

Obstacles and Opportunities in Africa for the Ratification of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*

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ABSTRACT

On December 18, 1990, the United Nations adopted the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (ICMWR), effectively establishing the principle of equal treatment and extending social and economic human rights to all regular and irregular migrant workers. Despite the Convention's landmark capability to serve as a legal instrument for the protection of undocumented workers' rights, as of 2017 only forty-six countries have agreed to its ratification, rendering the ICMWR the least ratified treaty among all major human rights treaties, with the significant absence of all Western European countries and the United States as signatories. A diversity of approaches to the ICMWR also exists within the African continent, as shown by the high ratification rates among West African countries, compared with the significant absence of migrant-receiving South Africa. The following article examines the ratification failures and the opportunities that the ICMWR poses for nation states and their interests, and for migration management within the African continent. The analysis subsequently develops a normative framework to evaluate the ICMWR's attempt to establish a rights-based international framework for migration management, drawing from Amartya Sen's institutionalization and feasibility critiques. It is concluded that African states and the global community should push for the ratification of the United Nations ICMWR, a thesis that draws normative support from Sen's imperfect obligation framework and practical support from the heterogeneity of human rights actors beyond the nation state.

Keywords: migration, social and economic rights, Africa, Amartya Sen, imperfect obligations

Introduction

At the September 2016 *Summit on Migrants and Refugees*, William Lacy Swing, Director General of the International Organization for Migration (IOM), described human migration as humankind's oldest poverty reduction strategy: "As long as you look on migration as a problem, as something to solve, you're not going to get anywhere. You have to look at it as a human reality that's as old as humankind" (UN Regional Information Centre for Western Europe 2017). The advocacy for and utilization of international human rights instruments to safeguard those who move within and across national and international borders concern international organizations such as the IOM, but also national governments, non-state actors, and individuals. With the formal development of the United Nations' international human rights regime after

World War II, legal instruments dedicated to safeguarding human rights for migrant workers have been debated, drafted, and ratified. In terms of migrant workers' rights, after the International Labour Organization's (ILO) adoption of the *Migration for Employment (Revised) Convention No. 97* in 1949, and the *ILO Migrant Workers (Supplementary Provisions) Convention No. 143* in 1975, the United Nations also formally introduced on December 18, 1990, the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMWR)*, effectively establishing the principle of equal treatment for migrant workers, instead of a minimum standards approach to migrant human rights (Siby 2002). The ICMWR actively extended fundamental human rights to regular and irregular migrant workers, offering full legal recognition and protection for the first time to all migrant workers irrespective of their legal status. Despite the Convention's landmark ability to serve as a legal instrument for the protection of undocumented workers' rights, as of 2017 only forty-six countries have agreed to its ratification, rendering the ICMWR the least ratified among all major human rights treaties, with the absence of all Western European countries and the United States as signatories. A significant diversity of approaches to the ICMWR also exists within the African continent.

The following article sets out first to address the ratification failures of the ICMWR, and to critically discuss the content and the role of the Convention in the formulation of appropriate policy responses by African states. Subsequently, the analysis turns to developing a normative framework for the application of a rights-based approach to labor migration, in order to engage with the Convention's implementation difficulties and the strained relationship between ethical imperatives and the institutional capabilities of governments. The logical structures from Amartya Sen's (2004) "Elements of a Theory of Human Rights" and Martin Ruhs and Ha-Joon Chang's (2004) "The Ethics of Labor Immigration Policy" will be drawn from to formulate the normative arguments to assess the theory and practice of the ICMWR in the international human rights regime and in African regional politics.

The ICMWR as a Human Rights Instrument

An initial understanding of the ICMWR's content is necessary to contextualize its objectives and outcomes within the framework of human rights instruments already available to global governance structures and national institutions. The ICMWR specifically addresses migrant workers, who are defined in Article 2 as follows: "The term *migrant worker* refers to 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." The ICMWR re-emphasizes the fundamental human rights already outlined in the Universal Declaration of Human Rights (UDHR) and the 1966 International Covenants adopted by the United Nations (International Covenant on Civil and Political Rights [ICCPR] and International Covenant on Economic, Social and Cultural Rights [ICESCR]), in order to re-state their applicability to migrant workers and members of their families of all legal statuses (Nafziger and Bartel 1991). The Convention's listed fundamental rights include the right to freedom of thought, conscience, and religion (Article 12), the right to life (Article 9), protection from torture, cruel treatment, and punishment (Article 10), and protection from slavery, servitude, and forced labor (Article 11). In Part III, the Convention extends legal representation rights to migrants of legal and illegal status, with Articles 18 and 20 introducing legal recognition and equal treatment of migrant workers in national tribunals and outlawing imprisonment for failure to fulfill contractual obligations. Finally, economic and social rights, such as the rights to social security, emergency medical care, employment opportunities,

and trade union participation, are recognized for all migrant workers, and Part IV extends further social protection rights to workers of legal status.

The ICMWR therefore both overlaps with previously codified rights and extends specific economic and social rights to migrant workers and members of their families residing with them in a state of which they are not nationals (Nafziger and Bartel 1991). While the contested includability of economic and social rights in governments' obligations to their citizens already animates scholarly debates on human rights (Sen 2004), the ICMWR further stretches the argument's conceptual soundness by granting economic and social rights to workers without citizenship qualifications. However, significant skepticism concerning the ICMWR's argument that social protection provisions should be unlinked from citizenship requirements still persists.

The ICMWR on the African Continent

In addition to the refusal of the United States and Western European countries to sign the ICMWR, heterogeneity in preference and participation also affects the African continent. African state signatories include Rwanda, Senegal, Morocco, Mali, Lesotho, Uganda, Niger, Ghana, Mauritania, Cape Verde, and Burkina Faso; however, with the exception of Nigeria (Adedokun 2013), primary migrant-receiving states such as South Africa, Kenya, and Ethiopia have neither signed nor ratified the treaty. In 2014, Ethiopia replaced Kenya as the largest refugee-hosting country in Africa and the fifth largest worldwide (UNHCR 2015). African migration literature has in fact shown that the continent's population is extremely mobile, at the internal, regional, continental, and transcontinental levels (Adedokun 1983). The *International Migration Report* published in 2002, the first report of its kind, shows that out of a total of 70.6 million migrants from "Less Developed Regions" (LDRs) combined in 2000, African states collectively generated 16.2 million migrants representing approximately 22 percent of world migration numbers (Olowu 2007).

Despite the limited and heterogeneous state-level ratification, African institutions have positively received the efforts of the ICMWR to standardize migration policy with a rights-based approach. In 2006, the African Union adopted its Migration Policy Framework for Africa, which expresses the need for a comprehensive migration policy across the continent (Van Eck and Snyman 2015). The policy framework calls on member countries to adopt principles from the ILO's 1949 and 1975 Conventions and from the ICMWR (Van Eck and Snyman 2015). Notwithstanding the aforementioned formal recognitions, disagreement within the academic community persists as to the efficacy of AU instruments for the regulation and protection of migrants, with Olivier (2012) arguing that the adoption, implementation and monitoring of international and regional standards appear to be problematic in relation to the accessibility to South African social security benefits for Southern African Development Community (SADC) country citizens. Regional policy solutions within the African continent are another institutionalized method used to harmonize social protection standards across African states. For example, member states of the Economic Commission for West Africa (ECOWAS) have agreed on a "Common Approach to Migration" and on establishing a protocol that ensures the free intra-regional movement of persons within the regional economic zone. Furthermore, all ECOWAS states are held accountable to the ICMWR and to Article 59 of the ECOWAS Treaty: "Citizens of the community shall have the right of entry, residence and establishment and Member States undertake to recognize these rights of Community citizens in their territories in accordance with the provisions of the Protocols relating thereto" (ECOWAS Commission 2008, 4). In addition to the ECOWAS regional economic zone, in August 2003, the SADC heads of state signed the

Charter of Fundamental Social Rights. Within the Charter, the SADC Social Security Code encourages member states to facilitate the exportability of benefits, however it does not yet include provisions for the rights of irregular migrant workers (Van Eck and Snyman 2015). As a consequence, authors Van Eck and Snyman (2015) admonish SADC member states such as Botswana, citing the 2007 World Bank Report to highlight the government's "exclusive approach with respect to social services for non-citizens and portability of these services in SADC" (Van Eck and Snyman 2015, 96). Social assistance is therefore generally limited to citizens only and is not rights-based, which means that those who are in need of social assistance do not have a legal basis to claim social security benefits. Institution strengthening should continue as a priority in order for African continental governance and overall global governance institutions to promote rights-based migration management outcomes, according to Van Eck and Snyman (2015), and UNESCO (2003).

Developing a Normative Framework for Migrant Rights: The Institutionalization Critique

After the practical analysis of what has been done and what most importantly has failed to be accomplished at the global governance level in terms of implementing an accountable rights-based safeguard for migrant workers and their families, a normative interpretation is required to dig deeper into the puzzling failure of the ICMWR to achieve international recognition. The rights-based debate is further complicated when social and economic rights are to be granted without citizenship or residency as argumentative bases. To construct and evaluate a normative framework for the ICMWR's ineffective ratification efforts and implementation outcomes, Amartya Sen's institutionalization and feasibility critiques will serve as the blueprint for the analysis.

In "Elements of a Theory of Human Rights," Sen's (2004) institutionalization critique first establishes human rights as ethical requirements that extend beyond delineated duties in structuralist frameworks. Structuralist concerns as argued by Onora O'Neill cite the weakness of freestanding "welfare rights" in international human rights regimes: "they must be institutionalized: if they are not there is no right" (O'Neill 2000, 132). Sen instead argues that the current unrealizability of any accepted human right does not, by itself, convert that claim into a *non-right*, drawing from the Kantian distinction between perfect and imperfect obligations. The definition of perfect obligations holds that specific persons have to perform particular acts to uphold the stated duty. On the other hand, imperfect obligations are ethical requirements that stretch beyond fully delineated and codified duties (Kant 1788, in Sen 2004, 321–22). According to the imperfect obligation approach, if economic and social rights cannot be realized because of inadequate institutional capacity, then to work for institutional expansion or reform can be part of the imperfect obligations generated by the recognition of these rights. Therefore, depending on institutional capabilities, the implementation of economic and social rights may call for both perfect and imperfect obligations on behalf of governments and human rights agents. As Sen concludes: "Imperfect obligations are correlative with human rights in much the same way that perfect obligations are" (Sen 2004, 319).

The imperfect obligations approach pushes the rights-based argument into the field of consequentialism, which debates the issue of exact correspondence between authentic rights and precisely formulated correlate duties. While strict consequentialism argues that correspondence exists only when a right is institutionalized, a more nuanced approach such as Sen's imperfect obligation argument can allow for greater cooperation among human rights actors and for the overlap of human rights and development discourses. Ruhs and Chang (2004) apply the

consequentialist framework specifically to migration human rights by considering the desirable degree of consequentialism in the ethical evaluation of public policies in their article “The Ethics of Labor Immigration Policy.” The authors coin the expression “bundle of rights” to argue that the impact of immigration on conventional outcome parameters in economic analysis depends on the rights package afforded to migrant workers (Ruhs and Chang 2004). Migrant workers’ rights change parameters such as economic efficiency and equity outcomes for the state, and a consequentialist understanding of migrant rights affects the interpretation of their obligations and outcomes.

The Feasibility Critique

The feasibility critique on the principle of holding states accountable for the social protection and equality of irregular migrant workers asks the fundamental question: should recognized human rights, of necessity, be wholly accomplishable? Arguing in terms of feasibility poses a challenge to the conditions for the cogency of a human right, placing importance on its realization and fulfillment rather than on its intrinsic moral value. Major obstacles to the safeguarding of the rights of migrant workers include the compatibility of international human rights treaties with domestic legislation and that international institutions cannot suffice as the primary sites of the struggles for human rights (Donnelly 1994). For example, domestic legal regimes must have the resources necessary for the transposition of international law, but often have differing instruments, legal structures, and enforceability mechanisms. Consequently, a second argument in favor of focusing on the feasibility of a human right is the high cost of developing the infrastructure required to implement the ICMWR, due to the differing levels of resources in individual states, the number of migrant workers present within national borders, and the state’s position of power in the global economic and political system. Additionally, various political obstacles hinder a government from granting greater economic and social rights to irregular migrants, such as domestic sentiments of nationalism and nativism, and incomplete welfare provision for citizens. Lastly, while the safeguarding of migrant human rights is often considered to be a “pull factor” that increases migration flows, Article 68 in the ICMWR addresses this concern by stating the Convention’s aim of reducing the employment of irregular workers by removing incentives for employers to exploit irregular migrants through giving the latter equal rights.

Sen addresses the feasibility critique by focusing on public reasoning as a necessary and beneficial strategy for ensuring civic engagement and creating solutions for rights-based policy. Sen argues that a theory of human rights “cannot be sensibly confined within the juridical model in which it is frequently incarcerated” (Sen 2004, 319). Public recognition and discourse can instead figure in as imperfect obligations generated from the drafting and signing of human rights instruments such as the ICMWR. In addition to Sen’s public reasoning focus, I further argue that the heterogeneity in human rights actors beyond the role of the state further strengthens the case for the ratification of the ICMWR despite the feasibility critique, because of the Convention’s role as a policy guide for non-state actors and advocacy work. Sen’s framework can in fact be used when discussing the potential role of non-state actors in using the ICMWR: “Human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms” (Sen 2004, 319). However, NGOs can play a relevant role in promoting human rights and the rights of migrant workers in Africa, as discussed in Makau Mutua’s (2009) *Human Rights NGOs in East Africa: Political and Normative Tensions*. It is important to critically consider the liberal elites in charge of

international NGOs on the African continent, particularly in terms of how their conditionality, neo-colonial operational mandates, democratization in management, and self-interest must be weighed against their promise and mission in any interpretation of Sen's human rights ethical framework.

Concluding Remarks

This paper has introduced a normative framework of analysis that uses structures and logical reasoning from Sen (2004) and Ruhs and Chang (2004), and takes into account Mutua's (2009) critical work, to support the decision to ratify the ICMWR. Such a framework can make use of the imperfect obligation framework, the consequentialism of rights allocation, the role of public discourse, and the heterogeneity in human rights actors to ensure migrant workers' rights can be safeguarded. Mutua's (2009) work further contextualizes the promises and pitfalls of the international human rights regime and international actors within the African continent. Despite the normative support outlined throughout this article for the ICMWR and the strengthening of global governance and standard-setting for migration management purposes, a final problematization of the exogenous structures within which migrant workers operate is necessary for a comprehensive policy recommendation for global migration management priorities and the African continent's related role. African mobility and African governments operate within the nation state political system and the predominantly neoliberal economic system, which affect the drafting, ratification, and implementation of the ICMWR.

The ICMWR establishes a narrow definition of migrant workers and by extension the members of their families (Article 2 and Article 4), thereby inextricably tying migration rights to labor rights. Rendering economic and social rights directly dependent on labor provision results in three potential pitfalls worthy of consideration: the exclusion of non-labor related migration, the commodification of transnational labor, and an emphasis on individual economic decisions as opposed to the structural realities influencing individuals. In terms of the exclusion of non-labor related migration, the ICMWR fails to consider other forms of migration that would not qualify migrants for refugee status, such as migration induced by climate change. The ICMWR renders social protection directly related to labor protection, which raises concerns as to the commodification of labor. Researcher Dejo Olowu, in "Globalization, Labour Migration and the Rights of Migrant Workers in Africa," states: "It is my contention that labor does not migrate; it is those men and women who provide it in form of services, skills and strengths that are capable of making the same available for productivity beyond the frontiers of their own states. It is therefore the plight, rights, and interests of these human beings that should form the essence of scholarly, institutional and policy discussions" (2007, 67). Olowu's commodification criticism of the international human rights regime's treatment of labor highlights the double-edged nature of generating comprehensive legal instruments to safeguard international migrant workers' rights. Preibisch, Dodd, and Su (2016) also address the incomplete vision of the ICMWR, but instead of labor commodification, the authors use the capabilities approach to criticize the Convention's inability to address the greater structural inequalities affecting the microeconomic decision-making of workers and migrants. They argue that "the emphasis on individual economic decisions obscures the structural realities of the global political economy including growing inequality between countries and within communities, development failures, and poor governance" (2016, 5–6). Overall, the ways in which the ICMWR is currently drafted, signed, and implemented imperfectly reflect an extractive global economic system that does not yet recognize all migrant labor as equal in value, and in a political system that is unable to positively

assure economic and social rights for all people, and not even in some cases for qualified citizens.

Despite the stated obstacles, African states and the global community should push for the ratification of the United Nations' ICMWR, a thesis that finds normative support in Sen's human rights ethical framework and practical support from the heterogeneity of human rights actors beyond the nation state. However, the Convention needs to be problematized in terms of African mobility in a global colonial history and postcolonial context, the risk of human labor commodification within the rights-based approach, and the institutional and feasibility critiques of the Convention's limited relevance, efficiency, and implementation. While a solid normative framework for the protection of migrant workers' rights can support the Convention's prerogatives, it is only the start of the journey toward the safeguarding of rights for migrants of all legal statuses and of all geographical origins and destination routes.

References

- Adedokun, Olaide A. 2013. *The Rights of Migrant Workers and Members of their Families: Nigeria*. UNESCO Series of Country Reports on the Ratification of the UN Convention on Migrants. UNESCO: International Migration and Multicultural Policies Section. <http://www.cetim.ch/legacy/fr/documents/UNESCO-CMW-Nigeria.pdf>.
- Donnelly, Jack. 1994. "Post-Cold War Reflections on the Study of International Human Rights." *Ethics & International Affairs* 8: 97–117. doi:10.1111/j.1747-7093.1994.tb00160.x.
- ECOWAS Commission. 2008. "ECOWAS Common Approach to Migration." 33rd Ordinary Session of the Head of State and Government, Ouagadougou, January 18. <http://www.unhcr.org/49e47c8f11.pdf>.
- Hune, Shirley. 1985. "Drafting an International Convention on the Protection of the Rights of All Migrant Workers and Their Families." *The International Migration Review* 19 (3): 570–615. doi:10.2307/2545857.
- Kant, Immanuel. [1788] 1956. *Critique of Practical Reason*. Translated by L. W. Beck. New York: Bobbs-Merrill.
- Mutua, Makau. 2009. *Human Rights NGOs in East Africa: Political and Normative Tensions*. Philadelphia: University of Pennsylvania Press.
- Nafziger, James, and Barry Bartel. 1991. "The Migrant Workers Convention: Its Place in Human Rights Law." *The International Migration Review* 25 (4): 771–99. doi:10.2307/2546844.
- Niessen, Jan, and Patrick Taran. 1991. "Using the New Migrant Workers' Rights Convention." *The International Migration Review* 25 (4): 859–65. doi:10.2307/2546849.
- Olivier, Marius. 2012. "Enhancing Access to South African Social Security Benefits by SADC Citizens: The Need to Improve Bilateral Arrangements Within a Multilateral Framework. (Part I)" *SADC Law Journal* 1: 121–48.
- Olowu, Dejo. 2007. "Globalization, Labour Migration and the Rights of Migrant Workers in Africa." *Malawi Law Journal* 1 (1): 62–79.
- O'Neill, Onora. 2000. *Towards Justice and Virtue*. Cambridge: Cambridge University Press.
- Preibisch, Kerry, Warren Dodd, and Yvonne Su. 2016. "Pursuing the Capabilities Approach Within the Migration–Development Nexus." *Journal of Ethnic and Migration Studies* 42 (13): 2111–27. doi:10.1080/1369183X.2016.1176523.

- Ruhs, Martin. 2013. *The Price of Rights: Regulating International Labor Migration*. Princeton: Princeton University Press.
- Ruhs, Martin, and Ha-Joon Chang. 2004. "The Ethics of Labor Immigration Policy." *International Organization* 58 (1): 69–102.
- Sen, Amartya. 2004. "Elements of a Theory of Human Rights." *Philosophy Public Affairs* 32 (4): 315–56. doi:10.1111/j.1088-4963.2004.00017.x.
- Tharakan, Siby. 2002. "Protecting Migrant Workers." *Economic and Political Weekly* 37 (51): 5080–81. <http://www.jstor.org/stable/4412979>.
- United Nations Economic Commission for Africa. 2016. "Migration is an Opportunity for Africa, if Managed Properly." April 2. <http://www.uneca.org/stories/migration-opportunity-africa-if-managed-properly>.
- United Nations General Assembly. 1990. *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*. December 18. A/RES/45/158. <http://www.refworld.org/docid/3ae6b3980.html>.
- United Nations High Commissioner for Refugees (UNHCR). 2015. "Worldwide Displacement Hits All-Time High as War and Persecution Increase." UNCHR, June 18. <http://www.unhcr.org/en-us/news/latest/2015/6/558193896/worldwide-displacement-hits-all-time-high-war-persecution-increase.html>.
- United Nations Regional Information Centre for Western Europe. 2017. "Migration - Mankind's Oldest Poverty Management Strategy." March 10. <http://www.unric.org/en/latest-un-buzz/30501-migration-mankinds-oldest-poverty-management-strategy>.
- Van Eck, Stefan, and Felicia Snyman. 2015. "Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community (with Emphasis on Botswana and South Africa)." *Journal of African Law* 59 (2): 294–316. doi:10.1017/S002185531500011X.