 IOM 2016 https://publications.iom.int/system/files/pdf/regional_guide_bilateral_labour_agreements.pdf.
85 Vallentgoed *Legal Protection of Rights of Migrant Workers in South Africa* 25.

Discrimination Convention[86] expressly mentions that any distinction, exclusion or preference in employment made on the basis of national origin amounts to discrimination.[87]

When a state ratifies the *Migrant Workers Convention*, it typically has two options: to accept one of the two parts (Part I or Part II) or to accept the entire convention.[88] However, there are provisions in both parts that are relevant to the optimised regulation of circular labour migration. These provisions, similar to the provisions of the *Migration for Employment Convention*, incline towards the protection of the rights of migrant workers. Nonetheless, some provisions from this convention may contribute to increasing benefits for both the sending and receiving countries.

From the outset, this convention promotes respect for the rights of all migrant workers.[89] Member states who ratify this convention undertake to treat migrant workers equally to their own citizens and vow to regard migrant workers as regular workers.[90] Under this convention, migrant workers should be afforded similar social security benefits to citizens of the receiving country such as old age, unemployment and family benefits.[91] However, this convention has not received wide ratification due to the fact that some countries believe that it is extremely difficult to implement.[92] All Southern African countries that serve as the focus of this study have not ratified this convention.[93] Despite the lack of ratification, this convention, like the *Migration for Employment Convention*, is also relevant to this thesis, because it expressly highlights the importance of bilateral labour arrangements in the management of labour migration. Article 15 encourages member states to conclude bilateral and multilateral agreements amongst themselves with a view to resolving any problems that may arise from the application of the provisions of the *Migrant Workers Convention*.

In addition to the *Migrant Workers Convention*, the ILO has adopted the *Migrant Workers Recommendation*. This recommendation is a further attempt by the ILO to promote equality

86 *Discrimination (Employment and Occupation) Convention* 1958 (111).
87 Article 1 *Discrimination (Employment and Occupation) Convention* 1958 (111).
88 Article 16.
89 Article 1.
90 Article 9.
91 Article 9.
92 Strydom *et al Essential Social Security Law* 290.
93 ILO 1975 https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312288.

of opportunity and eliminate discrimination against migrant workers in the world of work.[94] The recommendation specifically argues for migrant workers to be treated equally to nationals of the receiving country in areas such as opportunity and treatment in vocational training and employment, security of employment, advancement, remuneration for similar work, trade union membership, social security and conditions of life.[95]

Interestingly, the *Migrant Workers Recommendation* advocates that member states should formulate national policies based on international labour migration that may benefit all stakeholders in the labour migration process. Paragraph 1 of the *Migrant Workers Recommendation* indicates that member states should implement national migration policies that are based on the economic and social needs of both the sending countries and the receiving countries and take into account the short-term workforce needs and the long-term social and economic consequences of labour migration. This indicates that, generally, the *Migrant Workers Recommendation* recognises the essence of creating triple-win benefits for both the sending and the receiving countries and the migrants themselves. However, like the migrant worker-specific conventions and recommendations discussed above, the *Migrant Workers Recommendation* places more emphasis on the protection of the rights of migrant workers. The recommendation *inter alia* advocates for migrant workers and members of their families to receive similar social services to those received by nationals of the receiving country and to be granted the opportunity to look for alternative employment in the receiving country in instances where their employment is terminated prematurely.[96]

In addition to the above migrant worker-specific conventions and recommendations, the ILO has other key instruments that are relevant to the regulation of circular labour migration, specifically through bilateral labour arrangements. The relevant provisions of these instruments will be discussed next.

3.3.5 Other ILO instruments relevant to circular labour migration

The IOM and the ILO[97] highlight that, in principle, all labour standards apply to migrant workers unless otherwise stated. Be that as it may, some ILO conventions have provisions

94 Preamble *Migrant Workers (Supplementary Provisions) Recommendation* 1975 (151).
95 Article 2.
96 Paragraphs 23-31.
97 ILO and IOM 2019 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_722208.pdf.

that are relevant to the regulation of labour migration in general and circular labour migration specifically. One of these conventions is the *Maintenance of Social Security Rights Convention*[98] which sets a framework of internationally agreed upon principles and rules for the protection of the social security rights of migrant workers and the adoption of general and specific social security schemes. Article 4(1) of the convention encourages the conclusion of bilateral and multilateral agreements between member states to cover the social security of migrant workers.[99] The convention further lays down provisions that require immediate application following the enforcement of the convention and distinguishes those that require the conclusion of bilateral and multilateral social security agreements to come into existence.

Article 5 of the Convention specifically highlights that both the sending and the receiving countries must mutually determine the law and legislation covering migrant workers under the convention. Masoebe[100] states that the intention behind the requirement for the mutual agreement is to limit the possibility of conflicting laws covering migrant workers between the sending and receiving countries and undesirable consequences such as the under-protection of migrants or the plurality of social security contributions. Even though this convention is intended to set guidelines for the conclusion of bilateral agreements, primarily establishing coordination schemes on social security, amongst others, its provisions may be relevant when formulating bilateral labour agreements specifically tailored to the regulation of circular labour migration.

Where migrant workers are involved in labour migration for the purposes of domestic work, on the other hand, the *Domestic Workers Convention*[101] may provide additional guidance for purposes of bilateral labour agreements. The *Domestic Workers Convention* sets labour standards for domestic workers.[102] In an attempt to provide increased protection for migrant workers, the convention expressly requires member states to ensure that domestic workers

98 *Maintenance of Social Security Rights Convention* 1982 (157).

99 The social security schemes should cover areas such as medical care, sickness benefits, invalidity benefits, maternity benefits, old-age benefits, employment injury benefits in respect of occupational injuries and diseases, unemployment benefits, and family benefits. See art 4.

100 Masoebe *Portability of Social Security Benefits of Circular Migrant Workers in Selected SADC Member States* 60.

101 *Domestic Workers Convention* 2011 (189).

102 Preamble of the *Domestic Workers Convention* 2011 (189).

who are recruited into migrant work are provided with written offers and contracts of employment prior to their departure from the sending country.[103]

To further enhance the protection of migrant domestic workers, especially against abusive practices by private employment agencies, the *Domestic Workers Convention* requires member states to create laws and processes that regulate the work of private employment agencies within each individual member state.[104] This convention also places an obligation on member states to implement laws and regulations in their jurisdictions that outline the obligations of employment agencies to migrant domestic workers.[105]

The *Private Employment Agencies Convention*[106] provides additional guidance regarding the recruitment of workers by private employment agencies. Article 7(1) provides that private employment agencies should not charge workers any fees whatsoever for recruitment. This provision is included to avoid a situation where migrants have to carry a debt burden from the excessive recruitment fees charged. The excessive fees may inadvertently increase migrants' vulnerability and lead them into forced labour and exploitation in the receiving country in their attempts to offset the debt bondage.[107] In order to further prevent abuses and fraudulent practices in the recruitment, placement and employment processes, the *Private Employment Agencies Convention* encourages member states to conclude bilateral agreements between themselves.[108] This further highlights the support provided by and the importance of bilateral labour agreements for the labour migration process. Although the mentioned convention does not provide express guidance on what ought to be included in the said agreements to prevent abuses and fraudulent practices, the *Employment Policy Recommendation*[109] does provide some clarity on the areas that should be covered in the bilateral labour agreements. Article 44 of the recommendation advocates that member

103 Article 8.
104 Article 15(1) places this obligation but does not specifically outline the abusive practices in which employment agencies typically engage.
105 Article 15.
106 *Private Employment Agencies Convention* 1997 (181).
107 United Nations Global Compact date unknown https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2Flabour%2Ftools_guidance_materials%2Flabour-recruitment-fees.pdf.
108 Article 8(2).
109 The *Employment Policy (Supplementary Provisions) Recommendation* 1984 (169).

states concluding bilateral agreements should consider existing international labour conventions and recommendations on migrant workers, to cover issues such as:

i) right of entry and stay;
ii) the protection of rights resulting from employment;
iii) the promotion of education and training opportunities for migrant workers;
iv) social security; and
v) assistance to workers and members of their families wishing to return to their country of origin.

Furthermore, the ILO Multilateral Framework on Labour Migration provides more elaborate guidance to governments, social partners and stakeholders seeking to regulate labour migration more efficiently.[110] The Multilateral Framework is important in that it encourages the formulation of labour migration policies that guarantee the rights of migrant workers, reinforce their protection, and enhance the contribution of labour migration to development.

Lastly, it is worth noting that South Africa, despite being the prime destination for labour migrants in Africa, has not ratified any of these conventions specifically dealing with migrant workers and their rights to social protection.[111] This means that South Africa has only a general international obligation with regard to the standards of labour migration.[112] In the absence of ratification of the labour migration-specific conventions, South Africa has no legally binding obligation to adhere to any of the labour migration-specific conventions in its domestic legislation.

It is further important to note that besides the provisions of the various relevant instruments of the ILO as the specialised agency of the UN on labour-related matters, other instruments of the UN itself are relevant to the regulation of circular labour migration by bilateral agreements. The relevant provisions of the UN instruments will now receive attention.

110 ILO 2006 https://www.ilo.org/asia/publications/WCMS_146243/lang--en/index.htm.
111 Dupper 2010 *International Journal of Social Security and Workers Compensation* 61-70.
112 See para 3.2 above.

3.4 United Nations instruments relevant to labour migration

The UN has nine core human rights instruments.[113] These instruments form the backbone of the international system for the protection and the promotion of human rights.[114] Some of these conventions are supplemented by optional protocols. The optional protocols are instruments that typically address substantive issues related to a convention, establish additional rights and obligations, and are considered as conventions in their own right.[115] This means that the optional protocols are open to signature or ratification by countries that are party to the main convention.[116]

The most relevant convention for labour migration amongst the core human rights instruments is the *ICRMW*.[117] This convention was adopted in 1990 and specifically recognises the responsibility of the international community to provide standards of protection of migrant workers to serve as a basis for national laws in a UN member state.[118] The convention expressly defines a migrant worker 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".[119] Wickramasekara[120] holds the opinion that the foregoing definition of migrant workers is the most comprehensive definition of migrants found in international instruments.

Nonetheless, the provisions of this convention, like most of the ILO instruments discussed earlier, provide limited guidance on how the migration process can be regulated to also provide enhanced benefits for the sending countries and the receiving countries. However, its provisions may play a crucial role in guiding the formulation of bilateral labour agreements. Article 81 of *ICRMW* highlights that the convention does not prohibit member

113 *International Convention on the Elimination of All Forms of Racial Discrimination* 1965; *International Covenant on Civil and Political Rights* 1966; *International Covenant on Economic, Social and Cultural Rights* 1966; *Convention on the Elimination of All Forms of Discrimination against Women* 1979; *Convention against Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment* 1984; *Convention on the Rights of the Child* 1989; *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families* 1990; *International Convention for the Protection of All Persons against Disappearance* 2006; *Convention on the Rights of Persons with Disabilities* 2006.

114 Georgetown Law 2020 https://guides.ll.georgetown.edu/c.php?g=273364&p=1824722.

115 UN Women 2009 https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm.

116 UN Women 2009 https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm.

117 *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* 1990.

118 Article 1.

119 Article 2(1).

120 Wickramasekara 2018 *Assessment Guide for Bilateral Agreements and Memoranda of Understanding on Labour Migration, with a Special Focus on Bangladesh* 9.

states from providing more favourable rights to migrant workers over those provided for in the convention itself, by way of bilateral agreements. This may be interpreted to mean that the convention merely provides the basic rights to be afforded to migrant workers because member states are at liberty to provide additional rights to migrant workers. However, the convention does provide a list of additional rights that could be afforded to documented migrant workers and members of their families. These include the right to information pertaining to their rights; the right to participate in public affairs and elections; the right to equality of treatment in relation to social and economic rights; the right to form associations and unions; protection of the unity of the family; equality of treatment in relation to employment and unemployment; and the right to transfer money back to the sending country.[121]

South Africa has not ratified the *ICRMW*.[122] Nonetheless, South Africa has ratified the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) (*CEDAW)*.[123] *CEDAW General Recommendation No. 26 on Women Migrant Workers* (2008)[124] distinguishes between the responsibilities of the sending country and those of the receiving country in the labour migration process where women are involved. The recommendation highlights that the responsibilities that are specific to the sending country include regulation of recruitment, awareness-raising and the training of migrants, consular protection, and facilitating the right of return of migrants.[125]

Furthermore *CEDAW General Recommendation No. 26 on Women Migrant Workers* (2008) specifies that the responsibilities specific to the receiving country include the protection of the legal rights of the female migrant workers regarding areas such as civil law and constitutional law, access to remedies, and family reunification.[126] Notably, paragraph 27 also advocates for bilateral cooperation to facilitate labour migration, thereby adding to the

121 Articles 36-56.
122 Zimbabwe has not ratified the convention. However, Lesotho ratified the convention on 16 September 2005. See Anon uknown https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4.
123 https://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.ZAF.2-4.E.pdf.
124 This is a general Recommendation of the Convention on the Elimination of All Forms of Discrimination against Women (1979) Committee tasked with monitoring the implementation of the convention by states parties.
125 Paragraph 24.
126 Paragraph 26.

narrative that bilateral labour agreements are the ideal tools for regulating labour migration for the benefit of all stakeholders.

Following the discussion of the relevant instruments on labour migration, it becomes essential at this point to contextualise the various provisions highlighted above in the scope of bilateral labour agreements meant to provide triple-win benefits from circular labour migration. Given the background of the above provisions, the next part of this thesis will identify and discuss key areas that must be covered in bilateral labour agreements that are intended to provide triple-win benefits. An analysis of the international framework on labour migration reveals that three key areas must be covered to promote the optimised regulation of circular labour migration.[127] The discussion below will cover the areas that require attention in these three thematic areas.

3.5 Selected good practice provisions of ideal bilateral labour migration agreements

3.5.1 Protection of the rights of migrant workers

The IOM asserts that migrant workers are the most vulnerable parties in the labour migration process.[128] These migrants are overly vulnerable in receiving countries where the laws of their home countries do not provide them with adequate legal protection.[129] Consequently, international instruments have recognised the need to protect migrant workers who move to countries where they are not nationals. From the onset, international instruments assert that migrant workers should expressly be made aware of the rights that are available to them in the receiving country. The *ILO Migration for Employment Convention* emphasises that the member states ratifying the convention have an obligation to provide migrant workers with accurate information about immigration and emigration

127 These are protection of the rights of migrant workers, governance of labour migration, and linkages between development and migration. See Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 1.

128 IOM 2020 https://www.iom.int/news/iom-releases-global-guidance-international-recruitment-and-protection-migrant-workers.

129 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 36.

from the receiving country and the conditions of the migrants' employment, including the rights available to them in their work.[130]

This convention does not prescribe where this information is to be provided to the migrants. However, article 8 of the Model Treaty elaborates further on this obligation on the member states. It highlights that both the sending countries and the receiving countries have the shared responsibility of providing the migrant worker with all information relevant to his or her employment in a language that he or she understands.

In order to more efficiently protect the rights of migrants, the various instruments of the ILO, collectively, through their relevant provisions can be interpreted as recommending that the member states should specifically give effect to the following matters when developing bilateral arrangements:[131]

3.5.1.1 Address concerns regarding gender issues

In order for bilateral arrangements to protect the rights of all migrants, they have to incorporate a gender perspective and generally pay attention to groups of vulnerable migrant workers such as migrant domestic workers and migrant workers who are not covered by the labour laws of the receiving countries.[132] With regard to women, bilateral arrangements should contain provisions referring specifically to the problems faced by women migrants in relation to maternity protection, sexual harassment and night work.[133] Gallotti[134] emphasises that it is important that these bilateral labour arrangements that *inter alia* pay explicit attention to gender issues include concrete complaints and dispute resolution procedures, non-discrimination clauses, model employment contracts, and redress mechanisms. In addition, he emphasises that the agreements should include provisions relating to gender-sensitive training for government staff and union representatives involved in the implementation of the bilateral agreements.

130 Articles 2 and 3 of the *ILO Migration for Employment Convention* 1949 (97).
131 In this thesis, these matters are regarded as good practices of bilateral labour arrangements meant for triple-win benefits. For further reading on these principles, see ILO 2015 *ILO Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*.
132 ILO 2016 *Gender Sensitivity in Labour Migration-Related Agreements and MOU* 3.
133 OSCE 2009 *Guide on Gender-Sensitive Labour Migration Policies: Organization for Security and Cooperation in Europe*.
134 Gallotti 2014 "Incorporating Gender Issues in BLAs and MOUs" 8.

Furthermore, in order to give effect to enhanced protection for women in bilateral arrangements, countries that are party to the agreements can draw upon provisions relating to the protection of women's rights contained in general human rights and migrant workers instruments, such as the *Convention on the Elimination of all Forms of Discrimination Against Women* and the *Domestic Workers Convention.*

3.5.1.2 Solid and enforceable provisions relating to working conditions and employment contracts

The *Migrant Workers Convention*[135] and the *Migrant Workers Recommendation*[136] are in agreement regarding the importance of migrants being regarded as equal to the nationals of the receiving country in the workplace. Both assert that migrant workers and the nationals of the receiving country should be afforded similar working conditions. This indicates that the intention of these provisions is to prevent the unjustified differentiation of migrant workers, based on the fact that they are not citizens of the receiving country.

The employment contract is central to the benefits that migrant workers obtain from the labour migration process.[137] The contract is essential because it primarily outlines the conditions of work for migrant workers and the returns of employment, including wages and remuneration due to the migrant worker. The Model Treaty provides detailed guidelines on the necessary provisions to be included in standard contracts for migrant workers.[138] Similarly, article 7 of the *Domestic Workers Convention*[139] lists detailed provisions necessary in an employment contract for domestic workers. Both the above-mentioned instruments highlight that wage protection is essential to migrant workers.[140] The protection is necessary because migrant workers regularly become victims of unlawful deductions, underpayment, discriminatory wages and non-payment of overtime.[141] The protection is also necessary

135 Part II.
136 Paragraph 16.
137 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 36.
138 Article 22.
139 South Africa ratified the *Domestic Workers Convention* 2011 (189) in 2013, while neighbouring countries Lesotho and Zimbabwe have not ratified the convention to date.
140 Article 11 of the *Domestic Workers Convention* 2011 (189).
141 Sorrentino and Jokinen 2014 *European Institute for Crime Prevention and Control Publication Series* 78.

because these migrants often lack access to effective remedies if and when they fall victim to labour exploitation.[142]

In order to reduce the vulnerability of the migrant workers, the Model Treaty generally considers the following as important practices in employment contracts:[143]

i) explaining the employment contract to the migrant worker before they commence their employment;

ii) making a copy of the contract in a language that the migrant worker understands available to them before departure from the sending country;

iii) elaboration of the scope of the contract;

iv) duration of the contract, premature termination, and conditions for renewal;

v) wage protection measures;

vi) specification of living and working conditions;

vii) reference to applicable laws;

viii) access to complaints mechanisms and dispute resolution procedures;

ix) non-retention of travel and identity documents, and

x) provisions for return and repatriation.

The above provisions may be included in bilateral labour agreements in order to remove any ambiguities regarding the contracts of migrant workers. The IOM also regards the above provisions as necessary in migrant worker contracts.[144] The IOM highlights that in order to enhance the potential of circular labour migration to provide meaningful benefits to the

142 Sorrentino and Jokinen 2014 *European Institute for Crime Prevention and Control Publication Series* 48.
143 Article 22.
144 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community*.

migrants, the migrants have to receive clear information regarding the migration process and conditions in the receiving country before migrating.[145] This could contribute significantly to helping to reduce the vulnerability of migrants entering into potentially exploitative employment situations.

3.5.1.3 Specific reference to non-discrimination of migrant workers

The principles of "equal treatment and non-discrimination against migrant workers" refer to the elimination of discrimination against migrant workers in employment and occupation. As was indicated above, the *Migration for Employment Convention* specifically provides that all migrant workers in a receiving country should generally not be treated in a less favourable manner than the nationals of the receiving country with respect to employment and living conditions [146]

These principles of equal treatment are key features of international instruments relevant to migration. The ILO's *Equality of Treatment (Accident Compensation) Convention*,[147] for instance, compels member states that have ratified the convention to grant everyone who suffers personal injury, including migrant workers in the same workplace, similar workmen's compensation to that available to nationals of the receiving country.[148] It is therefore essential that bilateral labour arrangements comprehensively address the equality of treatment of migrants. The Model Treaty outlines the elements to be included in bilateral arrangements in order to sufficiently protect the rights of migrant workers to equal treatment and non-discrimination. The Model Treaty highlights that equal treatment of workers with regard to elements such as trade union rights, working conditions and social security should apply to all migrants who are lawfully within the receiving country, regardless of race, religion or sex.[149]

145 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community*.
146 Article 6.
147 The *Equality of Treatment (Accident Compensation) Convention* 19 of 1925.
148 Article 1.
149 Article 17.

3.5.1.4 Supervision of working and living conditions

The Model Treaty emphasises the importance of supervising the living and working conditions of migrant workers in the receiving country.[150] Sargeant[151] is of the opinion that this emphasis is due to the common practice of employers in receiving countries subjecting migrant workers to poor working conditions if left unsupervised. To address this, some bilateral agreements such as the *Jordan–Nepal General Agreement* of 2017 include a separate article for the supervision of the working and living conditions in Jordan.[152] Under this agreement, government officials from Nepal are authorised to visit the workplaces and living places of Nepalese migrant workers working in Jordan.[153]

Internationally, in order to supervise the working and living conditions of temporary migrants, the Model Treaty[154] specifically calls for cooperation between the competent authorities of both the receiving country and the sending country. As part of this cooperation, the receiving country must guarantee an adequate labour inspection system for supervising working and living conditions. The likelihood of this requirement being achieved in South Africa is relatively high because there is an already established office of the Inspector General in South Africa. The office of the Inspector General, comprising three teams – occupational safety and health, minimum labour conditions and employment equity – is responsible for labour inspection.[155] In order to satisfy the above-mentioned call of the Model Treaty, the office of the Inspector General can simply be tasked with the additional mandate, amongst others, of focusing on the inspection of the working and living conditions of migrant workers in South Africa.

While the receiving country has the above-mentioned responsibilities, the sending country, on the other hand, should send consular officials to the receiving country to visit workplaces and places of accommodation to inspect the working and living conditions.[156] It is unclear

150 Article 15.
151 Sargeant 2009 *Comparative Research in Law & Political Economy* 3.
152 General Agreement in the Field of Manpower Between the Government of the Hashemite Kingdom of Jordan and the Government of Nepal (2017).
153 Article 14 of the Jordan–Nepal General Agreement.
154 Article 15.
155 ILO date unknown https://www.ilo.org/labadmin/info/WCMS_150917/lang--en/index.htm.
156 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 52.

from the guiding principles and instruments as to what remedies the sending country will have available in the event that the officials find the working and living conditions in the receiving country to be below par. However, what is clear in this instance is that the receiving country's act of providing poor living and working conditions will amount to a breach of its obligations under a bilateral labour agreement, thereby risking the collapse of the bilateral agreement and an end to the benefits attached to it.[157]

Lastly, it is important to note that where the migrant workers involved are women in domestic work, the *Domestic Workers Convention*[158] provides for specific protection. The convention requires both parties to ensure that the domestic workers enjoy fair terms of employment as well as decent working conditions and decent living conditions that respect their privacy if they live in a household.[159]

3.5.1.5 Social protection benefits for migrant workers

Migrant workers generally struggle to access social protection in receiving countries,[160] including healthcare and social security benefits.[161] This is despite article 22 of the *Universal Declaration of Human Rights*[162] stating that "[e]veryone, as a member of society, has the right to social security".

In South Africa, the courts have played a prominent role in developing and broadening the social protection afforded to migrant workers, particularly regarding labour security.[163] However, the social security measures adopted are subjected to limitations. All legislation that advances social security in South Africa is subject to the limitations set out in section 36 of the *Constitution*. Olivier[164] provides clarity on this issue by stating that:

157 For a discussion of the benefits of bilateral labour arrangements for the receiving country, see para 2.4 above.
158 Article 5.
159 Article 6.
160 The ILO uses the two terms "social protection" and "social security" interchangeably in its publications. These two terms encompass a broad variety of policy instruments, including universal benefits and other forms of cash transfers, social assistance, social insurance, as well as measures to ensure effective access to health care and other benefits targeted at securing social protection.
161 ILO 2017 https://www.ilo.org/ilc/ILCSessions/previous-sessions/106/lang--en/index.htm .
162 *Universal Declaration of Human Rights* 1948.
163 Snyman 2013 *Social Protection for the Migrant Worker in South Africa* 1.
164 Olivier 2008 http://www.saflii.org/journals/LDD/2008/8.

> Any infringement on the duty to respect, protect, promote, and fulfil the right to access to social security by current and future legislation will have to be measured against the provisions of section 36(1) of the Constitution. Current social assistance legislation includes the Social Assistance Act 59 of 1992, Special Pensions Act 69 of 1996, Demobilisation Act 99 of 1996 and the Promotion of National Unity and Reconciliation Act 34 of 1995. Legislation regarding social insurance includes the Unemployment Act 30 of 1966 and Compensation of Occupational Injuries and Diseases Act 130 of 1993.

Given the foregoing, Snyman[165] asserts that the limitations in legislative instruments in South Africa have been extended to give effect to court decisions that afford migrant workers labour security.[166]

Nonetheless, internationally, the ILO observes that migrant workers may be denied access to social security in the receiving country due to their nationality and their short periods of employment.[167] The ILO further states that this denial may amount to discrimination against temporary migrant workers.[168] As a result, the ILO asserts that social protection policies play a critical role in realising the human right to social security for all.[169] It is imperative, therefore, that bilateral labour arrangements provide for the social security of migrant workers.

The ILO Model Treaty recommends that in order to give full effect to the right to social security of the migrants, the parties should determine, in a separate bilateral agreement, the methods of applying a system of social security for the benefit of migrant workers.[170] These separate agreements should then include, as a minimum, the provision of healthcare insurance and workplace insurance by employers.[171] Lastly, regarding social security, it is important to note that the *Social Security (Minimum Standards) Convention*[172] provides for the equality of nationals with non-nationals in workplaces.[173] Similarly, as indicated earlier,

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165 Snyman 2013 *Social Protection for the Migrant Worker in South Africa* 1.
166 See *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) and *Discovery Health Limited v CCMA* 2008 29 ILJ 1480 (LC).
167 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 23.
168 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 23.
169 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 23.
170 Article 21.
171 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 52.
172 *Social Security (Minimum Standards) Convention* 102 of 1952 (Convention 102).
173 Article 68.

the *Equality of Treatment (Accident Compensation) Convention* mandates countries that have ratified the convention to grant equal access regarding accident compensation to all, including migrants. Therefore, the provisions of these conventions could serve as guidelines when drafting bilateral agreements that refer to social security.

3.5.1.6 Trade union rights and access to support mechanisms from civil society

All workers have the right to join trade unions.[174] In order to give effect to this right of migrant workers, the ILO Multilateral Framework on Labour Migration recommends the promotion of bilateral and multilateral agreements between workers' organisations in the sending and receiving countries to provide for the exchange of information and transfer of membership between the unions of the two countries for migrant workers.[175]

To assist with the drafting of the agreements between trade unions, the ILO Bureau for Workers' Activities and the International Trade Union Confederation have drafted a model trade union agreement.[176] This agreement, which is considered by the ILO to be a good practice, highlights that the situation of migrant workers should be addressed through principles of social justice, equal opportunity, international trade union solidarity and gender equality.[177] In this agreement, signatories commit themselves to raising the concerns of migrant workers in their respective national tripartite labour committees and to ensuring that collective agreements and labour legislation in general fully protect the rights of all migrants, including temporary migrants.[178]

More importantly, signatories to the agreement undertake to develop initiatives that aim to ensure the participation of trade unions in the development of bilateral labour migration agreements between sending countries and receiving countries. In order to enhance their role in this process, the signatories to the agreement undertake to establish bilateral cooperation forums. These forums are meant to develop rights-based migration policies and the facilitation of regular labour migration channels in order to eliminate the possibility of

174 See *Freedom of Association and Protection of the Right to Organise Convention* 1948 (87); *Right to Organise and Collective Bargaining Convention* 1949 (98).
175 Guideline 2.6.
176 ILO 2008 Rights https://www.ilo.org/dyn/migpractice/docs/208/Model.pdf.
177 See ILO 2009 https://www.ilo.org/dyn/migpractice/migmain.listPractices?p_lang=en.
178 Model Trade Union Agreement on Workers' Rights https://www.ilo.org/dyn/migpractice/docs/208/Model.pdf.

the abuse and exploitation of workers in irregular work. This cooperation between trade unions is therefore essential because it helps to address the potentially vast exploitation of migrant workers in receiving countries and helps with reaching out to workers, such as domestic workers, who are normally excluded from the coverage of labour laws in the receiving countries.[179]

3.5.1.7 Incorporation of concrete mechanisms for complaints and dispute resolution procedures and access to justice

This principle relates to the settlement of disputes between migrant workers and employers and the access of migrant workers to justice and effective dispute resolution platforms. The ILO Principles and Guidelines assert that all migrant workers should have access to free and affordable dispute resolution mechanisms to address abuse issues that arise during the recruitment process.[180] Research by Riester and Newland[181] has shown that low-skilled workers have difficulty in accessing recourse to judicial means in the receiving country due to lack of *locus standi* in some cases, high legal costs and language barriers. To reduce the impact of these disadvantages on migrants, Wickramasekara[182] recommends that the consular services of the sending countries in the receiving countries should support the migrants with gaining access to interpretation services, legal services and the labour courts in the receiving countries. To achieve this, he suggests that a separate annex or protocol to bilateral labour agreements should be developed to include more detailed provisions about dispute resolution for migrants. However, this thesis acknowledges that poorer sending countries, such as Zimbabwe and Lesotho, may have limited capacity in providing the suggested consular assistance to migrants.

Nonetheless, with regard to disputes relating to migrant workers that arise within the work environment, the ILO recommends that provisions in agreements for complaints and dispute resolution mechanisms should allow for a two-step process.[183] The first step is to strive for

179 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 52.
180 Principle 13 and Guidelines 2.1, 8, 15.5 and 27 of ILO Principles and Guidelines on Fair Recruitment.
181 Riester and Newland 2018 *Migration Policy Institute* 3.
182 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 55.
183 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 31.

an amicable settlement between the parties. If the first step fails, agreements should then provide for judicial review.

Lastly, as indicated in chapter 2 of this thesis,[184] circular labour migration can have great economic and development benefits if properly governed and aligned with international standards. The above guidelines, which can be regarded as good practice guidelines, indicate that the primary responsibility for ensuring that the rights of circular migrant workers are sufficiently protected lies with the governments of both the sending countries and the receiving countries. The governments have the responsibility of ensuring that migrant workers, particularly those involved in low-skilled work, including female domestic workers, are comprehensively protected from abuse and discrimination.

It should be noted that bilateral labour agreements contribute significantly to enhancing the protection of the rights of migrant workers. However, as highlighted in the previous chapter,[185] in order to create triple-win benefits for all stakeholders involved in the labour migration process, it is essential to improve the governance of labour migration to provide benefits for both the sending country and the receiving country as well.

In recent years, the ILO has expressly recognised the positive role that bilateral labour arrangements play in achieving fair and well-regulated migration between sending countries and receiving countries for the benefit of all stakeholders involved.[186] Accordingly, guidelines provided by the labour migration-related instruments of the ILO and the UN discussed earlier, which may be included in bilateral labour arrangements to enhance the governance of labour migration, will be discussed below.[187]

It is worth noting that an analysis of the international framework on labour migration reveals that the UN and ILO instruments focus mainly on the protection of the rights of migrant workers. There is limited reference in binding instruments that sheds light on the ideal regulation of labour migration to enhance the benefits gained by the sending countries and receiving countries. However, there are non-binding tools emanating from the structures of the international organisations that provide insightful guidance on how the sending countries

184 See para 2.5.
185 See para 2.5.
186 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 46.
187 See paras 3.4 and 3.5 above.

and receiving countries may enhance the governance of labour migration to provide optimised benefits for all stakeholders. These tools will be essential in the discussion below.

3.5.2 Governance of labour migration

The ILO indicates that one of the main challenges in developing effective bilateral labour arrangements is the different bargaining positions of the sending countries and the receiving countries.[188] This difference in their bargaining positions may create pressure on the sending countries to accept below par standards for their migrant workers and refrain from discussing certain issues that are important for the welfare of the workers.[189] This may be influenced largely by their desire to secure work for the migrants abroad and to reduce the unemployment rate in the sending country. This desire of the sending country may differ significantly from the motivation and objectives of the receiving country for negotiating bilateral arrangements.[190]

Additionally, the differences in the binding status and scope of different bilateral arrangements such as MOUs, inter-agency understandings and bilateral labour agreements create challenges for the implementation and monitoring of bilateral labour arrangements. Therefore, it is crucial that the principles that govern the cooperation between the sending and receiving countries are clearly outlined in the bilateral labour arrangements.[191] The ILO specifically recognises this as a good practice of the inter-agency understandings between New Zealand and the Pacific Island countries.[192]

3.5.2.1 Exchange of relevant information between the sending country and the receiving country

In order to enhance the regulation of labour migration, the sending country and the receiving country need to exchange information regularly, particularly pertaining to the labour markets in the two countries.[193] This information will primarily help to effectively

188 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 34.
189 Cholewinski 2015 "Evaluating Bilateral Migration Agreements in Light of Human and Labour Rights" 237.
190 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 34.
191 ILO 2017 "Addressing Governance Challenges in a Labour Migration Landscape" 34.
192 The inter-agency understanding between New Zealand and Vanuatu is discussed in para 3.8.3.3 below.
193 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 31.

match the demand and supply of labour in both countries. A coordinating office can be established by the countries that are party to the agreement to facilitate the exchange of information.[194] This exchange of information is a good practice that is recognised in article 1 of the Model Treaty. Both the ILO Multilateral Framework on Labour Migration[195] and the Model Treaty provide guidance on how to use bilateral labour agreements to facilitate the exchange of information between countries that are party to the agreement. In this regard, the Model Treaty details the information that should be shared between the countries. According to the Model Treaty, the following information should be shared:[196]

i) social security laws and their applicability to migrant workers;
ii) the number, the categories, and the occupational qualifications of the migrants desired in the receiving country and available in the sending country;
iii) the conditions of life and work for the migrants relating to housing and remuneration; and
iv) legislative and administrative provisions relating to entry, employment and residence of migrants and members of their families in the receiving country and information relating to emigration from the sending country.

More importantly, both the *ILO Migration for Employment Convention*[197] and the Model Treaty[198] emphasise that, in the information shared, the countries party to the agreement must avoid providing misleading information relating to emigration and immigration, such as information regarding the working and living conditions in the receiving country. As highlighted earlier, misleading information may lead to unwanted migrants being stuck without employment in the receiving country and eventually resorting to illegal activities in order to earn a living.[199]

Against this background, it therefore becomes clear that aside from the benefits to the countries that are party to the agreement, migrant workers themselves will benefit

194 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 19.
195 Guideline 2.1.
196 Article 1.
197 Article 3.
198 Article 2.
199 See para 3.3.1 above.

significantly from the exchange of legitimate information. The likelihood of the nationals of the sending country being exploited in the receiving country upon discovering a different reality about the availability of work in the receiving country will be significantly reduced. Similarly, the sharing of credible information will specifically benefit the receiving country because this process will reduce the likelihood of legal migrants lured by false information about work ultimately engaging in criminal activities for survival. To obtain the foregoing benefits, Wickramasekara[200] advises that the parties to the agreement should include a sub-article in bilateral arrangements expressly indicating their desire to avoid the provision of misleading information.

3.5.2.2 Transparency

The ILO emphasises that transparency is a "major component of good governance".[201] Transparency in this instance refers to the dissemination of the content of the bilateral arrangements by the parties to the arrangement to all relevant stakeholders (employers, workers, non-governmental organisations and recruitment agencies). This dissemination creates awareness about the rights and obligations of stakeholders in the documented labour migration process and how bilateral labour arrangements affect them.

In order to increase awareness, the bilateral labour arrangements should be translated into local languages and should be shared with the migrant workers and their employers.[202] This enhances effective implementation of the arrangements and the manner in which the follow-ups to the arrangements will be undertaken. The receiving country should accordingly make these arrangements available to employers in the country so that they are aware of the provisions of the arrangements and how they affect the rights of the migrant workers.[203] Making these arrangements public and available to all benefits all stakeholders by making every party aware of their rights and responsibilities in the circular labour migration process.

200 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 52.

201 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 37.

202 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 37.

203 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 21.

3.5.2.3 Defining clear responsibilities between the parties

Closely linked with transparency highlighted above is the practice of defining clear responsibilities between the stakeholders in the labour migration process. This practice means that in order to enhance the governance of labour migration, bilateral arrangements should clearly define the responsibilities of the parties to the arrangement: the employers in the receiving country, migrant workers and recruitment agencies.[204] In this manner, every party that is responsible for the implementation of a specific aspect of the bilateral labour arrangement is expressly identified. This benefits all stakeholders involved because, in the process, clear definition facilitates the smooth implementation of the bilateral arrangement and accountability.[205] Assigning a specific responsibility to a stakeholder in the migration process significantly increases proper monitoring and evaluation of the bilateral arrangement. For instance, the *Agreement on Bilateral Cooperation on Labour Migration between Italy and Sri Lanka* of 2011 clearly defines the list of competent authorities that are responsible for implementing the agreement in both the sending country and the receiving country.[206] This enhances accountability and the smooth operation of the agreement.[207]

3.5.2.4 Concrete implementing, monitoring and evaluation procedures

While bilateral labour arrangements provide a broad framework for labour migration, it is critical to supplement them with concrete and practical measures in several areas to enhance the evaluation, implementation and monitoring procedures.[208] In order to facilitate the monitoring, evaluation and implementation of bilateral labour arrangements, the most common practice is to establish a joint committee made up of officials from the sending

204 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 31.
205 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 22.
206 Article 1.
207 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 22.
208 Wickramasekara 2012 http://ssrn.com/abstract=2032136.

country and the receiving country.[209] These joint committees play a significant role in making bilateral labour arrangements effective. The committees, amongst others, help to determine specific areas and occupations where circular migrant workers may be needed in the receiving country.[210]

To illustrate the importance of the role of the joint committees, Ruhunage[211] points out that the joint committee established under the bilateral agreement between Sri Lanka and Qatar has had notable success. This joint committee met three times, in 2009, 2011 and 2012. Consequently, the Sri Lankan delegation at the joint committee was able to successfully advocate the removal of a police clearance process that was compulsory for Sri Lankan migrant workers who wished to work in Qatar. The costs involved in obtaining this police clearance deterred a significant number of low-skilled migrants from engaging in labour migration to Qatar, thus denying the country of much-needed labour.[212] This therefore indicates that the joint committees will be important for monitoring, implementing and evaluating bilateral labour arrangements to primarily enhance the benefits of labour migration for the countries that are party to the agreement, as well as the migrants.[213]

South Africa has established these committees (JPCCs) between itself and the two other Southern African countries relevant to this thesis. As was indicated in chapter 1 of this thesis, the JPCC between South Africa and Lesotho and the JPCC between South Africa and Zimbabwe were established to facilitate contact between the public and private sectors in South Africa and the two neighbouring countries to provide a channel for promoting and enhancing cooperation between the various sectors of the governments of the cooperating countries.[214] These JPCCs are therefore suitably positioned to provide the concrete implementing, monitoring and evaluation procedures highlighted above in the Southern

209 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 24.

210 Martin and Costa 2018 https://www.epi.org/publication/temporary-labor-migration-programs-governance-migrant-worker-rights-and-recommendations-for-the-u-n-global-compact-for-migration/.

211 Ruhunage 2014 "Consolidated Report on Assessing Labour Migration Related Bilateral Agreements (BLAs), Memorandum of Understandings (MOUs) and Other Similar Arrangements in the Asian Region: Draft Report" in *ILO-KNOMAD Thematic Working Group on Low Skilled Migration*.

212 IOM 2020 https://www.iom.int/regional-consultative-process-overseas-employement-and-contractual-labour-countries-origin-asia.

213 Wickramasekara *Bilateral Labour Agreements and Memoranda of Understanding and Migration of Low Skilled Workers: A Review* 29.

214 Nshimbi and Fioramonti 2013 *MIWORC Policy Brief* 1.

African context. However, the JPCCs have been inactive in recent years, prompting the government of South Africa to express its desire to resuscitate the JPCCs.[215]

3.5.2.5 Fair recruitment principles

Recruitment in labour migration terms generally refers to the process that covers the recruitment of migrant workers, either directly by employers or through intermediaries such as work agencies.[216] In a report compiled by Abella and Martin,[217] recruitment costs have been appraised as a major cause of poor governance of labour migration. Research conducted by the UN shows that the high recruitment fees charged before labour migration takes place lead to high debt burdens and also erode savings and remittances.[218] Consequently, the charges erode the benefits of labour migration for sending countries, receiving countries and the labour migrants themselves. Migrants who incur high debts from the recruitment process at times overstay their legal duration in the receiving country as they try to recover the fees incurred during recruitment.[219] These migrants then become burdensome for the receiving country. As highlighted earlier,[220] circular labour migrants who overstay increase the population pressure in the receiving country, thus becoming problematic for the country. This is currently a concern in South Africa.

Similarly, reduced remittances due to the high recruitment costs paid by migrants are a disadvantage to the economy of the sending country, which receives less revenue. The ILO recommends that bilateral labour arrangements should be tailored towards reducing the high recruitment fees and preventing recruitment malpractices such as unlicensed recruitment agencies allowing migrant workers to travel to receiving countries without proper documentation.[221] In this regard, the ILO Recruitment Principles and Guidelines shed light on the provisions that should be included in bilateral labour agreements. The guideline document states that governments should ensure that bilateral labour agreements include

215 Ministry of Foreign Affairs 2013 http://www.foreign.gov.ls/news/PRESS_RELEASE-18_Apr_2013.php.
216 ILO date unknown https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_536263.pdf.
217 Abella and Martin 2014 "Measuring Recruitment or Migration Costs: Key Findings from KNOMAD Pilot Surveys in Korea, Kuwait, and Spain" 8.
218 United Nations 2013 "International Migration and Development: Report of the Secretary-General".
219 Costa and Martin 2018 https://www.epi.org/files/pdf/152373.pdf.
220 See para 2.6 above.
221 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 26.

mechanisms to guarantee that the recruitment of migrant workers is consistent with relevant international labour standards and internationally recognised human rights, including fundamental principles and rights at work.[222] The Recruitment Principles and Guidelines highlight that the most relevant rights here are the right to freedom of association and collective bargaining, the prevention and elimination of forced labour, and the prevention of child labour and discrimination in employment and occupation.[223]

In order to enhance compliance with fair recruitment principles, bilateral labour agreements should expressly state that the stakeholders will respect international standards of labour recruitment. The relevant international standards include the *ILO Private Employment Agencies Convention*,[224] the Model Treaty and the ILO Recruitment Principles and Guidelines. Lastly, in light of the standards to be observed to give effect to the good practice of fair recruitment, it is clear that all parties are beneficiaries under this good practice. The migrant workers are protected from exploitation, the receiving country avoids the overstay of unwanted migrants, and the sending country receives increased remittances due to lower recruitment costs, as explained above.

3.5.2.6 Social dialogue and consultative processes

The ILO asserts that migration policies and practices are likely to be more effective when based upon social dialogue involving social partners and broader civil society. Principles 6 and 7 of the ILO Multilateral Framework on Labour Migration emphasise the essential role of social dialogue. Principle 6 states that "[s]ocial dialogue is essential to the development of sound labour migration policy and should be promoted and implemented".[225] Principle 7, on the other hand, highlights that governments and social partners should consult with migrant associations and civil society on labour migration policy. Cholewinski[226] says that this consultation is especially imperative where bilateral labour agreements are involved

222 ILO General Principles and Operational Guidelines for Fair Recruitment, adopted by the *Meeting of Experts on Fair Recruitment* (5-7 September 2016, Geneva).

223 ILO General Principles and Operational Guidelines for Fair Recruitment, adopted by the *Meeting of Experts on Fair Recruitment* (5-7 September 2016, Geneva).

224 Article 7(1) of the ILO *Private Employment Agencies Convention* 1997 (181) expressly outlines that recruitment agencies shall not charge migrant workers extra fees for recruitment.

225 ILO *Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach*.

226 Cholewinski 2015 "Evaluating Bilateral Migration Agreements in Light of Human and Labour Rights" 231-252.

because employers' and workers' organisations are key actors in the real economy and need to be consulted in order to make bilateral labour arrangements more effective.

In the above regard, consultation with employers' organisations helps to ensure better compliance with national labour laws in the treatment of migrant workers, helps to match labour market needs with migrant supply, and minimises the need to resort to workers with irregular status who invariably offer cheaper labour.[227] Support of workers' organisations, on the other hand, is essential in this process in order to enhance the effective protection of migrant workers. These workers' organisations are tasked with monitoring workplace practices and organising both foreign and local workers, and hence would have heightened insights of the ideal provisions necessary in bilateral labour arrangements. This good practice of involving concerned stakeholders therefore primarily increases the benefits of circular labour migration for the receiving country. This good practice helps to match the supply and demand for labour, thus contributing to the more efficient allocation of resources and economic growth in the country.[228]

Lastly, the above good practice guidelines illustrate that bilateral labour arrangements play a pivotal role in addressing the challenges of labour migration and effectively govern circular labour migration to provide triple-win benefits. To enhance the likelihood of achieving triple-win benefits through optimised governance, the bilateral arrangements should primarily include provisions that enhance the accessibility of the contents of the arrangements to migrants, the provision of social dialogue, the existence of adequate monitoring mechanisms, and the enforcement of the bilateral labour arrangements. Moreover, in order to enhance the triple-win benefits of the labour migration process, bilateral labour arrangements should include provisions that link development to labour migration.[229] The good practices linking migration and development are discussed below.

227 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 35.

228 See para 2.5 above.

229 Olesen "Migration, Return and Development: An Institutional Perspective" 133-159.

3.5.3 Labour migration and development linkages

The ILO recognises that considerable labour migration flows occur outside bilateral agreement frameworks in all regions of the world.[230] The ILO points out that this occurrence limits the development impact of labour migration, indicating that the ILO recognises the importance of bilateral agreements in enhancing the development impact of labour migration.

The role of labour migration, particularly circular labour migration, in increasing development in the sending countries has recently received increased attention.[231] Traditionally, the role of labour migration in increasing development in the receiving country was more prominent. However, recently, the benefits of migrant remittances, the amplification of employment opportunities, and the contribution to human resource development in the sending country are becoming a more prominent narrative.[232] The ILO recognises the development benefits that arise from well-managed labour migration. This is observed in the ILO Multilateral Framework on Labour Migration, which states that the contribution of labour migration to employment, development, the alleviation of poverty and economic growth should be harnessed for the benefit of both the sending countries and the receiving countries.[233]

Traditionally, only North–South bilateral labour arrangements included the contribution of labour migration to development in the sending country as an essential objective.[234] This is primarily because, traditionally, migration from the less developed South to the more developed North was the more prominent type of migration.[235] However, recently, North–North migration and South–South Migration have gained more prominence.[236] As a result, bilateral agreements regulating this type of mobility more frequently include the objective of development in the sending country as one of the objectives in the bilateral labour

230 ILO *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 42.
231 See para 2.7 above.
232 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 57.
233 Principle 15 of the ILO Multilateral Framework on Labour Migration.
234 Wickramasekara 2015 *Bilateral Labour Agreements and Memoranda of Understanding and Migration of Low Skilled Workers: A Review* 33.
235 Leighton date unknown https://www.un.org/en/chronicle/article/labour-migration-and-inclusive-development-setting-course-success.
236 See para 2.5.2 above.

agreements. To illustrate this, for instance, the preamble of the *Argentina–Peru bilateral agreement*[237] specifically notes that the objective of the countries that are party to the agreement is to achieve mutual development in both countries. The New Zealand RSE agreements, which will be discussed in later in this chapter, on the other hand, specifically recognise the contribution of labour to development in the sending country as an objective of the agreements.[238]

The IOM points out that in order to effectively link labour migration with development outcomes, bilateral labour arrangements should encourage the circulation of labour migrants between the sending country and the receiving country.[239] Provisions that promote the circulation of migrants should attempt to reconcile the interests of all stakeholders involved in the migration process. Findings by the IOM reveal that circulation represents a major incentive for migrant workers.[240] When temporary migrants are guaranteed employment in the following year, they are more likely to return home, where they can potentially benefit the sending country through the skills they have acquired in the receiving country and invest in various entrepreneurial activities that foster development in the sending country. It therefore becomes essential for bilateral labour arrangements to incorporate provisions that facilitate remittance transfers, skills training that is oriented to needs in the sending country, and also funding for enterprise development on return to the sending country in cases where the financial positions of the countries allow for this.[241]

One of the best practices in the above regard is the *Spain–Guinea Bissau bilateral agreement*.[242] This agreement articulates actions that aim to enhance the impact of remittances on development in the sending country. The countries that are parties to this agreement specifically undertake to cooperate with financial institutions in both countries to reduce transaction costs and encourage productive investment on remittances. To enhance

237 Agreement on Migration between the Argentine Republic and the Republic of Peru 1998.
238 See para 3.8 below.
239 IOM 2008 "Analytical Paper Expert Seminar on Bilateral Temporary Labour Migration: Good Practices and Lessons Learnt" 10.
243 IOM 2008 "Analytical Paper Expert Seminar on Bilateral Temporary Labour Migration: Good Practices and Lessons Learnt" 10.
241 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review* 32.
242 Framework Agreement of Cooperation on Immigration between the Kingdom of Spain and the Republic of Guinea Bissau 2008.

the productive investment of the remittances, both countries promote popular savings and credit entities that can provide accessible services to migrant workers.[243]

Furthermore, as indicated previously, the skills that migrant workers acquire in the receiving country are essential to development in the sending country.[244] Upon their return to the sending country, the migrants have invariably used these skills in various enterprises that encourage development in the sending country.[245] To enhance the likelihood of these migrants being equipped with the necessary skills, it is important for bilateral labour agreements to include provisions that promote human resource development.[246] These provisions can require the sending country to train migrant workers and equip them with specific skills required for work in the receiving country. This training will benefit both countries as the migrants will eventually return home to the sending country with the skills and knowledge that they have acquired and will be able to apply them in the sending country.

Moreover, as indicated above, the circulation of migrants is essential for effectively linking labour migration with development benefits in the sending country. In order to encourage labour migrants to return home and participate in development-oriented activities, the IOM encourages a joint effort of public administrations, the private sector and international agencies to provide economic motivations for migrants to return home. These motivations may include access to tax discounts or exemptions, and promoting the setup of small and medium-sized enterprises.[247] This therefore illustrates that linking labour migration with development benefits all three stakeholders in the labour migration process. The migrant workers benefit primarily from the training and skills development, the credit facilities and the tax exemptions mentioned above, while both the sending countries and the receiving countries experience economic development.

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243 Article 6-9 Framework Agreement of Cooperation on Immigration between the Kingdom of Spain and the Republic of Guinea Bissau 2008.

244 See para 2.7 above.

245 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 57.

246 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 57.

247 IOM 2008 "Analytical Paper Expert Seminar on Bilateral Temporary Labour Migration: Good Practices and Lessons Learnt" 10.

In summary, the above discussion indicates that in order to enhance the benefits of labour migration, bilateral labour migration arrangements need to reconcile the interests of both the sending countries and the receiving countries as well as those of the labour migrant. The international good practice guidelines adduced above recommend that to achieve the desired objective of enhanced benefits, the bilateral arrangements should include provisions that protect the rights of the migrants and link migration and development policies through labour migration management.

Optimised bilateral arrangements are particularly pertinent in the Southern African region because regional bodies in Africa have experienced considerable difficulty with reaching consensus on specific steps to facilitate labour migration or with implementing the agreements once reached.[248] Consequently, bilateral arrangements present a viable means of regulating labour migration in the Southern African sub-region. Various instruments that attempt to regulate labour migration in Africa generally and Southern Africa specifically will now receive attention.

3.6 The African Union framework facilitating labour migration in Africa

The African Union (AU) is a 55-member continental organisation in Africa with the mission to foster "an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena."[249] The AU seeks to create an African Economic Community and recognises that the collaboration of the eight African regional economic communities (RECs)[250] is essential for creating the African Economic Community.[251] In efforts to move towards establishing the Economic Community, the AU mandates its member states, including South Africa, Zimbabwe and Lesotho, to gradually remove, among themselves, obstacles to the free movement of goods, services, persons,

248 Reitzes *Regionalising International Migration: Lessons for SADC* 6.
249 African Union date unknown https://au.int/en/overview.
250 These eight RECs are the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of West African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).
251 African Union 2020 Regional Economic Communities (RECs) https://au.int/en/organs/recs.

capital and the right of residence and establishment.[252] Consequently, the *Abuja Treaty*[253] details four activities that are essential for establishing the African Common Market.[254]

Activity 6(e)(iii) promotes the principle of free movement of persons and the rights of residence and establishment. In order to facilitate this free movement of persons, the AU encourages member states to cooperate in developing, planning and employing human resources by adopting appropriate employment policies. Accordingly, these employment policies should allow persons to move freely within the region by strengthening and establishing labour exchanges that facilitate the employment of available skilled manpower of one member state in other AU states where such manpower could be used fruitfully.[255]

The AU has developed guiding frameworks for its member states in the area of migration generally and labour migration specifically.[256] These frameworks include instruments such as the *2006 African Common Position on Migration and Development*,[257] the *Joint Africa–EU Strategy Action Plan Partnership on Migration, Mobility and Employment* (2008–2010),[258] the *AU Commission Strategic Plan* 2014–2017,[259] the *AU Declaration on Poverty Eradication,*

252 Paragraph 2(i) art 4, *Abuja Treaty*.

253 *Abuja Treaty Establishing the African Economic Community* 1994.

254 A common market is an agreement between a group of countries removing all trade barriers between themselves, establishing a common tariff and non-tariff barriers for importers, and also allowing for the free movement of capital, services and labour between the countries. See art 6(e).

255 Article 71(e) *Abuja Treaty*.

256 IOM *Regional Guidelines for the Development of Bilateral Labour Agreements in the Southern African Development Community*.
This framework adopted in Khartoum in July 2006 acknowledges the rising number of migrants in Africa and that this trend is likely to persist in the foreseeable future. It further highlights that the management of migration has become a critical challenge for countries in the new millennium. In recognition of the foregoing, the African Common Position on Migration and Development covers a number of areas, including migration and development, human resources and brain drain, remittances, trade, migration and peace, security and stability, migration and human rights, gender, regional initiatives and access to social services. The framework also contains a set of recommendations at the national, continental and international levels, which are aimed at addressing migration and development issues.

258 The Africa–EU Strategic Partnership is the formal channel through which the EU and the African continent work together. It was adopted at the second EU–Africa Summit in Lisbon in December 2007. The strategy identifies migration, mobility and employment as an area of cooperation. This strategic partnership reflects a common understanding between Europe and Africa and their commitment to creating better jobs in Africa and managing migration flows better.

259 This plan seeks to "promote labour migration to support cross-border investment and to fill the skills gap". The plan also recognises that Africans are increasingly becoming vulnerable to climatic changes that may induce migration and conflict. Furthermore, the plan also identifies population, migration, refugees and displaced persons as domains that require bold action in Africa.

Education and Inclusive Development 2015 and the *AU Declaration on Migration* 2015.[260] However, this part of the chapter will primarily focus on the non-binding instruments that may provide guidance on how the regulation of labour migration can be tailored towards providing benefits for all stakeholders involved in the circular migration process.

3.6.1 The Revised Migration Policy Framework for Africa (2018–2027)

This framework was the result of the revision of the *Migration Policy Framework for Africa 2006* which was developed following the 74th Ordinary Session of the OAU in Lusaka, Zambia in July 2001. This meeting called for the development of a Migration Policy Framework.[261] This session advocated:

i) the development of a strategic framework for migration policy in Africa. This framework would ideally contribute to addressing the challenges posed by migration and ensure the integration of migration and related issues into the national and regional agenda for security, stability, development and cooperation;[262]

ii) work towards the free movement of people and the strengthening of intra-regional cooperation in matters concerning migration, on the basis of the established processes of migration at the regional and sub-regional levels;[263] and

iii) the creation of an environment conducive to facilitating the participation of migrants, in particular, those living outside their country, in the development of their own countries.[264]

260 This declaration specifically acknowledges that the acceleration of widespread labour migration within the continent significantly contributes to development and poverty eradication through skills enhancement and remittances. The declaration also identifies labour migration as a key priority area in efforts to address high levels of unemployment and underemployment in Africa. Furthermore, the declaration also acknowledges the importance of increased inflows of migrant workers to Africa from other regions, notably Asia and Europe. Nonetheless, the AU also notes in the declaration its concern about the dramatic adverse consequences of migration and the danger of certain migration routes to other regions like the Middle East and Europe.

261 Decision CM / Dec 614 (LXXIV).

262 Article 5.

263 Article 6.

264 Decision CM / Dec 614 (LXXIV).

The foregoing indicates that the *Revised Migration Policy Framework for Africa* is in line with the aspirations of international guidelines to link labour migration with development.

Following the 74th Ordinary Session of the OAU, the Migration Policy Framework for Africa was adopted in 2006. This Policy Framework has recently been revised by the Revised Migration Policy Framework for Africa.[265] The Revised Policy Framework provides policy guidelines for the member states of the AU and the RECs in the management of migration.[266] This framework covers three broad themes in relation to labour migration. These are (i) national labour migration policies, structures and legislation; (ii) regional cooperation; and (iii) harmonisation of labour migration policies and the labour movement and regional economic integration.[267] The framework emphasises that well-managed labour migration can offer significant benefits for both sending countries and receiving countries. The framework confirms that labour migration has played a significant role in construction, agriculture and various sectors in many African receiving countries, thus contributing to economic development.[268]

Moreover, the framework recognises that the beneficial effects of migration, such as knowledge, remittances, return migration and skills transfer, have in some cases made tremendous contributions to the economies of origin countries.[269] These benefits of well-managed labour migration were highlighted earlier in this chapter.[270] The framework emphasises that mismanaged migration can have negative consequences for both sending countries and receiving countries and the wellbeing of the migrants. These negative impacts include potential destabilising effects on national and regional security and increased tensions between host communities and migrants, giving rise to discrimination and xenophobia.[271]

In order to harness the benefits of well-managed labour migration, the framework recommends the creation of a number of measures that are in line with the international

265 Revised Migration Policy Framework for Africa (2018–2027).
266 https://www.ilo.org/africa/areas-of-work/labour-migration/policy-frameworks/WCMS_671952/lang--en/index.htm.
267 https://www.ilo.org/africa/areas-of-work/labour-migration/policy-frameworks/WCMS_671952/lang--en/index.htm.
268 Strategy XXI Revised Migration Policy for Africa and Plan of Action (2018–2027) 7.
269 Revised Migration Policy for Africa and Plan of Action (2018–2027) 42.
270 See para 3.2 above.
271 Strategy XXI Revised Migration Policy for Africa and Plan of Action (2018–2027) 8.

position on the governance of labour migration discussed earlier.[272] It advocates the promotion of standardised bilateral labour agreements to ensure the protection of migrant workers, the facilitation of remittance transfers to the sending country, and accountable labour recruitment and admission systems.[273] The framework recommends that these bilateral labour agreements should be in line with international human rights law norms and standards.[274] The framework also advocates the integration of migrants into the labour market and the education and training sectors in both the sending countries and the receiving countries. According to the framework, these labour migrants should be given social protection and social security benefits while working abroad, as well as upon their return.[275] This emphasis on the protection of migrants suggests that the Revised African Union Migration Policy Framework provides more insights into how labour migration can benefit the migrants, but provides little guidance on how the benefits of labour migration can be enhanced for receiving countries and sending countries.

The framework nonetheless highlights the key tenets of global migration which benefits migrants and stakeholders in both sending countries and receiving countries, as highlighted by the IOM.[276] These principles involve developing evidence-based policies through a whole-of-government approach, complying with international standards, engaging with partners to address migration and related issues, and securing migrants' rights.[277] This means that the framework recognises governments in the sending and receiving countries as key players in formulating policies that will enhance the benefits of labour migration.

Moreover, the framework is particularly relevant to the circular labour migration narrative because it expressly recommends the implementation of migration policies to facilitate "brain gain". Brain gain normatively refers to an increase in the number of highly trained foreign professionals entering a country. In the context of circular migration, it ultimately refers to the increase in the number of the natives of a country who return home after having worked and gained skills in a foreign country.[278]

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272 See para 3.3 above.
273 Revised Migration Policy for Africa and Plan of Action (2018–2027) 15.
274 Revised Migration Policy for Africa and Plan of Action (2018–2027) 16.
275 Revised Migration Policy for Africa and Plan of Action (2018–2027) 13.
276 IOM 2015 https://www.iom.int/sites/default/files/about-iom/migof_brochure_a4_en.pdf.
277 Revised Migration Policy for Africa and Plan of Action (2018–2027) 11.
278 https://www.collinsdictionary.com/dictionary/english/brain-gain.

Additionally, the framework indicates that circular migration contributes to development in both the receiving country and the sending country. The framework declares that migration contributes to development in the sending country through the inflow of remittances which can be used for job creation purposes to reduce unemployment in the sending country. This development is further increased by the financial skills obtained by the migrants and technology and knowledge transfers.[279] The framework asserts that in the receiving country circular migration primarily helps reduce workforce shortages in critical sectors.[280]

Furthermore, the framework recognises that labour migration policies can be tailored to foster regular migration to meet the demands and supply of domestic and foreign labour markets, to increase the recourse to regular migration, and to promote the enforcement of labour standards.[281] This indicates that, despite providing minimal guidance pertaining to the contents to be included in ideal bilateral labour arrangements, the framework broadly supports circular labour migration. Therefore, the framework may provide essential guidance to countries seeking to reduce irregular migration to the country. Even though the framework is not binding and, therefore, member states cannot be held accountable within the framework, it lays out the vision to create enhanced benefits for stakeholders involved in the labour migration process.[282] Member states can use the recommendations in the framework as guidelines on how to regulate migration by including provisions aligned with the guidance of the framework in bilateral labour arrangements. Furthermore, member states could consider the general recommendations in the framework in conjunction with more detailed guidelines provided by the international labour migration framework to develop robust circular labour migration regulations. In this manner, the visions of both international and regional organisations can be realised.

Moreover, while the Migration Policy Framework for Africa articulates Africa's approach to labour migration, it also provides guidance on key areas that can help to enhance the benefits of circular labour migration in Africa. Similarly, sub-regionally, in the Southern African region, a number of SADC instruments also seek to provide a detailed, consistent framework supportive of gender-sensitive, rights-based labour migration. These instruments

279 Revised Migration Policy Framework for Africa and Plan of Action (2018–2027) 42.
280 Revised Migration Policy Framework for Africa and Plan of Action (2018–2027) 42.
281 Revised Migration Policy Framework for Africa and Plan of Action (2018–2027) 18.
282 Revised Migration Policy Framework for Africa and Plan of Action (2018–2027) 13.

mainly provide guidance on measures that member states can take to enhance the protection of migrant workers and, unfortunately, provide minimal insight on how to also enhance the benefits for the sending countries and receiving countries. However, these instruments are relevant for the purposes of this thesis as they at least provide guidance on how to enhance benefits for one stakeholder in the labour migration process. These SADC instruments are in line with the recommendations made by the AU in the *2006 Migration Policy Framework for Africa* to:

> enhance cooperation and co-ordination amongst States in sub-regions and regions with a view to facilitating free movement at bilateral, sub-regional and regional levels, from which an Africa-wide framework on the free movement of persons would be developed and to [c]all upon the Regional Economic Communities (RECs) and their Member States to consider the adoption and implementation of appropriate protocols in order to progressively achieve the free movement of persons.[283]

SADC has a number of instruments that are meant to facilitate the free movement of people, including the Code on Social Security in the SADC 2008,[284] and the SADC Revised Regional Indicative Strategic Development Plan (2015-2020).[285] The next section will thematically discuss instruments that may provide guidance on how labour migration is covered in SADC. The analysis endeavours to reveal how circular labour migration in SADC can be regulated to enhance the benefits of the stakeholders involved.

283 AU (African Union) 2006 Migration Policy Framework for Africa.

284 This code *inter alia* attempts to protect the rights of labour migrants in the region. Article 17 specifically deals with the rights of foreign workers, migrants and refugees. In setting out core principles for these migrants, it emphasises that member states should ensure that all legally employed foreign workers are entitled to the same social security protection as the citizens of the host country. It further provides that illegal residents and undocumented migrants should be granted social security protection, even though it only advocates that they should be provided with minimum protection. In practice, however, this code has a negligible effect as it lacks an enforcement mechanism due to its non-binding nature. Despite this, the code is a positive development for labour migrants as it at least recognises that the rights of migrants require specific attention.

285 This development plan asserts that the SADC Labour Migration Policy Framework should be approved and implemented by the member states. The plan specifically highlights that the Labour Migration Policy Framework should be implemented by members in order to facilitate labour movement to support industrial development across the region. Furthermore, the plan encourages cross-border portability of and the development and operationalisation of social protection instruments. The plan also encourages members to ratify and implement the SADC Protocol on Facilitation of Movement of Persons.

3.7 Labour migration governance in SADC

SADC is a Regional Economic Community (REC), established in 1992, comprising 16 members in Southern Africa.[286] SADC is committed to regional integration and poverty eradication within Southern Africa, to be achieved through economic development and ensuring peace and security.[287]

Amongst the five African sub-regions, Southern Africa has been the subject of sustained international migration studies over the past years.[288] This is partly because the member states of its regional integration flagship programme, SADC, have diverse historical backgrounds and levels of development and different stages of political and economic evolution. According to Mapuva and Mapuva,[289] the difference in political backgrounds and the nature of resources in various countries in Southern Africa has led to differences in levels of economic development. For instance, South Africa is the largest economy in the SADC region, accounting for over 60% of all intra-SADC trade and about 70% of the SADC GDP.[290]

Given the highly uneven economic development of the countries in the region, remittances from labour migrants provide a vital source of income for various households in the region.[291] A 2016 Finmark Trust study revealed that the rate of sending remittances in Southern Africa is amongst the highest in the world.[292] The study indicates that the global average of migrants who regularly sent remittances home was 7%. However, the average of migrants who regularly sent remittances from South Africa to other Southern African countries was 17%.[293] These remittances in Southern African countries are used for food and other material necessities such as housing, fuel and clothing, as well as basic services such as education and healthcare. Anything that may be considered a luxury is seldom

286 Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe. See https://www.sadc.int/about-sadc.
287 https://www.sadc.int/about-sadc.
288 Oucho 2007 *ISS Paper* 157.
289 Mapuva and Mapuva 2014 *Law, Democracy & Development* 1028-1053.
290 Vickers *The Commonwealth Journal of International Affairs* 189.
291 FinMark Trust 2016 http://finmark.org.za/cross-border-remittances-.
292 FinMark Trust 2016 http://finmark.org.za/cross-border-remittances-.
293 FinMark Trust 2016 https://finmark.org.za/search?tag_term=remittances.

purchased.[294] This indicates that migration in SADC can be regarded as a vital strategy for poverty alleviation and regional redistribution.[295]

In the recent past, labour migration governance in the region was a patchwork of national laws and policies as well as bilateral agreements governing formalised migrant labour, and there was no coherent regional framework on labour migration.[296] However, there have been increasing calls from scholars for a coherent legal framework facilitating labour migration in the region that can reduce illicit migration and create a better environment for triple-win benefits for stakeholders involved in the migration process.[297]

Consequently, there are new regional non-binding instruments that seek to manage the cross-border movements of labour migrants. The labour migration-related instruments in SADC are based on the founding treaty of SADC, the *Treaty of the Southern African Development Community* 1992. This treaty advocates "the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and the peoples of the region generally, among the Member States".[298] The relevant SADC instruments for labour migration are discussed below.

3.7.1 SADC Protocol on Employment and Labour 2014

This protocol was developed to serve as a legal framework for the cooperation of SADC member states on matters concerning employment and labour. This objective is in line with article 22 of the SADC Treaty, which states that "Member States shall conclude protocols as may be necessary in each area of cooperation, which shall spell out the objectives and scope of and institutional mechanisms for cooperation and integration". This means that it is necessary for member states to conclude a protocol that facilitates cooperation in a relevant area that requires cooperation, such as labour migration.

The *SADC Protocol on Employment and Labour* sets an objective for the SADC member states to promote the development of employment and labour, as well as social security

282 Ratha and Shaw 2007 https://openknowledge.worldbank.org/handle/10986/6733.
295 Crush and Dodson 2015 "Migration Governance and Migrant Rights in the Southern African Development Community" 3.
296 Nshimbi and Fioramonti 2014 *African Development Review* 52-63.
297 Mudungwe 2014 *ADPC Research Brief* 1; Parshotam 2018 *South Africa Institute of International Affairs* 2.
298 Article 5.

policies which facilitate labour mobility, increase sustainable productivity and decent work, and enhance industrial harmony in the member states.[299]

More relevant to this thesis, the protocol advocates the protection of migrant workers.[300] At large the protocol *inter alia* provides for collective bargaining,[301] trade unions and government,[302] equal treatment and social protection for workers and their families,[303] education, skills development and decent work.[304]

Article 19 mandates member states to endeavour to strengthen mechanisms for combatting the smuggling and trafficking of humans; to ensure that fundamental rights are accorded to non-citizens, especially social protection and labour/employment rights; to adopt measures to cater for the special needs of migrant children, youth and women; *to adopt a regional migration policy in accordance with international conventions* to ensure the protection of the rights of migrants; and to adopt measures to facilitate the coordination and portability of social security benefits for migrants. This means that the protocol, like the Labour Migration Policy Framework, primarily focuses on enhancing the benefits of labour migration for migrant workers and regrettably does not provide meaningful insights on how labour migration can be regulated to also enhance the benefits for both the sending country and the receiving country. Its terms are, however, still relevant for at least attempting to harness the benefits of circular labour migration for one of the stakeholders and ought to be taken into consideration.

It is nevertheless important to note that this protocol has not come into force because no member state has ratified it. The protocol has been signed by only eight countries: the Democratic Republic of Congo, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, Zambia and Zimbabwe.[305] This further limits the efficacy of the protocol in itself to provide regulation that facilitates triple-win benefits. These limitations subsequently reinforce the assertion that bilateral labour agreements are ideal instruments for regulating circular labour migration in the SADC region because, essentially, they can be tailored according to the

299 Article 3(e).
300 Article 19.
301 Article 11.
302 Article 6.
303 Article 7.
304 Article 21.
305 Landau 2018 *African Centre for Migration & Society University of the Witwatersrand* 76.

good practices recognised by the IOM and the ILO and they create legally binding rights and obligations. Against this background it becomes necessary to evaluate the best practices of circular labour migration recognised by the ILO and the IOM. An analysis of how identified countries regulate circular labour migration through bilateral labour arrangements to provide triple-win benefits is essential in order to identify areas that may possibly provide key lessons about how to improve the regulation of circular labour migration between South Africa and its neighbours, Lesotho and Zimbabwe.

The ILO identifies arrangements involving countries such as New Zealand and Spain as best practices.[306] The RSE scheme in New Zealand, which is a circular labour migration programme that involves the recruitment of thousands of low-skilled Pacific Island workers to New Zealand's horticulture and viticulture industries, has been recognised by various scholars for its success in providing triple-win benefits.[307] The RSE is delivered through a system of collaboration between migrant workers, employers and a range of government agencies in a number of Pacific Island countries.[308] This collaboration is implemented through agreements called Inter-Agency Understandings (IAUs) concluded between New Zealand as the receiving country and the various Pacific Island countries as the sending countries.[309] The RSE has exhibited positive results in addressing labour shortages in New Zealand, and, in the process, providing employment to a significant number of Pacific Island workers, thus contributing to development in the Pacific Island countries.

Similarly, the Temporary Circular Labour Migration (TCLM) programme, which facilitates the temporary migration of low-skilled workers between Spain and Colombia, has been recognised for its success in creating triple-win benefits. The TCLM has been identified by institutions such as the EU, the IOM and the OECD as an innovative model for regulating the flow of migrants and for reducing irregular migration to Europe.[310] Accordingly, the primary objective in the next section is to identify the key elements of effective regulation

306 ILO 2015 *Bilateral Agreements and Memoranda of Understanding on Migration of Low Skilled Workers: A Review*.

307 McKenzie and Gibson 2013 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718246); Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 11.

308 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 1.

309 These agreements are similar to MOUs in nature. See Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 2.

310 See para 1.3.4 above.

of circular labour migration in the bilateral arrangements between Spain and New Zealand and their sending countries.

3.8 New Zealand's approach to circular labour migration

3.8.1 Background to labour migration in New Zealand

A significant proportion of the citizens of New Zealand, a sovereign island country in the south-western Pacific Ocean, were born overseas. A very large percentage of New Zealanders also lives overseas.[311] Williams[312] states that about a fifth of New Zealand's total population living in New Zealand was born overseas, while an equal number of its citizens do not live in New Zealand. This suggests that a large portion of the population of New Zealand comprises immigrants who live and work in New Zealand. Immigration data indicates that, in 2018, New Zealand's government approved 220 221 work permits for migrants to work in New Zealand legally.[313]

This vast number of migrant workers can be attributed to New Zealand's history of labour migration. Historically, New Zealand has attempted to meet the short-term demand for workers through labour migration. The country had to attract labour migrants to the country following World War II and the Japanese invasion of Southeast Asia, Micronesia and Melanesia in 1942, which challenged the authority of the established colonial order in the Pacific. Consequently, New Zealand had to populate or perish.[314] This led to the country adopting ambitious immigration policies that had two main goals. Firstly, these policies aimed to attract immigrants mainly from Europe. Secondly, these policies facilitated the recruitment of low-skilled labour from Pacific countries in order to fill gaps in the rural workforce.[315]

Following these policies, in the 1970s, the government of New Zealand introduced the first formal work permit schemes to facilitate the regular flow of temporary workers from Pacific

311 Globerman and Shapiro 2008 *Transnational Corporations* 1-35.
312 Williams 2009 *Institute of Policy Studies Working Paper* 9.
313 Immigration New Zealand 2020 https://www.immigration.govt.nz/documents/statistics/statistics-work-applications-approved-by-occupation .
314 Bedford and Heenan "The People of New Zealand: Reflections on a Revolution" 133-177.
315 Bryant *et al* 2009 *Trade, Diaspora and Migration to New Zealand* https://nzier.org.nz/static/media/filer_public/20/a7/20a7dc0f-2610-4ec7-9655-65ef68770d11/wp2009-04_trade_diaspora_and_migration_to_nz.pdf.

Island countries.[316] These work permit schemes allowed for the recruitment of low-skilled workers primarily from three island countries, Tonga, Samoa and Fiji, to work mainly in rural areas on agricultural and forestry development projects in New Zealand. Of these schemes, the most successful was the Fiji scheme, which allowed for around 200 Fijians controlled through recruitment agencies, predominantly from areas affected by natural disasters such as hurricanes and droughts, to work as migrant workers in New Zealand for up to 12 months.[317] However, these schemes were ultimately terminated for several reasons, such as the overstaying of migrants and the tightening of immigration policy in New Zealand.[318] Subsequently, industry growth and the reduction of available seasonal labour in New Zealand's horticulture and viticulture industries led to the decision of the cabinet of New Zealand in 2007 on the formation of the RSE as a seasonal labour strategy for the future.[319] In order to lay a foundation for the discussion of the RSE, it is imperative to commence with a general discussion of the legal dispensation relevant to migrants in New Zealand. This will allow for a better understanding of the dynamics that facilitate the operation of the RSE.

3.8.2 General legal framework applicable to migrants in New Zealand

The *Immigration Act*[320] is the main law regulating migration into New Zealand. The Act sets out the requirements that migrants and employers must meet and the information they must give to Immigration New Zealand in order to qualify to work in New Zealand. From the outset, this Act states that everyone who is not a New Zealand citizen is required to hold a visa allowing him or her to travel to and stay in New Zealand.[321] The Act grants the minister the rights to develop immigration instructions which set the criteria for the issuance of visas to meet the objectives identified by the minister.[322] One of the main criteria in this instance is the contribution to New Zealand's workforce through the facilitation of skills and labour.[323]

316 Bedford *et al* 2007 *Asian and Pacific Migration Journal* 251-269.
317 Levick and Bedford 1988 *New Zealand Geographer* 14-21.
318 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 60.
319 Bailey 2009 *Unfree Labour? Ni Vanuatu Workers in New Zealand's Recognized Seasonal Employer Scheme* 10.
320 51 of 2009.
321 Section 2*(a)*.
322 Section 2*(b)*.
323 Section 2*(b)*(i).

In light of the foregoing objective, the *Immigration Act* specifically states that New Zealand supports the settlement of migrants and other protected persons in New Zealand.[324]

For migrant workers specifically, the Act contains provisions that seem to increase the benefits of labour migration to New Zealand. Section 351 of the Act expressly prohibits the exploitation of migrant workers. According to this provision, any employer who fails to pay a migrant worker at least the minimum wage set for all workers in New Zealand in the *Minimum Wage Act* 1983 will be in contravention of the *Immigration Act*. Furthermore, an employer who intentionally takes actions that hinder migrant workers from seeking their entitlements under the law of New Zealand will also be in contravention of the *Immigration Act*.[325]

It should be recognised that the law in New Zealand expressly excludes temporary migrant workers from the classes of employees entitled to social security benefits. Section 19 of the *Social Security Act*[326] states that people holding temporary visas are not entitled to receive social security benefits. This means that circular migrant workers, by virtue of being temporary workers, are not entitled to social security benefits in New Zealand.

Despite not being entitled to social security rights, migrant workers are entitled to a host of minimum employment rights such as rights to employment contracts, work rest and meal breaks, annual holidays, public holidays, sick leave, bereavement leave, parental leave, equal pay, trial periods, to join a trade union and health and safety in the working environment.[327] All the foregoing rights are generally available to all employees in New Zealand. Furthermore, in New Zealand, migrant workers are expressly included under the term "employee" in the *Employment Relations Act*.[328] This therefore indicates that, save for the right to social security, the legal framework in New Zealand largely provides for the equal treatment of migrant workers with New Zealanders, in the process increasing the benefits that migrant workers obtain from the circular labour migration process.

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324 Section 3.
325 Section 351*(b)*(iii).
326 Section 19(1)*(b) Social Security Act* 2018.
327 *Employment Relations Act* 2000.
328 Section 3.

3.8.3 Recognised Seasonal Employer (RSE) scheme

The RSE is a policy that was the result of various initiatives by successive New Zealand governments to meet the short-term demand for low-skilled workers who did not qualify for entry into New Zealand under selection policies that prefer migrants with high skills and qualifications.[329] The RSE has been hailed as a novel development that represents the first significant attempt in New Zealand to create an international migration policy that attempts to achieve triple-win benefits for migrants as well as for both the sending countries and the receiving country.[330] The policy became operational in December 2007, allocating 5 000 jobs per year for circular migrant workers to plant, maintain, harvest and pack crops in New Zealand's horticulture and viticulture industries.[331]

Initially, to kick-start the RSE, bilateral IAUs were negotiated between New Zealand and five Pacific States: Vanuatu, Kiribati, Tonga, Samoa and Tuvalu.[332] The RSE's main aim was to ensure that New Zealand employers had enough access to circular migrant workers. This would also help transform the horticulture and viticulture industries from low-cost industries to industries based on quality, productivity and high value through improved business practices. Essentially, this would contribute to New Zealand's broad objective in the region, which is to encourage Pacific economic development, regional integration and stability.[333]

Pursuant to the foregoing considerations, the RSE was implemented in 2007. This decision by the cabinet of New Zealand's government to implement the RSE came on the heels of a High-Level Dialogue on International Migration and Development in the UN General Assembly in 2006.[334] At this UN meeting, there was widespread acknowledgement of the potential for policies regulating international migration flows to make significant contributions to promoting the co-development of economic conditions in both sending

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329 New Zealand's immigration policies traditionally restricted the entry of low-skilled migrant workers but were more liberal in facilitating the entry of high-skilled migrants with good qualifications into the country. The Recognised Seasonal Employer Scheme 2020 https://www.immigration.govt.nz/about-us/research-and-statistics/research-reports/recognised-seasonal-employer-rse-scheme.

330 Ramasamy S *et al* 2008 *Pacific Economic Bulletin* 173.

331 Ramasamy S *et al* 2008 *Pacific Economic Bulletin* 173.

332 http://www.dol.govt.nz/initiatives/strategy/rse/understanding.as.

333 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and Its Impact on Employers, Pacific Workers and Their Island-Based Communities* 11.

334 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and Its Impact on Employers, Pacific Workers and Their Island-Based Communities* 13.

countries and receiving countries based on the reciprocities between them.[335] Following this meeting, New Zealand's government particularly recognised that the management of any temporary migration scheme between New Zealand and Pacific Island countries intended to achieve triple-win benefits would require extensive collaboration and consultation at several levels. These levels included governments and non-governmental organisations that had the mandate of protecting the welfare of migrant workers and their families.[336]

Consequently, the RSE engaged multiple stakeholders at all stages of design, implementation and ongoing management.[337] The ILO identifies this feature of engagement as the "best practice" feature of the RSE.[338] Three core government agencies are tasked with administering the RSE:

i) NZAID (a semi-autonomous body which manages New Zealand's overseas aid programme);
ii) the Ministry of Social Development; and
iii) Inland Revenue (a body tasked with developing RSE worker tax codes).[339]

The Ministry of Social Development plays the most important role amongst these bodies as it forecasts seasonal labour requirements and collaborates with the Department of Labour in order to determine if there is a genuine need to recruit overseas workers to New Zealand.[340]

Furthermore, in order to enhance the benefits of the labour migration process, the RSE policy emphasises the importance of minimising the risk of the exploitation of workers from the Pacific Island countries.[341] The RSE policy includes a list of provisions that are intended to minimise the risk of exploitation of work. To this end, the policy states that:

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335 United Nations 2006 "International Migration and Development" *Report of the Secretary-General United Nations General Assembly*.

336 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and Its Impact on Employers, Pacific Workers and Their Island-Based Communities* 13.

337 Hugo 2009 "Migration, Labour Mobility and Poverty" 23.

338 ILO 2009 https://www.ilo.org/dyn/migpractice/migmain.listPractices?p_lang=en.

339 Department of Labour *A Final Evaluation Report of the Recognized Seasonal Employer Policy* 2007–2009.

340 Farquhar *"Migration with Dignity": Towards a New Zealand Response to Climate Change Displacement in the Pacific* 17.

341 Under the RSE, preference of employment is given to workers from Pacific Island Forum Countries, who are granted seven-month visas and are eligible to work in New Zealand again after their initial work period, but only if they qualify.

i) workers must be provided with employment contracts, clearly stipulating the terms and conditions before they can enter New Zealand;
ii) migrant workers must be paid the same rates as New Zealand workers;
iii) employers must bear the entire cost of recruitment and workers must not be charged any recruitment fees; and
iv) RSE employers must not use recruitment agencies that require commission from workers in exchange for securing employment.[342]

It is worth noting that the above provisions were highlighted in this thesis as imperative for enhancing the protection of the rights of migrant workers.[343] The above provisions are indicative of the RSE's alignment with international guidelines regarding the protection of migrant workers. However, it is also worth noting that the burden on employers to bear the entire costs of recruitment may prove heavy for employers in less affluent countries, thus resulting in the reluctance of employers to employ migrant labour. A more balanced approach might be the provision of assistance to the employers by the governments of both the sending countries and receiving countries to cover the recruitment costs.

Lastly, to qualify for employment under the RSE, migrants mainly have to prove that they have job offers from an employer approved by the government of New Zealand to employ migrant workers under the scheme.[344] This is because, under the RSE, there is a clear "New Zealander first" dimension, which ensures that local people are not denied opportunities to obtain jobs as seasonal employees.[345] To ensure that locals are not denied employment opportunities, employers are required to list any available job opportunities with their regional Work and Income New Zealand (WINZ) branch, whereupon WINZ checks its regularly updated records of unemployed citizens and their skills for potential labour within the region.[346] If no locals who meet the minimum requirements of the job are available, the

342 Department of Labour *A Final Evaluation Report of the Recognised Seasonal Employer Policy* 2007–2009 10.
343 See para 3.5.1 above.
344 Recognised Seasonal Employer Work Category Immigration New Zealand www.immigration.gov.nz.
345 Ramasamy *et al* 2008 *Pacific Economic Bulletin* 174.
346 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and Its Impact on Employers, Pacific Workers and Their Island-Based Communities* 83.

employer can resort to employing migrant workers. Therefore, under the RSE, the onus is on employers to prove that no New Zealanders are available to perform the required work.

Other conditions that employers must fulfil before employing migrant labour from the Pacific Island countries are discussed below.

3.8.3.1 Conditions for employers under the RSE

To qualify as a recognised seasonal employer under the RSE, employers who wish to recruit migrant workers under the RSE have to first register and get approved by the government of New Zealand.[347] The employer must demonstrate that they are financially capable of providing accommodation and pastoral care to workers, that they can pay workers at least the minimum wage for 30 hours a week, that they have a dispute resolution process for workers, and that they have in the past complied with all relevant immigration and employment laws.[348] These requirements are put in place to minimise the likelihood of employers exploiting migrants. As a result, the requirements increase the benefits that migrant workers gain from managed circular labour migration.

Furthermore, prior to being granted employer status under the RSE, which normally lasts for two years, the employer has to lodge an Agreement to Recruit (ATR) with the Department of Labour.[349] An ATR is a document that contains the number of employees an employer requires; details about the terms and conditions offered to the workers, including the nature of the work of planting, maintaining, harvesting and packing crops; the countries from which the workers will be sourced; and the employment contracts offered to such workers.[350] Employers are required to submit these ATR applications every season. The main purpose of this requirement is to implement a vetting process in order to minimise the potential of employers seeking migrant workers solely for exploitation purposes.

Once the ATR has been approved, employers can start recruiting employees. Some employers prefer physically going to the Pacific countries to recruit employees themselves,

347 Gibson and McKenzie 2014 *Policy Research Working Paper* 6.
348 Gibson and McKenzie 2014 *Policy Research Working Paper* 10.
349 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 86.
350 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 81.

while others prefer to rely on recruitment agencies in the sending countries to undertake the recruitment process on their behalf. This is because, under the RSE, there are generally three possible methods of recruiting workers.[351]

The first method involves employers employing workers from a "work-ready" pool of workers who were selected and pre-screened by labour ministries in the sending states.[352] In Tonga, for instance, the employers provide the number of employees they seek, whereupon church and community leaders, together with district and town officers, screen and pre-select candidates to be employed on behalf of the employers.[353] These groups screen workers based on guidelines provided by the Ministry of Labour in Tonga to *inter alia* ensure that there are no court orders barring the selected workers from leaving the country.[354]

The second method involves using agencies in the sending country to screen and select workers.[355] This method is predominantly used in Vanuatu, where the government uses agents assisted by community councils to help screen and select workers on behalf of the employer. As indicated earlier, the fees for these agents who help with screening as part of the selection process are covered by employers in New Zealand.[356]

The third method involves direct recruitment by the employers themselves. This method is used by employers who have previous experience with the RSE. First-time RSE employers generally use the first two methods of recruitment.[357] Employers who have been involved in the RSE for several years establish contacts in various sending countries and can use these contacts to help recruit workers in the sending countries or re-hire old employees.[358] Furthermore, it is important to note that under the RSE, employers are also permitted to recruit outside the Pacific area if they have sufficient evidence that they were unsuccessful recruiting workers from the Pacific, or they can prove that they had an agreement to recruit

351 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 81.
352 Gibson *et al* 2008 *Pacific Economic Bulletin* 187-204.
353 Gibson *et al* 2008 *Pacific Economic Bulletin* 187-204.
354 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 81.
355 Luthria 2008 *Pacific Economic Bulletin* 166.
356 McKenzie *et al* 2008 *Pacific Economic Bulletin* 210.
357 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 83.
358 Gibson and McKenzie 2014 *Policy Research Working Paper* 6.

seasonal workers from another country outside the Pacific prior to the drawing up of the RSE.[359]

The foregoing methods of recruitment under the RSE indicate that recruitment under the RSE is largely the responsibility of the employers, recruitment agencies and social agents in the sending country. The governments in the sending countries merely play a facilitation role in the process. Nevertheless, employees also have conditions to fulfil in order to qualify for recruitment under the RSE. As a prerequisite to legally working in New Zealand, migrant workers selected to work in New Zealand under the RSE have to apply for a seasonal employment visa. This employment visa is a measure put in place primarily to reduce the risk of workers overstaying.[360] The RSE has been successful in its efforts to prevent overstaying as there have been very few documented cases of overstaying by RSE workers, due to the high level of compliance by key stakeholders such as employers, recruiters, government officials and the sending communities.[361]

3.8.3.2 Key programme features of the RSE designed to reduce the risk of overstaying

The RSE has several features that are intended to reduce this risk of migrants overstaying in New Zealand upon the expiry of their visas. Under the RSE, employers are specifically tasked with ensuring that the circular migrant workers they employ leave New Zealand following the lapse of their contracts. Employers who fail to abide by this obligation run the risk of being fined by the government and also lose their status as accredited employers under the RSE.[362] Immigration New Zealand as a government entity is specifically tasked with continually monitoring employers who employ migrant workers under the RSE to ensure that they do not allow or encourage workers to overstay.[363]

Similarly, migrant workers who overstay run the risk of being barred from participating in the RSE in the future. This indicates that, to prevent overstaying, the RSE includes features

359 Department of Labour *A Final Evaluation Report of the Recognized Seasonal Employer Policy* 2007-2009.

360 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 83.

361 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 81.

362 Bailey 2009 *Unfree Labour? Ni Vanuatu Workers in New Zealand's Recognized Seasonal Employer Scheme* 13.

363 Bailey 2019 http://dpa.bellschool.anu.edu.au/sites/default/files/uploads/2019-06/new_zealands_recognised_employer_scheme_rse_10_year_longitudinal_case_study.pdf.

that typically reduce incentives to overstay for both employers and employees. In attempts to reduce overstaying, firstly, the RSE limits the time that migrants can spend in New Zealand in a given year and grants them the liberty to return to New Zealand in subsequent years. Under the RSE, employers are given the freedom to employ the same migrants in the subsequent year.[364] Since the work in the vineyards is seasonal and induces a natural return to the sending country in the off-season, the prospect of having the same migrants who are already familiar with the work done in New Zealand return to perform the same job encourages both the employer and the employee to adhere to prohibitions against overstaying.[365]

Secondly, under the RSE, employers are mandated to cover at least half of the airfare for the migrants to and from the sending country and to guarantee a minimum amount of remuneration.[366] This duty of the employer reduces the financial burden on the employees, which would otherwise influence them to overstay in order to recoup the costs of travel. This simultaneously increases the benefits for the employee in using legal circular labour migration. However, it is worth noting that these extra financial burdens may be a deterrent in the context of South African employers following legal means to employ migrant workers. Nonetheless, the proximity of Zimbabwe and Lesotho to South Africa may open up channels for less expensive means of travel for the migrants, such as road transport. Using road transport for migrants' travel, as opposed to the air travel used in the New Zealand context, may decrease the financial burden on employers.

Thirdly, in the event that the migrant workers overstay, employers under the RSE are required to cover the costs associated with the removal of workers from New Zealand which can reach a maximum of NZ$3 000.[367]

Additionally, in order to further restrict the practice of overstaying, the New Zealand government expressly states in various IAUs that it concludes with Pacific Island countries that it has a zero-tolerance policy on overstaying. The government highlights in these IAUs

364 Bailey 2009 *Unfree Labour? Ni Vanuatu Workers in New Zealand's Recognized Seasonal Employer Scheme* 13.

365 Gibson and McKenzie *Policy Research Working Paper* 3.

366 The Recognised Seasonal Employer Scheme 2020 https://www.immigration.govt.nz/about-us/research-and-statistics/research-reports/recognised-seasonal-employer-rse-scheme.

367 The Recognised Seasonal Employer Scheme 2020 https://www.immigration.govt.nz/about-us/research-and-statistics/research-reports/recognised-seasonal-employer-rse-scheme.

that it is likely to discontinue recruiting workers from countries whose workers display non-compliance.[368] This then translates into action by the sending countries to deter workers from overstaying. For instance, Duggan[369] states that the Samoan prime minister announced that any shameful behaviour by RSE workers while in New Zealand would be punished by banning the worker's entire village from taking part in the RSE for two to four years. This, in turn, created social pressure for workers to comply with RSE requirements and not jeopardise the employment of the entire village.[370] This indicates that the explicit statement by the government of New Zealand of its intolerance for overstaying in the IAU is essential for discouraging the practice of overstaying. This deterrence on overstaying could apply in the context of Southern African countries like Lesotho and Zimbabwe, where some migrants originate from villages and would be compelled to desist from doing anything that could compromise the livelihoods of the entire village. This aspect of the agreement aimed at deterring the overstay of migrant workers significantly helps the receiving country to reduce the number of unwanted individuals staying in the country.

In summary, the discussion in this part of the thesis shows that immigration law in New Zealand is expressly receptive to the legal entry of migrant workers into the country. These migrant workers feed into New Zealand's two-pronged approach to enhance economic growth in the country and to inspire economic development in the Pacific region. The most proficient tool that New Zealand employs to achieve its goals is the RSE policy. This policy plays a vital role in creating triple-win benefits for the stakeholders involved in the labour migration process. It achieves these benefits through a range of best practice features for the management of circular labour migration. The features include attempts to increase awareness of RSE policy and to make the bilateral IAU documents publicly available; collaborative efforts between employers, trade unions and recruitment agencies to make the policy a success; increased efforts by all stakeholders to avoid the overstaying of migrant workers; systematic monitoring and evaluation of the RSE from the recruitment stage until the migrants are reintegrated back into their home communities; and protection of the rights of migrant workers, including through methods such as effective dispute resolution. This to

368 See Department of Labour 2007 "Recognised Seasonal Employer Policy – Vanuatu Inter Agency Understanding" https://dol.gov.vu/images/downloads/Vanuatu_agreement_labor.pdf.
369 Duggan *Marlborough Express*.
370 Gibson and McKenzie *Policy Research Working Paper* 10.

a large extent illustrates that the RSE is a suitable vehicle through which New Zealand migration policy accords with international guidelines, as discussed earlier in this chapter.[371]

The next part of this chapter will specifically outline further features of New Zealand's IAUs with the Pacific Island states which could be considered as good practices for the regulation of circular labour migration. The IAU between New Zealand and Vanuatu, the biggest migrant-sending country under the RSE, will be used as an example.[372]

3.8.3.3 IAU between Vanuatu and New Zealand

The IAU between New Zealand and Vanuatu seems to be based on a number of good practice criteria that were discussed earlier in this thesis.[373] These include equity, transparency, cooperation and development, which are areas that invariably promote triple-win benefits for the stakeholders involved in the circular labour migration process.[374]

Notably, this IAU attempts to increase awareness of the contents of the RSE policy and also makes the bilateral IAU documents publicly available.[375] The IAU specifically highlights that the major role players in the labour migration process – the recruitment agencies, the employers and the employees – should be adequately briefed by the governments of the sending and receiving countries about the provisions of the arrangements between the respective governments related to their rights, their obligations and how the provisions affect them.[376] In order to ensure transparency, this IAU asserts that the sending country in particular should implement measures to make the contents of the arrangement available in a language understood by the locals in the sending country.

Furthermore, the IAU states that employer organisations in the receiving country should disseminate information regarding the IAU to RSE-accredited employers in the country.[377] Making the documents publicly available for both the locals in New Zealand and the RSE

371 See para 3.5 above.
372 The RSE recruits about 4 000 workers from Vanuatu each year. See http://Vanuatu Independent.com/2018/01/23/New-Zealand-high-commissioner-toVanuatu-presentscredentials-to-head-of-state.
373 See para 3.5 above.
374 See para 3.5 above.
375 Section 11 of the New Zealand–Vanuatu Inter Agency Understanding.
376 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 1.
377 Article 11 *Vanuatu Inter Agency Understanding* 2007.

workers reduces the likelihood of misconceptions about the scheme from both parties as credible information about the scheme will be available to them. This IAU also defines arrangements for:

i) Recruitment (the pre-selection and screening of potential workers). In this regard, the IAU explicitly states that the parties will cooperate to *inter alia* ensure the transparency and accuracy of the recruitment procedure.[378] Vanuatu is the only country amongst the Pacific Island countries that has introduced special legislation to regulate recruitment activities and license recruitment agents.[379] Vanuatu's *Seasonal Employment Act*[380] regulates recruitment activities and licenses recruitment agents in Vanuatu. This licensing is regarded by authors such as Mendoza and Ruiz[381] as a best practice in bilateral labour migration programmes because it contributes significantly to the transparency and accuracy of the recruitment procedure.

ii) Visa processing. The IAU expressly stipulates that the granting of visas is the prerogative of the New Zealand department allocated for such work by New Zealand immigration legislation, regulations and any applicable government immigration policy.[382]

iii) Pastoral care. This term is used to refer to a range of support measures, including transportation to and from work, access to banking facilities, access to health insurance, required accommodation, translation and interpretation support, and access to religious and recreational opportunities.[383] Under the RSE, employers are directly responsible for providing "pastoral care" to migrants.[384] This enhances the

378 Section 10.2.
379 Abella "Policies and Best Practices for Management of Temporary Migration" 2.
380 23 of 2007.
381 Mendoza and Ruiz 2007 "Protecting Overseas Workers: Lessons and Cautions from the Philippines" http://www.migrationpolicy.org.
382 Section 8.1.
383 Bedford *Picking Winners? New Zealand's Recognized Seasonal Employer Policy and its Impact on Employers, Pacific Workers and their Island-Based Communities* 85.
384 This provision is not explicitly expressed in the New Zealand–Vanuatu IAU but it is stated in the RSE Employment Fact Sheet, which is made available to every migrant under the RSE to make them aware of their rights. See http://www.ilo.orgdyn/migpractice/120/Factsheet.pdf.

benefits that migrant workers receive from managed circular labour migration under the RSE.

Moreover, New Zealand seeks particularly to play an integral role in using circular labour migration to promote economic stability and regional integration within the Pacific region.[385] The development goals are predominantly achieved through the transfer of remittances to Pacific Island countries that occurs during the labour migration process. NZAID, the development aid agency of New Zealand, runs migrant-tailored programmes to facilitate the smooth transfer of remittances to sending countries to *inter alia* achieve development outcomes in the sending countries.[386]

Furthermore, the parties to this IAU expressly acknowledge that they enter into the IAU with the understanding that, under the RSE, workers from Vanuatu will be able to generate savings and relevant experience which may contribute to the economic development of Vanuatu.[387]

In this thesis, governance of labour migration, linking development and migration, and the protection of the rights of labour migrants are identified as the three cardinal themes for creating triple-win benefits in circular labour migration practices.[388] However, while the IAU discussed above does provide for matters of governance and economic development, it does not expressly refer to the rights that are available to migrants in New Zealand.

Nonetheless, the rights available to migrant workers are comprehensively articulated in a separate document, the Recognised Seasonal Employer Policy Employment Fact Sheet.[389] This document is not legally enforceable but primarily details the rights and obligations available to circular labour migrants under New Zealand immigration laws. This document refers to rights relating to holidays, sick leave and trial periods available to migrant workers under the RSE. More importantly, the document emphasises that migrant workers under the RSE will be employed under the same terms and conditions as workers from New Zealand

385 New Zealand Foreign Affairs and Trade date unknown https://www.mfat.govt.nz/en/about-us/our-strategic-direction/.
386 Maclellan 2008 https://apo.org.au/sites/default/files/resource-files/2008-05/apo-nid58386.pdf.
387 Article 5.2.
388 See paras 3.5.1, 3.5.2 and 3.5.3 above.
389 See https://www.ilo.org/dyn/migpractice/docs/120/Factsheet.pdf.

doing similar work.[390] Equality of migrant workers with local workers is an essential component of the protection of the rights of migrant workers.[391] Nonetheless, this document does not refer to some rights regarded as essential for enhancing the triple-win benefits of labour migration, such as the right to social security.[392] These rights are covered in the various pieces of legislation which make up immigration law in New Zealand.

In conclusion, in light of the foregoing, the most prominent feature of New Zealand's management of circular labour migration seems to be its "development focus". A critical success outcome of the RSE is that of contributing to the development objectives in various sending Pacific Island countries by fostering economic growth and regional integration under the RSE policy. In this manner, migrant workers become development agents. The migrants acquire vital skills and finances in New Zealand that they can use upon their return to the sending countries to inspire economic development, thereby creating triple wins for all stakeholders. To increase the benefits of the RSE for migrant workers, NZAID has funded a training programme for migrant workers under the RSE. Under this programme, migrants are equipped with English literacy, numeracy and financial literacy skills. The intention is to equip migrants with skills that will significantly help them to drive the co-development narrative between the sending and the receiving countries.[393] This principle of co-development is a best practice quality that is also prevalent in the circular labour bilateral agreement between Spain and Colombia under the Temporary Circular Labour Migration Programme (TCLM). The Spanish approach to circular labour migration will now receive attention.

3.9 The Spanish approach to circular labour migration

In recent times, Spain has experienced a surge in its migration flows, effectively making the country one of the biggest migration destinations in the world.[394] In 2010, there were 5 750 000 foreign nationals in Spain, which represented a 500% increase in the numbers

390 See https://www.ilo.org/dyn/migpractice/docs/120/Factsheet.pdf.
391 See para 3.5 above.
392 See para 3.5.1.6 above.
393 OECD 2011 "Aid For Trade Case Story" https://www.oecd.org/aidfortrade/46827617.pdf.
394 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 19.

that were recorded a decade earlier.[395] Recently, in 2018, the UN estimated the number migrants in Spain to be around 5 947 106.[396] Following the unprecedented surge in the population of migrants in Spain and the escalated rates of illegal migration, successive governments in Spain have attempted to develop strategies to manage the general migration flows.[397] The main intention was to simultaneously address the demand for labour generated by the Spanish labour market and to avoid the marginalisation and economic exclusion of migrant groups because of their illegal status in Spain.[398]

Consequently, since 2000, Spain's migration policies have incorporated measures to promote legal and orderly migration, primarily based on the model of recruitment in the sending country. These legislative developments are discussed below.

3.9.1 Spain circular migration law

Rinke[399] states that the Spanish position on circular labour migration is more advanced than that of other countries in the EU. This is primarily because the Spanish government emphasises the use of migration as a tool of co-development between the country of origin of the migrant and Spain as the receiving country.[400] Spanish migration law generally outlines procedures to be followed to achieve the desired co-development. [401]

Moreover, Spanish legislation specifically outlines the measures for promoting the protection of the rights of migrant workers. These measures are set down in the *Organic Law on the Rights and Freedoms of Foreigners in Spain and their Social Integration* (*Organic Law* 2/2009). This *Organic Law* introduced the possibility of residence and work permits for temporary and circular work under special schemes in Spain. The *Organic Law* creates two basic types of work and residence permits for circular migrants.

395 In 2000, the number of foreign migrants in Spain was about 950 000. See Marion 2010 "Standing Together Apart: Bilateral Migration Agreements and the Temporary Movement of Persons under Model 4 of GATS" 77.
396 Spain Population Pyramid 2020 http://avantgard.ie/site/15c214-spain-population-pyramid-2020.
397 UNHCR 2016 http://orca.cf.ac.uk/87078/1/UNHCR-%20FINAL%20REPORT.pdf.
398 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 20.
399 Rinke 2011 *The State of Environmental Migration IDDR Study* 25-34.
400 Nielson 2011 *Ethnic and Racial Studies* 20-39.
401 Nielson 2011 *Ethnic and Racial Studies* 20-39.

3.9.1.1 Provision of transnational service

This work and residence permit facilitates the circular migration of transnational service workers.[402] The permit is granted for up to one year for foreign workers of companies established outside the EU to work in Spain for a temporary period. This permit may be granted in three circumstances.[403] It may be granted to:

i) highly skilled migrants who seek to temporarily migrate to Spain to supervise contract work done by foreign companies in Spain;
ii) workers performing activities at the site of a foreign company in Spain; and
iii) workers relocating to Spain to perform work under the management of a Spanish company holding a contract with a foreign company in relation to specific work.

The above workers providing transnational services are guaranteed the working conditions set out in Law 45/1999 regarding salary, working hours, non-discrimination and the prevention of occupational hazards.[404] This means that prior to their travel to Spain, migrants providing transnational services may be made aware of the rights available to them in Spain as the receiving country. As highlighted earlier in this chapter, knowing about the rights available to migrants in the case of legal circular migration significantly motivates migrants to use legal channels to gain access to the labour markets of the receiving countries.[405]

3.9.1.2 Temporary residence and salaried employment

This type of permit is granted to circular migrants performing salaried work of a fixed duration in Spain.[406] The permit allows migrant workers to do the following types of work:

i) traineeship for a period of up to one year;
ii) work performed by senior management staff, professional athletes and performing artists for a period of up to one year;

402 For discussion of circular migration for transnationals, see para 2.3 above.
403 Article 56.
404 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 29.
405 See para 3.3.1 above.
406 Article 55.

iii) seasonal work of a period ranging between nine and twelve months; and
iv) contract work for a specific project, such as the construction of buildings and infrastructure, valid for a period of up to one year.

Migrant workers applying for permits for any of the above types of work are required to reside outside Spain at the time of recruitment.[407] This creates an incentive for migrants to remain in their home countries up until the time when they are recruited and to refrain from engaging in illegal migration to Spain in pursuit of job opportunities.

To recruit migrants in the sending countries, Spain employs collective management of recruitment. This is a procedure laid down by the Ministry of Labour and Immigration in consultation with the National Public Employment Service and the Tripartite Labour Commission on Immigration. These bodies collaborate to provide an annual estimate of the number of jobs that need to be filled through the collective recruitment of migrant workers in the sending countries. The actual recruitment of migrant workers into Spain, on the other hand, is coordinated by the Public Employment Service and the Labour Department or Labour Section of the Spanish Embassy.[408]

The collaboration of the above bodies has allowed foreign workers to become an essential source of labour in Spain and their recruitment has served as an essential means of managing labour flows to Spain. In this context, the Royal Decree 2393/2004 expressly highlights that bilateral international relations are imperative for managing migration flows. Furthermore, migration legislation in Spain provides that job offers will preferably be made to countries with which Spain has signed bilateral agreements to regulate and manage migration flows.[409]

Spain has a number of migration agreements with countries such as Colombia, Romania, Bulgaria, Morocco, Poland, Ecuador, Peru and Senegal.[410] Notwithstanding the agreements with these countries, the agreement between Spain and Colombia is unique, compared to

407 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 27.
408 Article 10 of Order TIN/3498/2009.
409 See Order ESS/2811/2015.
410 IOM 2009 http://publications.iom.int/bookstore/free/iml_16.pdf.493. See also OMS 2009 *IOM and Unio de Pagesos* 12-13.

all the other purely labour migration-related agreements which primarily regulate the recruitment process, the issuance of residence and work permits, the transfer of entitlements to each party, and the rights and obligations of foreign migrant workers.[411]

The Spain–Colombia bilateral agreement goes further than the ordinary provisions of the other circular labour migration agreements and alludes to co-development and the development impact of migrant remittances. *Unio de Pagesos*, the main agricultural trade union in the Spanish region of Catalonia, specifically suggested the inclusion of this provision, which has not been included in any labour agreement between Spain and other countries.[412] The bilateral agreement specifically obliges parties to encourage the reintegration of Colombian migrants back into their home communities, thereby facilitating economic, social and technological development in Colombia.[413] This obligation can foster development that encourages economic growth in the sending country. The efficiency of the bilateral agreement that facilitates this development, however, depends on the enabling legislation in the receiving country.[414] According to De Moor,[415] "a solid national legal framework is a *conditio sine qua non* for any migration programme".

Since the change of government in 2004, there has been a profound change in the approach to migration policy in Spain.[416] In 2004, the Socialist Party (*Partido Socialista Obrero Español*) came into power and brought significant changes to migration-enabling legislation in Spain.[417] The Spanish government, cognisant of the reality that immigration required a multidimensional approach, set four primary goals:[418]

i) enhancing international cooperation with sending countries to address the root causes of migration (lack of employment prospects, poverty and lack of development);

411 IOM 2009 http://publications.iom.int/bookstore/free/iml_16.pdf.493.
412 OMS 2009 *IOM and Unio de Pagesos* 12-13.
413 IOM 2009 http://publications.iom.int/bookstore/free/iml_16.pdf.493.
414 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 124.
415 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 123.
416 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 21.
417 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 21.
418 Bertosssi 2002 *Politique étrangèr*e 189-202.

ii) intensifying the struggle against illegal migration and human trafficking;
iii) developing policies aimed at the social integration of migrants; and
iv) more orderly management of labour migration flows.

The above goals of the Spanish government show that Spain regards the three themes necessary for the enhanced benefits of circular labour migration, as identified in this thesis, as essential for the management of labour migration.[419] Furthermore, it is clear that the Spanish government recognises circular labour migration as essential for achieving the above goals. The goals are complemented by a series of lines of action that are designed to transform circular migration into an element that is used to regulate the flow of workers to match labour market needs and to enhance the welfare of the workers and their sending countries. The lines of action by the Spanish government can be summarised as follows:[420]

i) prevention of brain drain from sending countries;

ii) strengthening of relations between Spain and the sending countries;
iii) promoting temporary and circular migration as an alternative to illegal migration;
iv) involving diverse parties such as governments, employers and social agents to set up recruitment schemes that stimulate co-development projects;
v) promoting the training of circular migrant workers in Spain; and
vi) facilitating the reintegration of returned circular migrants into their home communities.

The above actions align with good practice guidelines identified earlier in this chapter as vital for creating triple-win benefits from labour migration.[421] However, these lines of action typically cover only two of the three areas that were identified as cardinal for comprehensively creating triple-win benefits from the labour migration process.[422] Based on the good practice guidelines, the above lines of action seem to insufficiently address the protection of the rights of migrant workers.

419 See para 3.1 above.
420 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 21.
421 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 21.
422 See para 3.1 above.

Nonetheless, the above lines of action signal Spain's intention to create triple-win benefits. Aside from the apparent benefits to the sending and receiving countries that the actions present, the actions *inter alia* refer to the training of circular labour migrants in Spain, which is a significant positive in the narrative of creating benefits for the migrant workers. Moreover, the protection of the rights of migrant workers is addressed in other areas of Spanish law and policies, such as the Strategic Plan for Citizenship and Integration (*Plan Estratégico de Ciudadanía e Integración*), which was produced by the Spanish Ministry of Labour in 2007.[423] This plan encourages actions to promote the social inclusion of circular migrants in Spain and encourage their return to the sending countries with skills and resources, enabling them to act as development agents. The plan also seeks to encourage the signing of bilateral social security agreements with several countries to provide migrants with a variety of rights, including pension rights and other benefits. The approach is that the provision of these rights may become a stimulus for temporary and circular (legal) mobility in the medium and long term.[424] In this context, it is worth noting that migrant workers recruited to Spain through the collective management of recruitment are afforded the same social security rights as workers performing similar work in Spain. Accordingly, these migrant workers are expected to register with the social security system in Spain upon commencing work, and may register as job seekers with the public employment services in Spain if they lose their jobs before the expiry of their employment visas.[425]

However, the migrant workers cannot receive unemployment benefits because they are exempt from unemployment contributions primarily due to the temporary nature of their work.[426] This exclusion plays an insignificant role in the reduction of the benefits that migrants receive from engaging in legal circular labour migration to Spain. A considerable number of circular migrant workers migrate to Spain under circular labour migration projects that help to increase the benefits of the labour migration process for all stakeholders. One

423 De Moor 2011 "Labour Migration for Vulnerable Communities: A Strategy to Adapt to a Changing Environment" 101.

424 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 21.

425 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 29.

426 Stanek and Requena *Temporary and Circular Migration: Empirical Evidence, Current Policy Practice and Future Options in Spain* 29.

such project is the Temporary and Circular Labour Migration Project, which was implemented by *Unio de Pagesos* in 2001.[427]

3.9.2 Temporary and Circular Labour Migration Project (TCLM)

The TCLM is a scheme that seeks to facilitate the repeat recruitment of workers from Colombia to the Spanish regions of Valencia, Catalonia and the Balearic Islands.[428] In the process, the scheme simultaneously seeks to train migrant workers so that they can pursue family, community or financial undertakings upon their return to Colombia. In this manner, the migrants become development agents in their home communities.[429]

The TCLM scheme was originally conceptualised in the 1990s by *Unio de Pagesos* (UP) following shortages in the seasonal labour force in Spain. In the wake of the reduced labour force, the UP organised and supported the recruitment of foreign seasonal workers in order to respond to its members' needs for labour in the fruit harvesting industry in Catalonia.[430] In order to facilitate the recruitment, the UP initiated the TCLM.[431]

The UP stands out from other trade unions that are engaged in similar work in other countries because it, together with *Pagesos Solidaris* (Foundation for Peasant Solidarity), provides training courses for migrants while they are working in Spain. These courses aim to create opportunities and productive processes in the sending country, Colombia.[432]

The UP also offers logistical assistance in the recruitment process by helping with the selection of workers and making travel arrangements, including assisting with the visa process. The UP furthermore supports the workers during their stay in Spain by *inter alia* introducing them to available facilities and services to improve their quality of life, as well as by assisting them to integrate into the local culture and the healthcare system.[433] This indicates that the work of the UP in increasing the benefits for the stakeholders involved in the labour migration process is vital. Aside from the socio-economic benefits it promotes for

427 Zapata-Barrero *et al* 2012 https://www.hindawi.com/journals/ijpr/2012/498158/.
428 Stanek and Requena 2010 *European Migration Network Spain* 35.
429 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 4.
430 De Moor "Temporary Labour Migration for Victims of Natural Disasters: The Case of Colombia" 18.
431 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 4.
432 De Moor 2011 *COMCAD Arbeitspapiere* – Working Papers 101.
433 Engelman 2009 http://www.unfpa.org/swp/2009/wn/pdf/en_sowpoq.09.pdf.

the migrant worker, the work of the UP reduces the logistical burdens on both the sending country and the receiving country in recruiting migrant workers.

Initially, the recruitment of foreign workers under the TCLM was regulated by the *Reglamento do Extranjeria* (Immigration Rules) which, at the inception of the TCLM programme, were found in *Real Decreto* 2393/2004 (Royal Decree 2393/2004). However, due to changes in the domestic labour market and the economic crisis that affected Spain from 2007, the immigration rules have been modified to accommodate the need for low-skilled workers in Spain and can now be found in *Real Decreto* No 557/2010.

The concept of recruitment under article 50 of the *Real Decreto*[434] is an essential aspect of the legislation that supports the TCLM. According to article 50, the Public Service Department in Spain is mandated to prepare a list of available vacancies for seasonal workers under the TCLM, which list should be made available to consular services in the sending country. Prospective workers in the sending country then need to pass a selection test in order to qualify for circular migrant work in Spain. Similar to the situation in New Zealand, employers in Spain are allowed to make a request to employ foreigners only in instances where workers in Spain are not willing to accept a particular job.[435] The confirmation process for the availability of Spanish workers is undertaken by the Immigration Office. Prior to the employment of migrant workers in Spain, the Immigration Office in Spain must confirm that no Spanish citizens are willing to accept the job.[436] Following the confirmation of the absence of Spanish workers, the employers can then recruit migrant workers to fill the gaps in the Spanish labour market.

The process for recruiting migrant workers was enhanced further in 2007 when the IOM joined the TCLM scheme, assisting with the coordination between the stakeholders in the scheme to strengthen it and make it replicable.[437] The IOM joined the TCLM with the specific intention of promoting certain targeted communities in Colombia as the sending country to benefit from the programme.[438] This means that, while the UP has pioneered the scheme, the IOM added the dimension of "migration management" and successfully expanded the

434 *Real Decreto* N0 557/2010.
435 IOM 2009 http://publications.iom.int/bookstore/free/iml_16.pdf.493.
436 Anon date unknown https://www.internations.org/go/moving-to-spain/working.
437 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 4.
438 De Moor "Temporary Labour Migration for Victims of Natural Disasters: The Case of Colombia" 3.

scheme by increasing the number of beneficiaries and employers who took part in it.[439] Furthermore, the IOM plays a significant role in enhancing the benefits of the TCLM scheme by training the migrants involved in the scheme to generate economic and social development in the sending country.[440] To achieve this, the IOM assists the migrants with channelling their remittances towards purchasing goods that may improve the socio-economic status of the communities in the sending country.[441] In this narrative, it is important to note that the TCLM has been praised for its innovation in its manner of enhancing the benefits of targeted beneficiary communities in Colombia.[442]

Under the TCLM, migrants are trained on the ideal mechanisms to implement in order to use the savings they make in the receiving country to contribute to regional and local development in Colombia. Linking labour migration to development has been emphasised in this thesis as a pillar for deriving triple-win benefits from the labour migration process.[443]

Moreover, the IOM also supports the planning, coordination, formulation and management of community projects by circular migrants in the sending country. This reinforces the perspective that the IOM plays a cardinal role in deriving triple-win benefits from the TCLM.

3.9.3 Beneficiaries of the TCLM

In order to strengthen the development impact of the TCLM scheme, the IOM identifies specific target populations in the sending country from which circular migrant workers can be recruited.[444] Migrants from these communities return home to Colombia after a fixed period of work in the hope that they will be recruited to work in Spain again in subsequent years.[445] The IOM emphasises that, when recruiting migrant workers who have previously been part of the TCLM and worked in Spain, preference should be given to migrant workers who have a good track record of participating in activities that promote development in

439 Migration For Development date unknown http://www.migration4development.org/en/projects/temporary-and-circular-labour-migration-tclm-between-colombia-and-spain-model-consolidation.

440 De Moor "Temporary Labour Migration for Victims of Natural Disasters The Case of Colombia" 9.

441 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 4.

442 De Moor "Temporary Labour Migration for Victims of Natural Disasters: The Case of Colombia" 7.

443 See para 3.5.3 above.

444 IOM "Temporary and Circular Labor Migration: Experiences, Challenges and Opportunities" 2010 *IOM Series of Research into Migration* II.

445 IOM 2008 https://www.iom.int/sites/default/files/our_work/ICP/IDM/Labour-Migration-Infosheet-2008.pdf.

Colombia upon their return home.[446] The IOM believes that strong links between migrant workers and their home communities discourage the migrants from leaving the TCLM scheme and overstaying in Spain.[447] Therefore, migrants should be encouraged to maintain close ties with their families in the sending country.

The European Commission asserts that the successes of the TCLM, particularly with regard to assisting various vulnerable workers gain employment, elevate the TCLM above other labour migration programmes and crown it a "best practice" programme that should be replicated.[448] This is primarily because of the positive role that the TCLM plays in increasing the triple-win benefits of circular labour migration. In this instance, the sending country receives the development benefits, the receiving country receives labour to fill available gaps in the labour market, and the migrant receives workers' rights, skills development and the financial gains of employment.

It therefore becomes pertinent to discuss the conditions that are necessary for the replication of the TCLM scheme.

3.9.4 Conditions necessary for the replication of the TCLM

The TCLM was tailored to combat some of the problems caused by migration in Colombia. To achieve its objectives, the TCLM was vigorously supported by the government of Colombia and international and regional organisations such as the IOM and the European Commission. This indicates that political will in both the sending countries and receiving countries is necessary to support circular labour migration that focuses on co-development. Therefore, political will is required from both the sending countries and receiving countries seeking to replicate the TCLM.

Considering the economic and institutional dispensation in the receiving country is paramount to the replication of a circular labour migration programme similar to the

446 Rinke 2011 *The State of Environmental Migration IDDR Study* 25-34.
447 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 126.
448 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 14.

TCLM.[449] This *inter alia* means that a gap should exist between the labour supply and the labour demand in the receiving country. In South Africa, this gap may *prima facie* seem to be non-existent. However, research indicates that some employment fields in South Africa, such as the farming sector, have been relying on migrant labour for decades.[450] This *inter alia* maybe attributable to the reluctance of a sizeable number of local citizens to engage in labour-intensive work with minimal pay and poor working conditions, such as in the farming sector.[451] As indicated earlier, the TCLM was primarily initiated to cater for the gap in the Spanish agricultural sector where there was a large demand for seasonal migrant workers for harvesting fruit. Circular migrant workers at one stage accounted for 74% of the workforce in the Spanish agricultural sector.[452]

Furthermore, an effective circular labour migration programme depends on the protection of the fundamental rights of the labour migrant. The TCLM seeks to protect the rights of circular labour migrants and reduce their vulnerability by firstly mandating that workers participating in the programme be informed of their rights prior to departing from the sending country. In the process, they receive all the necessary information about the receiving country (Spain), including information about the community that will host them.[453] In this manner, with the support of the IOM and the governments of both the sending and the receiving countries regarding recruitment processes, migrant workers will have the incentive to cross borders legally with the necessary visas for work purposes.

De Moor[454] states that the replication of the TCLM is possible only where countries allow for the seasonal migration of low-skilled workers and permit the issuance of work permits to migrant workers. Spain facilitates the circular migration of migrants from sending countries in order to meet its demand for seasonal labour.[455] To achieve this goal, Spain enters into

449 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 129.

450 Jinnah Z "Silence and Invisibility Exploring Labour Strategies of Farm Workers in Musina South Africa" 2017 *South African Review of Sociology* 46-63.

451 Toby *Exploited Migrant Labour in the New Global Economy* 136;Jinnah 2017 *South African Review of Sociology* 47.

452 Zapata-Barrero *et al* "Temporary and Circular Labour Migration between Colombia and Spain to Consolidate" 52.

453 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 8.

454 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 30.

455 IOM *Laws for Legal Immigration in the 27 EU Member States* http://publications.iom.int/bookstore/free/iml_16.pdf.493.

bilateral agreements with the sending country. This, therefore, suggests that any country that seeks to replicate the TCLM would primarily have to precede the programme with a bilateral labour agreement with the sending country.

The receiving country must also encourage the circularity of migrants in its national legislation and guarantee the return of the circular migrant workers. The visa granted to workers under the TCLM is valid for a maximum period of nine months and prohibits a change of residence status. At the end of the seasonal work, the workers are expected to return to Colombia to show commitment to their communities of origin.[456] These migrants are encouraged to return to their country of origin on the understanding that they will be re-invited to Spain in the next harvest seasons. This incentive was highlighted as one of the incentives for circular migrant workers in New Zealand to return to their homes in the Pacific Islands upon the expiry of their work visas.[457]

Furthermore, the TCLM prioritises the recruitment of workers who *inter alia* prioritise community involvement and leadership in the country of origin.[458] Therefore, countries seeking to replicate the scheme should equally pay increased attention to the community involvement of migrants participating in the circular labour migration schemes. In this regard, these countries, like Spain with the TCLM, can employ the services of the IOM to train the migrants on the mechanisms needed to contribute to development in their home countries.

The foregoing indicates that, most importantly, a programme similar to the TCLM should focus on the developmental impact of circular labour migration on the sending countries. This development in the sending country can then improve the socio-economic standards in the sending country, thereby increasing the resilience of communities to various stresses such as endemic poverty and environmental disasters.

Castle[459] summarises the conditions necessary for the replication of the TCLM scheme thus:

456 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 46.
457 See 3.8.3.3 above.
458 Magri *Temporary Circular Labour Migration between Colombia and Spain: A Model for Consolidation and Replication* 8.
459 Castle 2006 *International Migration Review* 741-766.

i) strict immigration and employment laws should be implemented and enforced, especially against employers who employ migrants illegally and/or violate minimum wage and employment regulations;
ii) the cost at which migrants are made available to employers should be regulated. An example of this is the charging of minimum work permit fees. Furthermore, the migrant recruiting industry should be regulated with the objective of controlling the migrants' costs of migration;
iii) effective labour market tests should be implemented. This means that mechanisms should be put in place to create incentives for employers to recruit migrant workers only after basic efforts have been made to recruit local workers;
iv) migrant workers' rights should be protected; and
v) incentives to return home should be provided for workers whose work permits have expired.

However, Castle merely summarises the conditions necessary for the replication of the TCLM but does not articulate how these conditions can be achieved. To complement the above, this thesis argues that bilateral labour arrangements are the ideal tools to facilitate circular labour migration and to promote the conditions outlined by Castle.

Furthermore, based on the points articulated above, it is clear that the aforementioned best practice models of circular labour migration comprehensively address the three key areas that were identified earlier in this chapter as essential for the effective regulation of circular labour migration.[460]

In summary, this investigation revealed that the promotion of circular labour migration has been a crucial element used by the Spanish government to manage migration flows to Spain. The circular labour migration legal framework in Spain has been specifically tailored to promote the development of frameworks that encourage the legal migration of international migrants to Spain to meet the needs of the Spanish labour market. The labour migration framework has been used to strategically further the economic and social development of migrant-sending countries.

460 See para 3.5 above.

The labour migration legal framework has specifically facilitated bilateral cooperation to manage the labour migration flows between Spain and Colombia. The main tool used to facilitate these flows to promote triple-win benefits is the TCLM scheme. This scheme is considered a best practice model for the regulation of circular labour migration to provide benefits for all stakeholders. This is primarily because the scheme includes a number of provisions that motivate circular labour migrants to return to the sending country upon the expiration of their visas in order to qualify for work in Spain in subsequent years; involves diverse groups of government bodies, social agents, the IOM and employers in recruiting migrants in the sending country; and promotes actions to encourage development in the sending country.

3.10 Conclusion

This chapter sought to provide international and regional perspectives on the regulation of circular labour migration. Therefore, this chapter was guided by the following questions: What are the respective international and regional positions of the ILO, the IOM, the AU and SADC on the regulation of labour migration in general, and more specifically on circular labour migration and the proper use of bilateral labour arrangements? With reference to foreign law, how do Spain and New Zealand use bilateral labour arrangements?

At the outset, this chapter illustrated that the ILO mandates member states to observe the ILO's international labour standards. These international labour standards provide a framework for fair, effective and coherent national policies. The standards should, therefore, apply as minimum standards to labour migrants generally, and circular labour migrants specifically. However, some migrant workers are excluded from the scope of the protection of ILO conventions that set minimum standards. Under the ILO's migrant conventions, the protection provided is predominantly afforded to legal labour migrants, thereby excluding migrants involved in irregular migration practices. It is therefore more beneficial for labour migrants who wish to have their rights protected in their area of employment to pursue legal channels of entry into the receiving countries and to regularise their stay and employment. This chapter also identifies bilateral labour arrangements, especially bilateral labour agreements, as the ideal tools to regulate circular labour migration for the benefit of all the stakeholders involved.

Furthermore, this chapter asserts that the ILO, the IOM and the AU consistently insist that the best way to ensure triple-win benefits from circular labour migration is to improve regulation in three areas, namely, governance of labour migration, protection of the rights of labour migrants, and linkages between migration and development. In order to give effect to these three areas, this chapter identified the important areas that require attention in bilateral arrangements meant for triple-win benefits. To promote the protection of the rights of migrant workers, the following areas were identified as essential: addressing concerns regarding gender issues; solid and enforceable provisions relating to working conditions and employment contracts; specific reference to non-discrimination of migrant workers; supervision of working and living conditions; social protection benefits for migrant workers; trade union rights and access to support mechanisms from civil society; incorporation of concrete mechanisms for complaints and dispute resolution procedures; and access to justice.

To give effect to the protection of migrant workers, the following key areas were identified: the exchange of relevant information between the sending country and the receiving country; transparency; defining clear responsibilities between the parties; concrete implementing, monitoring and evaluation procedures; fair recruitment principles; social dialogue and consultative processes.

In order to promote linkages between labour migration and development, the following key areas were identified: the circulation of migrants between the sending country and the receiving country; the facilitation of the transfer of remittances; skills training of migrants; and the funding of the business enterprises of the migrants in the sending country upon their return where the financial positions of the countries allow.

Furthermore, given the guidelines provided by international law and standards of labour migration, this chapter sought to investigate how Spain and New Zealand effectively use bilateral labour arrangements to regulate circular labour migration for the benefit of all three stakeholders. Following an analysis of the legal framework in both New Zealand and Spain as the receiving countries, this chapter concludes that a solid national legal framework in the receiving country is essential for creating a circular labour migration programme that provides triple-win benefits for the stakeholders involved. This chapter also found that based

on the *modus operandi* in Spain and New Zealand, receiving countries should resort to using circular labour migrants only in instances where basic measures to employ local labour capable of performing the same jobs have been exhausted.

Moreover, political will in both the sending country and the receiving country is imperative to conclude bilateral labour arrangements that create triple-win benefits. Furthermore, countries seeking to enhance the facilitation of circular labour migration should primarily include provisions in bilateral labour arrangements that encourage the circular movement of workers between the sending countries and the receiving countries. To achieve this goal, the provisions should encourage workers to commit to returning to the sending country after performing their work, and should also allow for the workers to obtain work in the receiving country in subsequent years without having to go through a new selection process. These regulations should also enable the creation of employment boards to train workers before leaving the sending country to prepare them for work in the receiving country.

Lastly, some of the best practice features identified from the bilateral labour arrangements involving Spain and New Zealand as receiving countries include: actions to facilitate the resettlement of migrants in the sending country through financial aid and participation in development activities in the sending country, and actions to improve the skills of circular migrant workers in the receiving country in order to make them agents of development when they return to the sending country. Therefore, in conclusion, the foregoing are imperative features of bilateral arrangements that aim to derive triple-win benefits from circular labour migration.

The next chapter will provide a critical investigation of how circular labour migration to South Africa from its Southern African neighbours, Lesotho and Zimbabwe, is regulated. The main goal is to discuss the existing bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, and, in the process, determine the areas that may require development.

Chapter 4

Regulating circular labour migration between South Africa, Lesotho and Zimbabwe

4.1 Introduction

According to Jinnah,[1] "[m]igrating for work is one of the oldest and most common forms of migration in the world". In the Southern African region, the history of labour migration can be traced back to the beginning of the 20th century. In this region, migration for work was traditionally dominated by the movement of unskilled labourers from poorer countries like Malawi, Mozambique and Lesotho to the then more prosperous countries like South Africa and Zimbabwe.[2]

Today, improvements in transport and communication technologies have led to a more interconnected world that favours the relatively free flow of goods, technologies, knowledge and capital, but not labour.[3] South Africa, as the prime migrant-receiving country in Southern Africa, seems reluctant to accept unskilled labour into the country, like most migrant-receiving countries, but it more readily accepts investors and migrants with capital to start businesses.[4] This restriction on unskilled labour flows was motivated by *inter alia* the exponential rise of undocumented migration in the Southern African region and the desire to extend more employment opportunities to the nationals of South Africa.[5]

The previous chapter showed that optimising the regulation of circular migration through bilateral labour arrangements that provide triple-win benefits increases the likelihood of migrants engaging in regular migration.[6] This chapter will primarily focus on legal labour migration to South Africa. It is important to note that for a considerable part of South Africa's history, migration from Southern African countries into South Africa was largely controlled through bilateral labour arrangements that facilitated migrant work.[7] These labour

1 Jinnah 2015 *World Policy* 1.
2 Crush *et al South Africa's Labour Empire: A History of Black Migrancy to the Gold Mines* 16; Paton 1995 *Basingstoke Institute of Social Studies* 8.
3 Chikanda 2010 *Open Society Initiative for Southern Africa* 24.
4 Nshimbi and Fioramonti 2014 *African Development Review* 53.
5 Tati 2008 *Open Edition Journals* 423-440.
6 See para 3.2.2.6 above.
7 Jinnah 2015 *World Policy* 33.

arrangements, however, have been criticised for being overtly one-sided, predominantly offering benefits to the receiving country, offering few benefits to the sending country, and neglecting the rights of migrant workers.[8] This goes against the notion of triple-win benefits for all stakeholders in the labour migration process envisaged by both the ILO and the IOM.[9] The previous chapter identified three themes promoted by these organisations as essential for deriving triple-win benefits from the circular labour migration process. These are governance of labour migration, linking migration with development, and protecting the rights of migrants.

Against this backdrop this chapter will primarily focus on these three themes, both with regard to the bilateral arrangements that South Africa has concluded with its neighbouring countries, Lesotho and Zimbabwe, and with regard to the legislative position regarding migration in South Africa as the prime migrant-receiving country in Southern Africa.

Firstly, this chapter will analyse the legislative position regarding migration in South Africa in order to determine if and where this fails to address the triple-win potential of circular labour migration. Secondly, this chapter will critically investigate the labour migration practices and current bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe. These countries have two of the largest migrant populations in South Africa.[10] The analysis of these arrangements will provide the foundation for addressing the central guiding question in this chapter: Which areas in the bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, require development to provide enhanced benefits for all the stakeholders involved in the labour migration process?

If these aspects can be identified, it will ultimately be possible to seek targeted methods of improvement in these specific areas by drawing from the lessons learned from the

8 Pamu 2014 *International Labour Migration* 15.

9 See chapter 3 of this thesis.

10 This claim is evidenced by the fact that only migrants from these countries have received special dispensations from the South African government, regularising the stay of scholars, business owners and labour migrants from these countries. See Bimha *Legalising the Illegal: An Assessment of the Dispensation of Zimbabweans Project (DZP) and Zimbabwe Special Dispensation Permit (ZSP) Regularisation Projects* 16.

international law and standards of labour migration and the best practices of other countries investigated in the previous chapter.

Moreover, as far as migrant workers are concerned, it is widely understood that most migrants in South Africa are employed to do jobs that are considered dirty, degrading, mundane and dangerous by locals in the country who refuse to do such jobs.[11] Biney[12] believes that the jobs done by most migrants typically involve slavery-like conditions, since they involve poor pay, long working hours, and various types of discrimination and abusive behaviour, such as xenophobia.

According to Biney,[13] despite the treatment meted out to migrant workers, they remain readily available to take up migrant work and engage economically in the South African market. However, Biney states that the laws in South Africa prevent migrant workers from taking up available decent work that provides a significant level of protection of the rights of migrant workers.[14] It therefore becomes important for the purposes of this thesis to discuss the labour law framework that applies to migrant workers in South Africa. In order to formulate a more succinct appreciation of the current dispensation, a narrative of the historical development of regulations applying to migrant workers in South Africa is necessary.

4.2 The history of labour migration regulation in South Africa

The legislation regulating migration to South Africa was traditionally centred around South Africa's racially discriminatory past.[15] Since the beginning of the 20th century, legislation regulating migration to South Africa distinguished between people on the basis of gender, class and nationality, and placed more emphasis on race. The basis of these laws were the *Immigration Regulation Act*[16] and the *Aliens Act*.[17]

11 Toby *Exploited Migrant Labour in the New Global Economy* 136.
12 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 127.
13 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 127.
14 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 127.
15 Crush *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 19.
16 1913.
17 1 of 1937.

The *Immigration Regulation Act* traditionally provided the criteria for entry of migrant workers into South Africa. This Act prevented the entry of any "class of persons" deemed to be unsuited to the requirements of the Union of South Africa.[18] This unsuitability was to be determined by the minister based on economic grounds or on standards of the habit of life.[19] This Act gave the minister sweeping powers of exclusion as the wide phrase "class of persons" allowed the minister to exclude classes of persons and not only individuals. The minister could therefore exclude groups of people if they, for instance, could not write in a European language or were undesirable for political reasons.[20] This legislation therefore allowed the South African government to prevent many black Africans from entering South Africa.

Nonetheless, this Act also provided certain exemptions to entry which had the effect of allowing people who would otherwise be declared as "prohibited immigrants" entry into South Africa.[21] According to Crush,[22] despite the government's restrictive stance on the immigration of Africans to South Africa, the government used this exemption to retain access to labour power.[23] Consequently, the government allowed the entry of black people into South Africa through bilateral labour arrangements that were predominantly concluded between South Africa and its neighbouring Southern African countries primarily to provide labour for South Africa's flourishing mining industry.[24]

Black African migrants readily took up employment in South Africa's mines mainly because they were unable to support their families in their countries of origin.[25] Driven by poverty, the migrants who headed families sought better living conditions and employment opportunities in South Africa.[26] These migrants, who mostly originated from Southern

18 Section 4(1)*(a)*.
19 Section 4(1).
20 The political reasons were in line with apartheid, which was a political system that upheld segregationist policies against persons of colour in South Africa. See Crush *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 13.
21 The mining industry, for instance, was exempted from many of the Act's provisions. See s 5*(d)*.
22 Crush *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 13.
23 "Labour power" is a term first coined by Karl Marx, who defined it as "the aggregate of those bodily and mental capabilities existing in a human being, which he exercises whenever he produces a use-value of any kind". See Alfredo *Marx's Capital* 20.
24 Crush *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 21.
25 Griffin *Borderwork: "Illegality", Un-bounded Labour and the Lives of Basotho Migrant Domestic Workers* 15.
26 Dupper 2007 *Stell LR* 219-254.

African countries such as Mozambique, Lesotho and Swaziland, played an instrumental role in building and developing the gold mine industry, which eventually became one of the pivotal foundation pillars for development in South Africa. Jeeves *et al* acknowledge this essential role played by migrant workers. They point out:

> There is little doubt that if large numbers of low wage unskilled migrant miners had not been recruited from throughout the subcontinent, there would never have been a deep level gold mining industry in South Africa. The world's largest supplier of gold (until the 1980s) would have been at best a minor producer pecking away at the surface outcrops of enormous deep-lying reefs.[27]

This quotation also indicates that turning migrant labour into cheap labour was crucial to the development of the mining industry in South Africa. At this time, migrant workers in South Africa generally lacked the autonomy to negotiate better wages but would nonetheless take up employment in the mines because of financial desperation.[28] Research by Delius[29] shows that, initially, labour migrants from Southern African countries were able to return home from migrant work if wages were not satisfactory. This ability to return home compelled employers who wished to employ migrant workers to provide satisfactory wages in order to discourage migrants from returning home. However, following the colonisation of African countries in the period between 1870 and 1890, workers lost the economic and political autonomy to compel employers to provide better wages.[30]

Nonetheless, in the period between the 1950s and 1960s, poverty in the Southern African countries and the relatively better wage options presented by the labour market in South Africa drove the number of Southern African migrant workers in South Africa to escalate exponentially.[31] As a result, in 1970, 70% of the workers in South Africa's mines were migrants from Zimbabwe, Malawi and Lesotho.[32] Some authors note that this increase in

27 Jeeves *et al South Africa's Labor Empire: A History of Black Migrancy to the Gold Mines* 2.
28 Bank "Migrant Labour in South Africa" 12.
29 Delius 2017 *Oxford Research Encyclopaedia of African History* 3.
30 Delius 2017 *Oxford Research Encyclopaedia of African History* 3.
31 The pervasive poverty in black communities arose after a range of socio-economic challenges such as the rinderpest in 1896 and the east coast fever between 1904–1913 that destroyed up to 80% of African herds and exacerbated the situation, leaving Africans desperate and vulnerable. This led to the loss of economic self-sufficiency, and men in rural areas were forced to look for alternative sources of livelihood, condemning them to low wages because they had limited options available.
32 Smit 2015 *Journal of Comparative Family Studies* 32-40.

the number of Southern Africans in South Africa cannot be attributed solely to poverty, but can largely be attributed to measures instituted by the then apartheid government.[33]

Notably, the South African government regarded neighbouring Southern African countries as labour reserves.[34] To increase participation in migrant labour, the government set up a number of labour-recruiting agencies such as the Witwatersrand Native Recruiting Corporation and The Employment Bureau of Africa (TEBA) to recruit cheap legal labour from South Africa's neighbouring countries, namely, Lesotho, Swaziland, Botswana and Mozambique.[35] These agencies were particularly successful in recruiting migrant workers. For instance, by 1970, TEBA had managed to recruit 121 062 migrant workers from Lesotho to South African mines, making Lesotho at that time the main source of labour in South Africa's mines.[36] Consequently, by the 1980s, Lesotho was regarded as a pure labour reserve, primarily meant to feed labour into South Africa's mining industry.[37] The geographical position of Lesotho in the heart of South Africa made it an ideal source of this much-needed labour.

This practice of migration gradually became instilled in Basotho men and they grew accustomed to the regular practice of mobility.[38] It should also be noted that at this time, the 1980s, the number of Zimbabweans migrating to South Africa for purposes of work was not as high as the number of Basotho. This is because, at the time, Zimbabwe played a dual role as both a migrant-sending and a migrant-receiving country.[39] Zimbabwe received a significant number of migrant workers to work in its mines from its neighbours, Malawi and Zambia, while sending numerous migrants to South African mines itself. The nature of the migration of these migrant workers from Zimbabwe, Lesotho and other Southern African countries was circular in nature, mainly due to the external factors imposed by the South African government at the time.[40]

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33 Gelderblom and Kok *Urbanisation: South Africa's Challenge* 26.
34 A labour reserve is an area designated by colonial settlers to provide cheap labour for the mines and plantations. See Tlabela and Wentzel "Historical Background to South African Migration" 73.
35 Head 1995 *Journal of Contemporary African Studies* 91-120.
36 Matlosa 1995 *Centre of Southern African Studies* 13.
37 Bardill and Cobbe *Lesotho: Dilemma of Dependence in Southern Africa* 18.
38 Cobbe 1983 *Journal of Modern African Studies* 293-210.
39 Mlambo 2016 https://www.researchgate.net/publication/289335664_History_of_Zimbabwean_Migration.
40 Cobbe 1983 *Journal of Modern African Studies* 293-210.

The external factors that existed were government policies and laws that regarded black Africans as temporary residents in white areas. The apartheid government promulgated various laws and policies that restricted the ability of black Africans to migrate for prolonged periods as a family unit to urban areas of employment. These laws included the *Natives (Urban Areas) Act*[41] and the *Natives Laws Amendment Act*[42] which prevented black Africans from owning houses in urban areas.

The *Bantu Laws Amendment Act*[43] also institutionalised labour migration in the peripheral labour reserves by using labour recruitment agencies such as TEBA.[44] These labour recruitment agencies were instrumental in recruiting and monitoring the work conditions and return of migrants back to the labour reserves. This contributed to the circularity of the migrants. The *Black Labour Act*[45] contributed further to the circularity of labour by making it mandatory for Africans to obtain permission to be temporarily employed in white areas.

Considering the foregoing, it becomes clear that the entry of foreign workers into South Africa was controlled by a "two gates" policy. This policy is discussed below.

4.2.1 Two gates policy regulating the entry of migrant workers into South Africa

The South African government ensured the circularity of migrant labour by providing that no permanent rights to residency or work would be given to foreign workers.[46] The *Aliens Control Act*[47] denied permanent rights even to workers who had worked in South Africa for a lengthy period and had valid contracts of employment. Migrants who were also temporary residents were denied permanent employment and further training in South Africa.[48]

According to Vallentgoed,[49] the term "two gates" is used because there were essentially two gates for the entry of workers into South Africa. White foreign migrants gained entry into South Africa through the *Aliens Control Act*.[50] This Act required migrants who entered South

41 Section 5 of the *Natives (Urban Areas) Act* of 1923.
42 Section 10 of the *Native Laws Amendment Act* of 1937.
43 76 of 1961.
44 Tati 2008 *Open Edition Journals* 423-440.
45 Preamble to the *Black Labour Act* 67 of 1964.
46 Section 23 of the *Aliens Control Act* 1991.
47 Section 23 of the *Aliens Control Act* 1991.
48 Section 32 of the *Aliens Control Act* 1991.
49 Vallentgoed *Legal Protection of Rights of Migrant Workers in South Africa* 6.
50 96 of 1991.

Africa to possess skills which would allow them to be granted a permit allowing them to search for work in South Africa.[51] Migrants had to provide documents verifying their skills to the South African government as the gate keepers in order to qualify for entry into the country. These workers would then be afforded the same benefits as South Africans, such as social protection and assistance upon receiving permanent residency.[52]

The black migrants from neighbouring countries, on the other hand, gained legal entry into South Africa for purposes of work through various bilateral arrangements between the government of South Africa and neighbouring countries.[53] This was the second gate. Migrants who used this second gate were not afforded the protection and social benefits given to permanent workers or the skilled white workers who entered South Africa in terms of the *Aliens Control Act* (the first gate). This was aligned with the desire of the apartheid government to have a clear discriminatory division between whites and blacks in South Africa, hence going against the principles of the ILO regarding equality and non-discrimination.[54] However, the law did not prohibit employers from granting private benefits to their migrant employees.[55] It is not altogether clear whether employers used the absence of this prohibition to provide private benefits to their migrant employees.[56]

What is clear, on the other hand, is that the government of South Africa did not intend to conclude bilateral arrangements that provided triple-win benefits. The practice of denying migrant workers who gained entry into South Africa through bilateral arrangements the same benefits as those afforded to white migrants who used the first gate illustrates this lack of intention by the government. This therefore indicates that any bilateral labour arrangement concluded between South Africa and any one of its neighbouring countries during this era to facilitate the entry of black migrant workers was from the outset not aimed at providing benefits to migrant workers as a key stakeholder in the migration process.

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51 Crush *Beyond Control: Immigration and Human Rights in a Democratic South Africa* 45.

52 ILO 1997 www.ilo.org/public/english/region/apro/pretoria/papers/1997/popap3/intro.html.

53 Vallentgoed *Legal Protection of Rights of Migrant Workers in South Africa* 6.

54 As indicated in the previous chapter, South Africa during the apartheid era was ultimately forced out of the ILO due to its refusal to provide annual reports about the position of its domestic legislation regarding ILO conventions and recommendations dealing with freedom of association, the abolition of forced labour and the elimination of discrimination in employment. See para 3.3 above.

55 Vallengtoed *Legal Protection of Rights of Migrant Workers in South Africa* 7.

56 Vallengtoed *Legal Protection of Rights of Migrant Workers in South Africa* 7.

Today, the South African government still appears to prefer bilateral arrangements with neighbouring countries as a means of regulating labour migration.[57] However, the current legislation in South Africa does not discriminate between white migrant workers and black migrant workers. The *Aliens Control Amendment Act*,[58] which is a post-democratic transition law, and which was later repealed by the *Immigration Act*,[59] allowed people to enter South Africa for work purposes under two conditions: if an agreement existed between the government of South Africa and that of a neighbouring country, and if a specific recruitment scheme was granted permission by the minister to recruit workers to work as temporary workers in the country. This exemption also appeared in the *Aliens Control Act.*[60]

The *Aliens Control Amendment Act* provided new categories for temporary residence. It provided that foreigners can apply for visitors' permits, temporary permits, business permits and work permits.[61] The *Aliens Control Amendment Act* was therefore a significant improvement on apartheid legislation. By providing for the various types of permits, this legislation recognised that circular migration may occur either for temporary work purposes or for business purposes, and therefore allowed migrants seeking to do either of the two to legally enter South Africa.[62]

Currently, the *Immigration Act*[63] prohibits a change of purpose of visit by migrants.[64] Migrants are prohibited from migrating to South Africa for holiday purposes and then changing the purpose of visit to permanent residency following their arrival. This is because, traditionally, immigrants entered South Africa under false pretences, only to later seek employment in South Africa. These migrants would ultimately become irregular migrants and provide cheap labour for mines and farms, because they were willing to settle for lower wages than the South African workforce.[65] Irregular migrants, as indicated in chapter 3, are often subjected to minimum legal protection,[66] primarily because the ILO, as a specialised body of the UN tasked with the protection of migrant workers, provides little protection for

57 Minnaar "Illegal Aliens/Migrants in Zimbabwe" 127.
58 76 of 1995.
59 13 of 2002.
60 Section 40(iii) of the *Aliens Control Act*.
61 Section 13 of the *Aliens Amendment Act*.
62 Section 6(5) of the *Aliens Amendment Act*.
63 13 of 2002.
64 Section 11 of the *Immigration Act*.
65 Kok *et al Migration in South and Southern Africa: Dynamics and Determinants* 8.
66 See para 3.10 above.

the rights of irregular migrant workers.[67] In order to enhance an understanding of the level of legal protection afforded to migrant workers in South Africa, it is important to first discuss the legislation applicable to migrant workers in South Africa.

4.3 Regulation of labour migration in South Africa

As indicated earlier,[68] the labour migration dispensation in Southern Africa revolves around South Africa as the prime destination. The regulation of migration by South Africa is therefore imperative in shaping regional migration patterns. South Africa's immigration policies are heavily criticised by Jinnah for their weak nature, which ignores the reality and potential of regional migration, thus contributing to irregular migration into the country.[69] She criticises the laws and policies in South Africa for providing scant opportunities for low-skilled migrants to enter and to work legally in the country.[70] This section will discuss these laws and policies in order to subsequently determine the role that legislation could play in protecting the rights of migrant workers and in contributing to linkages between labour migration and development.

4.3.1 The Immigration Act[71]

The *Immigration Act* regulates the immigration of skilled migrants, tourists, students and other categories of temporary and permanent migrants. The *Immigration Act* places particular emphasis on the requirement of skilled labour in South Africa for economic growth purposes.[72]

The wording of the preamble of the *Immigration Act* indicates that one of the purposes of the *Immigration Act* is the promotion of economic growth through the employment of skilled foreign labour.[73] This Act requires these migrants to enter South Africa legally, and they must have a visa, if required.[74] Migrants who enter South Africa illegally and without the necessary documents, according to the Act, can be subjected to a fine or imprisonment of

67 See para 3.3 above.
68 See paras 4.1 and 4.2 above.
69 Jinnah 2015 *World Policy* 1.
70 Jinnah 2015 *World Policy* 1.
71 13 of 2002.
72 See the preamble of the *Immigration Act*.
73 Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 34.
74 Section 49 of the *Immigration Act*.

up to two years.[75] As noted in chapter 2, these migrants are called irregular migrants, undocumented migrants or illegal migrants.[76]

Furthermore, the *Immigration Act* explicitly prohibits the employment of illegal migrants in South Africa and imposes penalties of a fine or imprisonment of up to a year on employers who knowingly contravene this prohibition.[77] However, some academics are of the view that this Act does not completely prohibit the employment of illegal migrants in South Africa. According to Bosch,[78] the wording of section 38(1) contains the word "shall" and this can be interpreted in many ways. Section 38(1) reads: "no person shall employ – *(a)* an illegal foreigner". Bosch suggests that the use of the word "shall" does not expressly nullify an employment contract between an employer and an illegal migrant worker. The court's decision in *Discovery Health Ltd v CCMA*[79] also confirmed that the prohibition in the *Immigration Act* against the employment of "illegal" foreigners does not void the employment contract of such a foreigner. As a result, migrant workers, whether legal or illegal, who are employed in South Africa have both the constitutional right enshrined in section 23 of the *Constitution* to fair labour practices and the full range of rights in terms of their employment contracts.

The decision in *Discovery Health Ltd v CCMA*[80] may *prima facie* seem to encourage migrants to use illegal channels to migrate to South Africa, as they are still entitled to the same rights available to legal migrants. This in turn would inadvertently erode the incentive of migrants entering South Africa legally. However, it should be noted that some academics are of the view that the *Immigration Act*, by imposing criminal sanctions on both the employer and the illegal migrant, clearly intends to discourage the employment of illegal migrant workers.[81] The decision in *Discovery Health Ltd v CCMA*[82] does not affect the validity of section 38(1) of the *Immigration Act*. According to this section, employers have the legal obligation to ascertain that they do not employ illegal workers.[83] In theory, this legal

75 Section 49(1) of the *Immigration Act*.
76 See para 2.3 above.
77 Section 49(3) of the *Immigration Act*.
78 Bosch 2006 *Industrial Law Journal* 1346.
79 *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC).
80 *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC).
81 Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 34.
82 *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC).
83 Section 38(2).

obligation will deter employers from knowingly employing illegal migrant workers. Therefore, workers migrating to South Africa legally will have an advantage over illegal workers, thus creating an incentive for migrants to migrate legally to the country.

Nonetheless, it is clear that the role of the *Immigration Act* in facilitating the employment of migrants in South Africa is somewhat ambiguous. The Act appears to discourage the employment of illegal migrant workers, but, on the other hand, does not completely prohibit the employment of illegal migrant workers. The *Employment Services Act*[84] provides clearer direction on the employment of migrant workers in South Africa.

4.3.2 The Employment Services Act[85]

A primary goal of the *Employment Services Act* is to regulate the employment of foreign migrants.[86] The Act specifically prohibits employers in South Africa from employing foreign nationals without having ensured that they can produce a valid and applicable work permit issued in terms of the *Immigration Act*.[87] This increases the incentive for migrant workers to migrate to South Africa legally, as suggested above. If workers migrate to South Africa for work through recognised agencies, South Africa as the receiving country can better monitor and control the number of foreign workers, thus contributing to triple-win benefits.[88]

Furthermore, the Act prescribes certain measures that must be exhausted before migrant workers can be employed in South Africa. Section 8(2) of the Act grants the minister the authority to demand that employers satisfy themselves, prior to hiring a foreign migrant, that no citizen of South Africa possesses the necessary skills that are similar to those of the migrant. As observed in the previous chapter, where the principle of employing migrants only in instances where there is no local labour available to perform the job is concerned, the government of New Zealand tasks the WINZ branch with keeping a regularly updated list of unemployed nationals and the skills that they possess.[89] This provides a solid base when the exercise of checking available local labour is undertaken.

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84 4 of 2014.
85 4 of 2014.
86 Preamble of the *Employment Services Act*.
87 Section 8(1) of the *Employment Services Act*.
88 See para 3.2.3.5 above.
89 See para 3.8.3 above.

The *Immigration Act*, however, does not specify the measures to be taken to commence the process or the lengths to which employers should go to satisfy themselves that no citizen of South Africa possesses skills similar to those of the migrant.[90] It is imperative to have a clear procedure that employers should follow to ascertain the availability or otherwise of domestic labour. Ascertaining the availability of domestic labour, especially where low-skilled work is concerned, may prove to be difficult. Therefore, it is necessary to outline clear guidelines on the measures that employers should take to ensure the unavailability of local labour.

The *Employment Services Act* is even more relevant for the purposes of the current study because it enhances the likelihood of migrants benefiting from the labour migration process. The Act confirms that employees, including migrant workers, may enforce the terms of an employment contract and accordingly receive the rights and remedies emanating from such a contract.[91] However, as indicated earlier, these rights granted to both legal and illegal migrant workers do not remove the benefits of being a legal migrant.

Moreover, section 8(4) of the *Employment Services Act* conforms with the ruling of Van Niekerk AJ in *Discovery Health Ltd v CCMA*,[92] as discussed earlier in this chapter. He affirmed in this case that foreign nationals who are employed despite not having valid work permits can acquire employee status and the labour rights that emanate from such status if the relationship complies with the requirements of an employment relationship.[93]

The previous chapter noted that migrant workers are often vulnerable in their workplaces due to the lack of access to dispute resolution mechanisms offered by the courts of the receiving country.[94] The foregoing discussion sheds light on the positive contribution of the *Immigration Act* and the *Employment Services Act* to granting migrant workers access to dispute resolution processes in South Africa as the receiving country. In this regard, the *Immigration Act* and the *Employment Services Act*, at least to some extent, make positive contributions to governing labour migration, especially circular labour migration, to provide triple-win benefits.

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90 Badenhorst *The Labour Rights of Irregular Migrants in South Africa* 36.
91 Section 8(4).
92 *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC).
93 See *Discovery Health Ltd v CCMA* 2008 29 ILJ 1480 (LC) paras 24 and 29.
94 See para 3.2.2.7 above.

However, as indicated earlier, South Africa's immigration policy has been criticised for its generally restrictive nature to the entry of low-skilled migrant workers. As a result, migrants are forced to resort to illegal migration where they are less likely to be employed by employers seeking to comply with legal obligations.[95] Nonetheless, the negative impact of the foregoing is cushioned by the fact that migrant workers can claim labour rights in South Africa, as discussed above. In this regard, it is important to note that, fundamentally, South Africa has no specific labour migration framework or labour policies[96] for migrant workers.[97] However, as far as labour rights are concerned, as noted above, the general employment legislation will apply to migrant workers, because the national labour legislation applies to "all" employees in South Africa.[98]

In addition to the *Employment Services Act* discussed above, the applicable legislation includes the *Labour Relations Act*,[99] the *Employment Equity Act*,[100] and the *Basic Conditions of Employment Act*.[101] The protection of the rights of migrant workers provided by these statutes is, however, criticised as being inadequate because it relies heavily on the definition

95 Research indicates that no country in Southern Africa can solve the problems of irregular migration on its own. When a single receiving country imposes strict immigration policies, as in the case of South Africa, migrants will invariably find alternative ways of entering the country. See Moyo 2020 https://theconversation.com/why-south-africas-new-plan-to-fortify-its-borders-wont-stop-irregular-migration-145072.

96 Policies are instruments that guide the development of legislation and strategies.

97 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 124.

98 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 124.

99 66 of 1995. The *LRA* is the main legislation regulating labour relations in South Africa. The main purpose of the legislation is to advance social justice, economic development, labour peace and the democratisation of the workplace.

100 55 of 1998. The *EEA* was designed and enacted to redress the legacy of discrimination in the South African labour market through two mechanisms. Firstly, s 2*(a)* outlines the purpose of the Act to promote equal opportunity and fair treatment through the elimination of unfair discrimination practices against employees and applicants. Secondly, s 2*(b)* outlines the purpose of the *EEA* to implement and enforce affirmative action measures to redress past discrimination according to race, gender and disability for designated groups to ensure employee representation in the labour market. The *EEA* promotes and protects the right of all migrant workers to equal opportunity by rejecting discrimination on the grounds of race, gender, sexual orientation, language, ethnic origin and religious belief.

101 75 of 1997. The *BCEA* was enacted to give effect to everyone's right to fair labour practices by putting basic conditions of employment in place. The *BCEA* further intends to advance economic development and social justice by *inter alia* regulating aspects of the employment relationship such as regulation of working time, leave, particulars of employment and compensation, termination of employment, prohibition of employment of children and forced labour, variation of basic conditions of employment, and legal proceedings. The *BCEA* is applicable to all workers, with the exception of members of the following organisations: the National Intelligence Agency, the National Defence Force and the South African Secret Service. The foregoing types of work are reserved for South African citizens. This indicates that the *BCEA* may provide protection for migrant workers. More specifically, s 4 of the *BCEA* provides relief for all workers, specifically migrant workers who are subjected to employment relationships without documented contracts of employment.

of "employee" in granting protection to migrant workers in the workplace.[102] In the above-mentioned three statutes, an employee is defined as "any person excluding an independent contractor who works for another person or for the State, who receives, or is entitled to receive any remuneration and any other person who in any manner assists in carrying on or conducting the business of the employer".[103] Traditionally, the common law view and early jurisprudence in South Africa presumed an employment contract to be an eligibility criterion for interpreting the definition of an employee. This meant that illegal migrant workers were ordinarily denied the protection of South African employment law.[104] However, as discussed earlier, the decision in *Discovery Health Ltd v CCMA* indicated that the definition of "employee" in the LRA is not "necessarily rooted in a contract of employment".[105] The rationale in this instance was the assertion that a "contract of employment is not the sole ticket for admission into the golden circle reserved for 'employees'".[106]

Ultimately, the ruling of the court was to the effect that irregular migrants in South Africa may rely on the right not to be unfairly dismissed.[107] Given the finding in this case that a contract of employment is not the golden key to qualification for employee status, both illegal and legal migrant workers without contracts of employment can legally be regarded as employees. As a result, all labour legislation applying to "employees" in South Africa is applicable to them. However, the law needs to be clear on this matter in order to avoid recurring uncertainties on the matter.

In line with the three themes necessary for the optimised regulation of circular labour migration for triple-win benefits observed in the previous chapter, the next part of this thesis will discuss the legislation that addresses the protection of migrant workers in South Africa.

4.4 Protection of migrant worker rights in South Africa

The *Constitution* is the basis of the legal framework that protects the rights of migrant workers in South Africa.[108] The *Constitution* is the supreme law in South Africa and enshrines

102 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 124.
103 Section 213 of the *LRA*, s 1 of the *BCEA* and s 1 of the *EEA*.
104 Badenhorst 2016 *The Labour Rights of Irregular Migrants in South Africa* 21.
105 Paragraph 49.
106 *Discovery Health Ltd v CCMA* para 51.
107 *Discovery Health Ltd v CCMA* paras 54 and 55.
108 Vallengtoed *Legal Protection of Rights of Migrant Workers in South Africa* 9.

the rights of everyone in the country.[109] This means that the rights of migrant workers in South Africa are also enshrined in the *Constitution of South Africa*.

4.4.1 The Constitution of South Africa and migrant rights

The Bill of Rights entrenches the rights of "everyone" living in South Africa with reference to equality before the law,[110] personal freedom and security,[111] human dignity,[112] privacy[113] and social security.[114] It follows therefore that because both documented and undocumented labour migrants living in South Africa fall within the term "everyone", they should be afforded the rights enshrined in the *Constitution*. However, some specific rights are limited to South African citizens only. These rights include the rights to enter, reside and remain anywhere in South Africa,[115] the right not to be deprived of citizenship,[116] the right to a passport,[117] and the right to choose a trade, occupation and profession freely.[118] Consequently, by virtue of not being citizens in South Africa, migrant workers do not have these rights.

As indicated earlier, the rights of migrants are protected by section 23 of the *Constitution*, which pertains to rights regarding labour relations in South Africa. The provisions in this section relate to everybody working in South Africa. Section 23(1) specifically asserts that "everyone" has the right to fair labour practices. The term "everyone" implies that the provision applies to everybody. However, subsections (2) to (4) of section 23 qualify the scope of the right to fair labour practices by limiting it to four categories: employers, employers' organisations, workers and trade unions. According to Le Roux,[119] the conventional interpretation is that the foregoing subsections restrict the application of fair labour practices to the relationship between the employer and employee on terms that are fair to both parties. As a result, the widely accepted interpretation of section 23 is one that

109 Sections 2 and 8 of the *Constitution of the Republic of South Africa*, 1996.
110 Section 9.
111 Section 12.
112 Section 10.
113 Section 14.
114 Section 27.
115 Section 21(3).
116 Section 20.
117 Section 21(4).
118 Section 22.
119 Le Roux 2012 *Acta Juridica* 41-57.

guarantees the right to fair labour practices to individuals involved in the employment relationship or a relationship akin to it.[120] Therefore, migrant workers, by virtue of their employment, will be afforded the rights protected under the section. To further strengthen the foregoing assertion, the decision in *Discovery Health Ltd v CCMA* has clarified that the right to fair labour practices extends to migrant workers who are illegally employed. In summary, section 23 can therefore be interpreted to grant migrant workers in South Africa the following fundamental labour rights: the right to fair labour practices,[121] the right to form and join a trade union,[122] the right to participate in the activities and programmes of a trade union,[123] and the right to strike.[124]

The ILO considers the above rights as essential for the protection of the rights of migrants.[125] This indicates that South Africa, despite having no international obligations in this regard by virtue of not having ratified international labour migration instruments, does not have an obligation to include labour migration international labour standards in its domestic legislation. [126]

Furthermore, migrant workers in South Africa are afforded equal protection with citizens of South Africa under the anti-discrimination laws. Section 9(1) of the *Constitution* (the equality clause) provides that everyone in South Africa is equal before the law and has the equal protection of the law. Similarly, the use of the word "everyone" in this instance suggests that migrant workers are protected by the equality clause. The Constitutional Court confirmed the position on the equal treatment of migrant workers in *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*.[127] In this case, the applicants were foreigners holding permanent residency who were temporarily employed as teachers

120 The Constitutional Court in *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) paras 34 and 35 stated that it is the function of the legislature and the judiciary to give content and meaning to s 23(1). In this case Ngcobo J asserted that care should be taken to balance the interests of both the employer and employee when interpreting the right to fair labour practices.

121 The Constitution does not provide any definition of the right to fair labour practices in s 23(1). Cohen posits that the term "fair labour practices" was intentionally left as a flexible concept that would accommodate and balance the evolving interests and rights of employees and employers. See Cohen 2017 https://doi.org/10.1080/19962126.2004.11864831.

122 Section 23(2)*(a)*.

123 Section 23(2)*(b)*.

124 Section 23(2)*(c)*.

125 See para 3.5.1 above.

126 See para 3.3.5 above.

127 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

in the North-West Province. The Member of the Executive Council (MEC) for Education in the North-West province issued the foreign teachers with notices expressing the intention to terminate their employment. The MEC then proceeded to advertise their posts. The MEC asserted that, legally, only South African nationals could teach in a permanent capacity in state schools. The Constitutional Court found that their "permanent residency status" entitled the applicants to compete with locals in the employment market. The court also found that any limitation or exclusion on the grounds of citizenship status amounted to pure discrimination and had the potential to impair the dignity of the foreigners.[128]

However, despite the seemingly wide protection provided by the equality clause, it is worth noting that section 36 of the *Constitution* (the limitation clause) provides that rights may be limited by a law of general application that is "reasonable and justifiable in an open and democratic society based on dignity, freedom, and equality". This indicates that equality is not an absolute right and can be restricted in certain instances, such as coverage of social security to migrant workers in the informal economy.[129] Put differently, the law in South Africa clearly states that the rights of an individual pertaining to areas such as equality may be limited by law in certain instances. This means that migrant workers may also, in some instances, have their rights legally limited by a law of general application.

In addition to the judgments concerning fair labour practices and equality, the courts in South Africa have also been consistent about the interpretation of the provisions of the *Constitution* regarding social security, in line with international standards relating to migrant workers. The previous chapter recognised that international conventions such as the *Migrant Workers Convention* provide that migrant workers should be afforded similar social security benefits to citizens of the receiving country, for example, old age, unemployment and family benefits.[130]

4.4.2 The Constitution of South Africa and social security

South Africa is the only country in Southern Africa that currently protects the right to social security as a justiciable human right in its Constitution.[131] Section 27 of the *Constitution*

128 *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* para 24.
129 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 192.
130 See para 3.3.2 above.
131 Fombad 2013 *African Journal of International and Comparative* Law 21.

provides that everyone has the right to healthcare, food, water and social security. There is no common universally accepted definition of social security.[132] However, Olivier, Smit and Kalula[133] state that social security is commonly used in reference to:

> the protection which societies provide for their members, through a series of public measures, against economic and social distress that otherwise would be caused by stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, disability, old age and death; the provisions of medical care; and the provision of subsidies for families with children.

This definition means that social security is a term used to refer to the protection that society offers to its most impoverished members. Ideally, migrants should be integrated to become part of the societies in which they live and work.[134] In South Africa, as indicated above, the *Constitution* guarantees the right of access to social security to *everyone* in South Africa.[135] This right may be enforced by the courts of South Africa. In *Government of RSA v Grootboom*,[136] the Constitutional Court held that the government of South Africa is obliged to provide socio-economic rights enshrined in the *Constitution*, even to non-citizens. However, in this case, the court emphasised that the state is not obliged to go beyond available resources to realise the socio-economic rights immediately. Section 27(2) of the *Constitution* expresses this mandate of the government. The section states that the government must take reasonable measures "within available resources" to achieve the right to social security.

Furthermore, in the landmark case of *Khosa v Minister of Social Development*,[137] the Constitutional Court emphasised that the right to social security is afforded to "everyone" in South Africa and in its ruling expanded the right to social security to include foreigners who permanently reside in South Africa. Nonetheless, even though this matter did not directly involve migrant workers, the court highlighted that, in some instances, it might be reasonable to exclude temporary migrants from social security schemes. Masoebe[138] is of

132 Vallengtoed *Legal Protection of Rights of Migrant Workers in South Africa* 22.
133 Olivier *et al Social Security: A Legal Analysis* 24.
134 UN date unknown https://www.un.org/en/sections/issues-depth/migration/index.html.
135 Section 27(1)*(c)*.
136 *Government of RSA v Grootboom* 2001 1 SA 46 (CC).
137 *Khosa v Minister of Social Development* 2004 6 SA 505 (CC).
138 Masoebe *Portability of Social Security Benefits of Circular Migrant Workers in Selected SADC Member States* 181.

the view that the court's statement about temporary migrant workers was an endorsement of the narrative that migrant workers should be excluded from social security benefits in South Africa. However, the judgment in this instance clearly indicated that the courts in South Africa may extend the right to social security to non-nationals. This is a positive indication that the courts may also extend the right to social security to migrant workers where the rights of migrant workers themselves are at issue. In the event that migrant workers are denied social security benefits, they may seek redress on the basis of equality when being discriminated against. Section 9(2) of the *Constitution* expressly states that "[e]quality includes the full and equal enjoyment of all rights and freedoms"; therefore, a strong assertion can be made that migrant workers should be afforded the equal right to social security.

Despite this assertion, it should be noted that South Africa, as the prime receiving country, should not be expected to bear the sole responsibility of providing for the social security of migrant workers in all circumstances.[139] The Model Treaty provides that receiving countries should primarily seek to provide social security equal to that provided to citizens of the receiving country to "legal" migrant workers.[140] Furthermore, the ILO suggests that the provision of social security of migrant workers should be a collaborative effort between the sending country and the receiving country.[141] This indicates that the matter of the right to social security is crucial to the labour migration process, and should therefore be covered in bilateral labour arrangements.

Nonetheless, it is important to note that the protection of social security rights provided by South Africa's legal framework falls short of the good practices envisioned by international organisations in some respects. The previous chapter noted that social security coverage of migrant workers should, at a minimum, cover the provision of workplace insurance and healthcare by the employer.[142] In South Africa, section 27 of the *Constitution* guarantees everyone the right to basic healthcare. However, research by the South African Human Rights Commission shows that migrant workers are invariably denied access to healthcare

139 Vallentgoed *Legal Protection of Rights of Migrant Workers in South Africa* 13.
140 See para 3.2.2.3 above.
141 See para 3.3.5 above.
142 See para 3.5.1.6 above.

in South Africa.[143] The Human Rights Commission attributes this denial of access to healthcare to the lack of explicit provisions for migrant healthcare in South Africa's legislation.[144] This denial of access to healthcare is also fuelled by the attitude that the influx of migrants into South Africa has placed a strain on the country's ability to deliver healthcare to its citizens.[145] Some South African citizens also believe that the influx of foreigners into South Africa has led to surges in the crime rate, drug abuse and unemployment.[146] This has led to some recurring xenophobic attitudes towards migrants in South Africa.

However, the veracity of the reasons for these sentiments has been vehemently disputed by academics, who claim that African migrant workers are not criminals, but in fact contribute positively to South Africa's economy.[147] Jinnah[148] notes that these anti-migrant sentiments are mostly shared by people who are looking for convenient scapegoats. Such people identify migrants as the culprits because they are dissatisfied about poor service delivery, high levels of unemployment, and the lack of housing in South Africa. Moreover, these xenophobic sentiments illustrate historical amnesia amongst some South Africans about the contribution of migrants to South Africa's economy. Historically, migrant workers made a considerable contribution to the current status of South Africa as an economic and political superpower in the Southern African region.[149] Therefore, ideally, South Africa should be one of the countries evincing the optimised protection of migrant workers.

In summary, the above discussion shows that South Africa, despite having not ratified international conventions regarding migrant workers, has comprehensive legislation that governs labour migration and protects the rights of migrant workers. The most important legislative contribution are the fundamental rights to equality and fair labour practices of

143 South African Human Rights Commission 2018 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice.
144 South African Human Rights Commission 2018 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice.
145 South African Human Rights Commission 2018 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice.
146 Kingdon and Knight 2007 *Journal of African Economies* 813-848.
147 Isike and Isike 2012 *Alternation* 93-112.
148 Jinnah *World Policy* 1.
149 South African Human Rights Commission 2018 https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice.

"everyone" enshrined in the *Constitution*.[150] These provisions provide the foundation for migrant workers to be treated equally to South African workers regarding a variety of rights, such as the right to form and join a trade union, the right to participate in the activities of the trade union, the right to strike, and the right to social security.[151] The protection of these rights is a positive development that is in line with international standards.[152] However, the above discussion suggests that the legal framework of South Africa is mostly criticised for its lack of specific reference to the rights of migrant workers, hence creating grey areas about migrant rights in the country.[153] The legislative provisions that protect the rights of workers generally should be clear about the scope of their applicability to migrant workers. This will significantly help to avoid situations where provisions are vague and open to various interpretations.

Nonetheless, this thesis observes that the protection of migrant workers' rights provided by the *Constitution* significantly aligns with international minimum standards regarding labour migration. In line with the three themes outlined in the previous chapter, it therefore becomes pertinent to discuss the legislative instruments in South Africa that may contribute to linking migration with development.

4.5 Linkages between migration and development in South Africa

From the outset, this thesis recognised the need to link labour migration to development, both in sending countries and receiving countries as an essential component of deriving triple-win benefits from circular labour migration.[154] The previous chapter recognised that promoting the circularity of migrants between the sending and receiving countries is a central feature of a framework intended to effectively link labour migration with development in both the sending countries and the receiving countries.[155] The next part of this chapter will accordingly discuss the relevant legislative instruments in South Africa that contribute to the circularity of migrants between South Africa and the selected Southern

150 Sections 7 and 23(1).
151 See paras 4.3.1 and 4.3.2 above.
152 The importance of equality was emphasised in *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC), where the court observed that equality is very important in all aspects, such as when employing migrants and reducing unemployment. As a result, migrant workers should not be viewed any differently from South African citizens.
153 Biney *Inequality of Opportunity: The Rights of Foreign Workers in South Africa* 124.
154 See para 1.5.5 above.
155 See para 3.5.3 above.

African states. By contributing to the circularity, these instruments may potentially play a positive role in providing linkages between labour migration and development.

4.5.1 White Paper

The *White Paper* is a South African government policy document that primarily affirms South Africa's sovereign right to determine the admission of and residence conditions for foreign nationals in line with its national interest.[156] Essentially, the *White Paper* recognises the benefits of international migration to South Africa. The *White Paper*, which is a relatively new policy document, argues that the current international migration policy does not enable South Africa to adequately embrace opportunities for economic growth presented by both inward and outward migration while safeguarding its sovereignty and ensuring public safety and national security.[157]

The *White Paper* also recognises the deficiency in South Africa's legislative and policy framework in managing migration for development. The White Paper states that "South Africa has not yet built consensus at policy, legislative and strategic levels on how to manage international migration for development".[158] Consequently, the *White Paper* observes that this deficiency negatively impacts national thinking and attitudes to international migration by creating unproductive debates between proponents of stricter immigration controls and proponents of relaxed immigration controls.[159] Strict immigration controls invariably encourage migrants to use illegal channels to gain access to the receiving country.[160] In the South African context, this erodes the benefits of labour migration for South Africa as the receiving country, mostly due to the disadvantages of illegal migration that it experiences.[161] As indicated in chapter 3, illegal migration into a receiving country hampers the country's ability to monitor and manage the contribution of labour migration to its labour market.[162]

Therefore, the *White Paper* suggests a new approach to migration that should include the implementation of refurbished policy interventions. According to the *White Paper*, these

156 *White Paper on International Migration* (2017) 1.
157 *White Paper on International Migration* (2017) 2.
158 *White Paper on International Migration* (2017) 2.
159 *White Paper on International Migration* (2017) 2.
160 See para 2.4.1 above.
161 *White Paper on International Migration* (2017) 67.
162 See para 3.9.1.2 above.

policy interventions should allow managed legal migration of economic migrants from major source countries, such as Mozambique, Malawi, Zimbabwe and countries in the Southern African Customs Union (SACU).[163]

In order to regulate the migration of economic migrants from Southern Africa more efficiently, the *White Paper* recognises the essential role to be played by coordination between the various departments of home affairs, labour, economic cluster ministries and Statistics South Africa. More essentially, the *White Paper* suggests the introduction of new visa options that will encourage economic migrants from Southern Africa to use legal means of gaining access to South Africa.[164] As indicated earlier, legal labour migration enhances triple-win benefits because it *inter alia* enables the receiving country to monitor the influx of migrant workers to its labour market and the contribution they make, and to keep track of them.[165] This in turn enhances the ability of the receiving country to protect the rights of migrant workers. In the process, both the sending and receiving countries are able to avoid the unnecessary fees associated with the deportation of illegal migrants back to the sending country. The visa options suggested include:

i) SADC trader's visa: this visa is intended to facilitate the long-term, multiple entry of cross-border traders who enter and exit South Africa frequently. The *White Paper* emphasises that this visa is necessitated by the essential role played by cross-border migrants in intra-African trade, which benefits the regional economy.[166]
ii) SADC small-medium enterprise (SME) visa: this proposed visa is intended to allow the cross-border migration of self-employed people and small business owners. The *White Paper* emphasises the vital role played by these migrants in South Africa's economy through their payment of taxes. Incidentally, the *White Paper* suggests that the South African Revenue Service could play a significant role in the application process for this visa by *inter alia* helping to place a quota on the number

163 SACU is a customs union between five Southern African countries, South Africa, Botswana, Eswatini, Lesotho and Namibia, established in 1910, thus making it the oldest customs union in the world. See https://www.sacu.int/.
164 *White Paper on International Migration* (2017) 56.
165 See para 3.9.1.2 above.
166 *White Paper on International Migration* (2017) 56.

of small business owners, thus addressing the competitiveness concerns of local business owners.[167]

iii) SADC special work visa: this proposed visa is intended to allow holders to temporarily work in South Africa without qualifying for a permanent residence permit.[168] In order to enhance the efficiency of these permits, the *White Paper* suggests that the granting of these permits should be informed by a fact-based analysis of labour market dynamics inclusive of employment levels and the share of jobs held by foreign nationals.

The *White Paper* suggests that these visas should be regulated by a quota-based regime which will be implemented through bilateral agreements that outline the responsibilities for the state parties involved. This suggestion indicates that the *White Paper* recognises the need for modern bilateral agreements between South Africa and its SADC neighbours regarding labour migration.

Furthermore, the *White Paper* states that the challenge of high rates of illegal migration in South Africa places a strain on the budget of the Department of Home Affairs. The department constantly spends exorbitant fees on enforcing detentions and deportations.[169] For instance, between 2012 and 2016, the South African government conducted 369 726 deportations. The *White Paper* states that 88% of these migrants came from Mozambique, Lesotho and Zimbabwe.[170] The fees incurred in facilitating these deportations erode the benefits of labour migration, primarily for South Africa as the receiving country. As a result, the *White Paper* emphasises the need to find solutions for documenting low-skilled migrants from SADC countries since they represent a significant proportion of yearly deportations from South Africa.[171] This means that the *White Paper* recognises that the legislation in South Africa restricts the migration of low-skilled migrant workers to the country.

It is important to note that the *White Paper* points out the need to manage international migration to achieve the goals set in South Africa's National Development Plan (NDP).[172]

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167 *White Paper on International Migration* (2017) 56.
168 *White Paper on International Migration* (2017) 56.
169 *White Paper on International Migration* (2017) 29.
170 *White Paper on International Migration* (2017) 29.
171 *White Paper on International Migration* (2017) 29.
172 The main goal of the NDP is to eliminate poverty and reduce inequality by 2030. The intention is to achieve this by drawing on the energies of the people of South Africa, building capabilities, growing

More importantly, the White Paper recommends strategic policy improvement in eight policy areas: management of admissions and departures; management of international migrants with skills and capital; management of ties with South African expatriates; management of residency and naturalisation; management of international migration in the African context; management of asylum seekers and refugees; management of the integration process for international migrants; and management of enforcement. In all the above policy areas, the *White Paper* makes negligible mention of how South Africa can use economic migration to the country to inspire development in neighbouring South African countries. The White Paper merely identifies the need to achieve the end results. On the other hand, the *White Paper* outlines the policy objective of attracting skilled migrant workers who ideally will eventually train South African citizens to acquire similar skills. As a result of this acquisition of skills, South Africans who benefit can contribute to the development of the country.[173]

In summary, this part of the thesis observes that, as far as could be established, the *White Paper* typically recognises the need to link labour migration to South Africa with development. However, the *White Paper* fails to establish how these linkages between labour migration and development could be made. On a more positive note, the fact that the government of South Africa recognises the need to significantly improve the legislative dispensation in the country to facilitate the migration of economic migrants to enhance development is a good starting point.

The next part of this chapter will focus on the governance of labour migration between South Africa and Lesotho.

4.6 Labour migration governance between South Africa and Lesotho

In order to appreciate the labour migration relationship between Lesotho and South Africa, an introductory exposition of migration culture in Lesotho is necessary. Labour migration in Lesotho occurs on two fronts. Firstly, it occurs internally, involving the movement of people from the districts in the northern parts of the country to the southern and western parts.[174]

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an inclusive economy promoting leadership and partnerships throughout society, and enhancing the capacity of the state. See SA Government 2020 https://www.gov.za/issues/national-development-plan-2030.

173 *White Paper on International Migration* (2017) 47.

174 Lerotholi 2018 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/presentation/wcms_422407.pdf.

On the international front, migration from Lesotho is shaped by Lesotho's unique geographical location – it is completely surrounded by South Africa. This migrant labour system involving the migration of unskilled and semi-skilled workers from Lesotho to South Africa has been historically significant for both the government and households in Lesotho. For a significant number of Basotho, labour migration to South Africa has always been a fundamental means of survival. These migrants started flocking to South Africa in the 19th century, when the mineral revolution in South Africa created a huge demand for labour.[175]

The Basotho, affected by the imposition of debt and hut taxes and declining grain production in Lesotho, found employment in South African mines more lucrative.[176] Consequently, by the time of Lesotho's independence in 1966, more than half of Lesotho's male working force was employed in South Africa through the facilitation of employment bureaus such as TEBA.[177] Following Lesotho's independence in 1966, the numbers of Basotho migrant workers in South African mines rose exponentially.

In 1977, there were an estimated 121 062 Basotho migrants in South African mines, effectively rendering Lesotho the prime source of labour for the South African mining industry.[178] By the late 1980s, Lesotho was regarded as a pure labour reserve, supplying migrant labour to the South African mining industry.[179] At this time remittances for migrant workers in South African mines made up 52,7% of rural household income in Lesotho and more than half of the country's GDP.[180]

Grimwood[181] is of the view that the apartheid government in South Africa used the heavy dependence on migrant labour remittances by Lesotho to force the Lesotho government's hand in bilateral negotiations. However, this overt dependency changed following democracy in South Africa. After democracy, it became increasingly difficult for Basotho migrants to be employed in South African mines, mainly due to the high unemployment rate amongst the black population in the mid-1990s, which influenced an internalisation policy

175 Lerotholi 2018 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/presentation/wcms_422407.pdf.
176 Bardill and Cobbe *Lesotho: Dilemmas of Dependence in Southern Africa* 20.
177 Tati 2008 *Open Edition Journals* 423-440.
178 Bardill and Cobbe *Lesotho: Dilemmas of Dependence in Southern Africa* 80.
179 Tlabela and Wentzel "Historical Background to South African Migration" 71-96.
180 Cobbe 1988 *The Journal of Modern African Studies* 71-89.
181 Grimwood *An Analysis of the Interdependence within the Bilateral Relationship between South Africa and Lesotho* 23.

by the ANC government. This change of policy meant that local labour became the preferred choice in South African mines.[182] The result was the retrenchment of a large number of foreign migrants from the mines.

As a result of the retrenchments, the number of Basotho migrant workers in South African mines had decreased to a paltry 46 000 by 2005.[183] These retrenchments naturally had a devastating impact on scores of Basotho households who no longer received the remittances that had become a vital part of their lives over the years.[184]

It is essential to note that the decrease in the official number of Basotho in the South African mines cannot be attributed solely to the internalisation policy that prioritised employment for South African citizens. The "amnesty ruling" that the South African government implemented in 1995 to give amnesty to foreign workers who had resided in South Africa up to the inception of democracy also played a significant role in reducing the number of Basotho workers who sent remittances back to Lesotho.[185] When large numbers of Basotho became permanent residents in South Africa, they established families in South Africa and a significant proportion of them stopped sending remittances back to Lesotho.[186] Records show that Basotho were the biggest beneficiaries of the amnesty legislation.[187] Around two-thirds of all applications received for the amnesty were from Basotho. Oucho[188] states that this high number of Basotho applicants demonstrates the magnitude of Lesotho's dependence on South Africa.

The discussion above suggests that Lesotho's dependence on South Africa emanates from at least two realities: Lesotho's peculiar geographical position of being completely surrounded by South Africa, and opportunities that were traditionally provided by the South African mining industry which enhanced Basotho migrant livelihoods. The latter situation

182 Some estimates state that the unemployment rate among black people in South Africa during the mid-1990s was as high as 50%. See Maphosa and Morojele 2013 *Africa Development* 151-170.
183 Crush *et al Migration, Remittances and Development in Lesotho* 13.
184 Crush *et al Migration, Remittances and Development in Lesotho* 13.
185 Grimwood *An Analysis of the Interdependence within the Bilateral Relationship between South Africa and Lesotho* 26.
186 About 51 000 Basotho migrants became permanent residents in South Africa under this ruling. See Peberdy 2009 *Setting the Scene: Migration and Urbanisation in South Africa* 18.
187 Grimwood *An Analysis of the Interdependence within the Bilateral Relationship between South Africa and Lesotho* 26.
188 Oucho "Cross-Border Migration and Regional Initiatives in Managing Migration in Southern Africa" 47-70.

was largely regulated by the *Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho Relating to the Establishment of an Office for a Lesotho Government Labour Representative in the Republic of South Africa and the Movement of Such People Across an International Border* (hereafter the Lesotho–South Africa bilateral labour agreement).[189]

The Lesotho–South Africa bilateral labour agreement was originally concluded in 1963, and was updated in 1973 as part of a series of bilateral labour agreements regulating the employment of migrants from the BLS (Botswana, Lesotho and Swaziland) states in South Africa. Recently, there have been increasing calls by scholars to review the Lesotho–South Africa bilateral agreement to take into account South Africa's post-apartheid dispensation.[190] Lerotholi[191] suggests that it is particularly important to review the Lesotho–South Africa bilateral labour agreement or negotiate a new comprehensive labour agreement which provides a modern framework and sufficiently guarantees mutual benefits for both Lesotho and South Africa. This agreement could lay the foundations to significantly inspire economic development in Lesotho. The *White Paper* shares the above sentiments and particularly highlights the fact that new bilateral agreements with the main migrant-sending countries in Southern Africa would *inter alia* help to replace the current state-funded deportation model that has become unsustainable for the South African government. According to the *White Paper*, these agreements should rely on shared costs and greater cooperation between South Africa and the sending countries.[192]

Given the foregoing, the next part of the chapter will analyse the Lesotho–South Africa bilateral labour agreement in light of the international principles of labour migration and the development of ideal bilateral labour agreements discussed in chapter 3 of this thesis. It follows therefore that this process will involve regular references to the Model Treaty in order to highlight the areas where the Lesotho–South Africa bilateral labour agreement falls short.

189 Republic of South Africa Treaty Series No1/1973 (24 August 1973).
190 *Green Paper on International Migration* (2016) 58.
191 Lerotholi 2018 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/presentation/wcms_422407.pdf.
192 *White Paper on International Migration* (2017) 68.

4.5.1 Analysis of the Lesotho–South Africa bilateral labour agreement

This agreement traditionally governed passport control posts between South Africa and Lesotho and the documentation of South African and Lesotho citizens for the purposes of crossing their common borders.[193] More importantly, this agreement provided for the employment of migrants from Lesotho in South Africa. The agreement outlined conditions to be fulfilled by both employers and migrants before unskilled Basotho migrants could be employed in South Africa. Under this agreement, South African employers seeking to employ migrants from Lesotho had to obtain authorisation from the South African government to employ a specified number of workers.[194] Similarly, these employers had to seek permission from the Lesotho government and pay prescribed fees if necessary.[195]

Prior to the government granting authorisation, the Lesotho–South Africa bilateral labour agreement requires migrants to possess a valid passport and requires them to furnish a duly attested contract of employment in their country of origin, valid for at least two years.[196]

Notably, the Lesotho–South Africa bilateral labour agreement makes little reference to the contribution that labour migration between the two countries can make to development in both countries, especially the sending country, Lesotho. The agreement also contains no provisions that require both countries to promote the investment of remittances or the transfer of technologies to the sending country for developmental purposes. The agreement only makes a brief reference to contractual provisions that permit employers to deduct specific amounts agreed upon as remittances to the families of migrant workers in Lesotho.[197] Based on the general requirements for effectively linking migration to development as discussed in the previous chapter, this brief reference is insufficient to promote the link between development and labour migration.[198] As mentioned earlier, collaboration between sending countries and receiving countries is necessary in order to create the link between migration and development. For the link between migration and development to effectively contribute to triple-win benefits, collaboration between the

193 Pamu 2014 *International Labour Migration* 15.
194 Article 3 of the Lesotho–South Africa bilateral labour agreement.
195 Article 3.
196 Article 2.
197 Article 4.
198 See para 3.2.4 above.

sending and receiving countries is required primarily to enhance the human resource skills of the migrants and to recognise the skills, qualifications and competencies of migrants in the receiving country.[199] Furthermore, the countries should facilitate the transfer of remittances and savings at a low cost and also facilitate the circulation, return and reintegration of migrants in their home countries.

Notably, the Lesotho–South Africa bilateral labour agreement contains no provision for the mutual agreement and cooperation on the three matters that are regarded by the Model Treaty as crucial to the governance of labour migration. Article 1 of the Model Treaty identifies these indispensable matters as:

i) the environment, living conditions and social security systems prevalent in the state parties;
ii) the number of migrants willing to work abroad and the categories of migrants required in the receiving country; and
iii) the exchange of information by state parties on a number of issues, including administrative and legislative provisions governing migration.

Notwithstanding this omission, the Lesotho–South Africa agreement does contain provisions governing the selection of migrant workers by recruiting agencies. The agreement requires the governments of the two countries to approve recruitment arrangements between recruiting agencies and employers.[200] The agreement also requires Lesotho, as the sending country, to establish facilities within its territory where prospective employers can interview, engage and select prospective migrant workers.[201] Lesotho has complied with this obligation by establishing TEBA to undertake the foregoing activities within Lesotho. However, this recruitment process stipulated in the Lesotho–South Africa bilateral labour agreement falls short of the standards set in the Model Treaty.[202] The agreement does not expressly stipulate the technical, vocational and medical selection criteria and processes that ensure transparency and consistency in the selection of migrant workers.[203]

199 See para 3.2.4 above.
200 Article 7.1.
201 Article 6.
202 Pamu 2014 *International Labour Migration* 15.
203 Articles 5 and 6 of the Model Treaty.

Moreover, the Lesotho–South Africa bilateral labour agreement does not oblige the countries to guarantee that migrants are adequately informed about their future living and working conditions in South Africa and makes no provisions regarding the transportation of migrants and their families to and from the receiving country.

Additionally, the agreement does not protect the migrants from the unlawful retention or destruction of their travel or identity documents. All these omissions are contrary to the provisions of the Model Treaty, which specify that state parties must ensure that workers are transported under humane conditions and must provide assurance about the health and safety of migrant workers, both during their trip and upon arrival in the destination country.[204] According to the Model Treaty, the state parties should expressly agree on which party will cover the costs of travel of the migrants, their belongings and medical emergencies.[205]

Exacerbating the above shortcomings is the little attention paid in the Lesotho–South Africa bilateral labour agreement to the rights of migrants. Firstly, the agreement does not expressly refer to the rights of migrant workers from Lesotho in South Africa. The agreement does not give migrant workers the assurance that upon legally assuming work in South Africa, they will have access to all the rights available to migrant workers in South Africa. This assurance would essentially encourage Basotho migrants to use legal channels to gain access to South Africa's labour market. As highlighted earlier, the *Constitution* provides significant protection of the rights of migrant workers in South Africa.[206]

Secondly, this agreement does not include any provision relating to the equal treatment of Basotho migrants with South African nationals with regard to education, public work schemes, placement, training, healthcare and social services. The previous chapter highlighted the fact that the ILO regards the inclusion of provisions relating to gender equality, social justice, equal opportunity and international trade union solidarity in bilateral labour arrangements as good practices.[207]

204 Article 11 of the Model Treaty.
205 Article 26 of the Model Treaty.
206 See para 4.4.2 above.
207 See para 3.5.1.7 above.

Nonetheless, the Lesotho–South Africa bilateral labour agreement does contain some provisions that may protect the rights of Basotho migrant workers. The bilateral labour agreement protects the migrants from double taxation in both countries as it limits the migrants' liability to taxation to their country of origin only.[208]

More importantly, the agreement tasks Lesotho's consular authority in South Africa with providing assistance to migrant workers. This authority functions as a labour office dedicated to assisting migrant workers to comply with South African migration requirements and formalities.[209] The labour office may consult with the South African government and assist migrant workers with a number of issues, including remittances, housing, repatriations and compensation funds.[210] As indicated previously, these consular services may help to provide additional benefits to migrant workers by supporting them with gaining access to interpretation services where they cannot understand the local language in the receiving country.[211] The consular services may further assist the migrant workers with gaining access to judicial services in the receiving country because migrant workers are invariably disadvantaged by high legal costs, lack of access to justice, and language barriers in the receiving country.[212] This shows that the consular services of Lesotho as a sending country in South Africa are essential for protecting the rights of migrants in the receiving country and can potentially benefit South Africa by helping to facilitate the deportation of illegal migrants back to the sending country.

In a study conducted for the ILO, Pamu[213] notes the positive contribution of the above-mentioned provisions of the Lesotho–South Africa agreement. However, he is of the opinion that the phrasing of the provisions limits their potential to effectively protect migrant workers. He notes a number of shortcomings flowing from the phrasing of the provisions. Firstly, he notes that these agreements do not provide for the translation of employment contracts into the language of migrant workers. Secondly, there are no rules governing the conduct of recruitment agencies and imposing penalties for their non-compliance or their

208 Article 4 of the Lesotho–South Africa Bilateral Labour Agreement.
209 Article 3 of the Lesotho–South Africa Bilateral Labour Agreement.
210 Wickramasekara 2010 *Good Practices and Provisions in Multilateral and Bilateral Labour Agreements and Memoranda of Understanding* 52.
211 See para 3.5.1.8 above.
212 Riester and Newland 2018 *Migration Policy Institute* 3.
213 Pamu 2014 *International Labour Migration* 19.

exploitation of workers. Thirdly, this agreement does not require South African authorities to directly supervise and inspect the living and working conditions of the migrant workers.[214] As indicated earlier, the inclusion of provisions for the supervision and inspection of the conditions in which migrant workers live and work positively reduces the likelihood of the exploitation of the migrant workers.[215] Lastly, Pamu points out that the Lesotho–South Africa bilateral labour agreement does not provide aggrieved migrants with access to the courts of South Africa for the redress of their grievances in accordance with the laws of the country.[216]

Although the first three criticisms raised by Pamu are valid, the fourth criticism does not hold water, because the courts of South Africa have consistently held that the *Constitution* applies to everyone in South Africa, including migrants in many instances.[217] The case of *Discovery Health v CCMA*, discussed in various parts of this chapter, indicated that the rights of migrants, both documented and undocumented, are protected by the courts of South Africa.[218] This means that migrant workers, at the very least, have access to the courts of South Africa. Specifically relevant to the scope of this thesis, section 23(1) of the *Constitution* grants everyone in the world of work the right to fair labour practices. Consequently, because of the use of the word "everyone", it has become trite law in South Africa that migrant workers in the country have access to the courts to seek redress for grievances, especially regarding labour issues. This approach by the South African courts has in principle significantly enhanced the protection of the rights of migrants in South Africa.

Moreover, there has been significant progress in protecting the rights of migrant workers from Lesotho and their families. This is evidenced by the signing of a *Memorandum of Understanding on Labour Cooperation* between South Africa and Lesotho in October 2006. The MOU was updated in November 2013.[219] This memorandum primarily expresses the desire of both countries to promote and develop the exchange of cooperation in the field of

214 Pamu 2014 *International Labour Migration* 19.
215 Para 3.5.1.5 above.
216 Pamu 2014 *International Labour Migration* 19.
217 See *Khosa v Minister of Social Development* 2004 6 BCLR 569 (CC); *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BCC).
218 *Discovery Health Ltd v CCMA* 2008 29 *ILJ* 1480 (LC) paras 54 and 55.

219 As indicated in chapter 2, MOUs are not binding in nature but merely express the desire by both parties to cooperate in identified fields.

labour on the basis of mutual reciprocity, benefit and equality.[220] This MOU covers issues of dispute resolution, social dialogue and cooperation between the two countries.[221] Nevertheless, the memorandum is not binding on the two countries.[222] To date, the Lesotho–South Africa bilateral labour agreement signed in 1963 and updated in 1973 remains the only binding agreement on labour migration between the two countries. With regard to the 1963 Lesotho–South Africa bilateral agreement, the MOU specifically highlights the intention of both parties to review the Lesotho–South Africa bilateral labour agreement.[223] However, to date, this has not happened. At the time of writing of this thesis, the Lesotho–South Africa bilateral labour agreement is yet to be reviewed.

In summary, this analysis of the Lesotho–South Africa bilateral labour agreement indicates that the agreement makes few attempts to comprehensively address the three themes identified in the previous chapter as essential for optimising the regulation of labour migration for the benefit of all stakeholders. The agreement fails to include most of the good practice guidelines identified in chapter 3 as imperative for migration governance, linking migration with development, and protecting the rights of migrant workers. This chapter therefore confirms the narrative that the Lesotho–South Africa bilateral labour agreement requires prudent review in order to align it with modern governance of labour migration standards as envisioned by the ILO and the IOM.

What is more, an analysis of South Africa's labour arrangements, particularly those concluded with its neighbours after the democratic transition, reveals that South Africa prefers entering into non-binding MOUs to regulate labour migration between itself as the prime migrant-receiving country in the Southern African region and its neighbours. The Department of Labour in South Africa expressly indicates its preference for non-binding MOUs over bilateral labour agreements.[224] South Africa also has no binding bilateral labour

220 Preamble to the *Memorandum of Understanding between the Government of the Republic of South Africa and the Government of Lesotho on Cooperation in the Field of Labour* 2006.

221 Article 1*(a)-(d)*.

222 As indicated in chapter 2, MOUs are not binding in nature but merely express the desire by both parties to cooperate in identified fields.

223 Article 1*(d)*.

224 ILO and IOM 2019 https://www.ilo.org/global/topics/labour-migration/publications/WCMS_722208/lang--en/index.htm.

agreement with Zimbabwe, another of the biggest migrant-sending countries. The bilateral labour relationship between Zimbabwe and South Africa will now receive attention.

4.7 Bilateral labour migration relationship between South Africa and Zimbabwe

History indicates that, in the 20th century, Zimbabwe was the destination of choice for a substantial number of migrants from various parts of Africa.[225] These migrants were attracted by the vast demand for labour on Zimbabwe's farms, plantations and mines.[226] The demand arose following extensive land expropriation by the white settlers who originated mainly from Europe. However, over the years, Zimbabwe has ceased being a prominent migrant-receiving country and has instead experienced a major exodus of migrants from the country. The number of Zimbabweans leaving the country rose exponentially in the 1990s and the 2000s.[227] Many of these migrants leaving Zimbabwe point to the socio-economic problems caused by the political and economic tensions in Zimbabwe in the 1990s as the main driver of their migration.[228] The political tensions prevalent in Zimbabwe led to hyperinflation, devaluation of the Zimbabwean currency, and the collapse of major economic and public service sectors in this country.[229]

After the economic collapse in Zimbabwe, migrants sought better work opportunities in Zimbabwe's more economically affluent neighbours, Botswana and South Africa.[230] Although not perfect, these two countries at least offer better economic stability and relatively higher wages and employment standards.[231] South Africa receives a greater proportion of these migrants, whose migration is mostly circular and temporary in nature.[232] These circular migrants include farm workers, cross-border informal traders, contract workers and shoppers.[233] Research indicates that the majority of the farm workers migrating to South Africa to work on the commercial farms are undocumented, and therefore they experience overt violations of human rights and precarious working conditions, such as atypical work

225 Crush and Tevera *Zimbabwe's Exodus: Crisis, Migration, and Survival* 22.
226 Mlambo 2010 https://www.researchgate.net/publication/289335664.
227 Kiwanuka and Monson 2009 *Forced Migration Programme Wits University* 7.
228 Kiwanuka and Monson 2009 *Forced Migration Programme Wits University* 25.
229 Perryer *World Finance* 2.
230 Lefko Everett 2004 http://www.migrationinformation.org/profiles/display.cfm?ID =246.
231 Kiwanuka and Monson 2009 *Forced Migration Programme Wits University* 7.
232 Kiwanuka and Monson 2009 *Forced Migration Programme Wits University* 7.
233 Makina 2007 *University of South Africa* 4.

structures and exploitative labour.[234] However, as indicated in chapter 1, this thesis primarily focuses on the triple-win benefits associated with legal, documented circular labour migration. The advantages of this legal migration may encourage migrants to rather use legal channels of entry into South Africa.

Estimates of the number of Zimbabweans in South Africa vary.[235] The 2011 census estimated that there were about 672 308 migrants in South Africa.[236] As far as could be established, there are no recent official scientifically valid statistics about the number of Zimbabwean migrants in South Africa. However, Karombo[237] says that the current estimated number of Zimbabweans in the diaspora is between three million and five million. He further states that half of these Zimbabweans are said to be migrants in South Africa. These figures are a significant increase from the 510 084 Zimbabwean migrants that the World Bank estimated to be living in South Africa in 2005, and the 672 308 estimated by Census South Africa in 2011.[238]

Nonetheless, despite the uncertainty about the number of Zimbabwean migrants in South Africa, it is clear that the number of Zimbabweans in South Africa is now probably in the millions. Makina[239] highlights that a great number of these Zimbabweans are low-skilled circular migrant workers who travel in pursuit of means to sustain their lives and support families and networks back home in Zimbabwe. As noted above, currently there is no binding bilateral labour agreement between South Africa and Zimbabwe similar to the one between South Africa and Lesotho. However, two non-binding arrangements govern the labour migration of Zimbabweans to South Africa. These are a Memorandum of Understanding (hereafter Zimbabwe–South Africa MOU) signed in 2009,[240] and a Zimbabwean Documentation Process (ZDP), which provides a special dispensation programme for Zimbabweans working, studying or operating businesses in South Africa. The roles of the MOU and the ZDP in facilitating labour migration will now be briefly discussed.

234 Jinnah 2009 *ACMS Research Report* 7.
235 Jinnah 2017 *South African Review of Sociology*. 61.
236 Census 2011 http://www.statssa.gov.za/?page_id=3839.
237 Karombo 2019 https://www.iol.co.za/business-report/economy/62-rise-in-african-migrants-19004740.
238 Maimbo and Ratha (eds) *Remittances: Development Impacts and Future Prospects* 28.
239 Makina 2007 *University of South Africa* 4.
240 Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe in the Fields of Employment and Labour 2009.

4.7.1 Analysis of the Zimbabwe–South Africa MOU

This MOU was concluded with the prime objective of defining the basis for institutional relations under which co-operative ties can be developed between South Africa and Zimbabwe in the fields of employment and labour.[241] Importantly, this MOU expresses the will of the parties to facilitate the migration process between the two countries. The MOU refers to the establishment of a one-stop border post and a labour migration centre at the Beit Bridge in order to facilitate migration and assist labour migrants at the South African–Zimbabwean border.[242] The MOU also encourages the two countries to facilitate the linkages between former Zimbabwean migrant workers and their employers or recruiting agencies in South Africa.[243] This link is ideally intended to help former Zimbabwean migrants *inter alia* to finalise outstanding workmen's compensation claims.[244]

Furthermore, the Zimbabwe–South Africa MOU makes a significant attempt to facilitate migration to South Africa by providing for the regularisation of undocumented Zimbabwean migrants inside South Africa.[245] However, despite its provisions supporting the facilitation of labour migration, this MOU insufficiently addresses the principles identified in chapter 3 as essential for enhancing the triple-win benefits of the labour migration process.[246]

The agreement significantly addresses the governance of labour migration but falls short of sufficiently addressing the protection of labour migrants and the linkages between labour migration and development.[247] The main provision in the MOU that addresses the protection of the rights of labour migrants is article 3, which indicates that the parties shall cooperate in the field of social security. However, the Zimbabwe–South Africa MOU does not refer to the equality of treatment of Zimbabwean migrant workers with regard to social security rights.

241 Article 1.
242 Article 3(b)V.
243 Article 3(b)V(iii).
244 Pamu 2014 *International Labour Migration* 25.
245 Article 4.
246 See para 3.1 above.
247 In chapter 3 of this thesis, the governance of labour migration, linking labour migration and development, and protecting the rights of labour migrants were identified as the three fundamental components to be addressed in bilateral labour agreements that promote triple-win benefits.

Furthermore, apart from the provision that expresses the desire of the parties to cooperate in the field of social security, there is no specific reference to migrants' rights, or at least a general assurance that labour migrants from Zimbabwe will receive the protection offered by the *Constitution* to everyone. The judgment in *Khosa v Minister of Social Development*, discussed earlier in this chapter, revealed that to an extent, the meaning of "everyone" in the Constitution is still subject to interpretation.[248] As a result, it can be inferred that migrant workers do not have the assurance that their rights to social security will be protected under the *Constitution*.

Moreover, this lack of clear reference to the protection of migrants in the Zimbabwe–South Africa MOU limits the potential of reaching the goal of combating illegal migration that is set out in article 2(b) of the Zimbabwe–South Africa MOU. Providing an express assurance of the protection of the rights of migrant workers in the MOU should encourage them to use legal channels of circular migration because they would know that they are expressly entitled to the labour rights and the rights to equality enshrined in the *Constitution*.

Given the limited role that the Zimbabwe–South Africa MOU plays in protecting the rights of migrants and combating illegal migration, it is imperative to now discuss the linkages between labour migration to South Africa and development in Zimbabwe.

4.7.2 Circular labour migration and development in Zimbabwe

The ILO and the IOM are optimistic about the role of remittances in facilitating development in the sending country.[249] Both these organisations emphasise the essence of linking labour migration with development in order to optimise the benefits of labour migration.[250] However, labour migration to South Africa does not make a significant contribution to development in Zimbabwe. The remittances sent back home by labour migrants have only served to relieve people's suffering and provide them with their basic needs in the wake of economic chaos.[251] The level of poverty and the lack of basic necessities in Zimbabwe are so severe that the proportion of migrant remittances spent on food is amongst the highest

248 See *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) para 112.
249 Crush and Frayne 2007 *Development in Southern Africa* 1-24.
250 See para 3.2.4 above.
251 Landau "Drowning in Numbers: Interrogating New Patterns of Zimbabwean Migration to South Africa" 7-15.

in the world.[252] Unfortunately, only negligible amounts of remittances are directed towards income-earning and job-creating investments. Cognisant of this reality, the government of Zimbabwe has attempted to obtain a larger portion of funds from the remittance flows.[253] These efforts by the government have not been fruitful, because migrants continually use informal channels of remittance flows and avoid the more formal channels. Using more formal channels increases the likelihood of undocumented migrants becoming visible to authorities, and thus risking deportation back to the sending country. As a result, undocumented migrants invariably opt to use informal channels of remitting money back home.[254] This inadvertently contributes to the failure of labour migration to contribute to more development in Zimbabwe. This failure motivates the argument in this thesis that optimised bilateral arrangements between South Africa and Zimbabwe that *inter alia* encourage migrant workers to use legal channels of migration and facilitate the linking of migration with development may enhance the benefits that Zimbabwe, as the sending country, receives from the circular labour migration of its citizens to South Africa.

4.7.3 Analysis of the ZDP

In September 2010, the government of South Africa introduced the ZDP in order to temporarily regularise the status of a significant number of Zimbabweans who were irregular migrants, but were working, studying or operating their own businesses in South Africa.[255] Under the ZDP, these categories of Zimbabwean migrants would have relaxed permitting requirements.[256] In order to benefit from these relaxed requirements, applicants had to fulfil three requirements: possess a Zimbabwean passport, and submit a completed application form together with fingerprints and documentation confirming either proof of business (such as company registration), or proof of registration with an educational institution, or proof of employment (an affidavit from the employer, for example).[257]

There are various motivations behind the ZDP. DHA officials have stated that the ZDP was meant to be a tool for helping to register every foreigner in South Africa for the purposes of

252 Bracking and Sachikonge 2006 *Global Research Working Group Working Paper* 45.
253 Maphosa 2007 *Development South Africa* 132.
254 Chisasa 2014 *Banks and Bank Systems* 59-64.
255 Amit and Kriger 2014 *Kronos* 269-290.
256 *News24* http://www.news24.com/SouthAfrica/Politics/Home-affairs-to-clear-permit-backlog-20101118.
257 Taylor *Voice of America* 8.

planning and other national requirements.[258] The deputy home affairs minister, on the other hand, states that the ZDP is a policy that was partly designed to separate economic migrants from genuine asylum seekers.[259]

Even though the motivation for the ZDP is not entirely clear, the director-general of the DHA, while celebrating the success of the ZDP, asserted that "the main goal of the project was to provide rights to those Zimbabweans who had been employed in the country but were not granted protections due to their permit status".[260] The targeted migrants were illegal migrants who did not possess legal permits that allowed their stay in South Africa. Prior to the ZDP, no specific policy regulated the stay of Zimbabwean migrants in South Africa.[261] The introduction of the ZDP in April 2009 opened up legal channels for migrants from Zimbabwe to become documented. This created a platform for the enhanced benefits that Zimbabwean migrant workers can potentially gain from the labour migration process.

As highlighted earlier in this chapter, South Africa's post-apartheid immigration regime sets the stage for a range of legal rights to be conferred on documented migrants. This means that the ZDP can be adduced as an innovation that has the potential to enhance the protection of migrant rights in South Africa. The protection of the rights of migrant workers was raised in chapter 3 of this thesis as one of the three key areas for deriving triple-win benefits from circular labour migration. The ZDP has thus contributed to enhancing the benefits of circular labour migration to South Africa primarily for the migrant worker. Furthermore, the ZDP helps to regularise the stay of irregular migrants in South Africa. This has the significant potential to help both the sending country and the receiving country to monitor the migrants and consequently be able to more efficiently determine the contribution that the migrants can make to the economies of both countries.

In summarising the ZDP, we can observe that the ZDP seems to have been successful in achieving its goals. This is illustrated by the fact that the government of South Africa introduced an identical documentation programme, the Lesotho Special Permit (LSP), to

258 Mamabolo 2011 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=243714&sn=Detail&pid=71656.

259 Taylor *Voice of America* 8.

260 *Mail and Guardian* 2011 http://mg.co.za/article/2011-02-24-govt-zim-documentation-a-phenomenal-success.

261 Jinnah 2009 *ACMS Research Report* 19.

Lesotho migrants working, studying or running a business in South Africa in 2015.[262] At the inception of the ZDP, the South African DHA expressed its intention to roll out a similar model of documentation projects to nationals of other Southern African countries.[263] The subsequent roll out of a similar process for Lesotho nationals suggests that South Africa's DHA was satisfied with the progress of the pilot ZDP.

However, it should be noted that the ZDP is a unilateral dispensation, completely controlled and implemented by South Africa as the receiving country. Therefore, South Africa may unilaterally, at any time, opt to either amend or revoke the ZDP to the detriment of the sending country and the migrants. The ZDP places no binding obligations on South Africa.[264] This indicates that the ZDP's contribution to triple-win benefits primarily revolves around its benefits for the migrants and the receiving country. Therefore, when mapped against the migration arrangements discussed in the previous chapter, it appears that the ZDP provides negligible benefits for the sending country.[265]

Nonetheless, the introduction of the Zimbabwe–South Africa MOU and the ZDP are positive contributions that may encourage some Zimbabweans to use legal channels of remitting money back to Zimbabwe as they become legal migrants and are therefore less frightened of being found by immigration officers in South Africa. It is essential to note that the remittances sent to Zimbabwe from South Africa have been crucial in keeping the Zimbabwean economy afloat. The remittances have been pivotal in contributing to delaying the total collapse of Zimbabwe's economic and social fabric.[266] These remittances, however, have primarily been used for survival instead of for developmental purposes in Zimbabwe.[267] Chapter 3 of this thesis emphasised that creating a link between circular migration and development in bilateral labour migration arrangements is imperative for harnessing triple-win benefits for all stakeholders involved in the labour migration process.[268] The *White Paper* makes a crucial observation in this regard, noting that the development gap between South

262 Lesotho Special Permit date unknown https://www.vfsglobal.com/lsp/southafrica/Lesotho_special_permit.html.
263 Amit 2012 https://www.eldis.org/document/A62152.
264 Lesotho Special Permit date unknown https://www.vfsglobal.com/lsp/southafrica/Lesotho_special_permit.html.
265 See paras 3.8.3 and 3.9.2 above.
266 Crush and Tevera *Zimbabwe's Exodus: Crisis, Migration, and Survival* 22.
267 Makina 2007 *University of South Africa* 4.
268 See para 3.5.3 above.

Africa and its neighbours is the largest in any region globally.[269] South Africa's GDP per capita is five to seven times higher than that of the rest of SADC.[270] As a result, the *White Paper* encourages South Africa to make efforts to strategically use migration to inspire development in its neighbouring countries.[271] This thesis argues that actions to link labour migration to South Africa with development in the sending countries may help South Africa to reduce the recurring illegal migration to the country. Increased development in the neighbouring countries may encourage migrants to rather remain in the sending countries and play an active role in the labour markets in their home countries.

4.8 Conclusion

The central guiding question in this chapter was the following: Which areas in the bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, require development to provide enhanced benefits for all the key stakeholders involved in the labour migration process?

The chapter found that the *Immigration Act* in South Africa is the main law regulating the entry of migrants into South Africa. The *Immigration Act* encourages the entry of skilled migrant workers into the country as opposed to its restrictive stance on unskilled and illegal migrants. However, the provisions of the *Immigration Act* do not necessarily render an employment contract entered into by an illegal migrant automatically void. Nonetheless, this chapter notes that this does not necessarily mean that legal and illegal migrants are regarded as completely equal in South Africa. The *Immigration Act* imposes criminal sanctions on employers who knowingly employ illegal migrants. This in theory serves to deter the employment of illegal migrants, thus making it undesirable to become an illegal migrant seeking work in South Africa.

Regarding the three themes identified in the previous chapter as necessary for triple-win benefits, this chapter concludes that the *Constitution* significantly protects the rights of migrant workers in South Africa. Based on the decision in *Discovery Health Ltd v CCMA* this chapter concludes that section 23 of the *Constitution* should be interpreted as setting the

269 *White Paper on International Migration* (2017) 4.
270 *White Paper on International Migration* (2017) 4.
271 *White Paper on International Migration* (2017) 4.

stage for migrant workers to be granted labour rights, such as the right to form and join a trade union, the right to participate in the activities and programmes of a trade union, the right to strike, and the right to fair labour practices generally. Furthermore, even though this chapter recognises that the applicability of the equality clause in section 9 of the *Constitution* is determined on a case-by-case basis, this chapter concludes that section 9 of the *Constitution prima facie* protects migrant workers against discrimination in South Africa.

Furthermore, this chapter concludes that the *Constitution* generally protects the rights of migrant workers to social security in the country. However, the legal framework in South Africa could be improved to provide additional benefits, such as increased access to healthcare for migrants. Moreover, this chapter recognises the need to improve the legal dispensation in South Africa to better protect the rights of migrants by including provisions that expressly cover migrant workers. Furthermore, in order to protect citizens of South Africa from losing jobs to migrants, the employment legislation in South Africa should expressly outline the procedures that employers need to follow to ensure that no local labour is available to perform work prior to engaging migrant workers to perform the same job.

The chapter also concludes that the Lesotho–South Africa bilateral agreement requires significant review. The Lesotho–South Africa agreement insufficiently addresses all the three themes identified in chapter 3 as necessary for achieving triple-win benefits.

Similarly, the main bilateral labour arrangement between South Africa and Zimbabwe, the Zimbabwe–South Africa MOU, which is non-binding, is largely insufficient with regard to addressing the three themes necessary for achieving triple-win benefits. Against this background, the next chapter discusses conclusions from all chapters of the thesis and ultimately offers recommendations relating to all the research questions of the study.

Chapter 5

Conclusions and recommendations

5.1 General background

The analysis in the previous chapters suggests that circular labour migration is increasing in popularity all around the world, mainly due to the benefits it offers to the stakeholders involved, if properly regulated. From the outset, this thesis recognised that properly designed bilateral labour arrangements are the ideal tools for promoting triple-win benefits for the stakeholders involved in the circular labour migration process.[1] The need for these bilateral labour arrangements is heightened by the nature of circular labour migration itself. Circular labour migration involves the repeated mobility of migrants across international borders for the purposes of work.[2] Therefore, based on the nature of circular labour migration, clear guidelines are especially important in a region such as Southern Africa, where labour migration is characterised by, amongst others, mobility across porous borders into the main receiving country, South Africa. The need for these guidelines is increased by the absence of a legally enforceable regional circular labour migration framework policy.[3]

Currently, labour migration between Southern African countries, particularly South Africa and its neighbours, Lesotho and Zimbabwe, is managed through bilateral labour arrangements. However, several academic studies have highlighted the need for the improved regulation of labour migration in Southern Africa.[4] Moreover, the bilateral arrangements between South Africa and its neighbours have been criticised for being one-sided, offering benefits primarily to one party and offering insufficient protection of the rights of migrants.[5] However, as far as could be established, there has been no comprehensive study that seeks to determine how international law and standards on labour migration and lessons learned from best practices followed by other countries can help to

1 See para 1.1 above.
2 See paras 1.1, 2.1 and 2.7 above.
3 See para 1.1 above.
4 See para 1.1 above.
5 See para 1.2 above.

address the deficiencies observed in the regulation of circular labour migration between South Africa, Zimbabwe and Lesotho. Therefore, this thesis advanced the proposition that international law and standards of labour migration and best practices in New Zealand and Spain can assist in enhancing the regulation of circular labour migration between South Africa, Lesotho and Zimbabwe, to provide optimised benefits for all stakeholders. This thesis therefore sought to answer the following central research question: *What guidance can international law and standards of labour migration and best practices from selected foreign countries provide to enhance the regulation of circular labour migration between South Africa, Lesotho and Zimbabwe to provide optimised benefits for all stakeholders*?

The above research question was underpinned by the following sub-questions, upon which the individual chapters were built:

i) What does circular migration entail and what are the key aspects and issues relevant to the concept of circular labour migration?[6]

ii) What are the respective positions of the ILO, the IOM, the AU and SADC on the regulation of labour migration in general, and more specifically on circular labour migration and the use of bilateral labour arrangements? With reference to foreign law, how do Spain and New Zealand use bilateral labour arrangements?[7]

iii) Which areas in the bilateral labour arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, require reform to provide enhanced benefits for all the key stakeholders involved in the circular labour migration process?[8]

iv) Against the conceptual foundations of circular labour migration, good practice guidelines and the best practices in New Zealand and Spain, what lessons can be learned about how South Africa could optimise the regulation of circular labour migration between itself, Zimbabwe and Lesotho?[9]

6 Chapter 2.
7 Chapter 3.
8 Chapter 4.
9 Chapter 5.

5.2 Objectives and structure of the discussion

In answering the research questions outlined above, and as its main objective, this thesis sought to determine how and to what extent international law and standards of labour migration could assist in enhancing the regulation of circular labour migration between South Africa and its neighbours, Lesotho and Zimbabwe, to provide triple-win benefits through optimised bilateral labour arrangements. In line with this objective, this thesis appraised circular labour migration arrangements as the ideal tools to enhance the governance of circular labour migration, link circular labour migration with development needs, protect the rights of migrant workers, and limit irregular migration flows.

The discussion in chapter 2 outlined the various definitions of migration, established the need for a differentiation between voluntary and involuntary migration, and found a working definition of circular labour migration. To provide a more comprehensive theoretical background, the discussion in chapter 2 defined bilateral arrangements and explained how and why these arrangements are better suited for providing triple-win benefits. In this process, the chapter unpacked the relationship between circular labour migration and development, and established the need for less restrictive immigration policies that promote the circulation of labour migrants between sending countries and receiving countries.

Moving from the theoretical concepts in chapter 2, in chapter 3, the thesis discussed the relevant international and regional law and standards of labour migration that should ideally serve as minimum standards in bilateral labour arrangements. Furthermore, this chapter discussed the role that the IOM plays in facilitating the implementation of bilateral labour arrangements meant for triple-win benefits. Additionally, the discussion in chapter 3 identified the key elements of effective regulation of circular labour migration, as observed from the regulation of circular labour migration in countries such as New Zealand and Spain.

Lastly, chapter 4 provided an analysis of the legislative position regarding migration in South Africa, primarily to determine if and where this position fails to address the triple-win potential of circular labour migration. This was followed by a critical investigation into the labour migration practices and current bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe.

This chapter provides a summary of the analysis and conclusions, makes recommendations on the way forward, and offers suggestions for possible future research.

5.3 Summary of the main findings

The following main findings were made in each chapter:

5.3.1 Chapter 2 - Understanding the practice of circular labour migration

This chapter asked: *What does circular migration entail and what are the key aspects and issues relevant to the concept of circular labour migration*? This chapter found that there are varying approaches to the concept of circular migration. However, in this thesis, circular migration refers to the repetitive, temporary mobility of people primarily for economic reasons.[10] Additionally, the observation was made that the economic reasons for circular migration are invariably related to labour. As a result, I provided an operative term, "circular labour migration", which was used throughout the thesis to refer to the repetitive temporary mobility of people between two countries for work purposes.[11]

Three types of circular migration were recognised: hindered circular migration, regulated circular migration, and embedded circular migration. However, the prime focus in this study was on regulated circular migration. The thesis asserts that this type of circular migration, if well-regulated for labour purposes, can provide triple-win benefits for all the key stakeholders involved. Furthermore, the benefits that this type of circular migration offers, in theory, encourage migrants to rather engage in legal migration. This type of circular migration, therefore, has the potential to contribute to the reduction of illegal migration to gain access to the labour markets of the receiving country.

Moving from the general to the specific, following an analysis of the various advantages and disadvantages of circular labour migration, the observation was made that if circular migration is regulated to minimise the disadvantages, the benefits of circular labour migration possibly outweigh the disadvantages of this sort of mobility.[12] The main advantage noted from this analysis is the positive role of circular labour migration in the socio-economic

10 See para 2.3 above.
11 See para 2.3 above.
12 See para 2.5.2 above.

development of both the sending countries and the receiving countries. Circular migrants return to the sending country with increased finances, new ideas, knowledge and entrepreneurial attitudes that promote economic development.[13] The receiving country, on the other hand, primarily benefits from the growth inspired by migrant labour in crucial economic sectors. In this manner, the migrants become agents of development.

Additionally, the discussion in chapter 2 revealed that circular labour migration represents a potential dynamic migration policy solution. This is due to labour shortages in essential sectors in the receiving country being temporarily relieved, without allowing migrants to become a permanent part of the population. By the same token, the sending country can retain some of its potent workforce who will circulate back to the sending country and implement the skills acquired in the receiving country. These skills could ideally be used for various developmental purposes in the sending countries.[14] This therefore indicates that, to harness the benefits of circular labour migration, migration policy must encourage the temporary nature of circular labour migration.

Moreover, the discussion in chapter 2 argued that bilateral labour arrangements are essential tools for enhancing the benefits that can be derived from circular migration done for work purposes (circular labour migration).[15] These arrangements can be tailored towards helping receiving countries to have a flow of labour that helps to meet the needs of employers in crucial sectors of the economy, thus benefiting the receiving country. The sending countries, on the other hand, can primarily benefit from the revenue generated through the remittances that the migrants send home. Lastly, the migrants can benefit from the increased protection of their rights and security provided under such bilateral labour arrangements.

The above findings strengthen the assertion that bilateral labour arrangements are better suited to regulating labour migration for triple-win benefits than multilateral agreements. This is because bilateral arrangements allow sending countries and receiving countries to

13 See paras 2.5 and 2.6 above.
14 See para 2.7 above.
15 See para 2.4 above.

tailor their legal obligations to their specific needs, while multilateral agreements mostly provide general regulation that is normally fragmented and ineffective.[16]

Furthermore, bilateral labour arrangements help to facilitate freer mobility between the sending country and the receiving country. An analysis of the arguments for less restricted mobility, on the one hand, and restrictive policies, on the other hand, reveals that less restricted mobility is likely to create more benefits for all stakeholders involved in the migration process, as opposed to more restrictive immigration policies.[17] In this regard, the ILO and the IOM promote bilateral labour arrangements as the ideal tools to facilitate less restrictive circular labour migration for enhanced benefits to all stakeholders.

5.3.2 Chapter 3 - Regional and international perspectives on the regulation of circular labour migration

This chapter asked: *What are the respective positions of the ILO, the IOM, the AU and SADC on the regulation of labour migration in general, and more specifically on circular labour migration and the use of bilateral labour arrangements*? *With reference to foreign law, how do Spain and New Zealand use bilateral labour arrangements?* The chapter showed that the IOM and the ILO play a prominent role in the promotion of triple-win benefits from circular labour migration.[18] The IOM, through the various offices it has established all over the world, is suitably placed to provide ideal advice regarding migration flows, border management and legal migration to member states. In Southern Africa, the IOM has established a regional office in Pretoria, South Africa.[19] The advice provided by this office, ideally, will equip member states of the IOM in the region to formulate suitable policies and agreements to regulate circular labour migration more comprehensively.[20]

Similarly, the ILO as the international organisation tasked with developing, promoting and monitoring international labour standards is suitably placed to guide the ideal management of circular labour migration. The standards set by the ILO, particularly through conventions

16 See para 1.1 above.
17 See para 2.4.1 above.
18 See paras 3.2 and 3.3 above.
19 See para 3.2 above.
20 See para 3.2 above.

and recommendations, comprise a significant part of the international law and standards on labour migration.

More importantly, the standards set by the international law and standards on labour migration expressly encourage and provide foundations for member states to conclude bilateral labour arrangements, particularly where there is rapid labour migration taking place between themselves.[21] Consequently, the *Migration for Employment Recommendation* has an annex that contains a comprehensive model agreement (Model Treaty) that can be used as a blueprint by member states of the ILO who seek to sufficiently regulate labour migration between themselves through bilateral labour arrangements. The Model Treaty *inter alia* emphasises the shared responsibility of sending countries and receiving countries to provide the migrant with the necessary information regarding the migration process in a language he or she understands.[22] This requirement under the Model Treaty, in theory, increases the benefits of regulated circular labour migration for the migrants. Moreover, the Model Treaty sets several key criteria aimed at enhancing the protection of the rights of migrant workers, based on basic principles and standards contained in UN and ILO conventions. These criteria will be used as part of the summaries on "ideal" provisions to be included in bilateral labour arrangements that appear later in this chapter.

In addition to the Model Treaty, the instruments setting the international law and standards on labour migration include the three migrant worker-specific conventions, the ILO's *Migrant Workers Convention*, the *Migrant Workers Recommendation* and the *Migration for Employment Convention* as well as the United Nations' *ICRMW*. The discussion in chapter 3 showed that these instruments, which form part of the international law and standards of labour migration generally, provide significant guidance on the rights that should be enjoyed by all migrant workers.[23] The eight fundamental ILO conventions enshrined in the 1999 ILO Declaration on Fundamental Principles and Rights at Work and the nine universal human rights instruments and associated protocols were also found to be part of the international law and standards on labour migration.[24] In summary, chapter 3 revealed that some of the key issues to be addressed in bilateral labour arrangements intended for triple-win benefits,

21 See art 10 of the ILO Convention 97.
22 See para 3.5.1 above.
23 See para 3.3 above.
24 See para 3.3 above.

as reflected by international law and standards on labour migration, include: the rights of the migrants in case of expulsion; the rights of migrants to medical care; the rights of migrants to access and participate in trade unions; the payment of wages to domestic workers; free recruitment services for migrants; access to information about working conditions; equality of migrants regarding remuneration; social security benefits of migrants; equality of treatment of migrant workers regarding working conditions; migrants' access to the courts in the receiving country; and migrants' rights to non-confiscation of identity documents by officials in the receiving country.

It is important to note that these key issues outlined above from the conventions and recommendations on labour migration can only be regarded as minimum standards. This means that the standards do not prevent member states bound by them from adopting additional provisions that are more favourable to the protection of the rights of migrant workers in respective bilateral labour arrangements.[25]

Furthermore, based on the guidelines provided by the relevant provisions of international law and standards of labour migration, this study has identified three thematic areas that need to be comprehensively addressed in bilateral labour arrangements to promote triple-win benefits. These are governance of labour migration, linking migration to development, and protection of the rights of migrant workers. Consequently, the key provisions to be included in bilateral labour arrangements provided by international law and standards of labour migration were categorised into these three themes in chapter 3 of this thesis.[26] A summary of the key areas to be covered to comprehensively address the three themes respectively is provided below.

5.3.2.1 Good practice provisions protecting the rights of migrant workers

Given the recognised vulnerability of migrant workers, the international normative foundations of labour migration provide several key guidelines that are essential for improving the protection of migrant workers. To improve the protection of migrant workers, member states should, in bilateral labour arrangements, include provisions that: address

25 See para 3.4 above.
26 See paras 3.5.1, 3.5.2 and 3.5.3 above.

concerns regarding gender issues;[27] provide solid and enforceable guidance relating to working conditions and employment contracts;[28] make specific reference to non-discrimination of migrant workers in respect of working conditions;[29] address the supervision of the working and living conditions of migrant workers;[30] give effect to social protection benefits for migrant workers;[31] provide for the trade union rights of migrant workers and their access to support mechanisms from civil society;[32] and incorporate concrete mechanisms for complaints and dispute resolution procedures and access to justice.[33] A discussion of the above guidelines led to the conclusion that the fundamental responsibility to ensure that circular migrant workers, especially female workers and low-skilled workers, are adequately protected rests with the governments of both the receiving country and the sending country.

5.3.2.2 Good practice provisions enhancing the governance of labour migration

The different bargaining positions of sending and receiving countries when concluding bilateral labour arrangements cannot be ignored. The sending country is more likely to accept unfavourable conditions in the bilateral labour arrangements due to its desire to secure work for its nationals.[34] It therefore is important to expressly outline provisions that seek to create a balance between the positions of the two countries in the bilateral labour arrangements. These provisions, which were addressed in detail in chapter 3, should address the following areas:[35] the regular exchange of information between the sending and the receiving countries;[36] transparency about the dissemination of the content of the bilateral arrangements;[37] defining clear responsibilities of the key parties to the bilateral labour arrangement, including recruitment agencies;[38] concrete implementing, monitoring

27 See para 3.5.1.1 above.
28 See para 3.5.1.2 above.
29 See para 3.5.1.3 above.
30 See para 3.5.1.4 above.
31 See para 3.5.1.5 above.
32 See para 3.5.1.6 above.
33 See para 3.5.1.7 above.
34 See para 3.5.2 above.
35 See para 3.5.2 above.
36 See para 3.5.2.1 above.
37 See para 3.5.2.2 above.
38 See para 3.5.2.3 above.

and evaluation procedures of the bilateral arrangement;[39] fair recruitment procedures;[40] and social dialogue and consultative processes with migrant associations, employers' organisations and civil society representatives to make the bilateral labour arrangements more effective.[41] In summary, a discussion of the above guidelines reveals that to enhance the likelihood of bilateral labour arrangements contributing to triple-win benefits, these arrangements should include provisions that enhance the accessibility of the contents of the bilateral arrangements for all stakeholders generally and the migrants specifically. The arrangement should furthermore facilitate social dialogue and adequate monitoring mechanisms that *inter alia* contribute to the enforcement of the bilateral labour arrangements.

5.3.2.3 Good practice provisions linking labour migration to development

The role of labour migration in facilitating development in both sending countries and receiving countries is well documented.[42] Circular labour migration specifically, if well-regulated, contributes to development in both sending countries and receiving countries. An investigation into the linkages between circular labour migration and development revealed that bilateral arrangements intended to facilitate triple-win benefits should from the onset expressly highlight the goal to link labour migration with development.[43] The preamble to the *Argentina–Peru bilateral agreement*,[44] for instance, expressly outlines the goal by the countries to achieve mutual development in both countries through labour migration. Although the agreement does not include express provisions detailing how the development is to be facilitated, this thesis notes the acknowledgement of the desire to achieve mutual development as a good starting point.

Furthermore, generally, bilateral labour arrangements intended to achieve triple-win benefits should expressly include provisions that encourage the circulation of labour migrants, facilitate remittance transfers, promote skills training, and facilitate funding for the development of business enterprises by the migrants upon their return to the sending

39 See para 3.5.2.4 above.
40 See para 3.5.2.5 above.
41 See para 3.5.2.6 above.
42 See para 3.5.3 above.
43 See para 3.5.3 above.
44 Agreement on Migration between the Argentine Republic and the Republic of Peru 1998.

country.[45] In this regard, the *Spain–Guinea Bissau bilateral agreement*[46] was recognised in this thesis as a best practice.[47] This is due to the express undertakings by both the sending country and the receiving country to cooperate with financial institutions in the countries to reduce transaction costs and encourage productive investment of the remittances by the migrant workers. In addition, these countries undertook to promote savings and credit facilities intended to provide accessible services to migrant workers.[48]

The discussion in chapter 3 revealed that linking labour migration with development effectively benefits all three key stakeholders in the circular labour migration process. Both countries experience economic development from the work of the migrants in the receiving country and the transfer of remittances back to the sending country, while the migrants benefit from training and skills development, as well as credit facilities and tax discounts.

In summary, this thesis finds that comprehensively addressing the three thematic areas in bilateral labour arrangements and all that they entail helps to reconcile the interests of the three key stakeholders in the circular labour migration process. Following this conclusion, an observation was made about the lack of a multilateral framework in Africa generally and Southern Africa specifically, to provide effective guidance for deriving triple-win benefits. All things being equal, bilateral labour arrangements provide a more suitable approach for enhancing the benefits of labour migration.[49] Against this background, this thesis assessed the best practices of the regulation of circular labour migration recognised by the ILO and the IOM. The goal in this regard was to identify the key elements of what is regarded as effective regulation of circular labour migration in the two countries.

45 See para 3.5.3 above.
46 Framework Agreement of Cooperation on Immigration Between the Kingdom of Spain and the Republic of Guinea Bissau 2008.
47 See para 3.5.3 above.
48 Articles 6 to 9 Framework Agreement of Cooperation on Immigration Between the Kingdom of Spain and the Republic of Guinea Bissau 2008.11.
49 See paras 3.6 and 3.7 above.

5.3.2.4 Best practices of circular labour migration

5.3.2.4.1 The New Zealand perspective

Circular labour migration to New Zealand is primarily used by the government of New Zealand to address the labour shortages in crucial sectors of New Zealand's economy.[50] This circular labour migration into New Zealand is mostly facilitated through bilateral labour arrangements. The discussion in chapter 3 led to an important insight, namely, that the efficiency of a bilateral arrangement in creating triple-win benefits largely depends on the enabling legislation in the receiving country.[51]

The above realisation was made following the observation that the immigration laws in New Zealand are expressly receptive to the legal entry of migrant workers into the country.[52] Notably, the *Immigration Act* contains provisions that seem to provide essential protection of the rights of migrant workers, such as protection from exploitation.[53] The Act *inter alia* highlights that migrant workers have equal rights to minimum wages afforded to the citizens of New Zealand by the *Minimum Wage Act*. Furthermore, the *Immigration Act* seems to contribute to diminishing the risk of exploitation of migrant workers.[54] For instance, the *Immigration Act* provides that an employer who fails to pay migrant workers the minimum wage stipulated in the *Minimum Wage Act* will be in contravention of the *Immigration Act*.[55] This thesis regards this provision as an essential contribution to the promotion of triple-win benefits.

In general, the *Immigration Act* can be regarded as the main legislation enabling the promotion of circular labour migration benefits in New Zealand. This is because the *Immigration Act* prescribes the provision of employment rights to migrants, including the rights to employment contracts, work, rest and meal breaks, annual holidays, public holidays, sick leave, bereavement leave, parental leave, equal pay, trial periods, joining a union, and health and safety.[56]

50 See para 3.8.1 above.
51 See para 3.8.2 above.
52 See para 3.8.2 above.
53 51 of 2009.
54 See para 3.8.3 above.
55 Section 351.
56 See para 3.8.2 above.

As observed above, circular labour migration in New Zealand is mostly used to address labour shortages. To address the labour shortages in the horticulture and viticulture industries, the cabinet of New Zealand developed the RSE in 2007. The main successes of the RSE in generating triple-win benefits are largely the result of the collaboration of a multiplicity of stakeholders.[57] The RSE is delivered through concerted efforts between migrant workers, employers and a plethora of government agencies, both in New Zealand and the various Pacific Island countries. The government of New Zealand tasks four bodies, NZAID, Ministry of Labour, WINZ and the Ministry of Social Development, with assessing the genuine need for the employment of migrant workers in the country. Tasking these bodies with this duty is intended to ensure that New Zealanders are not denied job opportunities and to minimise the risk of exploiting migrant workers.[58]

Interestingly, under the RSE, various conditions are placed on employers to qualify for the recruitment and employment of migrant workers. These include a registration process where employers are required to demonstrate their financial ability to provide accommodation, pastoral care and the minimum wage to workers. Furthermore, recruitment under the RSE is primarily the responsibility of employers in New Zealand and recruitment agencies and social agents in the sending countries. This collaborative effort by key stakeholders has *inter alia* managed to contribute to preventing the overstaying of migrant workers in New Zealand.[59] The recruitment agencies and employers are constantly aware of the legality of the presence of the migrant workers in the receiving country. As a result, agencies and employers are well placed to identify migrant workers who have overstayed in New Zealand.

To further determine the elements of effective regulation of circular migration under the RSE, an analysis of the IAU between New Zealand and Vanuatu was necessary.[60] The analysis revealed that the IAU between New Zealand and Vanuatu is based on a range of good practices, including equity, transparency and development.[61] Amongst the best practice qualities identified, the transparency achieved by making the contents of the arrangements publicly available was found to be one of the most notable aspects, because

57 See para 3.8.3 above.
58 See para 3.8.3 above.
59 See para 3.8.3.1 above.
60 See para 3.8.3.3 above.
61 See para 3.8.3.3 above.

it significantly reduces the misconceptions about circular labour migrants in New Zealand and generally contributes to migrants' awareness of their rights.

The New Zealand–Vanuatu IAU further provides for the protection of the rights of migrant workers, including pastoral care. It is worth noting that the provision of pastoral care by employers goes beyond the international good practice guidelines for the protection of the rights of migrant workers identified in this thesis.[62] As emphasised earlier, international good practice standards essentially provide minimum standards for the regulation of labour migration.[63] Individual member states should build upon these international foundations to provide optimised regulation of labour migration. The reality of New Zealand's RSE employers providing additional pastoral care reinforces the assertion that the RSE is indeed a best practice model for the regulation of circular labour migration.

Equally important is the express provision made in the New Zealand–Vanuatu IAU of the contribution of circular labour migration to development in Vanuatu through the promotion of economic growth in Vanuatu and regional integration in the Pacific. In the IAU, New Zealand and Vanuatu expressly acknowledge the intention to help RSE workers from Vanuatu to generate savings and relevant experience which may contribute to the economic development of Vanuatu. This provision is an essential contribution to linking migration and development, which is a crucial component of achieving triple-win benefits.[64]

5.3.2.4.2 The Spanish perspective

Spain has successfully managed to develop labour migration strategies to drastically reduce illegal migration flows into the country.[65] These strategies have largely been successful due to Spanish migration policies emphasising the policy of using labour migration as a tool for co-development between Spain and various migrant-sending countries. Similar to the position in New Zealand, this analysis reaffirmed the narrative that "a solid national legal framework is a *conditio sine qua non* for any migration programme."[66] Spanish migration law provides various procedures that promote co-development. Under Spanish migration

62 See para 3.5.1 above.
63 See para 5.2.2 above.
64 See para 3.5.3 above.
65 See para 3.9 above.
66 De Moor *International Migration and Environmental Change: Legal Frameworks for International Adaptive Migration* 123.

law, *Organic Law 2/2009,* the main legislation regulating circular migration in Spain, covers various important areas such as the recruitment of migrants, the protection of the rights of migrants, and the issuing of work permits. *Organic Law 2/2009* provides for the collective management of the recruitment of workers. This process, identified as a good practice feature in this thesis,[67] provides for the collaboration of several government bodies in Spain to manage the recruitment, the stay and the return of migrant workers in Spain.

More importantly, *Organic Law 2/2009* expressly states that jobs available for migrants in Spain will preferably be given to migrant workers from countries with which Spain has signed bilateral labour agreements. This provision has significantly assisted Spain with managing migration flows better and has encouraged more workers to enter the country legally, which in turn means that they can be easily monitored. The rights of these legal migrant workers in Spain are protected by Spanish laws and policies. In its Strategic Plan for Citizenship and Integration, the Spanish government specifically sets the objective of promoting the social inclusion of circular migrants in Spain and inspiring their return back to sending countries, equipped with skills and resources enabling them to become change agents. Additionally, the workers recruited to Spain through the collective management of recruitment are afforded equal rights to Spanish workers performing the same or similar jobs. In this manner, triple-win benefits are achieved. The Spanish government receives the requisite labour to fill gaps in crucial sectors of the economy and the migrants receive increased protection of their rights and are equipped with valuable skills. These skills can ultimately be used to inspire development in the sending country, thus benefiting the sending country.

The Spain–Colombia bilateral agreement, which is identified as a best practice bilateral agreement, provides additional benefits for migrant workers from Colombia.[68] The bilateral agreement promotes the benefits through the facilitation of the TCLM. Notably, the UP, the main trade union in Spain, plays an instrumental role in ensuring the success of the TCLM in providing triple wins for the stakeholders involved. The UP was the main proponent of what seems to be one of the best features of the TCLM. The Spain–Colombia bilateral agreement obliges the parties to the agreement to facilitate the return and reintegration of Colombian workers under the TCLM back into their home communities in Colombia. The

67 See para 3.5.2.6 above.
68 See para 3.9.2 above.

reintegration of Colombian migrants into their home countries after acquiring new skills and savings encourages economic growth in Colombia.

The UP also plays an important role in the recruitment of workers from Colombia and supports the workers *inter alia* to integrate into the healthcare system and the local culture. This indicates that the UP plays a crucial role in promoting triple-win benefits under the TCLM.

Similar to the approach in New Zealand, Spain resorts to the recruitment of migrant workers only in situations where verification has been done by government bodies in Spain that no local labour is available to fill the identified labour shortages.[69] These conditions for the recruitment of foreign labour are made available in the Immigration Rules found in the *Real Decreto* N0 557/2010.

Lastly, in light of the benefits of the TCLM, this thesis identified the conditions that are necessary for the replication of a programme similar to the TCLM.[70] In summary, the conditions identified were political will in both the sending country and the receiving country; the existence of a gap between the labour supply and demand in the receiving country; a focus on the developmental impact of circular labour migration on the sending country; and the participation of diverse groups, including social agents, trade unions, government bodies and employers' organisations.[71]

In conclusion, having discussed the main features of the regulation of circular labour migration in both New Zealand and Spain, this thesis identified the main areas that can be regarded as best practices that are covered in bilateral arrangements involving the two countries to derive triple-win benefits from circular labour migration.[72] These include actions to facilitate the circulation and eventual resettlement of migrants back into the sending country through financial aid and participation in development activities in the sending country; actions to protect the rights of migrant workers; a reduction in the overstaying of migrants in the receiving country; and actions to improve the skills of circular migrant

69 See para 3.9.2 above.
70 See para 3.9.4 above.
71 See para 3.9.4 above.
72 See para 3.10 above.

workers in the receiving country to make them agents of development upon their return home.[73]

5.3.3 Chapter 4 - Regulating circular labour migration between South Africa, Lesotho and Zimbabwe

This chapter asked: *Which aspects in the bilateral arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, require development to provide enhanced benefits for all the stakeholders involved in the labour migration process*? From the outset, it is essential to note that as far as a gap between labour supply and demand in South Africa is concerned, superficially it may seem that there is no demand for migrant labour in South Africa. The current unemployment rates in the country for South Africans themselves may indicate that, theoretically, there is no visible place for migrant workers in the labour market in the country. However, currently, the practical reality on the ground is that there is an unknown number of illegal migrant workers working in South Africa's mining, domestic and farming sectors. They mostly wish to remain undetected.[74] This suggests that there is a demand for labour in these sectors. However, this demand is largely met by using illegal labour migrants. The main problem is how to offset the reliance on illegal migrants in these sectors and encourage the employment of legal circular labour migrants, which is an alternative that may potentially benefit all the key stakeholders involved in the labour migration process. The hypothesis presented by this thesis is that international normative foundations of labour migration and best practices from selected foreign countries can provide comprehensive guidance for enhancing the regulation of circular labour migration between South Africa, Lesotho and Zimbabwe, to provide optimised benefits for all stakeholders.[75] More specifically, this thesis asserts that the potential benefits presented by optimised bilateral labour arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, can motivate illegal migrants to increasingly engage in legal circular labour migration to South Africa.[76]

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73 See para 3.10 above.
74 See para 3.9.4 above.
75 See para 1.3 above.
76 See para 1.3 above.

5.3.3.1 An assessment of the governance of labour migration between South Africa and Lesotho

Today, a significantly large population of the Basotho work both legally and illegally in South Africa.[77] The main legal agreement that facilitates migration to South Africa is still the Lesotho–South Africa bilateral labour agreement, which was last updated in 1973.

An analysis of this agreement revealed numerous areas where the agreement falls short of international standards.[78] In summary, the analysis of this agreement illustrates that the agreement fails to include the bulk of the good practice guidelines identified in chapter 3 as essential for promoting migration governance, linking migration with development, and protecting the rights of migrant workers.[79] The agreement does not mention the contribution that labour migration to South Africa may have made to development in Lesotho. Furthermore, this agreement does not have any provisions relating to the exchange of information between the sending country and the receiving country regarding the living conditions of the workers and the provision of rights, including social security, to the migrant workers. This agreement also does not provide any guidance on the facilitation of the return of migrant workers back to the sending country. This confirms the assertion that the Lesotho–South Africa bilateral labour agreement requires extensive review to align it with modern governance of labour migration standards as envisioned by the ILO and the IOM.

5.3.3.2 An assessment of the governance of labour migration between South Africa and Zimbabwe

Like the Basotho migrants mentioned above, a significantly large number of Zimbabwean migrants are working illegally in South Africa.[80] These workers could receive more protection if they used legal channels to obtain access to the South African labour market.[81]

Nonetheless, the current reality is that remittances from South Africa to Zimbabwe have played a crucial role in keeping the Zimbabwean economy afloat. Despite this, the

77 See para 4.5 above.
78 See para 4.5.1 above.
79 See paras 3.5.1, 3.5.2 and 3.5.3 above.
80 See para 4.6 above.
81 See para 2.4.1 above.

remittances have not been used to achieve any meaningful development in Zimbabwe, due to the lack of comprehensive links made between labour migration in South Africa and development in Zimbabwe.[82]

Furthermore, there is no meaningful collaboration between South Africa and Zimbabwe to recognise and enhance the skills, the qualifications and the competencies of Zimbabwean migrants in South Africa. Additionally, minimal attempts have been made to assist in the transfer of remittances at low cost and to facilitate the circulation and reintegration of migrants into Zimbabwe. This thesis found that unilateral efforts made by the government of Zimbabwe to facilitate the transfer of larger amounts of remittances have yielded few dividends as migrants continually use more informal channels to transfer remittances to Zimbabwe.[83] This reinforces the finding that optimised bilateral labour arrangements between South Africa and Zimbabwe that *inter alia* facilitate the linking of labour migration to South Africa with development outcomes in Zimbabwe may enhance the benefits that Zimbabwe as the sending country receives from the circular labour migration of its citizens to South Africa.

The formulation of a bilateral labour agreement specifically is especially important in this context due to the notable absence of a binding bilateral labour arrangement between Zimbabwe and South Africa. Instead of a binding bilateral agreement, currently, the South Africa–Zimbabwe MOU and the Zimbabwean Documentation Process (ZDP) are the main arrangements that attempt to facilitate the labour migration of Zimbabweans to South Africa.

The key components of the South Africa–Zimbabwe MOU include its express encouragement of the facilitation of the linkages between former Zimbabwean migrant workers and their employers or recruiting agencies in South Africa. This link benefits the migrant workers as it is intended to help ex-Zimbabwean migrants finalise outstanding workmen's compensation claims in South Africa.

This thesis found that the South Africa–Zimbabwe MOU makes a significant contribution to comprehensively addressing the governance of labour migration, but falls short in providing

82 See para 4.6 above.
83 See para 4.6.3 above.

sufficient protection of the rights of labour migrants and promoting the linkages between labour migration and development.[84]

Furthermore, it can be concluded that an express guarantee in the MOU for the protection of the rights of Zimbabwean labour migrants working legally in South Africa may encourage more Zimbabweans working illegally in South Africa to rather use legal channels to access the South African labour market. (This guarantee ordinarily requires the support of the legal framework in South Africa.) As established earlier in this thesis, legal migration, as opposed to illegal migration, typically results in higher wages for legal migrants, increased remittances to the sending country, and fewer deportation costs incurred by the sending country.[85] In this manner, all three key stakeholders gain benefits from labour migration experiences.

The ZDP was then examined to ascertain the role it plays in enhancing the triple-win benefits of labour migration to South Africa. This assessment revealed that the ZDP was successful in opening up legal channels for Zimbabweans to become documented in South Africa. This created a platform for Zimbabwean migrant workers to gain from the various benefits of legal migration highlighted throughout this thesis. The success of the ZDP is also reinforced by the recent replication of a similar dispensation for Basotho migrant workers, the LSP. This led to the conclusion that the ZDP is an innovation that has contributed to the benefits that Zimbabwean migrant workers obtain from the circular labour migration process to South Africa, thus making it a notable contribution to the promotion of triple-win benefits.

5.4 Recommendations

This thesis primarily discussed the good practice guidelines offered by the international law and standards of labour migration and the best practices in New Zealand and Spain. Having discussed these guidelines, the gaps in the regulatory framework for circular labour migration between South Africa and its neighbours, Lesotho and Zimbabwe, were also identified. Based on the good practice guidelines offered by the international normative framework of labour migration and the best practices in New Zealand and Spain, this thesis

84 For a general discussion of the shortcomings identified in the South Africa–Zimbabwe MOU, see para 4.6.3 above.

85 See paras 1.3.1 and 1.3.2 above.

concluded that bilateral arrangements between South Africa, Lesotho and Zimbabwe respectively can be significantly improved to provide triple-win benefits. In this regard, it is important to note that the conclusions reached in the analysis of the approaches in New Zealand and Spain are not meant to be blindly transplanted into the South African context, but are rather intended to provide significant direction on how bilateral labour arrangements can be optimised to provide triple-win benefits. In the light of these conclusions, this thesis makes the following recommendations:

i) The South Africa–Lesotho bilateral agreement should be reviewed. In the process of reviewing the bilateral labour agreement, the two Southern African countries should draw upon the normative framework of the ILO core conventions, the UN human rights instruments, the ILO and UN migrant worker conventions, and general international labour standards, including more specifically those set down in the Model Treaty. These instruments provide a broad labour migration normative framework that can serve as a point of reference for creating triple-win benefits in the Southern African context.

ii) Within the realm of optimising existing bilateral labour arrangements, the three Southern African countries that are the focus of this work should each formulate a model bilateral agreement template that draws upon the principles identified in this chapter as essential for enhancing the governance of labour migration, linking migration with development, and protecting the rights of migrant workers. The availability of such templates that are tailored to the needs of each country may expedite bilateral negotiations between the sending and receiving countries. Typically, to enhance the likelihood of facilitating triple-win benefits, these templates should at a minimum cover the following areas related to the protection of migrant workers' rights: concerns regarding gender issues; the provision of solid and enforceable guidance relating to working conditions and employment contracts; specific reference to the non-discrimination of migrant workers in respect of working conditions; the supervision of the working and living conditions of migrant workers; social protection benefits for migrant workers; trade union rights of migrant workers and their access to support mechanisms in civil society; concrete

mechanisms for complaints and dispute resolution procedures; and access to justice.

Furthermore, as observed in this thesis to be the practice in both Spain and New Zealand,[86] to link circular labour migration with development, the templates should include provisions that: encourage the circulation of labour migrants; facilitate remittance transfers; promote skills training; and facilitate funding for the development of business enterprises by the migrants upon their return to the sending country.

Lastly, to enhance the governance of circular labour migration the template should include provisions that address: the regular exchange of information between the sending and receiving countries; transparency about the dissemination of the content of the bilateral arrangements; defining clear responsibilities of the key parties to the bilateral labour arrangement, including recruitment agencies; concrete implementing, monitoring and evaluation procedures for bilateral arrangements; fair recruitment procedures; and social dialogue and consultative processes with migrants' associations, employers' organisations and civil society representatives.

iii) The relevant Southern African countries should seek support from the ILO and the IOM for the design and implementation of the bilateral arrangements suggested above. The discussions in chapter 3 revealed that both the ILO and the IOM periodically provide technical assistance to countries negotiating and formulating bilateral labour agreements.[87] As a result, both organisations are best suited to provide imperative support to the Southern African countries to formulate bilateral arrangements that enhance triple-win benefits. Furthermore, these organisations may provide invaluable training to the circular migrant workers who are subject to the bilateral labour arrangements. These migrants can be equipped with technical training that can help them to save the remittances they receive in the sending country and initiate business ventures that encourage development in the sending

86 See paras 3.8 and 3.9 above.
87 See paras 3.2 and 3.3 above.

countries. In this manner, the IOM and the ILO can contribute to making the migrants agents of development.

iv) The government of South Africa should increase its efforts to promote development through circular labour migration in Lesotho and Zimbabwe. Migrants from the neighbouring countries are likely to continually flock to South Africa, using both legal and illegal channels, if their home countries remain considerably underdeveloped, thereby inadvertently contributing to a migration crisis in South Africa. The discussion about the New Zealand perspective suggests that New Zealand intentionally uses circular labour migration to inspire development in the adjacent Pacific Island countries. Development in these countries inevitably reduces the heavy reliance on labour migration to New Zealand as a means of survival.[88]

v) In general, the legal framework in both New Zealand and Spain reflects the desire to provide enhanced benefits from circular labour migration. Similarly, South Africa as the main receiving country in Southern Africa should consider including provisions in its legal framework reflecting the desire to create triple-win benefits. These provisions should *inter alia* expressly outline the rights available to migrant workers in South Africa. The *Immigration Act*, similar to the *Immigration Act* in New Zealand and the Immigration Rules in Spain, should explain the rights available to migrant workers. Moreover, the *Immigration Act* should facilitate the entry of low-skilled migrants into the country to fill any labour shortages that may occur in sectors such as farming, mining and domestic work. This thesis notes that these gaps may not be immediately visible. However, as mentioned earlier, the employment of a significant number of undocumented Basotho and Zimbabwean migrants in these sectors suggests that there is a need for migrant labour in the sectors. Lessons learnt from New Zealand show that promulgating express legislation regulating migrant workers can go a long way in removing ambiguities related to the extension of employment and human rights to migrant workers, and thus encourage legal labour migration. Therefore, enhancing the legal framework

88 See para 3.8.

in South Africa to provide additional benefits, such as increased access to healthcare for legal migrant workers, may motivate illegal migrant workers in South Africa to use legal channels to work in the country, in order to have access to the additional benefits. In the process, the visibility of the migrants may be enhanced so that they inadvertently participate more actively in the economies of both the sending country and the receiving country.

vi) To protect migrant workers from exploitation in South Africa, the country must consider promulgating laws that expressly prohibit the exploitation of migrant workers. As a start, South Africa should expressly include migrant workers in legislation that sets the minimum wage for all workers in South Africa. This will provide more clarity to the courts when dealing with matters involving migrant workers and their eligibility to receive employment benefits that are theoretically available to all workers in South Africa. The decision in *Discovery Health Ltd v CCMA*, despite shedding light on the extension of employment rights to migrant workers, cannot be regarded as a panacea for the insufficient protection of the rights of migrant workers in South African workplaces. In this regard, labour inspectors in South Africa can play a role in ensuring that migrant workers' rights are protected.

vii) The governments of the three Southern African countries examined in this thesis should enhance efforts to resuscitate the JPCCs between South Africa and its neighbours, Lesotho and Zimbabwe. These JPCCs should be capacitated to provide for the concrete implementation, monitoring and evaluation of bilateral arrangements to provide triple-win benefits. The experiences in both Spain and New Zealand illustrate that concrete implementation, monitoring and evaluation of bilateral arrangements are central to creating triple-win benefits from circular labour migration.

viii) Similarly, there is a need to strengthen bilateral cooperation between trade unions in the receiving country (South Africa) and trade unions in the sending countries. In Spain, UP, the main trade union in the country, plays a central role in enhancing

cooperation between key stakeholders in both the sending country and the receiving country. Therefore, cooperation between workers' representatives in South Africa, Lesotho and Zimbabwe may significantly improve the likelihood of realising the sufficient protection of the rights of migrant workers in practice. Moreover, generally, in Southern Africa, there is little evidence of the participation of the key actors in the economy (workers and employers' organisations) in the conclusion of bilateral labour arrangements. These actors need to be more prominently involved in the negotiation and implementation of the bilateral labour arrangements to ensure that these arrangements are more effective and more responsive to genuine labour market needs.

ix) The government of South Africa needs to establish a clear procedure that must be followed by employers seeking to employ circular migrant workers. This procedure should manifestly illustrate the need for employers, as far as reasonably possible, to determine that no local workers have the requisite skills to perform the job before engaging migrant workers. The DHA in South Africa may be capacitated to provide employers with assistance in relation to the above function. This may help to eradicate the misconception in South Africa that migrant workers steal jobs from the locals. As observed in New Zealand, the government tasks the WINZ branch with keeping updated lists of unemployed citizens. Employers then simply just check with the WINZ branch to ensure that no local labour is readily available to perform the same work, before engaging migrant workers.

5.5 Recommendations for further research

Throughout this study, it became evident that some issues could potentially benefit from further research. These issues are briefly listed as research questions that could form central themes of doctoral research in the future:

i) To what extent could a circular labour migration partnership agreement between Lesotho and South Africa assist in enhancing climate change adaptation in Lesotho?
ii) What legal remedies are available in international law for Southern African countries seeking to enforce the provisions of binding bilateral labour agreements?

iii) How can an optimised regional labour framework enhance the capacity of post-apartheid South Africa to redress the practice of exploiting migrant workers in the country?

iv) What role can trade unions in South Africa play in increasing the benefits for all stakeholders involved in labour migration in South Africa?

v) What role has the introduction of various remitting companies to facilitate the transfer of remittances from South Africa played in promoting development in migrant-sending countries?

5.6 Conclusion

The role of the international law and standards of labour migration and the best practices in selected foreign countries in enhancing the regulation of circular labour migration through bilateral labour agreements between South Africa and its neighbours has not received attention from academics. As far as could be established, this thesis represents the most comprehensive attempt thus far to address the topic. This research provides insight into how bilateral labour arrangements between South Africa and its neighbours, Lesotho and Zimbabwe, can be improved to provide triple-win benefits. Most scholars simply refer briefly to the need to review these arrangements and align them with modern international standards.[89] This research, however, delved deeper into how such a review can be achieved, thus providing a unique contribution. This thesis outlined the lessons to be learned from international law and standards on labour migration and more developed legal frameworks regulating circular labour migration, and made a number of recommendations. These recommendations and lessons should assist in addressing the gaps and improving the regulation of circular labour migration between South Africa and its neighbours

89 See Lerotholi 2018 https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/presentation/wcms_422407.pdf; Poku 2001 *Security and Development in Southern Africa* 90.

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