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The Definition of 'Migrant Worker' in International Law: Adequacy and Gaps

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Abstract

This paper critically examines the conceptualization of a migrant worker in international law. It emphasizes the importance of definitional clarity for understanding the concept of a migrant worker in particular. The paper further contests the qualification of certain categories of migrants as migrant workers under ILO Convention No. 97 concerning Migration for Employment and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 1990, arguing they prima facie fail to require the 'attainment of the status of a worker' for any migrant to qualify as a migrant worker, which should be the prerequisite for validating someone as a worker, using a doctrinal legal research approach.

Keywords: definition, migrant worker, international law, adequacy, gaps

1. Introduction

The importance of the definition of concepts in Law cannot be overemphasized. Conceptual definitional clarity aids understanding of concepts and situates them in context whenever the need arises. The concept of a 'migrant worker' is one of those concepts in international law that needs definitional clarity; since, as per the definition of the concept 'migrant worker' in relevant international law instruments, one may be tempted to misconceive its true meaning to the effect that other categories of migrants are considered to fall within the prism of migrant workers.[1]

Therefore, because of this definitional misconception in relevant international law instruments, this paper becomes very relevant, as it probes into the definition of the concept of a 'migrant worker' in relevant international law instruments and proffers a classical definition of the concept as ought to be understood in practical International Labour law. In doing this, the paper examines the choice to work as the basis for the attainment of the status of a worker, it discusses the methodology adopted for the study, it further categorizes the term 'migrant worker' as used in this paper, it also contextualizes international law as used in this paper, it further probes into the definitions of the concept of a 'migrant worker' in relevant international law instruments, it then criticizes the definition of the concept of a 'migrant worker' as propounded in relevant international legal frameworks and finally ends with a conclusion and a recommendation.

2. The Choice to Work as the Basis for the Attainment of the Status of a Worker (Migrant Worker)

The protection of the rights of workers and provision of decent working conditions has been man's major concern for a very long time. This idea was first coined 'Decent Work' by the ILO in a report published in 1999 when it described the goal of decent work as 'not just the creation of jobs, but also the creation of jobs of

[1] Other categories of migrants are included in the definition of migrant workers.

acceptable quality.'[1] Justice Forbang in *Akamangwa Martin v. SONARA*[2] described the right to work as 'sacrosanct.' It follows from this judicial statement that citizens' right to work is so important that it cannot be interfered with, and the States are obliged to provide work and guarantee its security and performance by the contractual parties under acceptable conditions.

The right to work is sacrosanct in that it gives mankind the opportunity to be economically empowered. On this view, Mak[3] argues that there is a systematic correlation between poverty and unemployment. This is so in that without the right to work, mankind will be unemployed and will have no means of meeting their daily needs. Unemployment always goes along with poverty and generally hinders socio-economic development. In this way, the right to work is regarded as a valuable activity contributing to human flourishing,[4] a source of identity, self-realization[5] and fulfillment.[6]

It is against this backdrop that most individuals usually migrate within or without a State in search for such employment opportunities in their regions or host countries. When they eventually meet such employment opportunities and accordingly conclude an employment contract thereof, they transcend from ordinary migrants to migrant workers. It follows from this line of reasoning that it is the conclusion of an employment contract with a named employer in the host region or country that gives a migrant the status of a migrant worker and not the mere act of migration. Therefore, migrant workers are migrants *sui generis* in that, despite being ordinary migrants, they have attained a different status from their peers; that is the status of 'a worker' through the conclusion of an employment contract in their host region or State, making them migrant workers.

3. Methodology

The methodology employed in the analysis offered in this paper is purely qualitative. The research method used in accomplishing this methodology is doctrinal which consists of the content analysis of both primary and secondary sources of data. The primary sources of data used here include case law and legislations such as ILO Convention 97 and Recommendation 86 on Migration for Employment 1949, ILO Convention 143 and Recommendation 151 on Migrant Workers, The European Convention on the Legal Status of Migrant Workers 1997, The United Nations Convention on the Protection of the Rights all Migrant Workers and Members of their Families, 1990, amongst others while the secondary sources of data consist of text books, journal articles and websites.

4. The Categorization of Migrant Workers

Migrant workers as conceptualized in this study are divided into two broad categories; we have internal migrant workers and external migrant workers. Internal migrant workers comprises of persons who have journeyed within a country; by moving from one region of the same country to another[7] or by moving within the same region of a country,[8] and have taken up paid employment in the said region or area. Whereas, external migrant workers are individuals who have journeyed out of their country of origin or residence due to unemployment, underemployment, poverty, conflicts and wars, amongst others, and have taken up remunerated activities in their host States.

5. The Conceptualization of International Law in the Context of This Paper

The term International Law as used in this paper includes; relevant United Nations instruments such as the

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[1] www.eurofound.europa.eu/observatories/eurowork/industrial-relations-dictionary/decent-work Accessed on 10/1/2025.

[2] Suit No. HCF/L.011/2000-2001 (Unreported).

[3] Mak, B. (2016). The right to work: Legal and philosophical perspectives. *Industrial Law Journal, 45*(3), 465–475.

[4] Bogg, A. (n.d.). Only fools and horses: Some skeptical reflections on the right to work. In B. Mak (Ed.), *The right to work: Legal and philosophical perspectives*. *Ibid.*

[5] *Ibid.*

[6] Davidov, G. (2016). *A purposive approach to labour law* (p. 43). Oxford University Press. Work is also instrumentally valuable as a source of income which enables mankind to live a decent life. The right to work was a socialist claim resulting from an unemployment crisis due to foreign competition between the French and the English industries to the effect that the French industry could not maintain employment levels. As such, the French government instituted the right to work in a bid to guarantee employment. The right to work was coined by the French socialist leader Louis Blanc in light of the social turmoil of the early 19th century and rising unemployment in the wake of the 1846 financial crisis which led up to the French Revolution of 1848. See generally Priscilla, R. S. (1952). *Revolutions of 1848: A social history* (p. 69). Princeton University Press.

[7] For example, moving from the conflict affected areas of the South West Region of Cameroon to the West and other regions of the country.

[8] Such as the movement of persons from the conflict affected areas (such as; Ikata, Muyenge, Ikliwindi Mile 12 and 16 etc) of the South West Region of Cameroon to stable areas of same region such Limbe, Tiko, and party of Buea.

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICPRMWMF) 1990, ILO instruments such as the Migration for Employment (Revised) Convention, 1949 (ILO Convention 97), the Migrant Workers' (Supplementary Provisions) Convention, 1975 (ILO Convention 143), the Migration for Employment Recommendation (Revised), 1949 (ILO Recommendation 86) and the Migrant Workers' Recommendation, 1975 (ILO Recommendation 151). Regional instruments[1] such as the European Convention on the Legal Status of Migrant Workers, 1997, the Protocol to the treaty establishing the African Economic Community on the Free Movement of Persons, Right of Residence and Right of Establishment, 2018 and supra-national laws such as the ECOWAS Protocol on the Free Movement of Persons and the Right to Residence and Establishment, 1979 also constitutes the content of international law as use in this paper.

6. A Migrant Worker Distinguished from Other Categories of Migrants

Though there are several[2] definitions of the term 'Migrant worker,' unfortunately, some scholars[3] opine that there is no universally acceptable definition of this term. This reasoning is premised on the fact that it is impossible to draw a sharp line between 'migration for work' and 'migration.' This view doesn't hold sway in this paper. The term 'migrant worker' is self-explanatory. As conceptualized in this paper, a migrant worker is first and foremost an immigrant (in the case of external migration) who has attained the status of a worker in his host country by being gainfully employed. Therefore, the term 'migrant worker' cannot be used interchangeably with 'migration for work'[4] or 'migration' since these terms are construed to mean entirely different things. Literally, migration for work has two connotations; it is either migration within or without a State for an anticipated employment or it is a kind of migration within or without a State occasioning the conclusion of an employment contract, be it electronically or through other means. Migration itself refers to the movement of persons within or without a State. It follows that the terms 'migration for work' and 'migration' are not the same as the term 'migrant worker' and as such cannot be taken to mean the same things. However, the second limb of the definition of 'migration for work' as proposed above suggests the attainment of the status of a worker by the migrant and as such can be used interchangeably with the term 'migrant worker'.

Commenting on the absence of a harmonious definition of the term 'migrant worker', Chetail argues that 'migration'; all types of migrations combined, is commonly perceived as 'a movement of people leaving or entering a State, to enter another State in order to reside on a permanent or temporary basis.'[5] This definition, therefore, covers emigration (departure or travel), immigration (arrival in the host country), and residence and possibly return.

In more general terms, a migrant worker can be defined as 'a natural person who leaves or who has left the country in which he /she is resident with the intention of moving to another country, of which he/she does not have nationality for the purposes of employment.'[6]. This reasoning is not *in tandem* with the analysis offered in this paper. Migration for the purposes of employment doesn't qualify someone as a 'migrant Worker.' An immigrant anticipating employment in his/her host country is not yet a migrant worker. They only become migrant workers when they have attained the status of a worker by entering into a valid subsisting contract of employment with a named employer in his/her host country. However, in the situation where the immigrant has already concluded an employment contract with a name employer based in the host country prior to migrating,

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[1] Such the African, the Inter-American and the European regional instruments. Though these instruments do not provide the definition of a migrant worker, they at least safeguard the core labour rights of this caliber of workers.

[2] Article 2 (1) of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, defines "migrant worker" in general terms. The definition includes any person who is to be engaged, is engaged or has already been engaged in a remunerated activity in a State of which he or she is not a national. Excluded from the above definition are personnel of international organizations, persons who are employed by a State outside its territory, investors, refugees and stateless persons, students, trainees, seafarers and workers on an offshore installation provided that they have not been admitted to take up residence and engage in a remunerated activity in the State of employment. On its part article I1 (1) of the ILO Convention No. 97 on Migration for Employment (revised), 1949 defines a migrant worker as a person who migrates from one country to another for the purpose of employment. This definition includes any person who is regularly admitted as a migrant for employment.

[3] See V. Chetail, V. (2008). *Code of international migration law*. Bruylant. Cited in Papinot, C. (2014). *International protection of migrant workers* (PhD thesis, Paris West University Nanterre), p. 19.

[4] This is a situation wherein someone journeyed within or without his/her country with the intention of gaining an employment. Until the said employment is gained, then such a person can be term a migrant worker.

[5] *Ibid.*

[6] At this instance, the said migrant is considered as an alien until he/she acquired the nationality of the said country. See generally the report of Global Commission on International Migration. (2005). *Migration in an interconnected world: New directions for action* (p. 6). GCIM.

he/she remains a migrant worker, since he/she has already attained the status of a worker by concluding an employment contract in the host country prior to migrating. These employment contracts could be concluded from a distance through an online negotiation or through an agent of the employer in the country of departure.

Migrants, and migrant workers in particular, can be placed in numerous, and often multiple categories, as being in a regular or irregular situation, having migrated temporarily or permanently, as being low skilled or high skilled, or as being students, an accompanying family member, refugees, or asylum seekers.[1] What qualifies these categories of migrants for the status of migrant workers is their ability to be gainfully employed in their host countries/communities. It flows from this analytical view point that the qualification of migrants, no matter the types, as migrant workers should be obsolete and not fashionable in classical international labour law. This view, as seen above, is informed by the fact that for one to be term a worker, whether domestic or international, he/she must have attained the status of a worker.

It follows from this line of reasoning that in defining the term 'migrant worker' one has to take into consideration all the categories of migrant workers, be it those under regular and irregular migrations,[2] refugees working in the host countries, migrant students working in the host countries, asylum seekers working in the host country, among others. The choice of these categories of migrants is justified by the fact that the objective of finding a job and better living conditions is one of the main motivations for migration.

In the light of the foregoing definition, the terms migration for work, migrant, and migrant worker should not be used interchangeably. Migration for employment simply means a situation where someone leaves his/her country of origin/residence to another country in view of gaining employment; until such an employment is obtained, he/she remains a migrant and not a migrant worker. Whereas a migrant is anyone who has moved out of his/her country of origin to another country for a variety of reasons, such as studies, business, medical reasons, amongst others. A migrant worker, on its part, is someone who has moved from his/her country/region of origin/residence to another country/region where he/she is gainfully employed in the cases of international and national/domestic migrant workers, respectively.

In line with the above analysis therefore, a person can only become a migrant worker if he/she is gainfully employed in a foreign land/region in the cases of international and domestic migration respectively. In this connection, this researcher does not support the view that upholds students, refugees and migrants for employment as migrant workers. This view is informed by the reasoning that, for one to become a worker, be it a national or international migrant worker, he/she must, first of all, attain the status of a worker, which is usually evidenced by the availability of an employment contract, which could be in writing.[3] It is thus our contention that the basis for according someone the status of a migrant worker should be absolutely premised on his or her attainment of the status of a worker.

While formulating the standards for the protection of migrant workers, members of the ILO and the UN human rights system have addressed themselves to defining this particular group, in order to determine the scope of the envisaged protection standards. For the first time in its history, the ILO tried to formulate a legal definition of 'migrant workers' in its Convention No 97, as 'a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker.'[4] The first limb of this definition remains problematic in that 'a person who migrates from one country to another with a view to being employed' has not yet attained the status of a worker and as such cannot be termed a 'migrant worker' in the strict sense of the word; he/she is simply a migrant.

Some specific groups of workers, such as frontier workers, members of liberal professions and artisans who enter on a short-term basis, and seamen, are excluded from this definition, thus making it narrow and exclusive.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICPRMWMF) 1990 offers us a more comprehensive definition, thus further developing this area. According to this convention, a 'migrant worker' is 'a person who is to be engaged, is engaged, or has been

[1] Global Commission on International Migration. (2005). *Migration in an interconnected world: New directions for action* (p. 6). GCIM. Among the many and complex reasons for such migration are the following: the conflicts and human rights violation, unemployment and/or lack of career opportunities in the country of origin, need for flexible labour force and/or low birth rates in the country of destination, as well as curiosity and entrepreneurship.

[2] That is those who have a valid work contract in the said country as well as those who clandestinely entered the said country and are gainfully employed.

[3] As the case with many employment contracts involving migrant workers.

[4] See Article 11(1).

engaged in a remunerated activity in a State of which he or she is not a national.'[1]

The first limb of this definition (a person who is to be engaged) is not in line with the view of this researcher. In this light, this researcher argues that for a person to be termed a worker, be it nationally or internationally, he/she must, first of all, attain the status of a worker as seen above. This reasoning is premised on the fact that a person who is 'to be engaged' is not yet a worker since, as his/her engagement is still in due course, until when he /she must have concluded the employment contract (attaining the status of a worker), can we term him/her a worker.

However, this definition is more extensive than the definitions in the ILO Conventions and the definitions in other instruments, such as the European Convention on the Legal Status of Migrant Workers.[2] Some categories of migrants, such as frontier workers, project-tied workers and self-employed workers, who were usually excluded from the definition and from the application of the migrant workers' legal framework, are also covered by this definition.[3] Nonetheless, workers employed by international organizations, government employees sent to perform official functions in the host State, persons employed by a State or on its behalf outside the territory to participate in development projects, investors, refugees, stateless persons, students and trainees, seafarers and offshore workers are, for various reasons, excluded from coverage.[4] Whether or not the exclusion is justified, it has slightly limited the application of the Convention.

7. Conclusion

Conclusively, drawing inspiration from the above analysis, it should no longer be fashionable to argue that the term 'migrant worker' has no universally acceptable definition as opined by Chetail. This is so because the conceptual clarification of the term within the context of this paper cannot be overemphasized. Migrant workers, though, are *sui generis*[5], are workers like any other category of workers. It follows that for any migrant, be it a student, refugee, or any other class of migrant, to become a worker as understood in the strict meaning of the word, he/she must have attained the status of a worker by being gainfully employed by a named employer in their host region or country. Thus, by so being employed, the status of such a migrant changes to that of a migrant worker. We therefore submit that provisions of relevant international instruments that upholds migrant students, refugees and persons migrating in anticipation of employment in their host countries as migrant workers, as seen above, should be modified to give the term 'migrant worker' the unique clarification it deserves.

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[1] Article 2 (1) of the ICPRMWMF, 1990.

[2] Article 1 of the European Convention on the Legal Status of Migrant Workers, 1997, defines a migrant worker as 'a national of a Contracting Party who has been authorized by another Contracting Party to reside in its territory in order to take up paid employment.'

[3] Part V (articles 57–63) of the Convention covers these categories of workers.

[4] See article 3 of the ICPRMWMF. The reasons for exclusion and their impact on each specific category of workers have been discussed extensively by Cholewinski. See Cholewinski, R. (1997). *Migrant workers in international human rights law: Their protection in countries of employment* (pp. 153–154). Oxford University Press.

[5] This is because these categories of workers are often seen as vulnerable workers who are often subservient to the labour administration of foreign States.

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