



# Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)

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**Regional Overview of Social Protection for Non-Citizens in the  
Southern African Development Community (SADC)**

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# Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)<sup>1</sup>

## Executive Summary

The social security position of different categories of non-citizens (permanent residents, temporary residents including migrant workers, asylum-seekers, refugees and undocumented migrants) in SADC differs. Their position is influenced by a range of conceptual and contextual factors, with reference to among others a narrow definitional framework predicated on an essentially formal labour market conception of social insurance and limited, discretion-based and embryonic social assistance frameworks; as well as poverty indicators and segmented labour markets in SADC, which impact on their position both as migrants and within social security. This is fortified by the orientation and nature of in particular intra-SADC migration, in terms of which intra-SADC migrants usually end up at the lower end of the labour market. Social security laws often draw distinctions based on nationality and/or residence. In addition, immigration laws execute a major influence, as they invariably make access to and sojourn in a country for several categories of migrant workers and their families dependent on the non-citizen not being or becoming a burden on the State. Despite the major role that generations-long migration movements within SADC have played in both the economic and infrastructural development of several SADC countries and survival at the level of households and individuals, immigration policies in SADC focus on control and deportation, and not on freedom of movement, regional integration and proper respect for the human rights of affected migrants.

The precarious position of migrant workers and their families demands an appropriate response in the form of special protection embedded in or foreseen by a proper policy framework. Such a migration policy framework in SADC needs to be informed by applicable AU policy and SADC standards instruments, by human rights imperatives, and by the need to integrate immigration and social security policies, and should be developed and implemented at both the country and regional level. Furthermore, the conclusion of bilateral agreements with suitable content could go a long way towards extending social security protection to intra-SADC migrants on the basis of equality of treatment, totalisation or aggregation of insurance periods, maintenance of acquired rights, and portability of benefits. This should ideally be undergirded by a multilateral instrument which draws its principled framework from international and regional standards. Also, there is a clear need to prioritise addressing the precarious social security position of certain particularly marginalised migrant groups – especially female and irregular migrants – in accordance with relevant international law and human rights imperatives. The conceptual widening of social security coverage to include at least

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certain categories of informal economy workers is an important step to extend social security protection to intra-SADC migrants, given the fact that the preponderance of migrant workers are to be found in the informal economy. Extension of coverage to the informal sector would further require alternative institutional arrangements, linked to appropriate regulatory responses. Also, there is need for an appropriate human rights framework for the proper treatment of intra-SADC migrants as far as social security is concerned. International standards, comparative best practices, the regional and inter-country response framework and constitutional dispensations are important for the advancement of human rights in this area. Simultaneously this requires a principled approach. In particular, there is from a human rights perspective little justification for the continued discrimination in social security law and policy of non-citizens who lawfully reside in the host country.

The comprehensive task of rolling out appropriate forms of social security protection to intra-SADC migrating non-citizens requires a careful and sensitive consideration of options, priorities and sequencing. The primary starting point, so it would seem, is to revamp and reform the legal and policy frameworks at the national or country level, with reference to the deficiencies and shortcomings in the system. Secondly, there is need to strengthen and expand the current range of regulatory instruments at the regional level and to enter into appropriate bilateral arrangements, informed by a tailor-made multilateral instrument for the SADC. Thirdly, it is necessary to ensure that sufficient attention is paid to prioritising, in the reform of national and regional legal and policy frameworks, the position of groups that are particularly marginalised, especially women and irregular/undocumented intra-SADC migrants and, from a broader perspective, informal economy migrant workers.

JEL Codes: F22, H55

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# 1. Introduction

This report gives an overview of the social security status of non-citizens in the Southern African Development Community (SADC),<sup>2</sup> describes measures and efforts to support labour mobility through enhanced social security protection of non-citizens in SADC, and makes recommendations as to how to improve the social security status of the said non-citizens, including through the portability of acquired benefits and other cross-country co-ordination arrangements. After dealing with the relevant conceptual framework, the report commences with a section highlighting the current diversity of social security systems in SADC countries and the problems this diversity creates for the mobility of people in SADC and their social security status. Restrictions contained in the legal system are in particular emphasised.

The next section gives a high-level overview of those developments, initiatives and measures at a national, regional and international level which enhance the social security status of non-citizens in SADC, with specific reference to:

- at a national level, constitutional and statutory provisions, as well developments in the jurisprudence;
- at an inter-country level, bilateral arrangements aimed at regulating the labour mobility and social security status of (SADC) non-citizens when they migrate within the region;
- at a regional level, the impact of institutional structures and regional (SADC) instruments aimed at regulating and enhancing the social security status of non-citizens, with specific reference to the provisions of among others the SADC Treaty, the Charter of Fundamental Social Rights in SADC ("Social Charter"), the recently adopted Code on Social Security in SADC and the Draft Protocol on the Facilitation of the Movement of Persons; and
- at an international level, the impact of international standards, in particular those international standards to which SADC Member States subscribe, on the social security status of non-citizens.

Finally, based on this descriptive and analytical section, the report proceeds with an analysis of how the problems experienced by non-citizens in SADC in social security terms, might be solved, where the shortcomings of the current initiatives are, and how to overcome these shortcomings. In this regard this final part also considers the potential to introduce cross-border social security arrangements, with particular reference to the maintenance of acquired social security rights, the aggregation of insurance periods, and the portability of social security benefits. It furthermore reflects on a range of other measures which need to be introduced in order to enhance and standardise the social security position of intra-SADC migrants, with reference to:

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<sup>2</sup> The Southern African Development Community (SADC) consists of 15 Member States: Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

- Developing an appropriate SADC migration agenda and policy framework;
- Addressing the precarious social security position of certain particularly marginalised migrant groups – especially female and irregular migrants;
- Developing integrated labour market policy responses in the SADC region, with emphasis on extending social security coverage to migrant workers in the informal economy; and
- Adopting an appropriate human rights and principled framework, including the need to prioritise appropriate country reforms.

## 2. Conceptual framework

For purposes of this report, two issues of a definitional nature need to be clarified. **Firstly**, the report deals with the *social protection* status of non-citizens. At a primary level, this encompasses social security measures, i.e. measures aimed at preventing social risks from arising, reintegrating and rehabilitating persons when these risks do occur, and compensating people when relevant. Traditionally, nine classical risks, which by and large form the basis of a range of international and regional standards, have been identified: health care; retirement; survivors; disability; maternity; occupational injuries and diseases; unemployment; sickness; and family benefits.<sup>3</sup> Social security systems in Southern Africa invariably employ these narrow risk-based approaches and also still rely on the traditional distinction between social insurance and social assistance being embedded in the concept of social security. In terms hereof social insurance denotes contributory- and risk-based arrangements giving rise to fixed benefit payments aimed at income maintenance, while social assistance refers to tax-based benefit payments on a universal or targeted basis, aimed at minimum income-support.<sup>4</sup>

It is suggested that one should refrain from defining the concept of social security too narrowly. In particular in the African and more specifically Southern African context, where poverty is endemic, where people are exposed to a range of risks not traditionally captured by the social security concept (e.g. droughts, calamities, natural disasters, HIV/AIDS), and where the focus often is on satisfying immediate needs rather than meeting long-term risks, it may be necessary to adopt alternative or additional nomenclature that would sufficiently capture the broad range of social security

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<sup>3</sup> ILO Social Security (Minimum Standards) Convention, 102 of 1952; ILO *Introduction to Social Security* (ILO 1989) 3.

<sup>4</sup> ILO *Introduction to Social Security* (ILO 1989) 3-5; Pieters, D *Introduction into the Basic Principles of Social Security* (Kluwer 1993) 5. Social assistance could be either targeted at those who are poor (e.g. through income and means testing) or universal.

measures,<sup>5</sup> as well as the chronic forms of deprivation alongside the temporary adversity to which people living in developing countries are exposed.<sup>6</sup>

For Southern African purposes, and in accordance with recent conceptual developments internationally, it may be necessary to be mindful of, at a secondary level, the wider social protection approach, rather than relying on the more limited social security notion. Internationally, this concept is increasingly used alongside, as an alternative to, and/or as a wider concept than the notion of social security. According to some commentators, social protection denotes a general system of basic social support which is no longer linked to the regular employment relationship, and which is founded on the conviction that society as a whole is responsible for its weaker members. In other words, the term denotes a system of general welfare support and protection.<sup>7</sup> Essentially, social protection encompasses social security and non-income transfers, as well as developmental strategies and basic support to ensure an adequate standard of living for everyone. The need to ensure an adequate standard of living forms the basis of the human right to social security. It is contained in international and regional, also SADC instruments,<sup>8</sup> is embedded in the Millennium Development Goals,<sup>9</sup> and goes beyond mere poverty relief.<sup>10</sup>

According to the Asian Development Bank, social protection is seen as "consisting of policies and programmes designed to reduce poverty and vulnerability by promoting efficient labour markets, diminishing people's exposure to risks, enhancing their capacity to protect themselves against hazards and interruption/loss of income."<sup>11</sup> The Bank suggests that these policies and programmes that are designed to reduce poverty and vulnerability encompass five key areas, namely labour market policies and programmes, social assistance/welfare assistance, social insurance, child protection measures and micro and area-based schemes.

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<sup>5</sup> Such as indirect forms of social security (e.g. essential housing, nutrition) and informal forms of social security. See among others Devereux, S *Social protection mechanisms in Southern Africa* (Institute of Development Studies 2006). See also Olivier, M "The concept of social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 2, on which the following paragraphs are based.

<sup>6</sup> See Ahmad, E, Drezé, J, Hill, J & Sen A *Social Security in Developing Countries* (Clarendon Press 1991) 43.

<sup>7</sup> Von Maydell, B "Fundamental Approaches and Concepts of Social Security" in Blanpain, R *Law in Motion* (The Hague 1997) 1034.

<sup>8</sup> See par 7.2 below.

<sup>9</sup> See par 4.1.1.2 below.

<sup>10</sup> The South African-based Committee of Inquiry into a Comprehensive System of Social Security for South Africa (see note 12 below) indicated that (comprehensive) social protection operates through a variety of mechanisms, embracing a package of social protection interventions and measures, namely: (i) measures to address "income poverty" (provision of minimum income); (ii) measures to address "capability poverty" (provision of certain basic services); (iii) measures to address "asset poverty" (income-generating assets); and (iv) measures to address "special needs" (e.g. disability or child support) (Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report 2002) 38, 41-42).

<sup>11</sup> Asian Development Bank *Social Protection* (2007) 1, accessed at <http://www.adb.org/SocialProtection/default.asp>

In a report released by the *Committee of Inquiry into a Comprehensive System of Social Security for South Africa*, the Committee notes the description afforded by the United Nations Commission on Social Development, namely that:

*"Social protection embodies society's responses to levels of either risk or deprivation... These include secure access to income, livelihood, employment, health and education services, nutrition and shelter."*<sup>12</sup>

So understood, it is also necessary to underscore the importance of the fact that social protection (as is the case with the narrower concept of social security) encompasses much more than public measures. While traditionally it was maintained that social security operates through public measures,<sup>13</sup> modern social security thinking suggests that an operational division of social security is needed, as opposed to describing the existing patchwork of schemes and operations that may fit experiences of social protection. It is thus suggested that social, fiscal and occupational welfare measures – collectively and individually – whether public or private or of mixed public and private origin, be taken into account when developing coherent social security policies. In a region such as SADC, such an approach may not only be advisable, but also necessary, in order to fully-utilise limited resources. This implies that a functional definition of social security be adopted, which includes all instruments, schemes or institutions representing functional alternatives for the publicly-recognised schemes – that is to say, all instruments available to society for guaranteeing social security.<sup>14</sup>

From this it follows that not only does one have to take into account a range of relevant state-provided social and fiscal measures, but also other collective, individual and/or

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<sup>12</sup> Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (Draft Consolidated Report 2002) 40. The Committee accordingly adopted the concept of comprehensive social protection which it defined as follows: "*Comprehensive social protection for South African seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development. Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy-approach including many of the developmental initiatives undertaken by the State.*" (41).

<sup>13</sup> The ILO (ILO *Introduction to Social Security* (ILO 1989) 3) defines social security as follows: "*The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children.*" (emphasis added)

<sup>14</sup> Berghman, J "Basic Concepts of Social Security" in Bruylant, T *Social Security in Europe* (Maklu 1991) 18. This is also the approach adopted by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa. In its Report, the Committee remarks: "*Important to the revision of the social security system, is the development of a broader understanding of the inter-relatedness of all areas of social security, whether public, social insurance or private. The financial system is essentially a reflection of the institutional framework of social security. For this reason social budgets, which measure all of social security expenditure, and not merely the on-budget items, have become important measures to evaluate the performance of such spending within a nation.*" See Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* 143.

private arrangements which serve a social security purpose. According to need, non-traditional forms of protection – sometimes referred to as indirect forms of social security – such as study grants, housing-benefits, food and the provision of transport – can, in this way, be made part of the social security concept.<sup>15</sup> Informal arrangements, forms of family-solidarity and private insurance aimed at guaranteeing social security could also be integrated within the broader social security framework.<sup>16</sup> This is of particular importance to developing countries in Southern Africa, where the traditional social security contingency approach is either unaffordable or unable to address the essential issues and perceived needs associated with social insecurity at the core level. The risk management approach advocated by the World Bank also recognises the multi-measure framework needed to fully provide for social protection coverage in the developing world. According to this approach risk management strategies entail both a mix and a balancing of informal, market-based and public or government-provided arrangements in order to deal effectively with risks at the level of prevention, mitigation and coping. These arrangements should, therefore, be seen as complementary.<sup>17</sup> This becomes evident when regard is had, amongst other things, to the tendency of so-called informal risk management mechanisms to break down when faced with macro-type or covariate risks, such as HIV/AIDS or long-term unemployment.<sup>18</sup>

**Secondly**, it is imperative to consider the distinctions in social protection status of different categories of non-citizens. Essentially, the following broad categories of non-citizens are recognised, namely permanent residents, temporary residents, refugees, asylum seekers, and irregular/undocumented migrants. Migrant workers constitute a subset of temporary residents and are often treated separately in the SADC context, as is apparent from the labour agreements discussed below.<sup>19</sup> Refugees, as is the case with asylum-seekers, also constitute a separate category worthy of special protection, at least in international law.<sup>20</sup> The social protection status of these different categories could differ vastly. This report reflects on these distinctions and difference in status in the SADC context, to the extent required.

### 3 Migration in SADC: the contextual framework

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<sup>15</sup> See above.

<sup>16</sup> ILO *Introduction to Social Security* 19; Berghman "Basic Concepts of Social Security" 18. See in particular Olivier, M & Kaseke, E *Informal social security and formal social security: developing an integrative approach* (Paper prepared for the SADC Core Group of Social Security Specialists' Regional Conference on "Social Security in the Making: Developments in the Informal Economy and Informal Social Security", Gaborone, Botswana, 29-30 November 2004).

<sup>17</sup> Holzmann, R "Risk and Vulnerability: The forward looking role of social protection in a globalizing world" in Dowler, E & Mosely, P (eds) *Poverty and Social Exclusion in North and South* (Routledge 2002) par III.

<sup>18</sup> *Ibid.*

<sup>19</sup> See par 6 below.

<sup>20</sup> See par 8.2 below.

### 3.1 Migration data, nature and trends; historical perspectives

Increased movement of people, including migrants, across national borders has become a hallmark of the modern era. World-wide, there are 175 million people who are currently not residing in their countries of origin. Of these, 90 million are migrant workers.<sup>21</sup> There are essentially two reasons why people migrate: political and economic. This is true of SADC as well. Political migration has largely been the result of instability in countries such as the DRC and, earlier, Angola and Mozambique. Economic migration appears to be by far the most prevalent form of migration: "The chief motive for the majority of migrants is without doubt the pursuit of better living standards for themselves and for their families."<sup>22</sup> Also within SADC, the majority of migrants target countries with better economies. Therefore, "the migration flow is towards Botswana, Namibia and South Africa because these countries have stronger economies and also experience skills shortages."<sup>23</sup> These countries, therefore, offer migrants better prospects for improving their quality of life."<sup>24</sup> South Africa in particular attracts by far the majority of intra-SADC migrants.<sup>25</sup> From the available evidence, subject to some exception,<sup>26</sup> it appears that most of the migration from SADC is actually to other SADC countries: intra-SADC movement is therefore the prevailing characteristic of migration from SADC countries.<sup>27</sup>

In fact, migration has been a long-standing feature of the labour market framework in Southern Africa, in particular as far as work on the mines and in agriculture is

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<sup>21</sup> ILO *Changing patterns in the world of work, Report of the Director-General, ILC, 95<sup>th</sup> Session* (ILO Geneva 2006) 26; Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 1.

<sup>22</sup> Stepanek, M & Skorpik, J *Social Security in a long life society* (Paper presented at the ISSA 4<sup>th</sup> International Research Conference on Social Security, Antwerp, 5-7 May 2005) 3.

<sup>23</sup> In terms of the traditional classification a distinction is drawn between labour-exporting and labour-importing countries (i.e. in particular South Africa); however, some traditionally labour-exporting countries also receive migrant streams, such as the DRC, Tanzania, Zambia and Zimbabwe: Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush, J *MIDSA Report No 1* (IDASA & Queens University 2004) 76.

<sup>24</sup> Kaseke, E *The social security context of migration* (Paper presented at an International Conference on Migration and Social Security in SADC: Prospects and Challenges, University of Johannesburg, 3-4 October 2007) 2. The main reason for migration within Southern Africa therefore is to amass capital and income: Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 17.

<sup>25</sup> For example, a recent five country study on intra-SADC migration revealed that 86% of migrants from the said countries (Botswana, Zimbabwe, Lesotho, Swaziland and Southern Mozambique) are currently working in South Africa: Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 3.

<sup>26</sup> At least two exceptions should be noted. The first relates to the tendency of sizeable numbers of citizens of SADC countries to migrate to the erstwhile colonial metropolises. Secondly, South Africa constitutes a unique case, as vast numbers of South Africans have emigrated to a range of countries: see note 27 below for the relevant data source.

<sup>27</sup> See the migration data for SADC: Global Migrant Origin Database Version 4, accessible at [http://www.migrationdrc.org/research/typesofmigration/Global\\_Migrant\\_Origin\\_Database\\_Version\\_4.xls](http://www.migrationdrc.org/research/typesofmigration/Global_Migrant_Origin_Database_Version_4.xls); FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 5.

concerned.<sup>28</sup> Apart from informal cross-border trade-related migration,<sup>29</sup> work on the mines, in particular in South Africa, served as a magnet for both internal<sup>30</sup> and external migrants. As a result, as indicated by Crush *et al*, it could be argued that the industrial development of some countries in the region was only made possible by the use of labour from other countries.<sup>31</sup> From the historical perspective, as is supported by data on modern-day migration movements within SADC,<sup>32</sup> it could be said that systems of labour migration in Southern Africa are deeply entrenched and have become part and parcel of the generations-long movements of people, primarily in search for better living and working conditions.<sup>33</sup>

Migration within SADC is largely voluntary in nature, despite the fact that it is deeply embedded in a search for economic survival and upliftment for those directly affected thereby. To this there are two broad exceptions: human trafficking and internal and external refugee movements. There is increasingly evidence of growing numbers of local smugglers and an expanding network of transnational criminal syndicates involved in a diverse range of human trafficking activities.<sup>34</sup> Furthermore, internally displaced persons (IDPs) in SADC – the result of among others political and military instability in some of the countries – make up 2,9 million of the approximately 13 million IDPs in Africa – more than half of the global total of IDPs and dwarfing the number of refugees.<sup>35</sup> And yet the position is that a coordinated response to the challenge of internal and external refugee movements is lacking in SADC:

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<sup>28</sup> Cf Fenwick, C & Kalula, E *Law and labour market regulation in East Asia and Southern Africa: Comparative Perspectives* Development and Labour Monograph Series, Occasional Paper 2/2004 (2004) (also published as (2005) 21 *International Journal of Comparative Labour Law and Industrial Relations*, 193-226) 16-20.

<sup>29</sup> See generally Peberdy, S *Hurdles to trade? South Africa's immigration policy and informal sector cross-border traders in the SADC* and Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 15-16. It has been reported that cross-border traders and shoppers spent an estimated 10 billion Rands in South Africa in 2005: FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 38.

<sup>30</sup> Internal labour market-related migration, in particular in South Africa, was not always voluntary. The need for labourers initially resulted in the introduction of a plethora of taxes (to be paid in cash – so-called hut or poll taxes), which were applied to push reluctant peasants into wage labour in the region: see generally Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 2-10 (at 2).

<sup>31</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 5-6.

<sup>32</sup> See the discussion above.

<sup>33</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 5-6.

<sup>34</sup> *Ibid* 21-23; 25-26.

<sup>35</sup> Brookings Institution - University of Bern Project on Internal Displacement *Regional Seminar on Internal Displacement in the Southern African Development Community (SADC) Region* (Gaborone, Botswana, 24-26 August 2005) 4-6; Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 6.

*"Individual countries are left to shoulder the burden as best they can with support from international agencies. All are signatories to the major refugee conventions but few have advanced or adequate systems of refugee determination in place. Regional burden sharing is a key concept that SADC could easily turn into a reality."<sup>36</sup>*

For a range of reasons reliable data on the extent and volume of migration within and to SADC is hard to obtain<sup>37</sup> – this also applies to the major migrant-receiving country in the region, namely South Africa.<sup>38</sup> Nevertheless, it is generally accepted that SADC-related migration is characterised by several dimensions, some of which are discussed in more detail in this report:<sup>39</sup>

- (The restructuring of) labour contract migration;
- Declining levels of legal migration to and within the region and the increase in clandestine and undocumented (i.e. irregular) migration, as well as cross-border human trafficking;
- Substantial brain drain migration;<sup>40</sup>
- Mass internal and at times external refugee movements;
- Feminisation of cross-border migration;
- Growth in intra-regional informal cross-border trade; and, generally
- Growth in the volume and complexity of cross-border movements.

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<sup>36</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 13-14. See also IOM *Current migration themes in Southern Africa: An IOM perspective* (IOM (International Organisation for Migration 2005) 5).

<sup>37</sup> Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 12-15. The dimensions of migration in SADC are uncertain: Williams, V *An overview of migration in the SADC region* (Paper presented at SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002) 65. Also in Africa generally, "there are conflicting accounts of the volume of migration in contemporary Africa, reflecting the paucity of data sources and their often poor quality": Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 5. See, however, the data source mentioned in note 27 above.

<sup>38</sup> See Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 3, 6. for data on migrants world-wide and in Africa generally. As remarked above (see note 25 above), the majority of intra-SADC migrants are working in South Africa.

<sup>39</sup> See generally Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 1-2.

<sup>40</sup> It would, however, appear that the brain drain is to countries *outside* SADC. A recent five country survey found no evidence of a massive skills drain to the main migrant-receiving country, South Africa: Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 4. See further Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 19-21 and Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 14).

Migration within SADC has been influenced by a range of factors.<sup>41</sup> Two may be mentioned in particular – the rise in the proportion of migrant workers in contract labour, and the influence of HIV/AIDS. As regards the first issue, the proportion of foreign workers in contract labour, especially on the mines, rose from 40% in the late 1980s to close to 60% today.<sup>42</sup> Secondly, it has been suggested that the HIV/AIDS crisis has increased cross-border movements in the region as well as spurred movements from rural to urban areas.<sup>43</sup> On the other hand, also, the separation of families associated with migrant labour, fuels HIV/AIDS. For example, rates of HIV infection are much higher in the transport sector, the conduit of migration, and in mining communities.<sup>44</sup>

Cross-border migration in SADC is in particular characterised by the precarious position of those who migrate, and their dependants. There are several reasons why this is so. As is apparent from the rest of this report, the inchoate immigration, social security and labour market frameworks applicable to migrants are major contributing factors. For those who migrate, working and living conditions are often, and have often been,<sup>45</sup> inadequate. Cross-border migrants are mostly unskilled or semi-skilled,<sup>46</sup> and are typically found at the lower end of the labour market in receiving countries.<sup>47</sup> Irregular migrants in particular suffer exploitation of their workers' and human rights.<sup>48</sup> Migrants are especially affected by the restructuring of and conditions prevailing at the environments where they are usually employed, such as in mining – as a result of among others labour market flexibility,<sup>49</sup> the mining industry in South Africa shed a large

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<sup>41</sup> See generally Fenwick, C & Kalula, E *Law and labour market regulation in East Asia and Southern Africa: Comparative Perspectives* (2004) 16-20.

<sup>42</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 7: This has been particularly beneficial to Mozambique, as the share of Mozambican workers in contract labour in South Africa rose from 10% to 25% in this period.

<sup>43</sup> IOM *Current Migration Themes in Southern Africa: An IOM Perspective* (IOM Regional Office for Southern Africa 2005) 2, 5; see also SAMP & IOM *HIV/AIDS, Population Mobility and Migration in Southern Africa: Defining a Research and Policy Agenda* (Southern African Migration Project (SAMP) & International Organisation for Migration (IOM) 2005) 21-27, 29-33 and Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6)(Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 7-8.

<sup>44</sup> Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

<sup>45</sup> Poor working conditions of intra-regional migrants in Southern Africa are a historical reality: Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 5-6.

<sup>46</sup> A recent five country survey of intra-SADC migration found that the traditional unskilled and semi-skilled forms of migration to in particular South Africa still dominate: Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 3.

<sup>47</sup> Cross-border migrants are usually found in marginalised categories such as causal work, sub-contracting and informal trading: Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 15.

<sup>48</sup> *Ibid.*

<sup>49</sup> Sub-contracting activities on South African mines have also been growing: *Ibid* 16. By 1994 10% of the total workforce in the gold mines already consisted of contractors (as opposed to 3% in 1987); in the coal mines the figure was 16% (as opposed to 5% in 1987). Apart from specialist services rendered by some of the contractors in the mining industry, several non-core activities, such as cleaning and catering, have also

number of regular jobs between 1989 to 2000, causing a drop in mining jobs from almost 422 000 to about 231 000, with little effort, also on the part of the state, to ameliorate the effects of retrenchments.<sup>50</sup> Also, it has been noted that the mining sector in particular has a stubbornly high rate of disablement and deaths.<sup>51</sup> In addition to their precarious position in SADC labour markets, migrants also suffer from negative official and community responses – this flows from severely restrictive policy and legislative approaches<sup>52</sup> and the wide-spread prevalence of xenophobia, in particular in South Africa.<sup>53</sup>

Another set of characteristics related to intra-SADC migration concerns the question whether such migration is essentially of a temporary or permanent nature. Here it is necessary to distinguish between the temporary orientation of periods of sojourn in the host country for many intra-SADC migrants, and the overall permanent or ongoing nature of migration patterns. It has been reported that a large number of cross-border migrants in Southern Africa remain *circular* migrants – their visits to the host country are generally seen as temporary.<sup>54</sup> As remarked, across a whole range of indices, these migrants tend to prefer living in their own countries.<sup>55</sup> And yet, once immigration linkages are established, they are very difficult to break, and migration flows are almost impossible to reverse.<sup>56</sup> This is in particular true of the mining and agricultural industries in Southern Africa. In fact, a recent five country migration study in SADC indicated that migration is now clearly regarded as a career rather than a passing phase in the working lives of most people who have been migrating<sup>57</sup> – despite the fact that they maintain strong links with the home country.<sup>58</sup> This also flows from the fact that more migrants from the respective countries<sup>59</sup> are older,<sup>60</sup> married<sup>61</sup> and, in most cases, heads of households.<sup>62</sup> In addition,

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been contracted out since the 1980's (Standing, G *et al Restructuring the labour market: The South African challenge (An ILO Country Review)* (ILO 1996) 302).

<sup>50</sup> Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 16.

<sup>51</sup> *Ibid* 17.

<sup>52</sup> See par 4.2 below, and generally Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004).

<sup>53</sup> See Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 27; Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 73; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 6, 34.

<sup>54</sup> "Migrants maintain strong links with home, although their ability to return regularly is influenced by many factors": Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 4.

<sup>55</sup> *Ibid* 8-9, 17.

<sup>56</sup> Reitzes, M *Regionalizing International Migration: Lessons for SADC* (Migration Policy Brief No. 11) (SAMP (Southern African Migration Project)) 18.

<sup>57</sup> Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 2-3, 15.

<sup>58</sup> *Ibid* 4.

<sup>59</sup> I.e. (migration from) Botswana, Lesotho, Southern Mozambique, Swaziland and Zimbabwe: *ibid* 1.

<sup>60</sup> Only 7% of the migrants covered in the survey were under the age of 25; in contrast, 41% were over the age of 40: *ibid* 2. This seems to contradict the statement that evidence suggests that the demographics of

the same study indicates that many migrant sending households have a migration "tradition" which is passed on from one generation to the next – parents and even grandparents worked outside the home country.<sup>63</sup>

SADC country and regional policy frameworks pertaining to migration and the position of migrants, particularly in the host country context, need to factor in these phenomena of intra-SADC migration. Wrong and overly restrictive policy choices may have a devastating effect on household survival and poverty in the region:

*"Restrictive policy interventions that fail to acknowledge migration linkages between sending and receiving countries are likely to depend on coercive measures rather than on consensus. They would disrupt and dislocate survival networks, generating increased poverty by severing the economic lifelines on which many migrants and their dependants rely for survival. No historical linkages existed between labour-receiving countries in western Europe and the sending countries from which they recruited and imported their labour. Despite this,...., once migration linkages were established they could not be broken, and governments found it impossible to reverse migration flows."*<sup>64</sup>

### **3.2 Irregular migration**

Irregular migrants refer to those categories of migrants who lack the (documentary) authority to be and/or remain in the host country.<sup>65</sup> It is, therefore, possible to discern different categories of irregular migrants<sup>66</sup> – ranging from those who, as a result of porous borders, economic instability and weak institutions, are involved in a range of

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movement are changing significantly towards a younger population, as averred in IOM *Current Migration Themes in Southern Africa: An IOM Perspective* (IOM Regional Office for Southern Africa 2005) 2. See further Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 21-23.

<sup>61</sup> As many as 62% of the migrants covered by survey were married: *ibid* 2.

<sup>62</sup> Just over half the migrants were actually household heads rather than ordinary members of the household, although the pattern differed in the respective countries: *ibid* 2-3.

<sup>63</sup> About 50% of the migrants covered in the survey indicated that their parents had been cross-border migrants: *ibid* 3.

<sup>64</sup> Reitzes, M *Regionalizing International Migration: Lessons for SADC* (Migration Policy Brief No. 11) (SAMP (Southern African Migration Project)) 18.

<sup>65</sup> See the following definition offered by Bosniak, L "Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention" (1991) 25 *International Migration* 742: "As a rule, irregular migrants ... are people who have arrived in the state of employment or residence without authorization, who are employed there without permission, or who entered with permission and have remained after the expiration of their visas. The term frequently includes de facto refugees (persons who are not recognized as legal refugees but who are unable or unwilling to return to their countries for political, racial, religious or violence-related reasons), as well as those who have migrated specifically for purposes of employment or family reunion." See also Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS) 2008) 14-56 at 18-19.

<sup>66</sup> Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 4.

clandestine and unlawful cross-border criminal activities,<sup>67</sup> to those who trade and visit informally across borders, and those who are unable to procure the necessary documentation or who have overstayed the period of their authorised sojourn in the host country.

Irregular migration is nothing new in and appears to be wide-spread and on the increase in Southern Africa, although the exact numbers of irregular migrants are a subject of constant debate and conflicting opinion.<sup>68</sup> The negative treatment of these migrants as a result of restrictive government policy and societal distrust, in particular in South Africa, has been widely reported on. Enforcement of strict policies "[t]ends to focus on identifying and deporting violators with the minimum of due process", while the treatment of irregular migrants within SADC, in particular in South Africa, is characterised by "[c]onsistent violation of standards, sub-minimum wages, rampant economic and sexual exploitation, and great instability and fear among migrants."<sup>69</sup> The result is that, in terms of official policy and provision, and borne out by the experience world-wide<sup>70</sup> as well as in several SADC countries, irregular migrants have very limited access to labour law and social protection. This is also largely true of South Africa, in particular as far as the social security and, at least until recently, labour law status of undocumented foreigners is concerned.<sup>71</sup> This leaves them in a precarious position when it comes to claiming rights and benefits, as they may be refused the right to do so,<sup>72</sup> or may not lodge such claims, for fear of being subjected to the operation of restrictive immigration laws and policies.<sup>73</sup> The picture described here applies in particular to the social security position of undocumented intra-SADC migrants, barring those migrants covered under special protective regimes applicable to asylum-seekers and refugees.<sup>74</sup>

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<sup>67</sup> Such as human trafficking – see par 3.1 above.

<sup>68</sup> A recent study estimates that there are 500 000 irregular migrants in South Africa: Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 12-13. See also FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 5.

<sup>69</sup> *Ibid.*

<sup>70</sup> Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 7.

<sup>71</sup> See par 4.2 below. However, in terms of a progressive recent decision of the South African Labour Court, *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC), a foreigner whose work permit has expired, still has a valid employment contract and is entitled to the protection provided for in South African labour laws – in this case the unfair dismissal protection embedded in the Labour Relations Act 66 of 1995.

<sup>72</sup> See, for example, the position until recently of irregular migrant workers in South African labour law: they were deemed not to be employees who are entitled to labour law protection. See, however, note 71 above and par 4.2.3 below.

<sup>73</sup> This has also been the experience in, for example, the US: unclaimed social security benefits, affecting in particular irregular/undocumented Mexican migrants, have been a particular problem in the US. See Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 26-27.

<sup>74</sup> See par 4.2.3 and par 5.2 below regarding the statutory protection available to these categories in, for example, the South African legal system, as confirmed by jurisprudential pronouncements, par 7.2.2 below

Of course, it has to be understood that there are important links between, firstly, the increase in migratory activity within SADC as a result of regional integration; secondly, the general policy and regulatory environment within which intra-SADC migration occurs; thirdly, the specific treatment of irregular migrants in SADC referred to above; and, finally, the extent of irregular migration within SADC:

*"The fundamental contradiction facing most countries is this: enhanced regional integration means greater mobility in the factors of production (including labour) but nationalist sentiments cast foreigners as a threat to the job security of citizens. As long as migration is viewed as a threat not an opportunity, for sending and receiving states, the legal drawbridge will remain up. Without legal means to sell their labour or pursue economic livelihood strategies across borders, migrants will turn to clandestine methods. Already, the predictable result has been a massive "trade" in forged documentation, police corruption as migrants buy the right to stay, and increase in trafficking and the disintegration of sound and professional management practices."<sup>75</sup>*

These are factors which must be carefully considered in the development of an appropriate policy framework. So too is the human rights framework pertaining to irregular migrants an important consideration. This much is evident from a recently adopted SADC social security instrument, jurisprudential developments in South Africa, and from some policy expressions. Article 17.3 of the Code on Social Security in the SADC<sup>76</sup> provides that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country. Also, in terms of recent case law in South Africa,<sup>77</sup> irregular migrants enjoy freedom and human dignity, and are entitled to the constitutional protection embodied in the fundamental rights pertaining to, among others, freedom and security of the person, and property.<sup>78</sup> More recently, in the area of labour law protection, it was held that an undocumented foreigner who, despite lawful residence in South African, no longer held a valid work permit, should still be regarded as having a valid employment contract and thereby qualifying for protection in terms of South African labour laws.<sup>79</sup> Finally, despite

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regarding protection extended at the SADC (instrumental) level, and par 8.2 below regarding applicable international standards.

<sup>75</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 13.

<sup>76</sup> Adopted in 2007.

<sup>77</sup> Apparently in contrast with view earlier held that South African jurisprudence on immigration is not well developed and focuses on "arrest, detention and removals": see Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 18.

<sup>78</sup> See *Lawyers for Human Rights & Another v Minister of Home Affairs* 2004 (4) SA 125 (CC): based on the protection of their human rights enjoyed by "illegal foreigners" the Constitutional Court found that a court order is required if such a foreigner is to be detained on a ship or aircraft for a period longer than 30 days. In yet another judgment, concerning the unlawful eviction of foreigners, it was held that governmental agencies that unlawfully destroyed shacks had to construct habitable shelters for those affected: *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* [2007] SCA 70 (RSA). See now also the recent (19 February 2008) judgment of the Constitutional Court in *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* [2008] ZACC 1 (Case CCT 24/07).

<sup>79</sup> *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

generally restrictive regulation and policy implementation vis-à-vis irregular migrants in South Africa, the White Paper on International Migration<sup>80</sup> recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights<sup>81</sup> owing to the status of a person while in South Africa, including illegal immigrants.<sup>82</sup> One could, therefore, conclude that even irregular/illegal/undocumented non-citizens in South Africa are constitutionally entitled to core social assistance.<sup>83</sup>

### 3.3 Gender dimension

Despite the fact that growing feminisation of migration has become an international trend<sup>84</sup> and that there are indications of increased female migration within SADC,<sup>85</sup> intra-SADC migration is still heavily male-dominated. Most migrants continue to be male.<sup>86</sup> This, however, does not detract from the fact that female migrants in SADC are predominantly concentrated in cross-border trade and informal sector activity,<sup>87</sup> even though in Africa an increasingly growing number of skilled and professional women are also migrating<sup>88</sup> and female migrants are generally better educated than their male

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<sup>80</sup> Of 1999: see GN 529 in *Government Gazette* 19920 of 1 April 1999.

<sup>81</sup> Chapter 2 of the Constitution of the Republic of South Africa, Act 108 of 1996.

<sup>82</sup> White Paper on International Migration par 2.2 - 2.4.

<sup>83</sup> Which does not necessarily imply monetary support, as long as basic amenities are made available. See par 9.3.2 below for further reflection on the social security position of irregular/undocumented non-citizens.

<sup>84</sup> As of 2000, 49% of all international migrants were women or girls – in some developed regions this proportion has reached 51%: UN Economic and Social Council *Gender permeates causes, consequences of international migration* (Commission on the Status of Women, Fiftieth Session) (Economic and Social Council 2006) (WOM/1544) 1. See also Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 54.

<sup>85</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 14; SAMP & IOM *HIV/AIDS, Population Mobility and Migration in Southern Africa: Defining a Research and Policy Agenda* (Southern African Migration Project (SAMP) & International Organisation for Migration (IOM) 2005) 17.

<sup>86</sup> A recent five country study in SADC revealed that in Botswana, Mozambique and Swaziland over 80% of migrants are male: Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 2, 14. See also Dodson, B *Women on the move: Gender and cross-border migration to South Africa* (Southern African Migration Project) (Migration Policy Series No. 9) accessed at <http://queensu.ca/samp/sampresources/samppublications/policyseries/policy9.htm> on 3 July 2006.

<sup>87</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 14; Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

<sup>88</sup> Economic Commission for Africa *International Migration and the achievement of MDGs in Africa* (International Symposium on International Migration and Development, Turin, Italy, 28-30 June 2006) (Sustainable Development Division, Economic Division for Africa) (UN/POP/MIG/SUMP/2006/04) 5.

counterparts.<sup>89</sup> Women are migrants in their own right, as well as partners of migrant male spouses.<sup>90</sup>

It has to be understood that migration within SADC is deeply gendered. On the one hand, as noted by the Economic Commission for Africa, the fact that more professionally educated women may be emigrating, is a "key pathway to reducing gender inequality, reducing poverty and empowering experiences for women."<sup>91</sup> As a result of, among others, this phenomenon, traditional male-dominated power structures tend to weaken among populations. Also, it provides a means of economic sustenance and, in principle, economic independence for some migrating women.<sup>92</sup>

On the other hand, the migration experience often leaves affected women in SADC severely disadvantaged. Several dimensions of this truism could be highlighted, both for those females who migrate and for those who remain behind. For those who migrate, eligibility barriers to enter the host country may appear to be insurmountable. It has, for example, been remarked that the lack of accessible cross-border permits<sup>93</sup> makes the significant number of cross-border traders, who are largely made up of women, subject to corruption and legalistic obstacles in their attempts to engage in informal sector and unskilled economic activity.<sup>94</sup> In fact, difficulties experienced in obtaining legal means to access the host country have resulted in several malpractices, such as marriages of convenience,<sup>95</sup> and in irregular entry by many female migrants.<sup>96</sup> Also, the use of financial means in SADC Member States as a criterion for lawful entry into and residence

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<sup>89</sup> Dodson, B *Women on the move: Gender and cross-border migration to South Africa* (Southern African Migration Project) (Migration Policy Series No. 9) accessed at <http://queensu.ca/samp/sampresources/samppublications/policyseries/policy9.htm> on 3 July 2006.

<sup>90</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 14; see also UN Economic and Social Council *Gender permeates causes, consequences of international migration* (Commission on the Status of Women, Fiftieth Session) (Economic and Social Council 2006)(WOM/1544) 1.

<sup>91</sup> Economic Commission for Africa *International Migration and the achievement of MDGs in Africa* (International Symposium on International Migration and Development, Turin, Italy, 28-30 June 2006) (Sustainable Development Division, Economic Division for Africa) (UN/POP/MIG/SUMP/2006/04) 5.

<sup>92</sup> *Ibid.*

<sup>93</sup> In South Africa, the Immigration Act of 2002 introduced cross-border permits which allow multiple entries for a citizen or resident from another SADC country that shares a border with South Africa. However, these permits do not specifically allow these persons to trade. In addition, they have to have a passport or must be registered with the Department of Home Affairs. Finally, another impediment is that these permits are prohibitively expensive and may not authorise long enough stays in South Africa: FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 19.

<sup>94</sup> Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 74. Stigmatisation, harassment and xenophobic treatment, followed by deportation, appears to characterise the cross-border experience of these women who desire to migrate for economic reasons: Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

<sup>95</sup> *Ibid.*

<sup>96</sup> Women hardly participate in the regulated aspects of cross-border migration: Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

in a country,<sup>97</sup> has a decisive gendered effect, as it effectively amounts to discrimination in favour of men, even though the criterion is formally gender-neutral.<sup>98</sup>

Migration invariably increases the burden of women (spouses) who stay behind, as they have to seek subsistence and take care of the household in a split-family situation.<sup>99</sup> Also, as appears to be prevalent in SADC, they have to look after returning migrants who suffered occupational illness or injury in the host country.<sup>100</sup> Generally, those who remain behind have to retain access to land and housing at home, and have to bear the increasing labour load of the home household.<sup>101</sup> Furthermore, and given the prevalence of traditional cultural and social perceptions, decisions on the use of moneys received through remittances and who should benefit therefrom, effectively impact in the medium and long-run on the family structure, and reinforce the gender division.<sup>102</sup> Also, as recently remarked,

*"Obstacles that women – especially poor women from rural areas – confront in accessing the financial system, credit and land ownership as well as in participating in the labour market and income-generating activities, to a large extent, limit their capacities to benefit from the entrance of remittances in the communities."<sup>103</sup>*

and

*"Women's needs are systematically invisible in development projects financed by remittances sent by migrant associations."<sup>104</sup>*

In addition, all of this has severe implications for migrating women's access to the formal system of social security and to social services.<sup>105</sup> Due to their participation predominantly in informal activity, their often irregular status in the host country, and their household responsibilities in either the home or host country, women exposed to the consequences of migration rarely have the opportunity to participate in and benefit from the essentially formal employment-based social insurance arrangements obtaining in the home and host countries. For most of them, there is also no access to social assistance arrangements.<sup>106</sup>

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<sup>97</sup> See the discussion in par 4.2.3 below.

<sup>98</sup> Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 62.

<sup>99</sup> Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

<sup>100</sup> *Ibid.*

<sup>101</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 14-15.

<sup>102</sup> Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 55.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 11-12.

<sup>106</sup> See the discussion in par 9.3.1.1 below.

It is, therefore, clear that migrant women or female relatives of migrants are more exposed to adverse conditions.<sup>107</sup> Gender and migration in SADC are often dual and intersecting vulnerabilities.<sup>108</sup> Formal equality, coupled with the lack of a formal migration policy which accommodates the gendered effect of migration, may nevertheless be an indication of a differential (and negative) impact on women.<sup>109</sup> There is therefore an evident need for the development of migration policy in SADC countries and at the regional level that takes appropriate account not only of the distinctive role of migrating females<sup>110</sup> and the need to develop gender-sensitive policies,<sup>111</sup> but also the impact of migration on female spouses both in the home and host country.

### 3.4 Remittances

Globally the evidence reveals that remittance income in developing countries provides a stable flow of income, is exceeded only by foreign direct investment, and exceeds donor and capital market flows.<sup>112</sup> In Africa, however, since most sub-Saharan countries do not report any data on remittances, international remittances play a much smaller role than in any other world region, representing just 10% of external finance in 2001.<sup>113</sup> For Africa as a whole, in 2004, remittances by the estimated 3.6 million Africans in the diaspora to

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<sup>107</sup> Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 54. Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 5.

<sup>108</sup> Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 74; Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 5.

<sup>109</sup> Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 54.

<sup>110</sup> For example, Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18 remarks that "no clear policy has been adopted with respect to such activities of the informal economy [referring to cross-border (informal) trade], and yet they play such an important economic role." See also Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 56.

<sup>111</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration) (2005) 35. See also Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 54: "For development to be both human and sustainable, the different needs and interests of men and women must be considered and gender equality be promoted not reinforcing previously existing gender inequalities."

<sup>112</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 7-8. Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 52.

<sup>113</sup> Compared to 63% in South Asia, and 56% in the Middle East and North Africa: Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 18.

their households in Africa amounted to \$14 billion, with Egypt, Morocco and Nigeria being the largest recipients.<sup>114</sup>

Data on the extent of remittance flows in SADC is not generally available.<sup>115</sup> And yet, despite temporary fluctuations,<sup>116</sup> remittances remain a primary source of household income in migrant-sending SADC countries – for example, in 2001 in Lesotho, remittances were estimated to contribute as much as 26.5% of GDP.<sup>117</sup> It is especially at the household level that remittance income constitutes a significant livelihood strategy for Southern Africans across all skill levels.<sup>118</sup> A recent study undertaken in five SADC countries found that 85% of migrant-sending households receive cash remittances<sup>119</sup> – these are sent on a regular basis and "easily outstrip agriculture in relative importance as a household income source."<sup>120</sup> In fact, the same study remarks that, "[A]cross the region as a whole, annual median income from wage employment and cash remittances is the same ... When cash and commodities are combined, however, the value of remittances exceeds all other forms of income."<sup>121</sup> Remittances are primarily used for consumption spending, in particular for household food security and other basic needs.<sup>122</sup>

However, remittances also play a significant role in the economic development of SADC countries. As remarked in a recent study, and echoing the international experience in this regard,<sup>123</sup> "[F]or national economies, cross-border remittances are a source of foreign exchange and taxes, contribute to the balance of payments, and provide capital for enterprises and valuable household incomes."<sup>124</sup> SADC governments and even international organisations have therefore started to integrate remittances as a tool for

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<sup>114</sup> Economic Commission for Africa *International Migration and the achievement of MDGs in Africa* (International Symposium on International Migration and Development, Turin, Italy, 28-30 June 2006) (Sustainable Development Division, Economic Division for Africa) (UN/POP/MIG/SUMP/2006/04) 2.

<sup>115</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 11.

<sup>116</sup> During the 1990s remittances to many areas in SADC, especially Lesotho and Swaziland, fell (see Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 7-8) – presumably as a result of the comprehensive retrenchments which occurred on South African mines.

<sup>117</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration) (2005) 18.

<sup>118</sup> *Ibid* 17.

<sup>119</sup> Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 4.

<sup>120</sup> *Ibid* 5.

<sup>121</sup> *Ibid*.

<sup>122</sup> *Ibid* 6-7.

<sup>123</sup> See Thouez, C "The impact of remittances on development" in UNFPA *International Migration and the Millennium Development Goals* (Selected papers of the UNFPA Expert Group Meeting, 11-12 May 2005, Marrakech).

<sup>124</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 18.

development in their poverty reduction strategies.<sup>125</sup> And yet, the emphasis on the (national, economic and household) developmental impact of remittances has been criticised for a range of reasons, including:<sup>126</sup>

- the allegedly unstable nature of remittances as a source of income;
- remittances are unevenly spread between developing countries, and tend not to flow to the poorest;
- poor people who cannot afford the financial costs of migration, do not benefit from remittance flows;
- the detrimental effects of the skills brain drain must be offset against the benefit from remittances;
- remittance sending countries possess economic leverage over remittance dependent countries; and
- remittances do not automatically generate development, and should not be regarded as policies that do so.

Important, in particular from the social protection perspective, is the fact that "[A] reliance on remittances may create an illusion of sustainable prosperity that provides a disincentive for governments to address issues of poverty and inequality that originally led – and in all probability continue to lead – to the forced emigration of their remittance-sending citizens."<sup>127</sup> In fact, it also has to be asked to what extent remittances contribute to development at the household level. Evidence from SADC suggests that remittances are predominantly spent on consumption, and that there is little reinvestment of income in savings.<sup>128</sup> There is, therefore, a close correlation between migration and poverty alleviation in SADC. Remittances to SADC countries consequently have little developmental value, in the traditional sense of the word.<sup>129</sup> More nuanced approaches, however, suggest that development should be defined in broader social terms. Using remittances to enhance human capital spending (improving nutrition, health and education) thus has a social development impact.<sup>130</sup>

It is suggested that welfare policies in this regard have a role that goes beyond poverty alleviation, income transfer for consumption purposes and social development in the

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<sup>125</sup> Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 52.

<sup>126</sup> Mitchell, S *Migration and the remittance euphoria: Development or dependency?* (NEF (New Economic Foundation) 2006) 15 *et seq.* See also Thouez, C "The impact of remittances on development" in UNFPA *International Migration and the Millenium Development Goals* (Selected papers of the UNFPA Expert Group Meeting, 11-12 May 2005, Marrakech).

<sup>127</sup> Mitchell, S *Migration and the remittance euphoria: Development or dependency?* (NEF (New Economic Foundation 2006) 16.

<sup>128</sup> Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 6-7.

<sup>129</sup> *Ibid* 7.

<sup>130</sup> See Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 11.

sense used here. For example, as noted above, available evidence indicates that migration has both a positive and negative impact on gender roles.<sup>131</sup> Women who stay behind often carry an increased burden of care and support. They may also be constrained as far as the use of remittances is concerned.<sup>132</sup> It is therefore necessary to develop evidence-based welfare policies which are sensitive to the wider implications of migration and family remittances.<sup>133</sup>

Nevertheless, to the extent that remittances do fulfil a crucial sustenance and poverty alleviation role, it needs to be asked what role governments should play to facilitate and support this mode of income- and sometimes also goods-transfer. In Africa, it is clear that little has been done to improve and extend the banking system to assist with the flow of remittances,<sup>134</sup> despite the fact that "[F]or some countries in the developing world, the fees for monetary transfers across international borders could be quite substantial – in many cases well above 10% of the principal amount."<sup>135</sup> Within SADC, other than the strongly criticised South African-based deferred pay system operating in favour of countries<sup>136</sup> such as Mozambique, there is no evidence of government policies to encourage remittance transfer.<sup>137</sup> However, reducing transactional costs may not be the priority intervention needed. The reason is that currently personal transfer appears to be the main and preferred remittance channel, also in view of the fact that most migrants work in neighbouring SADC countries and return home relatively frequently.<sup>138</sup> Much more important, it would appear, is the need to properly realign welfare policies to deal effectively with social assistance and social development, bearing in mind the (limited) role that remittances can and do play in this regard.

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<sup>131</sup> See UN Economic and Social Council *Gender permeates causes, consequences of international migration* (Commission on the Status of Women, Fiftieth Session) (Economic and Social Council 2006) (WOM/1544) 1.

<sup>132</sup> See par 3.3 above.

<sup>133</sup> See Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 52-53: "And yet, studies on patterns of remittances, transfer channels, use of remittances and their potential for development have barely considered the gender perspective."

<sup>134</sup> Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 14.

<sup>135</sup> Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 26.

<sup>136</sup> These arrangements are usually provided for in terms of bilateral labour agreements between South Africa and certain SADC countries: see the discussion in par 6 below. The National Union of Mineworkers (NUM) in South Africa has recommended that the deferred pay system be abolished as it does not serve the interests of workers. However, the Chamber of Mines and the supplying states think otherwise: see Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 18.

<sup>137</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 18.

<sup>138</sup> Pendleton, W, Crush, J, Campbell, E, Green, T, Simelane, H, Tevera, D & de Vletter, F *Migration, Remittances and Development in Southern Africa* (Southern African Migration Project) (Migration Policy Series No. 44) (IDASA 2006) 5.

## **4. Diversity and restrictions**

### **4.1 Diversity**

#### **4.1.1 The socio-economic, labour market and poverty context of the SADC region**

##### **4.1.1.1 Social protection impact**

The socio-economic, labour market and poverty context of the SADC region has a marked effect on migration. Rather than inhibiting migratory flows, it has instead influenced the nature of migration. The more affluent countries of the region, in particular South Africa, have served as a magnet for citizens of poor neighbouring countries in particular. In social protection terms this has a number of consequences, which relate partly to the legal framework of the immigration and social security status of those who migrate, and partly to (the lack of) accrued social security entitlements. Many of those who migrate are the poor. They migrate as undocumented foreigners, and then fall foul of the restrictive legal framework pertaining to this category of non-citizens, as discussed elsewhere in this report.<sup>139</sup> In addition, as a result of their immigration status and the operation of social security laws and policies, they are unlikely to be accommodated within the social security framework of the host country. Furthermore, such migrants invariably are not able to accrue social security entitlements in their home country which potentially could be transferred or taken into account within the framework of the social security system of the host country, if such possibilities were in existence. This also flows from the fact that these categories of migrants often participate in the informal economy, both in the home and host country, and therefore fall outside the purview of the essentially formal employment-based framework of (social) protection available in most of the SADC countries.

##### **4.1.1.2 The poverty context**

It is against the background of the various poverty indicators which reveal the depressing state of poverty in the SADC region that some of the migratory trends and the associated social protection implications<sup>140</sup> need to be understood. According to recent UNDP Development Reports the position is that:<sup>141</sup>

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<sup>139</sup> Par 4.2 below.

<sup>140</sup> ECLAC *Shaping the Future of Social Protection: Access, Financing and Solidarity* (Montevideo: ECLAC 2006) 140 observes: "Poverty hinders people's ability to exercise the individual right to a decent life, which requires being able to satisfy the basic needs of life."

<sup>141</sup> See the SADC website: <http://www.sadc.int/>; Selected information in the *UNDP Human Development Report 2005 – International cooperation at a crossroads: Aid, trade and security in an unequal world*. The

- In terms of the Human Development Index (HDI) indicator, 5 SADC countries fall within the "Medium Human Development" sphere (ranging from places 65 to 145), and 9 SADC countries within the "Low Human Development" sphere (ranging from places 146 to 168);
- According to the Human Poverty Index (HPI) indicator, except for Mauritius (at 11.4), SADC countries are ranging from 30.9 (South Africa) to 52.9 (Swaziland) on the relevant scale;
- The percentage of population living below the *national* poverty line ranges from 10.6% (Mauritius) to 72.9% (Zambia);
- The percentage of population who are undernourished ranges from 6% (Mauritius) to more than 30% in the case of 9 SADC countries, and is as high as 47% (Mozambique), 49% (Zambia) and 71% (DRC);
- Income inequality according to the Gini index has a rating of more than 50 in 8 SADC countries; and
- Infant mortality is one of the few areas where significant improvements have been recorded.

How does SADC fare in achieving the First Millennium Development Goal, which envisages that countries will halve, between 1990 and 2015, the proportion of people whose income is less than \$1 per day? In a number of SADC countries, more than 50% and even 60% are living below this yardstick. This also appears to be the picture in the rest of sub-Saharan Africa, where the overall percentage of those living below \$1 per day (an amount which has not been adjusted to reflect the rising living costs) has remained at 44% in 2006 (as opposed to 44.6% in 1990).<sup>142</sup> Sub-Saharan Africa is the only region where there has been an increase in both the number of poor people and in the incidence of poverty.<sup>143</sup> As remarked by the Economic Commission for Africa:<sup>144</sup>

*"Despite significant progress by some of its subregions and countries, Africa fared worst among the world's regions. It saw the slowest progress overall and suffered reverses in some crucial areas. In sub-Saharan Africa (SSA), the number of people living in extreme poverty (on \$US1 a day or less) rose from 217 million in 1990 to 290 million in 2000, the majority of whom are women. Adult life expectancy is reckoned to have declined from a little over 50 years to 46 years. Based on the trends of the past 15 years, SSA will not achieve the MDGs on time."*

#### 4.1.1.3 The labour market context<sup>145</sup>

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HDR website contains functions for creating individual data tables and is available to the public on - <http://hdr.undp.org/statistics/data/>

<sup>142</sup> United Nations *The Millennium Development Goals Report 2003* (2006).

<sup>143</sup> UNDP *Summary: Human Development Report 2006. Beyond Scarcity: Power and the Global Water Crisis* (New York: UNDP 2007).

<sup>144</sup> Economic Commission for Africa *The Millennium Development Goals in Africa: Progress and Challenges* (2005).

<sup>145</sup> See Olivier, M & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 22.

The prevailing labour market context in SADC has to be appreciated, as this is the context to which migrants, in particular intra-SADC migrants, are exposed. National labour markets in South and Southern Africa are deeply segmentised and are generally characterised by the prevalence of and steep increase in the use of forms of atypical labour, and the informalisation and casualisation of labour, the rise in unemployment levels and jobless growth in the economy. Unemployment tends to be as high as 50% and informal employment as high as 90% in several SADC (Southern African Development Community) countries.<sup>146</sup> As noted in a recent study,<sup>147</sup> across the SADC region, between 10% and 20% of the economically active population are engaged in the formal sector of the labour market, and a significant minority work in farming, typically in subsistence agriculture. Thus the majority of the economically active population in Southern Africa work in the informal sector of the economy. Industrialisation as a development policy is of relatively recent origin in SADC, having been introduced late in the colonial era. It is therefore of limited relevance in the African and SADC context, despite deliberate attempts to pursue industrialisation strategies, in particular through the device of Export Processing Zones (EPZs).<sup>148</sup>

The historical and colonial roots of these phenomena must of course be clearly understood. As remarked in another study,<sup>149</sup> the combination of an exclusionary enclave formal sector-led economic growth and the imperatives of racial discrimination have resulted in a number of socio-economic outcomes in the region. The first is that the majority of the population, consisting of Africans, has been simultaneously marginalised and excluded from participation in productive activities. Secondly, income-generating opportunities have been segregated to one degree or another such that the incidence of under-employment, open unemployment and poverty is unequal and highly skewed against the marginalised majority. Thirdly, the HIV/AIDS epidemic is having grave consequences in all social and economic spheres in all the countries. And, finally, the quest for both regional and global integration is resulting in mixed consequences, which are exacerbating the condition of the poor, and the underemployed and the unemployed in urban and rural areas. It is within this context that the migration context within SADC and the agenda for reforming the social security framework pertaining to migrants have to be understood.

Essentially therefore the countries of the sub-region have evolved what may be labelled as enclave economies in which growth has been predicated on a narrow economic base represented by the formal sector. This formal sector, while accounting for the greater proportion of gross domestic product and economic growth, only accounts for a very small proportion of employment. Thus the fundamental problem the countries are confronted with is that, for almost all of the countries except South Africa and Mauritius,

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<sup>146</sup> Fenwick, & Kalula 31.

<sup>147</sup> Fenwick & Kalula 14.

<sup>148</sup> Fenwick & Kalula 30. EPZs strategies are in particular officially pursued in Mauritius, Namibia, Zimbabwe and, more recently, Zambia.

<sup>149</sup> See Mhone, GZ & Kalula, *ER Report of a Study on the Formulation of Policy Objectives, Priorities and Strategies for the SADC* (Report prepared for the SADC Employment and Labour Sector (ELS) 2001). See generally Mhone, GZ "The socio-economic context and social policy needs in South Africa" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 1.

the majority of the labour force still ekes out a living in the non-formal sectors of the economy comprising small holder agriculture, rural non-farm activities and urban informal activities.

Also in the South African context many of these exclusions, apart from being archaic in nature, have a distinct racial and/or gender flavour: because of the country's history of employment-based racial and gender hierarchy, these groups are most likely to be African and/or women.<sup>150</sup>

For those who work, there is seldom a standard framework: a bewildering array of non-standard work relationships, including independent and dependent contractors, part-time workers, home-based work, hired and contract employment in a range of corporate and non-corporate environments presents itself to the observer.

In SADC there is no formal regional labour market – one is essentially dealing with fifteen different systems of labour market regulation. Labour regulations within and between SADC countries differ with respect to their coverage, content and degree of implementation. The philosophy driving labour market regulation differs from one country to another depending on the cultural and social norms, historical experiences, the nature of the labour market especially with respect to the degree of worker organisation and the nature of the legal and institutional framework.<sup>151</sup>

It is recognised that labour market regulation has an influence on the economic and social situation in countries, in that it impacts on issues such as equity at the workplace, wage levels and levels of worker organisation.<sup>152</sup> It is also recognised that labour regulations have an impact on the nature of the economic interaction between countries especially with respect to trade, flow of goods and labour migration.<sup>153</sup> The importance of regional labour market regulation lies in the need to prevent beggar thy neighbour policies among trading partners and "more positively the need to promote efficient forms of trade and regional co-operation; and the need to ensure that the social welfare and the fundamental rights of workers are protected and enhanced in line with increased regionalisation and globalisation of economies."<sup>154</sup>

Another factor to consider is the belief that where there is effective labour market regulation the costs of production will be higher and the situation may develop where the lowering of labour standards (and resulting lower costs) is used to attract investors.<sup>155</sup> This has led to the phenomenon known as social dumping, i.e. the exporting of products, which owe their international competitiveness to low labour standards. One effect of

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<sup>150</sup> See Lund, F "State social benefits in South Africa" *International Social Security Review* (1993) 1 7.

<sup>151</sup> Mhone & Kalula 43.

<sup>152</sup> For a more detailed discussion on the impact of labour and social security law, see par 4.1.1.4 below.

<sup>153</sup> Mhone & Kalula 43.

<sup>154</sup> *Ibid.*

<sup>155</sup> Lee E "Globalization and labour standards: A review of issues" *International Labour Review* Vol 136 (1997) No 2 (Summer) 174.

social dumping is what is known as the "race to the bottom."<sup>156</sup> This is the competition between states to reduce regulatory regimes to attract investments. It has been argued that the pressure to cut costs would lead to a negative impact on labour standards in that governments wishing to attract and retain foreign direct investment have to make concessions.<sup>157</sup> These concessions would normally be in the form of lowering labour standards.

#### 4.1.1.4 The regulatory framework

##### 4.1.1.4.1 *The limited impact of labour and social security law*<sup>158</sup>

The impact of labour law on the prevailing labour market context in SADC, and on the position of scores of intra-SADC migrant workers who tend to work at the lower end of the labour market, in particular in the non-formal economy<sup>159</sup> is, to say the least, disappointing. This flows from the fact that labour laws in Southern Africa, inherited from the colonial masters, traditionally apply to the formal employment context, thereby excluding those who work informally or in many non-standard arrangements from coverage<sup>160</sup> – despite some recent developments in terms of which the reach of labour law has been extended beyond the traditional employment relationship.<sup>161</sup> For example, in South Africa statutory labour law protection is, as a rule,<sup>162</sup> limited to the traditional employer-employee relationship, since only persons who satisfy the definition of "employee" as contained in the various laws<sup>163</sup> are generally covered.<sup>164</sup> This protection is consequently not available to certain categories of non-standard employees, and in particular not to those who work informally.<sup>165</sup> In general, therefore, and despite some innovative recent attempts to extend the reach of labour law in SADC, it can be said that labour law in the region tends to be narrowly focused on regulating labour relations in

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<sup>156</sup> Hepple B "A race to the top? International Guidelines and Corporate Codes of Conduct" in *Comparative Labour Law and Policy Journal* Vol 20(3) (1999) 355.

<sup>157</sup> Lee 176.

<sup>158</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 16-19, from where this part has been taken.

<sup>159</sup> See par 3.1 and par 4.1.1.1 above.

<sup>160</sup> Fenwick & Kalula 31.

<sup>161</sup> See par 4.1.3.1 below.

<sup>162</sup> However, some innovative recent reforms have extended the personal scope of coverage of labour law in South Africa beyond the traditional framework – see par 4.1.3.1 below.

<sup>163</sup> E.g. the Labour Relations Act (LRA) 66 of 1995, the Basic Conditions of Employment Act (BCEA) 75 of 1997 and the Employment Equity Act (EEA) 55 of 1998.

<sup>164</sup> This is true, even bearing in mind that the definition of who would qualify as employees is fairly wide. And yet the courts have consistently held that independent contractors are excluded from the ambit of South African labour laws.

<sup>165</sup> See Olivier, M "Extending labour and social security protection: The predicament of the atypically employed" *Industrial Law Journal* Vol 19 (1998) 669; Olivier, M "Critical issues in South African social security: The need for creating a social security paradigm for the excluded and the marginalised" *Industrial Law Journal* Vol 20 (1999) 2199; Horwitz, F and Erskine, V "Labour market flexibility in South Africa: a preliminary investigation" *South African Journal of Labour Relations* (1995) 45.

and extending protection to workers in the formal sector, resulting in its obvious inability to deal effectively with the dual phenomena of a shrinking formal sector and high and steadily increasing informal employment and unemployment.

In addition, it is also necessary to understand the limited impact of labour law in a context where many Southern African countries are economically dependent on regional trading blocks, and, historically, on financial support provided by international funding organisations. For example, some SADC countries<sup>166</sup> are bound together in the Southern African Customs Union (SACU). For most of these countries, in particular the smaller ones, this has practically meant the adoption of an export-oriented approach to industrialisation.<sup>167</sup> As suggested by the literature<sup>168</sup> and as appears to be borne out by the position in the smaller SACU member states, export-oriented industrialisation is likely to be associated with restrictive labour laws, designed to maintain flexibility and low labour costs. Furthermore, financial assistance from international financial institutions has often been made available subject to (and for) the implementation of Structural Adjustment Programmes (SAPs). Policies actively pursued as part of such programmes have included making labour markets and labour laws more flexible, and reducing public-sector employment (which provides a very significant part of formal sector employment in African and Southern African countries) in order to cut public spending. This has had a marked impact on increasing unemployment and lowering wages, with labour laws following suit to accommodate the constraints imposed by the SAP regime.<sup>169</sup>

The same dismal picture emerges in the area of social security protection.<sup>170</sup> In almost all the SADC countries<sup>171</sup> social security legislation, with particular reference to social insurance laws, tends to be very categorical and exclusionary (even more than is the case with labour law), especially as far as the personal sphere of coverage is concerned, in the

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<sup>166</sup> I.e. Botswana, Lesotho, Namibia, Swaziland and South Africa.

<sup>167</sup> See Fenwick & Kalula 20-22.

<sup>168</sup> Cf Kuruvilla, S "Linkages between industrialization strategies and Industrial Relations/Human Resources Policies: Singapore, Malaysia, the Philippines, and India" Vol 49 (1996) *Industrial and Labor Relations Review* 635, and Kuruvilla, S "Economic Development Strategies, Industrial Relations Policies and Workplace IR/HR Practices in Southeast Asia" in Wever, K & Turner, L (eds) *The Comparative Political Economy of Industrial Relations* (Industrial Relations Research Association, Madison, Wisconsin, USA 1995), referred to with approval by Fenwick & Kalula 5, 21-22.

<sup>169</sup> See generally Jamal, V "Adjustment Programmes and Adjustment: Confronting the New Parameters of African Economies" in Jamal, V (ed) *Structural Adjustment and Rural Labour Markets in Africa* (St Martin's Press, New York; Macmillan, Basingstoke and London 1995) 1-37; Mailafia, O *Europe and Economic Reform in Africa – Structural adjustment and economic diplomacy* (Routledge, London/NY 1997); Fenwick & Kalula 22-23.

<sup>170</sup> See Olivier, M "Social protection in SADC: Developing an integrated and inclusive framework – a rights-based perspective" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 34-35, on which the following paragraphs are largely based.

<sup>171</sup> With the exception of Mauritius, whose system is for most part residence- and not formal sector employment-based. For example, self-employed people may, in terms of the National Pensions Act, join the public pension system. Namibia also has a partly residence-based system, which effectively broadens the basis of social protection. See now the Law on Social Protection (2007) of Mozambique, which in principle extends social insurance protection to self-employed workers.

sense that a few benefit, while large pockets of people generally and informal workers specifically are excluded from protection. Several devices are utilised to obtain this result. For example, much of the area of social insurance is purely formal employment-based, in the sense that one must be an employee (in the formal sector context) as defined in the relevant legislation in order to qualify as a contributor and, consequently, as primary beneficiary.<sup>172</sup> In addition, for certain purposes<sup>173</sup> it may be required that one must have been a contributing member of a particular social insurance fund for quite some time in order to qualify for benefits.<sup>174</sup> Alternatively, a lesser period of contribution may affect the nature of the benefit which accrues to the beneficiary.<sup>175</sup> In the area of social assistance a categorical approach is often adopted, in that categories of beneficiaries are specifically indicated as worthy of the protection of the State, at the expense of other (often equally vulnerable) categories of people who fall outside the protective net. There is, therefore, no universal coverage – something which is exacerbated by the needs-based approach adopted in some of the countries: only those who qualify in terms of a set means test (by reference to a maximum level of income and/or maximum amount of assets allowed by the applicable legislation) are eligible to receive protection from the social assistance system. The categorical nature of social assistance provisioning is strengthened by a host of other conditions, amongst which is the requirement often set that the beneficiaries must be both resident in and citizens of the country concerned.<sup>176</sup>

Even in one of the countries often praised for its relatively extensive social security network, South Africa, the position is that social security (in particular social insurance) legislation still excludes most non-standard workers from its sphere of application.<sup>177</sup> The exclusion of non-standard workers is multi-faceted and has consequences which go beyond those directly affected. Firstly, protection is only extended to those who qualify as "employees".<sup>178</sup> Secondly, one of the curious characteristics of the social security legislation in South Africa remains the exclusion of categories of persons from the ambit

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<sup>172</sup> However, some interesting developments are taking shape in some of the SADC countries in this regard. In some countries, e.g. Namibia, informal sector (self-employed) workers are entitled to join particular social security schemes; similar developments are apparently being considered in, for example, Zambia and Mozambique. In Mauritius, self-employed persons can also belong to the National Pensions Scheme established under the National Pensions Act of 1976. In Mozambique the position is that while informal sector workers are presently excluded from the social security system, separate institutions are being developed to provide for these workers.

<sup>173</sup> In particular pension purposes.

<sup>174</sup> In the case of pension coverage under the INSS system in Mozambique, it is required that one must have contributed for at least 120 months during the last 20 years in order to qualify for the pension. Somebody with less years of contribution (e.g. 9 years) is accordingly excluded from receiving a regular pension.

<sup>175</sup> In Zimbabwe, retirement and invalidity pensions [under the Pensions and Other Benefits Scheme] are paid to members with a minimum contribution record of 10 years. Those who have contributed for less than 10 years are eligible for grants which are lump-sum payments.

<sup>176</sup> The mainly residence-based systems of Mauritius and, to a lesser extent Namibia, are notable exceptions.

<sup>177</sup> The Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) and the Unemployment Insurance Act 63 of 2001 (UIA) (replacing the Unemployment Insurance Act 30 of 1966) provide perhaps the most telling examples.

<sup>178</sup> Or a similar term used, such as "contributor": see section 2(1) of the UIA of 1966 and the similarly worded provision in the UIA of 2001. See also section 1 of COIDA.

of the definition of "employee" (or a similar term) contained in the relevant laws, even though these persons would otherwise perfectly fit the notion of being employees. The most telling example is perhaps domestic employees employed as such in a private household,<sup>179</sup> although seasonal workers and foreign contract workers are also affected. Coverage extensions have been restricted, affecting limited categories of workers in particular contexts only.<sup>180</sup> Thirdly, a dependant of a deceased employee can also qualify for a benefit in terms of the South African laws. However, the definition of "dependant"<sup>181</sup> in the various social security laws is normally linked to the employee/contract of service concept, in the sense that coverage is extended only to dependants of deceased employees or persons who rendered services on the basis of a contract of employment. Finally, sometimes exclusion and marginalisation in South African social security may be the result of the lack of a legal obligation to participate in a particular scheme or programme aimed at insuring workers against certain social risks. Membership of occupational retirement funds (i.e. provident and pension funds) serves as an example. There is no general statutory compulsion to belong to a pension or provident fund, resulting in around 40% of the economically active population in South Africa not being covered. This has a detrimental effect on the state social assistance system.

#### **4.1.1.4.2 Inchoate collective bargaining regimes<sup>182</sup>**

Also, those outside the organised interest groups, notably workers not involved in regular wage labour, and therefore many of the migrant workers in the SADC region, are left out of the distributional strategy, to the extent that this is provided for by labour laws in the region.<sup>183</sup> This is the result of the legislative framework informing the establishment and operation of trade unions, a dramatically downward trend in union membership in the economically most prominent SADC country (South Africa), and the position adopted by unions themselves. Labour laws in the region invariably restrict union membership to workers who are involved in an employment relationship with an identifiable employer, i.e. in the formal sector.<sup>184</sup> This leaves unions with little scope to officially represent non-

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<sup>179</sup> Section 1 of COIDA. The UIA of 2001 foresaw the eventual coverage of domestic workers (excluded in terms of section 2(2)(i) of the UIA of 1966) – which happened in terms of amending legislation in 2003 (i.e. the Unemployment Insurance Amendment Act 32 of 2003).

<sup>180</sup> Amendments to the UIA in 2003 (see the provisions of the Unemployment Insurance Amendment Act 32 of 2003) brought on board domestic and seasonal workers – as was already foreseen in the UIA of 2001. However, domestic workers, for example, remain excluded from the purview of COIDA.

<sup>181</sup> The statutory method providing for the coverage of dependants differs: in some cases the definition of "employee" is widened so as to include dependants (see section 1 of COIDA); in other cases a specific definition of "dependant" is added to the legislation (section 30 of the UIA of 2001, and section 1 of the Pension Funds Act 24 of 1956).

<sup>182</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 22-23, from where this part has been taken.

<sup>183</sup> For perspectives on this in the South African context, see Standing, G *et al Restructuring the labour market: The South African challenge (An ILO Country Review)* (ILO 1996) 178.

<sup>184</sup> For example, section 213 of the South African LRA defines an "employee" as (a) "any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration", and (b) "any other person who in any manner assists in carrying on or conducting the business of an employer". A trade union is defined as "an association of employees

standard workers, workers in informal employment and the unemployed, in the work and political contexts.<sup>185</sup> Given this limited legal framework it is therefore not surprising that collective bargaining is undermined by the increasing employment of workers who do not qualify as employees for labour law purposes.<sup>186</sup> In addition, evidence from South Africa suggests that after a rapid increase in union membership after the adoption of the 1995 LRA, membership has declined sharply after peaking in 2002.<sup>187</sup>

Furthermore, union stances as regards those who do not fall within their traditional constituency could at best be described as ambivalent. Generally speaking, mainline unions see it as their main task to cater for those involved in formal, in particular standard employment. They therefore tend not to represent those who are not their members, and to resist labour force structure flexibility, as the likely impact might be that increased use of non-standard workers may erode their support base.<sup>188</sup> This reluctance on the part of trade unions to officially represent non-standard workers is of course a problem experienced in many comparative jurisdictions, including jurisdictions in the developed world.<sup>189</sup>

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whose principal purpose is to regulate relations between employees and employers, including any employers' organisations". See, however, the recent attempts at widening the personal scope of coverage of labour law in some SADC countries, as reflected on in par 4.1.3.1 below.

<sup>185</sup> However, in South Africa union federations are represented on and intensely involved in social dialogue affecting non-standard workers and the unemployed as well, at the level of the National Economic Development and Labour Council (NEDLAC), set up under the NEDLAC Act 35 of 1994. NEDLAC is a high-level institution through which all labour-related legislation must be channelled before consideration of same by Parliament. For a more detailed discussion, see Olivier, M & Kalula, E *Alternative forms of regulating voice and representation in a developing country context: A South African case study* (Paper to be presented at the 15<sup>th</sup> World Congress of the International Industrial Relations Association (IIRA), held in Sydney, Australia, from 24-27 August 2009). Furthermore, through its participation in the tripartite political alliance with among others the ruling ANC, the main union federation in South Africa, COSATU, influences policy-making, also in relation to the areas discussed here.

<sup>186</sup> In 1996 a South African Presidential Commission remarked: "In some industries, notably construction, industry bargaining has been undermined by the increasing use of labour brokers, casuals, and sub-contractors. In construction differential conditions for casuals have been introduced recently in an attempt to regulate the situation." (Commission to Investigate the Development of a Comprehensive Labour Market Policy (1996) 53).

<sup>187</sup> Total membership has fallen from its 2002 peak of 4 069 000 to 2 935 864 in 2005: Godfrey S "Key labour market institutions: Emerging trends" in Cheadle, H *et al Current Labour Law 2006* (LexisNexis Butterworths 2006) 118-119, based on data supplied by the Registrar, Department of Labour, South Africa.

<sup>188</sup> See, among others, Horwitz, F & Franklin, E "Labour market flexibility in South Africa: Researching recent developments" *South African Journal of Labour Relations* (1996) 5 at 7. Exceptions, also of recent origin, do exist. In some instances strong existing unions have taken the task upon themselves to include categories of peripheral workers (see Horwitz & Franklin (1996) 7, 12). However, these arrangements are limited in number and ambit, restricting extension merely to certain categories of peripheral workers and to certain topics only. As a result of this, certain independent unions (albeit with relatively small membership) have recently been set up for and by non-wage and contract workers (see Standing *et al* (1996) 96, 162, 178).

<sup>189</sup> See Pollert, A "The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights" Vol 34(3) *Industrial Law Journal (ILJ)* (UK) (2005) 217-238 and Brown, W & Oxenbridge, S "Trade Unions and Collective Bargaining: Law and the Future of Collectivism" in Barnard, C, Deakin, S & Morris, G *The Future of Labour Law* (Hart Publishing, Oxford, 2004) 63-77 for comparative perspectives.

Bearing in mind the significant impact of these constraints and the limited framework that is left to collective bargaining, it has to be remarked that collective bargaining and collective agreements have the potential to regulate the employment incidences of and social security provisioning for those employed in the formal sector and their dependants. Areas of labour law and social security importance which are typically covered by such agreements, whether at decentralised (plant) level,<sup>190</sup> central level, or at both central and plant level,<sup>191</sup> include employment security, minimum conditions of service, occupational based pension arrangements, health insurance, and unemployment provision. The further advantage of relying on collective bargaining as an instrument of social protection importance concerns, in many cases, the legally binding nature of such agreements, once the statutory requirements for entering into them have been satisfied.<sup>192</sup>

#### ***4.1.1.4.3 Jurisprudential responses***<sup>193</sup>

Barring some notable examples, the role of courts in the region in cementing and protecting labour law and social security principles and entitlements has generally been weak and disappointing.<sup>194</sup> This is so despite the fact that rich common law and colonial legal traditions inform the legal systems of these countries – whether of a British, Roman-Dutch, French or Portuguese origin. One reason for this state of affairs clearly relates to the limited legislative framework which traditionally provided for labour law and social security protection.

Of course, important exceptions do exist, and increasingly so. In Lesotho, for example, the labour court has moved beyond merely resolving labour disputes and entrenching the common law, by using its equitable jurisdiction to protect striking employees from dismissal in the context where a strike is called in response to hostile employer conduct.<sup>195</sup> In Namibia, through its progressive interpretation of the constitutional right to freedom of expression the high court ruled in favour of a police official who had publicly criticised perceived shortcomings in the police force.<sup>196</sup> And in Tanzania, courts appear ready to enforce social security entitlements for the benefit of in particular vulnerable groups and individuals.<sup>197</sup> Similarly, in South Africa the courts, notably the Constitutional Court, have made it clear that socio-economic rights must be interpreted in

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<sup>190</sup> E.g. in Zambia.

<sup>191</sup> As is the case in South Africa.

<sup>192</sup> For example, in Zambia, Zimbabwe, Tanzania and South Africa (see sections 23 and 32 of the LRA respectively).

<sup>193</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 23-25, from where this part has been taken.

<sup>194</sup> See, generally, Fenwick & Kalula 29-30.

<sup>195</sup> *Lesotho Haps. v Employees of Lesotho Haps and Another* (LC 52/95); Fenwick & Kalula 29-30.

<sup>196</sup> *Kuesa v Minister of Home Affairs, Namibia* 1995 BCLR 1540 (NmS).

<sup>197</sup> For example, in the matter of *Nuke Ritual v Zambia Road Services Ltd* (1971) HCD no. 62 it was held that where dependants of the deceased are minors, compensation must be paid to the court, in an attempt to protect children.

a manner which would ensure that due recognition is given to the plight of the poor and vulnerable.<sup>198</sup>

In fact, the most comprehensive treatment of labour law and social protection-related issues, from a constitutional, statutory and common-law perspective, undoubtedly comes from South Africa. Since the 1980s the then industrial court, the labour appeal court, the supreme court, and more recently also the labour court and Constitutional Court, have rendered major contributions to shaping and developing labour and social security law in South Africa. Empowered with a broad-based statutory authority to determine unfair labour practices, the then industrial and labour appeal court effectively developed the legal contours of collective bargaining, dismissal and discrimination law. Since the advent of the interim and final Constitutions of 1993 and 1996 respectively the courts, in particular the Constitutional Court, have done much to determine the scope of the constitutional fundamental labour rights provision, as well as the scope of powers, jurisdiction and sphere of activity of a range of labour law dispute resolution institutions; to carve out a constitutional haven for parties to the employment relationship who or employment matters which have been excluded from (statutory) regulation/protection; to set the constitutional boundaries for collective bargaining; and to authoritatively endorse the operation of the principle of substantive equality within an affirmative action framework. In the process the courts have skillfully integrated and applied international and comparative norms and standards, taken into account historical developments, have had regard to the context and requirements of reshaping South African society, including the society in the employment sense of the word, and generally upheld the constitutional ethos and value system.<sup>199</sup>

In the broader social protection area the courts have likewise used their authority, based on the available and at times newly constructed statutory and common-law (including administrative law) framework, as well as the constitutional and fundamental rights dispensation to extend unprecedented protection to applicants and beneficiaries of social security entitlements.<sup>200</sup> As discussed elsewhere in this report, the rich constitutional rights-infused jurisprudence in South African has also been instrumental in enhancing the labour law and social security position of non-citizens. This is evident from, for example, court judgments which extended the social assistance grant system to permanent residents; directed government to protect unaccompanied foreign children through the child welfare protection system in South Africa; and recognised the continued existence

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<sup>198</sup> See, among others, the Constitutional Court judgments in *The Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC); *Minister of Health & others v Treatment Action Campaign & others* 2002 BCLR 1033 (CC); and *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC); as well as Olivier, M "Constitutional perspectives on the enforcement of socio-economic rights: recent South African experiences" *Victoria University of New Zealand Law Review* Vol 33(1) (2002) 117-151 (also published in *New Zealand Association for Comparative Law* (Yearbook 7, 2002) (p 117-151).

<sup>199</sup> See Olivier, M "Reshaping private and public employment in South Africa: The impact of the Constitution and the Bill of Rights" *Speculum Iuris* Vol 20(2) (2006) 215-240.

<sup>200</sup> See generally Olivier, M "Access to justice in welfare law and litigation: judicial reform in South Africa" *Obiter* Vol 27(3) (2006) 470-501.

of an employment contract despite the fact that a work permit of a foreigner may have expired.<sup>201</sup>

#### **4.1.1.5 The socio-economic context<sup>202</sup>**

It is clear that the SADC countries are relatively interdependent and share a common legacy in many respects, such as through their economic interdependence. The countries are, secondly, linked through the phenomenon of labour migration of which the primary trend entails migration to South Africa from many of the countries in the region. It also entails inter-country migration among the other countries. Thirdly, the countries share a similar legacy in that they were initially colonised primarily because of the need to exploit primary commodities and that subsequently some of them (South Africa, Mozambique, Zimbabwe and Zambia) were colonised and settled in such a manner that the racial discrimination evolved to influence a number of social, economic, labour market and political outcomes in the region.

Economic policies pursued immediately following the attainment of independence in many of the countries of the sub-region failed to transform this inherited legacy and merely reinforced it for a number of reasons, leaving a co-ordinated, inclusive response as the only viable option for transformation.

According to a SADC study on the formulation of policy objectives, priorities and strategies,<sup>203</sup> it is necessary to note that the countries of Southern Africa are confronted with the problem of both growth and development. The problems of economic growth primarily concern the need to increase gross domestic product, while that of development can be viewed as concerning the need to increase gross domestic product in such a manner that the per capita incomes of the poorest members of the society also increase over time. Thus, while the attainment of economic development necessarily implies the reduction in the depth and breadth of poverty, economic growth can occur without necessarily reducing poverty.

The long-term orientation of social security systems in SADC is crucial to the survival of these systems.<sup>204</sup> In this regard reference should be made to a report of the Expert Group Meeting on Labour Markets and Employment in Southern Africa,<sup>205</sup> which noted that social security policies should be considered within the prevailing social and economic context of individual countries or groups of countries. In developed countries, for

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<sup>201</sup> See par 5.2 below.

<sup>202</sup> See Olivier, M & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 22.

<sup>203</sup> See note 149 and the discussion in par 4.1.1.3 above.

<sup>204</sup> See Olivier, M "Acceptance of social security in Africa" *Proceedings of 15<sup>th</sup> African International Social Security Association Regional Conference (ISSA)*, 9-12 August 2005 (ISSA 2006) 17-18, from where the next paragraphs have been taken.

<sup>205</sup> United Nations Economic Commission for Africa, Southern Africa Office (ECA/SA), *Labour markets and employment in Southern Africa* (Report and Recommendations of the Expert Group Meeting, 3-6 February, 2003, Lusaka, Zambia) (ECA/SA/EGM/2003/2).

example, most social security policies were concerned with loss of income. In the African context, however, social security policies also need to address the prevailing lack of income.<sup>206</sup> The Expert Group therefore noted the need for social and economic policies to reinforce each other.<sup>207</sup> The different categories of social policies (such as social assistance, social insurance, social services and public work programmes) are all interrelated and should be geared to reinforce social and economic policies to achieve sustainable human development. The aim of social policies in the African context should be to reduce and alleviate poverty and inequality, and support the objective of a growing economy with a larger tax base for government revenues.<sup>208</sup>

As noted by Mhone, economic development provides the resources with which to finance social policy objectives in the form of social services, social insurance and social assistance. At the same time it must be recognised that these same services have a consumption aspect, which directly benefits the beneficiaries, and an investment aspect, which may enhance the beneficiaries to contribute more effectively and efficiently to the economy in the future. It is, therefore, important to look at social protection as the other side of the coin of economic development. One of the reasons for doing so is that the inability of a country to promote sustainable economic growth and development (that is equitable and inclusive of growth) over time generally implies that the country will continue to shoulder a large social backlog or burden.<sup>209</sup>

According to Mhone, a unique feature of the African landscape has been the absence of any conscious attempts to define comprehensive social policy regimes that are linked to economic policy. Outside of education, which has been adequately recognised as both a consumption- and investment-related social service, many other aspects of social delivery have been adopted as imports from abroad (e.g. social assistance programmes for children and the aged, social insurance and other forms of social security) to address formal sector needs and as such have had restricted coverage and benefits in the African context. Thus there has not been much of an attempt to align social policy with economic policy to any strategic degree.<sup>210</sup>

#### **4.1.2 General characteristics of and dissimilarity of SADC social security systems<sup>211</sup>**

A regional ILO/SAMAT study indicates the following as the core context in Southern Africa which informs the state and development of social security systems in the region: economic features comprising limited productivity, persistently high inflation rates, high and increasing informal sector employment, skewed income distributions; demographic

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<sup>206</sup> Par 94.

<sup>207</sup> Par 95.

<sup>208</sup> Par 96.

<sup>209</sup> Mhone, G.C.Z. "The socio-economic context and aspects of social security policy in South Africa" in Olivier, M *et al Introduction to social security* (LexisNexis Butterworths 2004) 1.

<sup>210</sup> *Ibid* 1-2.

<sup>211</sup> See Olivier, M & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 22

characteristics, with reference to uneven population densities, low life expectancies, high birth rates, differing patterns of retirement; and issues of governance, relating to emerging democracies and weak subsystems for public administration.<sup>212</sup> The same study concludes in this regard as follows:<sup>213</sup>

*"Together these conditions create a great need for social security in Southern Africa. Large segments of the population live and work on the edge of poverty; formal sector employment is limited and declining; inflation erodes incomes and savings; and the AIDS epidemic is reducing national productivity and leaving a generation of children without parental care. At the same time, low productivity means that social security is difficult to finance; and weak and undeveloped systems of governance pose major structural barriers to efficient administration. These constraints pose enormous challenges to those charged with delivering social security to the region's people, particularly to the groups which are most in need".*

It is therefore apparent that there is a great need for social security in Southern Africa, but due to factors such as HIV/AIDS, limited and declining formal sector employment and high rates of inflation, this need is not sufficiently met. The low productivity means that social security is difficult to finance and weak and undeveloped systems of governance pose enormous challenges to efficient administration.<sup>214</sup> It is thus evident that there is an inability, both at national and regional level, to provide adequate social protection.

As with most other aspects of regional development, the provision of social protection differs from country to country. It would appear that social security in the region is in some instances fairly well developed (e.g. Mauritius), partly in the process of and/or the result of major transition (e.g. South Africa and Namibia), and partly still very much underdeveloped by general international and comparative standards.<sup>215</sup> The need exists therefore to develop approaches to adequately regulate social protection on a regional level. This regional method of regulation must take cognisance of inter-country differences, such as differences in levels of development, resources and social and cultural differences.

High levels of unemployment and underemployment, as well as the inadequacy of current labour and social protection standards hamper the delivery of social protection in the SADC region.<sup>216</sup>

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<sup>212</sup> Fultz, E & Pieris, B *Social security schemes in Southern Africa: An overview and proposals for future development* (ILO Harare 1999) 7-12. See also Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future (Draft Consolidated Report)* (March 2002) 151-153.

<sup>213</sup> Fultz & Pieris 7.

<sup>214</sup> *Ibid.*

<sup>215</sup> Olivier MP *Regional Social Security: Are innovative developments in Southern Africa relevant to the European context?* (Paper presented at the EISS (European Institute of Social Security) Annual Conference, Bergen, Norway (September 2001)) 1; Olivier, M "Social security for migrants: Does the EU framework provide lessons for developments in SADC?" in Berghman, J *et al Social Security in Transition* (Kluwer 2002).

<sup>216</sup> Olivier, M *Regional Social Security: Are Innovative Developments in Southern Africa relevant to the European experience?* 5, 12.

Analysis of the existing social protection regimes in the region reveals that one of the most common striking features of social protection in the region is that most social security schemes in the region are insurance-oriented and focus on those people who are employed in the formal sector. This type of cover is often further limited in that only certain categories of the formally employed benefit from social security schemes set up to deal with particular contingencies.<sup>217</sup>

Coverage of targeted populations tends to be narrow, leaving the most vulnerable across the region, in particular those in rural areas, without any form of social protection. The benefits paid by many schemes are inadequate to meet basic needs. In the case of non-contributory schemes, a heavy reliance on general tax revenues strains government financing, keeping benefits at low levels in most countries. Moreover, the social welfare/assistance schemes (or non-contributory schemes) are still in an embryonic stage, and the number of beneficiaries is low.<sup>218</sup>

It is also clear that the systems, as is the case with the underlying socio-economic, administrative and political profiles of the countries, are hugely diverse in nature.<sup>219</sup> This, of course, makes it difficult to develop baseline standards for the region and to adopt measures to co-ordinate the various country social security systems. Examples abound. For example, in many countries there are no or very few public social security institutions – as is the case in, for example, Malawi, Botswana, Swaziland and Lesotho. In many of these instances responsibility for providing protection against social risks has been shifted onto the employer. Employers bear the burden of either providing coverage directly or insuring the relevant risk, such as in the event of compensation for employment injuries and diseases. Even South Africa still lacks a national retirement and health insurance framework in the form of public schemes, although reforms aimed at introducing public retirement and health schemes are envisaged.<sup>220</sup>

Co-ordination of social security is presently almost totally absent in the region. The few examples that do exist do not function satisfactorily,<sup>221</sup> while attempts to enter into more comprehensive arrangements still have to bear fruit.<sup>222</sup> This affects in particular the position of SADC citizens migrating within the region.

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<sup>217</sup> *Ibid.*

<sup>218</sup> Mauritius and, to some extent, South Africa are two notable exceptions. Mauritius has a generous family allowance system, and continues to offer free education, free health services and even subsidised food. In South Africa the popular but means-tested state-provided old age, disability and child support grants fulfil an extremely important function as poverty relief measures and reach sizeable numbers of those who fall within the said categories.

<sup>219</sup> This is evident from, amongst others, the way in which contributory retirement and health provision is structured. While in many of the countries public systems may be in place, in countries such as South Africa this function is fulfilled by strong private sector institutions.

<sup>220</sup> See National Treasury (Republic of South Africa) *Social Security and Retirement Reform* (Second Discussion Paper 2007).

<sup>221</sup> Fultz, E & Pieris, B *The Social Protection of Migrant Workers in South Africa* (ILO/SAMAT, Harare, 1997) 11.

<sup>222</sup> *Ibid.* See also par 6 and par 9.2 below.

Administrative inertia and institutional inefficiency in the area of social security delivery are, with some notable exceptions, major obstacles. And yet it would appear that tailor-made solutions, for example, relying on non-governmental and community-based organisations and traditional authorities,<sup>223</sup> to assist in this regard, have been relatively successful.

Considerable challenges face governments and social security systems in Southern Africa.<sup>224</sup> One of these challenges relates to the inherited institutional design and the resultant governance problems. In many Southern African countries, as is the case in many other African countries, there are clear indications of excessive state intervention or interference. Governments often control the composition and appointment of governing boards, as well as social security administrations, the management of funds and investment decisions. At the same time there are also increasingly positive experiences indicative of restrictions on government intervention. In many cases boards of directors and chief executive officers now enjoy substantial autonomy, subject to contractual and performance arrangements with an overall supervision by government departments.<sup>225</sup>

In the area of investment decisions certain governments have directed these funds to invest in specific projects or companies. Furthermore, in some cases investments may not be made off-shore. Some fund managers also often tend to invest in assets which may not provide the best yield, such as real estate. In other Southern African countries, however, direct government control has been put at arms length by, for example, the adoption of legislation that contains investment guidelines, and the establishment of separate investment committees.<sup>226</sup>

One of the major sources of distrust in social security institutions in Africa as well as in SADC has to do with the mismanagement of some of these schemes. There is, for example, a tendency in some countries to redirect sources from certain benefits to pay for other benefits, such as pensions. High administrative costs and the absence of budget constraints on administrative expenditures have contributed to the deterioration of fund reserves in many sub-Saharan countries in particular.<sup>227</sup>

Service delivery is an area which has generated substantial dissatisfaction among members of social security schemes. Most of the complaints revolve around the inadequacy of benefits, delays in payments, the lack of up to date information about the schemes and the amount of individual contributions made and estimated benefits (i.e. benefit statements). Contribution records are often incomplete and apparently not always

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<sup>223</sup> In Swaziland, the public assistance system is accessible on recommendation of community leaders at grassroots level and the regional social worker who assesses the need.

<sup>224</sup> See Olivier, M "Acceptance of social security in Africa" *Proceedings of 15<sup>th</sup> African International Social Security Association Regional Conference (ISSA)*, 9-12 August 2005 (ISSA 2006) 1-3 (Executive Summary), from where the next paragraphs have been taken.

<sup>225</sup> *Ibid* – as is the case with, for example, the Namibian Social Security Commission (SSC).

<sup>226</sup> *Ibid* – as is the case with, for example, the NAPSA (National Pension Schemes Authority) of Zambia.

<sup>227</sup> *Ibid*.

computerised. On the positive side, the use of information technology and public awareness campaigns are contributing to the improvement of social delivery.<sup>228</sup>

Regulation of social security schemes could play a significant role in causing social security institutions to perform in accordance with acceptable standards and to build trust in these institutions. Regulation of both the public and private environment is important to increase transparency and protect beneficiaries. However, there is insufficient experience of this in many Southern African countries. Usually public social security schemes are subject to their governing laws and the oversight of Ministries of Labour and Finance only. And yet there are increasingly good examples of regulatory bodies that have been set up.<sup>229</sup>

In addition to the specific matters referred to above, there are other fundamental considerations which will play an important role in making social security frameworks on the sub-continent relevant and acceptable to the population, as well as the members of the funds. The first consideration relates to the need for an appropriate conceptual context that would encapsulate, within a social security framework, non-formal employment; informal forms of social security; the coverage of covariate risks and of immediate needs as opposed to merely covering future needs or risks; African extended family concepts; and gender neutrality.<sup>230</sup>

A second matter which causes much concern to social security contributors, relates to the fact that they may lose social security coverage when they move between schemes – both within a country and across borders. There are, however, commendable country examples of how universally accepted principles in this regard have been successfully implemented on the continent.<sup>231</sup>

Thirdly, social security has been an area which has seen very little in terms of a conscious attempt to define comprehensive social policy regimes that are linked to economic policy. There is a clear need for social and economic policies to reinforce each other. The aim of social policies in Africa, also in the area of social security, should be to reduce and alleviate poverty and inequality, and support the objective of a growing economy with a larger tax base for government revenues.<sup>232</sup>

In the fourth instance, of serious concern is the fact that social security in Southern Africa through its limited coverage of those in the formal sector contributes to social differentiation and social exclusion. Social security is therefore often seen as serving the interests of the working elite, and not reaching out to those most in need of coverage. Yet it is clear that the general picture in Southern Africa reveals an increase in the informal sector and in unemployment, while the formal sector is generally shrinking.<sup>233</sup>

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<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid* – for example, in Namibia and, currently, in Tanzania (see the provisions of the Social Security (Regulatory Authority) Act, 2008).

<sup>230</sup> See also par 2 above.

<sup>231</sup> *Ibid.* See also par 9.2.3 below.

<sup>232</sup> *Ibid.* See also par 4.1.1.5 above.

<sup>233</sup> See par 4.1.1.3 above.

Concentrating attention on reforming that part of the social security system which covers only a small part of the labour force at the expense of the informal sector and those who are unemployed is inherently unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with no or little social security coverage. In recent times, though, in both Southern Africa and elsewhere in the developing world innovative and mutually-supporting approaches have been adopted to extend protection to the informal sector: through extending the social assistance system and the sphere of coverage of existing social insurance schemes; through acknowledging and factoring in the importance and potential use of existing informal social security arrangements; and through the establishment and support (by way of, for example, a subsidy) of public low cost social security savings arrangements.<sup>234</sup>

Finally, a conspectus of the reasons why social security institutions in many Southern African countries lack trust and appreciation, leaves one with the clear impression that the absence of standards with which these institutions and governments should comply is one of the primary considerations. It is suggested that, in keeping with encouraging developments on the continent, appropriate standard-setting at country and regional level – through appropriate human rights frameworks, the adoption of regional benchmarks, and the introduction of international standards – could do much to enhance the acceptance of social security in Africa.<sup>235</sup>

### **4.1.3 Reform initiatives and direction**

#### **4.1.3.1 Labour law reforms<sup>236</sup>**

Innovative attempts aimed at developing appropriate paradigms for labour market intervention and at strengthening and extending protection have changed the face of labour law in the region dramatically.<sup>237</sup> Whereas the inherited labour law could at best be described as law which had with little adaptation been received, major country-level labour law reforms have taken place in many of the SADC countries since the 1990s, including Namibia, Malawi, Swaziland, Lesotho, Zambia, Tanzania, Botswana, Zimbabwe and South Africa.<sup>238</sup> Influenced in part by ILO intervention and norms developed by the ILO, based around essential labour law principles developed in industrialised economies, and underpinned at times by extensive constitutional guarantees,<sup>239</sup> far-reaching legislation providing for a floor of legislated minimum rights, freedom of association, tailor-made collective bargaining regimes, occupational health

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<sup>234</sup> *Ibid.* See also par 9.4.2 & par 9.4.3 below.

<sup>235</sup> *Ibid.* See also par 9.5 below.

<sup>236</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 25-27, from where some of the following text has been taken.

<sup>237</sup> Olivier, M *Social protection as a key to development in the SADC region: opportunities and challenges posed by innovative approaches in Namibia and beyond* Paper presented at Namibian Development Research Conference, University of Namibia, Windhoek, 31 October – 2 November 2001.

<sup>238</sup> See Fenwick & Kalula 24.

<sup>239</sup> As in the case of, for example, South Africa and Tanzania.

and safety, anti-discrimination and equality in the workplace, and protection against unfair dismissal of workers, has become the hallmark of revolutionary changes to many of the country systems. However, there has, at least until recently, been little attempt to stretch the reach of labour law beyond those who work in the formal sector. SADC labour laws by and large still exclude many categories of non-standard workers as well as informal sector workers from their scope, although limited provision is made for the essentially bureaucratic<sup>240</sup> and occasionally collective bargaining<sup>241</sup> extension of the application of labour laws to some of these categories.

However, recent developments in labour legislation in some SADC countries are indicative of attempts to widen the net of labour law coverage to include workers outside the formal sector and who do not work in accordance with an employment contract as that term is traditionally understood. These developments to some extent mirror the suggestions which are now contained in a recent ILO instrument, the Employment Relationship Recommendation 198 of 2006. In Tanzania,<sup>242</sup> based on a similarly worded provision in section 230(3) of the UK Employment Rights Act, 1996, an employee is defined with reference not only to a contract of employment, but also any other contract under which the individual undertakes to work individually for the other party to the contract and the other party is not a client or customer of any profession, business or undertaking carried on by the individual.<sup>243</sup> In South Africa, as indicated above,<sup>244</sup> an administrative capacity to regulate unprotected work was given to the Minister of Labour to apply provisions of all labour laws to persons other than employees.<sup>245</sup> In addition, a rebuttable presumption of employment has been introduced into some of the major South African labour laws.<sup>246</sup> The presumption is triggered by a range of factors, of which at

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<sup>240</sup> In South Africa, for example, the BCEA of 1997 extends the possibility of (some) labour law protection to certain categories of non-standard workers. Section 55(4)(g) stipulates that a sectoral determination may in a sector and area prohibit or regulate task-based work, piecework, home work and contract work. It may also specify minimum conditions of employment for persons other than employees (section 55(4)(k)). Also, section 83 of the Act (as amended in terms of the provisions of the Basic Conditions Employment Amendment Act 11 of 2002) further permits the Minister, on the advice of the Employment Conditions Commission, to deem any category of persons specified in a notice published in the Government Gazette, to be employees for purposes of the whole or any part of the BCEA, any other employment law, or any sectoral determination.

<sup>241</sup> Again in South Africa, in terms of another recent amendment to the LRA, the powers and functions of bargaining councils are expanded to extend services and functions of the council to two categories of non-standard workers, notably workers in the informal sector and home workers (see section 28(1) of the LRA, as amended on the basis of section 3 of the Labour Relations Amendment Act 12 of 2002).

<sup>242</sup> See the provisions of the Tanzanian Employment and Labour Relations Act, 2004.

<sup>243</sup> As quoted by Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 12-13.

<sup>244</sup> Note 240 above.

<sup>245</sup> Section 83 of the Basic Conditions of Employment Act 75 of 1997; Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 3-4.

<sup>246</sup> Section 83A of the Basic Conditions of Employment Act 75 of 1997 and section 200A of the Labour Relations Act 66 of 1995; Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 4-5.

least one may be particularly relevant to the informal worker context. This is the notion of "economic dependence".<sup>247</sup>

Finally, in Swaziland, the definition of employee extends the scope of the labour legislation to workers other than contractual employees. The Swaziland Industrial Relations Act 1 of 2000 defines an employee as "a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service, or under any other arrangement involving control by, or sustained dependence for the provision of work upon, another person." "Arrangements", therefore, indicating control by or sustained dependence upon another person will be sufficient to trigger the protective labour rights contained in the legislation. A contract of employment is therefore not required.<sup>248</sup>

In his study on the scope of the employment relationship in Southern African countries, Benjamin concludes that legislative responses have expanded the scope of labour law and assisted individuals to prove the existence of an employment relationship. This may be relevant when the extension of social security coverage is considered.<sup>249</sup>

Furthermore, the development of bipartite and tripartite structures (workers, employers and government representatives working together) has changed not only the rules but also the actors in developing policy and setting norms and standards. Tripartite or multi-partite bodies in the nature of labour advisory councils or social and economic councils have been established in some Southern African countries.<sup>250</sup>

Finally, some Southern African countries<sup>251</sup> have introduced legislation providing for the promulgation of codes of practice, covering areas such as termination of employment, sexual harassment and employment discrimination. In this way a mechanism has been provided to guide workplace policies and practices which, although not directly enforceable, is nevertheless a powerful instrument setting standards of behaviour: failure to justify a deviation may lead to an adverse ruling.

#### **4.1.3.2 Social security reforms<sup>252</sup>**

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<sup>247</sup> Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 3-7.

<sup>248</sup> Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 10-11.

<sup>249</sup> Benjamin, P. *No longer at ease: Approaches to the scope of the employment relationship in SADC countries* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 21.

<sup>250</sup> E.g. Nedlac (National Economic Development and Labour Council) in South Africa, established by the National Economic Development and Labour Council Act 35 of 1994, and the tripartite Labour Advisory Council of Namibia, established in terms of the Labour Act 6 of 1992 of Namibia. See also Fenwick & Kalula 26.

<sup>251</sup> E.g. Lesotho, Namibia and South Africa.

<sup>252</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 27-28, from where some of the following paragraphs have been taken.

Many SADC countries have embarked on major reform initiatives, in an attempt to overhaul their social security systems comprehensively in order to deal effectively with exclusions and marginalisations in the system and with the need to address poverty holistically and in an integrated fashion from a social protection point of view.<sup>253</sup> These reforms have largely been informed by international norms and the involvement of international agencies, such as the ILO and the World Bank,<sup>254</sup> important regional instruments,<sup>255</sup> constitutional provisions including human rights guarantees included in constitutions,<sup>256</sup> and regional and international best practices.

In a substantial number of countries there has been a clear transition from national provident fund to public pension fund systems.<sup>257</sup> Some countries in the region have introduced short-term benefits for workers and their dependants as a first step towards developing the social security system holistically.<sup>258</sup> Also, in a range of SADC workers compensation schemes a public compensation fund regime has been established, thereby replacing wholly or partially individual employer liability.<sup>259</sup> Furthermore, social security and/or pension fund regulators have been established (or provided for in recent legislation) in several SADC countries.<sup>260</sup> In many of the SADC countries there has unmistakably been a significant increase in the number of beneficiaries benefiting from the existing protection or from new forms of protection introduced, indicating that service delivery in some environments is increasingly being streamlined.<sup>261</sup>

Also, while social assistance schemes remain embryonic in most SADC countries, in certain countries innovative social assistance support has been introduced.<sup>262</sup> In some of the SADC countries where social assistance has traditionally been provided for, the number of beneficiaries has grown exponentially, sometimes partly as a result of

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<sup>253</sup> Some of the most recent examples include Tanzania (a new social security (regulatory authority) and workers compensation dispensation – see below), Mozambique (new social security framework legislation, the Law on Social Protection, 2007), Malawi (draft workers compensation legislation), and South Africa (comprehensive pension reform being considered).

<sup>254</sup> See par 8.2 below.

<sup>255</sup> See par 7.2 below.

<sup>256</sup> See par 5.1.1 below.

<sup>257</sup> The transition has already occurred in Tanzania and Zambia and (in principle) in Namibia, while some other countries are contemplating a similar transition/development.

<sup>258</sup> This is in particular true of the highly successful system recently introduced in Namibia and implemented by the newly established Social Security Commission. Also, both Swaziland and Zambia have announced their intention to introduce unemployment insurance benefits.

<sup>259</sup> See, for example, the Workers Compensation Act, 2008 (Tanzania). Malawi has prepared draft legislation to similar effect.

<sup>260</sup> E.g., the Social Security (Regulatory Authority) which, alongside the Bank of Tanzania, is responsible for the regulation of social security schemes in Tanzania.

<sup>261</sup> This appears to be the case in, amongst others, erstwhile war-torn Mozambique: see Garcia, A *Mozambique Country Profile* (prepared for a SADC Conference on Social Security, entitled "Towards the Development of Social Protection in the SADC Region"), held at Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001 (p 12 and further – Appendix). In South Africa, the establishment of a national institution, the South African Agency for Social Security, has largely been the result of the need to improve and standardise social assistance service delivery: see the South African Social Security Agency Act 9 of 2004.

<sup>262</sup> E.g. Lesotho recently introduced a state-provided old age grant for pensioners from age 70.

significant extensions of the system. For example, in South Africa, the Child Support Grant is now available to households with needy children under the age of 15<sup>263</sup> (as opposed to the age of 7 initially), while the grant has also been made available to primary care givers who are themselves children of at least 16 years of age, in an attempt to provide support to the growing number of child-headed households.<sup>264</sup> In addition, the gradual phasing out of the age differential in accessing the old age grant<sup>265</sup> is currently being implemented. The cumulative effect of these developments in South Africa is that about 13 million individuals, approximately 25% of the South African population, are currently recipients of social assistance grants. In addition, as a result of Constitutional Court and High Court intervention, social assistance support has effectively been extended to certain categories of non-citizens, in particular permanent residents and their children<sup>266</sup> and unaccompanied foreign children<sup>267</sup> respectively.

Furthermore, a renewed appreciation of the role of informal forms of social security is evident, leaving policy-makers grappling with questions such as how to deal with and strengthen and/or regulate this phenomenon, and how to dovetail it with the formal system.<sup>268</sup> Also, SADC Member States are increasingly aware of the importance and urgency of co-ordinating the social security systems of the region, *inter alia* in view of increased migration and the requirements of enhanced integration in the region. Finally, a growing interest in prioritising social protection policy-making, innovative social security approaches, structures and models, and in identifying "best practices" is clearly evident.

In essence, however, barring the limited developments in social assistance, the recently introduced or foreseen reforms mainly benefit those who work(ed) in the formal sector on the basis of a formal contract of employment and their dependants. While some provision has been made to provide coverage to workers outside this framework, such as workers in the informal economy, these developments remain restricted in ambit and effect,<sup>269</sup> also

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<sup>263</sup> As per announcement of the Minister of Finance, South Africa, the eligible age for accessing this grant was increased from 14 to 15 with effect of 1 April 2008.

<sup>264</sup> See the definition of "primary care giver" in section 1 of the Social Assistance Act 13 of 2004.

<sup>265</sup> This grant has been available to poor women as from age 60 and to poor men from age 65.

<sup>266</sup> *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC).

<sup>267</sup> In *Centre for Child Law & Another (Lawyers for Human Rights) v Minister of Home Affairs & Others* 2005 (6) SA 50 (T) the High Court dealt with the state's obligation to treat unaccompanied foreign children as children in need of care through the formal child protection system as opposed to processing them through the immigration system. The Court issued a supervisory interdict, which compelled government departments within the so-called social cluster of departments to address the problem collectively, to coordinate action and submit regular progress reports on specified dates to all parties concerned.

<sup>268</sup> See among others Olivier, M & Kaseke, E *Informal social security and formal social security: developing an integrative approach* (Paper prepared for the SADC Core Group of Social Security Specialists Regional Conference on "Social Security in the Making: Developments in the Informal Economy and Informal Social Security", Gaborone, Botswana, 29-30 November 2004).

<sup>269</sup> In Mozambique, for example, despite attempts in the newly adopted Law on Social Protection of 2007 to extend social security coverage to self-employed persons, it appears that only limited categories of self-employed persons are on an obligatory basis covered by compulsory social security. Informal economy workers still appear to be excluded from the insurance-based framework of the statutory system of social protection: see Olivier, M *Review of the Mozambican social security legal framework; extension of social security coverage in Mozambique* (Report to the INSS, the government of Mozambique and the

because they are often either dependent on bureaucratic intervention<sup>270</sup> or on voluntary participation.<sup>271</sup>

Also, it has to be stressed that much still needs to be done, in particular in the areas of analysing the role and function of informal social security mechanisms, and linking same to the formal system, as well as dealing effectively with non-citizens. Non-citizens are in many of the systems excluded from the sphere of social protection (excluding those systems where permanent residence status and a number of years actual residence are sufficient for social security coverage or where non-citizens are entitled to participate in social insurance-based schemes).<sup>272</sup>

## **4.2 Restrictions in the legal system and policy framework**

### **4.2.1 General**

As is evident from the discussion below, the position generally of non-citizens in SADC as regards social security is to a large extent precarious. Their position is further complicated by the fact that there are different categories of non-citizens, including non-citizen workers, whose position may differ according to the status enjoyed on the basis of the category to which the person belongs. National laws, and often also international instruments, differentiate between permanent residents, temporary residents, migrant workers, refugees, asylum-seekers and illegal/irregular/undocumented non-citizens. The interplay between immigration, termination of service and social security laws is crucial to the understanding of the status of non-citizen workers.

### **4.2.2 Social security laws, policies and institutional frameworks**

National social security laws often contain provisions which adversely affect social security rights of non-citizen workers. Sometimes nationality conditions apply. Such conditions may exclude foreigners from the personal scope of application of the social security schemes.

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Mozambican social partners) (2007). See now the provisions of the Social Security (Regulatory Authority) Act, 2008 of Tanzania, which employs the same (more extensive) definition of "employee" than the one contained in the applicable labour law – see par 4.1.3.1 above.

<sup>270</sup> Section 69 of the South African Unemployment Insurance Act (UIA) 63 of 2001 empowers the Minister of Labour, on compliance with certain procedural and substantive requirements, to declare that as from a date specified any specified class of persons, or any person employed in any specified business or section of a business or in any specified area, will be regarded as contributors for purposes of this Act.

<sup>271</sup> For example, section 20(2) of the Namibian Social Security Act 34 of 1994 states that a self-employed person who does not employ any other person may voluntarily register himself/herself as an employer and employee. Since an employer is required to deduct the contributions of his/her employee from such employee's remuneration and pay it, together with the contributions payable by him/her as an employer to the SSC (Social Security Commission) (section 21(4)), a self-employed person who registers voluntarily has to pay *both* the contribution payable by an employer and an employee (section 21(5)). The (not promulgated) Tanzanian Social Security Bill, 2005 also provided for the coverage of informal economy workers on a voluntary basis – certain social insurance schemes in Tanzania, notably the National Social Security Fund and the Parastatal Pension Fund, already provide for this possibility.

<sup>272</sup> As is the case with Mauritius.

Alternatively these conditions may restrict access to benefits, in particular upon the departure of the non-citizen worker from the host country.

Furthermore, there may be all sorts of provisions in social security laws which constitute an obstacle to payment of benefits abroad. Also, the payment of benefits abroad may not be properly regulated, or regulated at all, in cross-border social security agreements. In addition, cross-border activities of workers may not be synchronised with the provisions of social security schemes.

In South Africa non-citizens who have acquired permanent residence status are eligible for social protection on the same basis as South Africans, for purposes of both social assistance<sup>273</sup> and social insurance. However, other categories of non-citizens do not necessarily qualify for equal treatment with South African citizens and permanent residents.<sup>274</sup> For example, the Unemployment Insurance Act (UIA)<sup>275</sup> excludes persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such person must leave the Republic, or that such person be repatriated upon termination of the contract.<sup>276</sup> The UIA itself appears to be inconsistent as far as different categories of fixed-term contract workers are concerned. Fixed-term contract workers who lose their employment as a result of the termination of their contract remain entitled to receiving UIF benefits.<sup>277</sup> However, non-citizen fixed-term contract workers, who have to return home upon completion of the contractual period, are specifically excluded.

The Compensation for Occupational Injuries and Diseases Act (COIDA)<sup>278</sup> to a certain extent restricts the right of a returning non-citizen resident to claim benefits, but simultaneously provides for the portability of benefits, albeit not on a regular basis. In terms of section 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension. Section 94 of the same law provides for the possibility of bilateral cross-border agreements on the basis of reciprocity between South Africa and another country. The reciprocal arrangement has to relate to compensation for employees for accidents resulting in disablement or death. The potential benefit for returning non-citizens is clear. However, little use has been made of this provision.

In accordance with the provisions of the Refugees Act,<sup>279</sup> refugees in principle enjoy full legal protection which includes the rights set out in Chapter 2 of the Constitution.<sup>280</sup>

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<sup>273</sup> See par 4.2.3 below.

<sup>274</sup> See par 4.2.3 below with regard to the position of irregular non-citizens in South African social security.

<sup>275</sup> 63 of 2001.

<sup>276</sup> Section 3(1)(d) UIA; section 4(1)(d) Unemployment Insurance Contributions Act 4 of 2002.

<sup>277</sup> See UIA section 16(1)(a)(i).

<sup>278</sup> 130 of 1993.

<sup>279</sup> 130 of 1998.

<sup>280</sup> Section 27(b) of the Refugees Act 130 of 1998.

Persons who have obtained refugee status<sup>281</sup> therefore qualify for constitutionally entrenched socio-economic rights in terms of section 27 of the Constitution, amongst which the right to access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. However, the Social Assistance Act<sup>282</sup> does not extend protection to refugees. An apparent conflict therefore exists between the two Acts.<sup>283</sup>

### 4.2.3 Immigration laws

On the other hand, entitlement to benefits is sometimes linked to the immigration status of the worker. Legal residence may be required and may be subject to the requirement that the non-citizen worker does not become a burden on the state. The lack of application of unfair dismissal laws to certain categories of non-citizens, in particular undocumented foreign workers, may have this effect. Also, as is evident from the discussion below, in relation to illegal/irregular immigrants links with immigration law often operate to their detriment.

In South Africa, for example, the *Immigration Act* 13 of 2002 regulates non-citizens' entry into and residence in South Africa. Immigration legislation has always been a tool used by the government to determine who they will allow to become new members of the South African nation and on what terms.<sup>284</sup> It has been remarked that the Act attempts to strike a balance between the needs of the South African economy (in particular of highly skilled workers), the will to limit the inflows of largely unskilled migrant workers or economic refugees,<sup>285</sup> and the concern that working conditions of migrants may undermine established labour standards and practices.<sup>286</sup> And yet, given the specific legal requirements that have to be met,<sup>287</sup> with some exception<sup>288</sup> the majority of SADC migrants to South Africa and employed in low-skilled jobs cannot qualify for a general work permit under the available categories.<sup>289</sup>

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<sup>281</sup> Section 3(a) of the Refugees Act 130 of 1998 defines people who qualify for refugee status as those persons who have fled their own country fearing persecution by reason of their race, religion, nationality, political opinion or their membership of a particular social group. Section (3)(b) mentions certain other categories of persons, namely people who have fled their own country owing to external aggression, occupation, foreign domination or events seriously disturbing public order. According to section 3(c) dependants of those who have been granted refugee status also qualify for refugee status.

<sup>282</sup> 13 of 2004.

<sup>283</sup> The Social Assistance Act and the Refugees Act 130 of 1998.

<sup>284</sup> Perbedy S "A brief history of South African immigration policy" accessed at <http://www.polity.org.za/govdocs/greenpapers/migration/hista.html>

<sup>285</sup> Both for security reasons and because of the high level of unemployment prevailing in South Africa: FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 18.

<sup>286</sup> *Ibid.*

<sup>287</sup> In particular the requirement that it has to be shown that nobody in South Africa has equivalent skills, qualifications or experiences: FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 5.

<sup>288</sup> E.g. mine workers covered under bilateral agreements.

<sup>289</sup> FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 18.

The Act distinguishes, as does preceding immigration legislation, between permanent and temporary residence. In terms of section 9(4)(b) of the Act, a non-citizen may only enter the Republic if issued with a valid temporary or permanent residence permit. Permanent residents are not regarded as 'foreigners' and they are granted all the rights of a citizen, except for those that a law or the Constitution explicitly ascribes to citizenship (for instance, the right to vote).<sup>290</sup> As such they are the elite of non-South Africans, and, since they are able to apply for citizenship after five years,<sup>291</sup> their status might be regarded as that of probationary citizens. In fact, the Constitutional Court has held that permanent residents may not be discriminated against vis-à-vis citizens when it comes to access to permanent employment in the public sector<sup>292</sup> and to access to social assistance.<sup>293</sup> As a result of the *Khosa* judgment, social assistance in South Africa is now available to permanent residents and their children. However, it is also clear from the available constitutional jurisprudence that categories of non-citizens other than permanent residents may in principle be excluded from or restricted as regards the exercise of constitutional and statutory protection.<sup>294</sup> This does not mean that certain categories of non-citizens and migrants are not entitled to special protection, as is indeed the case with refugees<sup>295</sup> and non-citizen children.<sup>296</sup>

The second category consists of temporary residents. According to the South African Act, a foreigner may only remain in the country if he or she is in possession of one of 14 different kinds of temporary residence permit.<sup>297</sup> In addition to the ordinary visitor's permit provided to tourists, the most important of these are the work, study and business permits.<sup>298</sup> The crucial provision in this regard is that a temporary residence permit is issued on condition that the non-citizen is not, or does not become a 'prohibited or undesirable person'.<sup>299</sup> One of the means by which this is attained in relation to temporary residents, is by including various financial requirements for the issue of permits, and

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<sup>290</sup> Section 25(1) of the Immigration Act 13 of 2002.

<sup>291</sup> See section 5 of the South African Citizenship Act 88 of 1995.

<sup>292</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

<sup>293</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>294</sup> In the *Khosa* matter the Constitutional Court held that it might be reasonable to exclude citizens from other countries, visitors and illegal residents who have only a tenuous link with the country (eg, non-citizens in South Africa who are supported by sponsors who arranged their immigration). Temporary residents are therefore excluded from social security benefits: *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) par 58-59. Also, in *The Union of Refugee Women & others v The Director: The Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC) the Constitutional Court found that certain other categories of non-citizen workers, i.e. refugees, may, subject to the right to be considered for exemption, validly be excluded from access to the private security industry.

<sup>295</sup> See section 21(2)(a) of the Refugees Act 130 of 1998.

<sup>296</sup> See the *Khosa* judgment, as well as *Centre for Child Law & Another (Lawyers for Human Rights) v Minister of Home Affairs & Others* 2005 (6) SA 50 (T), referred to in not 267 above.

<sup>297</sup> See sections 11-23 of the Immigration Act 13 of 2002.

<sup>298</sup> Olivier, M *et al Comparative Review of rights of access of non-citizens to social benefits, with specific reference to social security and social assistance* (A report to National Treasury, South Africa, 2004) 44-46.

<sup>299</sup> As defined in sections 29 and 30.

therefore the granting of lawful entry into South Africa. Section 10 of the Act requires a permit to be issued only on condition that the holder is not or does not become a prohibited or undesirable person. An example is anyone who has been judicially declared *incompetent* or an *unrehabilitated* insolvent. In terms of section 30, an undesirable person includes anyone who is likely to become a public charge. This may imply that a non-citizen is deemed to be undesirable and denied entry if he/she lacks financial resources and is in need of social assistance or welfare.

The picture described above generally also applies to other SADC Member States. Economic grounds constitute grounds for exclusion. As remarked by Klaaren and Rutinwa, "[N]early universally, the status of being likely to become a public charge leads to prohibited immigrant status." The same applies when a person has insufficient funds.<sup>300</sup>

South Africa also used to serve as an example of a country where irregular (in the sense of "illegal") workers would not qualify for compensation. The reason is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act<sup>301</sup> is not an employee for labour law and, one could add, social security law purposes (for purpose of bringing a case before the labour law adjudicating institutions<sup>302</sup>), as no valid contract of employment exists and such a person cannot legally be understood to be "an employee".<sup>303</sup>

However, a recent Labour Court judgment indicates a radical departure from this position. In *Discovery Health Limited v CCMA & others*<sup>304</sup> the court held that a foreigner whose work permit has expired, still has a valid employment contract and is entitled to the protection provided for in South African labour laws – in this case the unfair dismissal protection embedded in the Labour Relations Act 66 of 1995. It is submitted that this judgment has important consequences not only for labour law purposes, but also for (employment-based) social insurance arrangements. To a large extent the judgment turned on the effect of the impact of the constitutional protection embedded in the right of every person to "fair labour practices"<sup>305</sup> on the immigration dispensation involving workers. The court noted that, although the Immigration Act<sup>306</sup> prohibits the employment of foreign workers without work permits, the only consequence of doing so is that the employer is guilty of a criminal offence. This position effectively rejects a line of decisions that held that a contract is void even if only one party is subject to a criminal

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<sup>300</sup> Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University) (2004) 55.

<sup>301</sup> 13 of 2002.

<sup>302</sup> *Moses v Safika Holdings (Pty) Ltd* 2001 22 ILJ 1261 (CCMA); *Vundla v Millies Fashions* 2003 24 ILJ 462 (CCMA); *Lende v Goldberg* 1983 2 SA 284 (C); *Georgieva-Deyanova v Craighall Spar* 2004 (9) BALR 1143 (CCMA); *Maila v Pieterse* 2003 (12) BALR 1405 (CCMA) see, however, *Mackenzie v Paparazzi Pizzeria Restaurant obo Pretorius* 1998 BALR 1165 (CCMA).

<sup>303</sup> Smit, N "Employment Injuries and Diseases" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 472.

<sup>304</sup> [2008] 7 BLLR 633 (LC).

<sup>305</sup> See section 23(1) of the South African Constitution.

<sup>306</sup> 13 of 2002.

penalty.<sup>307</sup> In view of the new constitutional era, Courts are obliged to interpret all legislation in a way that would "promote the spirit, purport and objects of the Bill of Rights."<sup>308</sup> In interpreting the provisions of the Immigration Act, the court must ensure that it does not unduly limit the constitutional right of "everyone" to "fair labour practices".<sup>309</sup> The court further remarked:

*"If s 38(1) (of the Immigration Act) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and ... she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the (Basic Conditions of Employment Act), for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them."*<sup>310</sup>

In other words, extending (labour law) protection to irregular migrant workers would strengthen the purpose of the Immigration Act, instead of undermining same. If employers were aware that foreign nationals who do not have work permits had recourse to the rights contained in labour legislation, they would be less likely to breach immigration legislation by entering into contracts with irregular migrants.<sup>311</sup> A contrary interpretation would frustrate the primary purpose of section 23(1) of the Constitution, which is to extend the right to fair labour practices to "everyone". The implication is that

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<sup>307</sup> See, for instance, *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Lende v Goldberg* (1983) 4 ILJ 271 (C) and the authority mentioned in note 302 above.

<sup>308</sup> Section 39(2).

<sup>309</sup> Section 23(1). The progressive nature and impact of this judgment has to be contrasted with the much criticised decision of the United States Supreme Court in *Hoffman Plastic Compounds v. National Labor Relations Board* 535 U.S. 137 (2002), where it was held that the extension of labour rights to irregular migrants would undermine the purpose of immigration legislation, which is to discourage illegal immigration.

<sup>310</sup> Par 30.

<sup>311</sup> Par 33. Studies indicate that in South Africa, migrant workers, particularly irregular migrants, are extremely vulnerable to abuses at work because of their precarious legal situation. Most of the time, they will not try to enforce their rights nor seek redress as this would expose them to the risk of being arrested and deported. There are also indications that some employers deliberately seek undocumented migrants, who are considered to be more 'docile' and 'hard-working'. In some instances, employers threaten to report irregular migrants to the police if they do not 'behave' or if they seek redress for an abuse. In rare but regular cases, employers in commercial agriculture and construction even reported their workers to immigration officers just before payday. See FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 30.

the validity of the contract was not affected by the fact that the employer breached the Immigration Act. The prohibition on employing "illegal" foreigners contained in the Immigration Act<sup>312</sup> is therefore aimed at the employer, and not, in the first place, the (foreign) employee concerned.

Section 32 of the Immigration Act stipulates that an illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending an application for a status. It is also expressly provided that "any illegal foreigner shall be deported". Deterring and preventing people from illegally migrating to South Africa appears to be a major aim of the Act. This objective is found in the immigration law of most SADC countries and is obviously a genuine concern. It is the method by which a country seeks to achieve such deterrence and prevention, however, which may be problematic.

Special provision is also made for refugees and asylum-seekers in most national systems. Unlike most countries with refugee camps, South Africa's policy promotes local integration, which allows refugees to settle anywhere in the country. As a result of this policy, refugees are required to survive without any assistance from government.<sup>313</sup> The Refugees Act allows for any person to apply for asylum and states that no person should be denied the right to apply for asylum in South Africa.<sup>314</sup> The Immigration Act of 2002 also includes asylum seekers as a category of temporary residents. However, as this Act makes clear, the position of asylum seekers is subject to the Refugees Act 130 of 1998. The latter Act allows recognised refugees to work and therefore grants them access to social insurance coverage.<sup>315</sup> Attempts to prevent asylum-seekers awaiting procession of their applications from working or studying<sup>316</sup> were not upheld: these provisions were held to be *ultra vires* the Constitution.<sup>317</sup> Whether other public services such as housing and health care can be accessed during this time is not clear.<sup>318</sup> There is also no indication whether these services, if accessible, should be delivered under the same conditions as delivered to South Africans.

Finally, as far as refugees are concerned, it should be added that both the Cape High Court<sup>319</sup> and the Constitutional Court<sup>320</sup> endorsed the international law principles in respect of the *non-refoulement* of a refugee to a state where he or she would be likely to

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<sup>312</sup> Section 38(1) of the Immigration Act 13 of 2002, read with section 49(3) of the same Act.

<sup>313</sup> Baguley, D "Asylum seekers can now work and study" in *Botshabelo Sanctuary* (2003) vol. 6 no 1 p 11.

<sup>314</sup> Section 21(2)(a) of the Refugees Act 130 of 1998.

<sup>315</sup> However, the specific statutory exclusion of refugees from some areas of private security work has been upheld by the Constitutional Court: *The Union of Refugee Women & others v The Director: The Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC). Access to social assistance is not necessarily guaranteed, as the provisions of the Social Assistance Act 13 of 2004 exclude most categories of non-citizens from coverage.

<sup>316</sup> See regulation 7 of the Refugee Regulations (Forms and Procedure) 2000.

<sup>317</sup> *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA), upholding the judgment in *Watchenuka and Another v Minister of Home Affairs and Others* 2003 (1) BCLR 62 (C).

<sup>318</sup> Palmay, I *Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government A Research Report for the Centre for the Study of Violence and Reconciliation*. Accessed at <http://www.csvr.org.za/papers/papalm4.htm> on August 30, 2004.

<sup>319</sup> *Kabuika v Minister of Home Affairs* 1997 4 SA 341 (C).

<sup>320</sup> *Mohamed v President of the RSA* 2001 7 BCLR 685 (CC).

face persecution or inhuman treatment or punishment. Also, in line with the refugee protection regime provided for in the legislation, the Refugees Act contains a comprehensive prohibition on *non-refoulement*. It states that: "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country to be subject to any other measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in the country where:

- (a) he or she may be subject to persecution on account of ...; or
- (b) his or her life, physical safety or freedom would be threatened on account of..."<sup>321</sup>

The Immigration Act of 2002 also gives far-reaching powers in relation to random identity controls of foreigners and foreign-looking persons, the possibility to interview them, and to take them into custody if they are believed, on reasonable grounds, to be "illegal foreigners".<sup>322</sup> In fact, organs of state and certain other institutions are legally required to ascertain the status or citizenship of the persons they are in contact with and to report any illegal foreigner, or any person whose status could not be ascertained.<sup>323</sup> Effectively this implies that, as has been remarked in a recent study, the focus of enforcement has been shifted from border control to control by institutions and members of the community within the country.<sup>324</sup> Finally, apart from the fact that many documented migrants apparently remain for long periods on temporary permits,<sup>325</sup> as the possibility to apply for permanent residence after five years is not generally publicised and promoted, there are two further policy hurdles which effectively discourage and restrict migration to South Africa. The first is that migration policies in South Africa do not favour family reunification;<sup>326</sup> secondly, a policy decision was taken by the Department of Home Affairs not to allow a foreigner to hold more than one permit at a time, and that refugees should not change their status or asylum seekers their permits if they marry South African citizens, or have children with South African citizens.<sup>327</sup>

#### 4.2.4 Conclusions

The legal position of non-citizen workers in social security is therefore a weak one. Without special measures, these workers can only partly enjoy the protection of social security schemes or are excluded from this protection altogether.<sup>328</sup> The prevailing evidence is clear: through available legislative mechanisms governments are able to give precedence to immigration laws over labour and social laws. Secondly, the legislative policy in both South

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<sup>321</sup> Section 2 of the Refugees Act 130 of 1998.

<sup>322</sup> See section 41(1) of the Act; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 20.

<sup>323</sup> Sections 44 and 45 of the Act.

<sup>324</sup> FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 20, 35-37.

<sup>325</sup> *Ibid* 21.

<sup>326</sup> *Ibid*; see section 18 of the Immigration Act.

<sup>327</sup> *Ibid*.

<sup>328</sup> Jansen van Rensburg, L & Olivier, MP "International and supra-national law" in Olivier, MP *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) 624.

Africa<sup>329</sup> and the other SADC Members States is geared towards security concerns and (population) control. Thirdly, essential compliance with human rights standards set out in international law instruments may be absent, despite the fact that a country may have ratified these instruments. For example, the United Nations Committee against Torture recently remarked the following, with reference to South Africa's non-compliance with the treaty provisions of the Convention against Torture,<sup>330</sup> in relation to migrants.<sup>331</sup>

*"The Committee is concerned with the difficulties affecting documented and undocumented non-citizens detained under the immigration law and awaiting deportation in repatriation centers, who are unable to contest the validity of their detention or claim asylum or refugee status and without access to legal aid. The Committee is also concerned about allegations of ill-treatment, harassment and extortion of noncitizens by law enforcement personnel as well as with the absence of an oversight mechanism for those centres and with the lack of investigation of those allegations (articles 3, 2, 12, 13 and 16)."*

As remarked by an ILO study, the absence or near absence of social protection for migrants could reduce cost of labour for employers and could lead employers to favour migrants in hiring.<sup>332</sup> This is an important policy consideration which invites a human rights-sensitive treatment of irregular non-citizens. Recent jurisprudence emanating from the Labour Court in South Africa supports this view.<sup>333</sup>

Finally, there is clearly also a need to achieve greater horizontal equity *among* migrants. Many "temporary" migrants have in fact been working in South Africa for years, and some, for decades. A clear rationale for denying them social protection therefore appears to be absent.<sup>334</sup>

## **5. National level responses: constitutional and statutory provisions, as well as developments in the jurisprudence**

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<sup>329</sup> FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 6.

<sup>330</sup> UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984: the Convention entered into force in 1987.

<sup>331</sup> Committee against Torture *Consideration of reports submitted by State Parties under Article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture – South Africa* (37<sup>th</sup> Session, 6-24 November 2006, CAT/C/ZAF/CO/1) available at <http://www.ohchr.org/english/bodies/cat/cats37.htm>

<sup>332</sup> ILO (Pretoria) *The social protection of migrant workers in South Africa – Chapter III: Policy Directions* (ILO Area Office at Pretoria) (1997) 1.

<sup>333</sup> See quotation from the judgment in *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC) in note 310 above.

<sup>334</sup> *Ibid.*

## **5.1 Constitutional and statutory protection of social security in SADC<sup>335</sup>**

### **5.1.1 Constitutional protection**

Potentially the constitutional embodiment of socio-economic rights, and in particular of rights related to labour law and social protection, is of particular significance, also as far as the legal position of migrants is concerned, as this creates the possibility to hold governments bound to granting the protection foreseen in the constitution. Of course, the potential impact of this differs from system to system, depending on the status accorded to these rights by the constitution, and on the powers and ability of the courts to enforce these rights.

In the constitutions of some of the SADC countries there is no reference whatsoever to socio-economic rights.<sup>336</sup> However, there are several interesting examples of how certain SADC country constitutions provide directly or indirectly for the protection of socio-economic rights. Many of these rights are related to labour law and social security. In the case of South Africa fundamental labour rights<sup>337</sup> and the right to (access to) social security<sup>338</sup> are specifically provided for in the Constitution. However, as is apparent from the discussion below, in some SADC country constitutions the constitutional reference is of a generalised nature, and does not create directly enforceable social security or broader social protection, including labour rights. Other constitutional provisions (as in the case of Malawi and Zambia, the "principles of national policy" and "principles of state" respectively, or in the case of South Africa, the notion of constitutional values) may also play an important role in giving shape to interpreting and enforcing specific labour law and social security-related rights. In addition, as is evident from the South African experience, the very interrelatedness of the various socio-economic rights impacting on the areas of labour rights and social security is crucial for purposes of giving meaning and effect to specifically enumerated rights relating to labour law and social security.

Malawi is one of the interesting country examples which illustrate some of the above-mentioned trends. In section 30 the Malawian Constitution makes provision for a right to development<sup>339</sup> and a corresponding duty to ensure equality of opportunity as far as access to basic resources, education, health services, food, shelter, employment and

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<sup>335</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 42-46, from where this part has largely been taken.

<sup>336</sup> E.g. the Botswana Constitution contains a Bill of Rights, but no mention is made of socio-economic rights.

<sup>337</sup> Section 23 of the 1996 Constitution.

<sup>338</sup> Section 27(1)(c).

<sup>339</sup> Section 30(1): "All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right."

infrastructure are concerned.<sup>340</sup> This, however, does not create directly enforceable rights pertaining to these areas.<sup>341</sup> Section 13, on the other hand, contains as one of the enumerated principles of national policy the obligation on government to promote the welfare and development of the people of Malawi.<sup>342</sup> These goals may be taken into account by courts when interpreting the Constitution and other laws, or determining the validity of decisions of the executive.<sup>343</sup> The High Court of Malawi indeed exercised this right within the context of its general interpretative role in at least two decisions of constitutional significance. On closer analysis it would appear that the Court has done so in a way which acknowledges the lack of resources as a factor which strengthens the position adopted by the relevant statute<sup>344</sup> or government,<sup>345</sup> thereby serving as implicit limitations on the exercise of their rights by Malawians.

In Tanzania, social rights, defined as rights to adequate minimum income, housing, adequate education and adequate health care, are specifically protected in the Constitution.<sup>346</sup> Article 11(1) stipulates that the state authority shall make appropriate provisions for the realisation of a person's right to work, to self education and social welfare at times of old age, sickness or disability and in other cases of incapacity. The Zambian Constitution<sup>347</sup> poses yet another example of provisions which extend protection not in the nature of enforceable rights. Under the principles of state in section 7 of the Constitution it is stipulated that the state will endeavour to provide social

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<sup>340</sup> Section 30(2): "The State shall take all necessary measures for the realization of the right to development. Such measures shall include amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure."

<sup>341</sup> However, the Malawian Constitution does make specific provision for the right to education (section 5), property (section 28) and economic activity (section 29).

<sup>342</sup> By progressively adopting and implementing policies and legislation aimed at achieving gender equality, adequate nutrition, adequate health care, enhancing the quality of rural life, providing adequate resources to the education sector, to support the disabled, promote the full development of children, respect and support the elderly and to achieve a sensible balance between the creation of and distribution of wealth through the nurturing of a market economy and long term investment in health, education, economic and social development programmes.

<sup>343</sup> Section 14.

<sup>344</sup> See Kanyongolo, N "Social protection in SADC: Developing an integrated and inclusive framework – the case of Malawi" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 97 at 100: "In *Kamanga v The Attorney General* [Civil Case no. 948 of 1995], the court justified the statutory requirement for any suit against the government to be preceded by a three-month notice submitted to the Attorney General, partly on the ground that the requirement catered for delays in communication which were to be expected in Malawi where 'there are still vast areas where modern technology [for transmission of communication] is still underdeveloped'."

<sup>345</sup> Kanyongolo 101: "In *Mungomo v The Electoral Commission* [Miscellaneous Civil Application No. 23 of 1999], the same court considered the fact that the Government of Malawi relies on donors to finance its elections to be a relevant consideration in its decision ordering a postponement of the 1999 presidential and parliamentary elections because of irregularities in the voter registration process. In effect, therefore, lack of resources was factored into a decision which directly affected the exercise of rights by Malawians."

<sup>346</sup> In sections 11, 22 and 23 of the Constitution of the United Republic of Tanzania of 1977. Article 8(1) of the Constitution of the United Republic of Tanzania of 1977 states that the primary objective of the government shall be the welfare of the people.

<sup>347</sup> Constitution of Zambia Act 18 of 1996.

protection to its citizens subject to the ability of resources. As has been noted: "According to legal interpretation, this statement is not meant to be construed as a right but a function that the state shall undertake as it discharges its governance of development through its various instruments."<sup>348</sup> This social protection principle is executed by the government on the basis of various (primarily legislative) instruments which have been enacted.

The most comprehensive treatment of social protection-related issues from a constitutional perspective undoubtedly comes from South Africa. In the chapter dealing with the Bill of Rights the Constitution guarantees a range of labour rights, such as the right to fair labour practices, the right to freedom of association, the right to organise, the right to engage in collective bargaining, and the right to strike.<sup>349</sup> As indicated above,<sup>350</sup> some of these provisions have already been interpreted by the courts, in particular the Constitutional Court, in a way which can be described as extremely progressive. The Constitution also introduces a constitutional imperative whereby the government is compelled to ensure the "progressive realisation" of the right to access to social security).<sup>351</sup> The Constitution grants to everyone "[t]he right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance".<sup>352</sup> It also obliges the state to implement appropriate measures: "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights".<sup>353</sup>

Furthermore, the State has a duty to respect, protect, promote and fulfill the aforesaid right of access to social security.<sup>354</sup> In interpreting this right (and other related entrenched rights in the Bill of Rights), the South African courts are required to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>355</sup> In addition, they must promote the spirit, purport and objects of the Bill of Rights.<sup>356</sup>

There are several core principles which underlie and enhance the constitutional protection of social security as a human right in South Africa, amongst which the principles of:

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<sup>348</sup> Chisupa, N "Social protection in SADC: Developing an integrated and inclusive framework – the case of Zambia" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 198.

<sup>349</sup> Section 23.

<sup>350</sup> Par 4.2.3 above.

<sup>351</sup> Section 27(2).

<sup>352</sup> Section 27(1)(c).

<sup>353</sup> Section 7(2).

<sup>354</sup> Section 7(2).

<sup>355</sup> Section 39(1)(a) of the Constitution.

<sup>356</sup> Section 39(2).

- constitutional supremacy (effectively replacing the principle of parliamentary sovereignty);<sup>357</sup>
- entrenchment of the rights contained in the Bill of Rights;<sup>358</sup>
- a general human rights-friendly approach in terms of which, amongst others, the state is compelled to give effect to the said rights;<sup>359</sup>
- an international law-friendly approach, which allows institutions entrusted with interpreting and enforcing fundamental rights to rely extensively on international law norms and precedent;<sup>360</sup>
- a strong emphasis on socio-economic rights and the recognition of an intimate relationship between the various categories of fundamental rights;<sup>361</sup>
- an obligation on the state to give effect to these rights,<sup>362</sup> and an obligation on the courts, tribunals and forums – entrusted with the interpretation of any legislation<sup>363</sup> – to promote the spirit, purport and objects of the Bill of Rights;<sup>364</sup> and
- wide-ranging constitutional jurisdiction allocated to the courts, in particular the Constitutional Court,<sup>365</sup> supported by the specific powers granted to certain

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<sup>357</sup> This follows from the supreme status which has been allocated to the Constitution: according to section 2 it is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

<sup>358</sup> Section 74(2) of the Constitution signifies enhanced protection accorded to the Bill by requiring comprehensive support for its amendment: the amending Bill must be passed by the National Assembly, with a supporting vote of at least two thirds of its members, while at least six provinces in the National Council of Provinces must cast a supporting vote.

<sup>359</sup> The Constitution places a specific duty on the State to take positive measures in order to give effect to the constitutional rights, in particular the second and third generation fundamental rights, including the right to have access to social security. See, for example, section 27(2). This is fortified by the constitutional provision that the State must respect, protect, promote and fulfill the rights in the Bill of Rights: see section 7(2).

<sup>360</sup> Section 39(1)(b) stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law. According to the Constitutional Court decision in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35 (quoted with approval in *The Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC)) in the context of this provision, public international law would include non-binding as well as binding law. Furthermore, section 233 provides that "... when 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."

<sup>361</sup> The Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated and mutually supporting: *Grootboom* par 53; *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) par 40.

<sup>362</sup> Section 7(2) stipulates: "The state must respect, protect, promote and fulfill the rights in the Bill of Rights." As is evident from the discussion below, certain of the fundamental rights place a specific duty on the state to realise the rights in question in a specific manner.

<sup>363</sup> Or when developing the common law or customary law.

<sup>364</sup> Section 39(2). The courts have not hesitated to enforce the supremacy of the Constitution, in the area of social security, in circumstances where its principles have not been adhered to: *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) 800D–F (pars 76–77); *Minister of Health & others v Treatment Action Campaign & others* 2002 BCLR 1033 (CC).

<sup>365</sup> The Constitutional Court is the highest court in all constitutional matters and may decide only constitutional matters: section 167(3). The courts are empowered, whenever they decide on any issue involving the interpretation, protection and enforcement of a fundamental right contained in the Constitution, to make

constitutional institutions (in particular the South African Human Rights Commission)<sup>366</sup> to monitor compliance with fundamental rights.

In more concrete terms all of this is intended to have an impact on the quality of life of those subject to the Constitution. So much has been acknowledged by the present Chief Justice of South Africa: "The vision of [the South African] Constitution is to establish an open democracy committed to social justice and the recognition of human rights. It seeks to improve the quality of life of all citizens and free the potential of each of them".<sup>367</sup>

There is an intimate interrelationship between social security as a fundamental right and other fundamental rights. This is illustrated by the integrated approach which the courts, in particular the Constitutional Court, adopt whenever related constitutional rights, such as the right to equality, to human dignity, to just administrative action, and to access to courts are affected. In the area of socio-economic rights, in particular social security, this has led to fascinating responses on the part of the Court, especially when marginalised, poor and otherwise vulnerable people are affected. The Constitutional Court has affirmed that all the rights contained in the Bill of Rights are interrelated, indivisible and mutually supporting.<sup>368</sup>

In particular as far as social security is concerned, the Constitutional Court itself remarked, when considering the purpose of providing access to social security to those in need, that:<sup>369</sup>

*"A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs."*

The impact of the interrelated nature of the fundamental rights contained in the South African Constitution in the area of social assistance has been clearly illustrated in a recent case dealing with the exclusion of permanent residents from the purview of the South African social assistance system. In *Khosa* the court once again stressed the importance

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any order that is just and equitable (see section 167(4)(e)) and may grant "appropriate relief" (see sections 172(b) and 167(7) of the Constitution).

<sup>366</sup> A particularly important role is allocated to the South African Human Rights Commission (HRC) in the area of fundamental rights advocacy, promotion, and monitoring; see section 184(1). The Commission fulfils its constitutional mandate by undertaking research in order to produce protocols to organs of state; by submitting reports to Parliament and making them available to organs of state; by receiving individual complaints and involving itself in particular meritorious court actions (it intervened in the *Grootboom* case as *amicus curiae*); and by monitoring compliance with the order of a Constitutional Court, for example when requested to do so by the Court (as has been the case in the *Grootboom* matter). See also the Human Rights Commission Act 54 of 1994.

<sup>367</sup> Per Langa CJ "National Judges' Symposium (2003) Statement" – accessed at <http://www.doj.gov.za>.

<sup>368</sup> *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 53; *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) par 40.

<sup>369</sup> *Khosa & others v The Minister of Social Development & others*; *Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) 573A (case headnote summary).

of adopting a holistic approach which takes into account the fact that all rights are interrelated, interdependent and equally important,<sup>370</sup> the availability of human and financial resources in determining whether the state has complied with the constitutional standard of reasonableness, and other factors that may be relevant in a given case.<sup>371</sup> It remarked that where the state argues that resources are not available to pay benefits to everyone entitled under section 27(1)(c), the criteria for excluding a specific group (in this case permanent residents) must be consistent with the Bill of Rights as a whole.<sup>372</sup> Whatever differentiation is made must be constitutionally valid and cannot be arbitrary, irrational or manifest a naked preference.<sup>373</sup>

It has to be noted that there is a specific constitutional focus on addressing the plight of the most vulnerable and desperate in society. In particular, where categories of people belonging to deprived and impoverished communities are marginalised or excluded, and the right infringed is fundamental to their well-being (such as appropriate social assistance, or adequate housing), the Constitutional Court appears to be willing to intervene. This is, in particular, the case where the said communities have been historically marginalised and/or excluded or appear to be particularly vulnerable. For example, in *Minister of Health & others v Treatment Action Campaign & others Treatment Action Campaign*<sup>374</sup> the Court emphasised that:

*"[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."<sup>375</sup>*

This is of particular relevance for the debate on the position and social security status of non-citizens in South Africa, in view of the Constitutional Court's finding that non-citizens are a vulnerable group worthy of protection.<sup>376</sup>

The following conclusions in relation to the protection of social security rights in SADC constitutions, which are also of significance as far as the legal position of intra-SADC migrants is concerned, can therefore be drawn:

(a) The way in which provision is made for social security is in some cases, and barring some notable exceptions in the region, still reminiscent of an era where such protection has not necessarily been seen as guaranteeing entitlements to needy individuals and

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<sup>370</sup> *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 (6) BCLR 569 (CC) par 40.

<sup>371</sup> *Khosa* pars 43-44.

<sup>372</sup> *Khosa* par 45.

<sup>373</sup> *Khosa* par 53.

<sup>374</sup> 2002 BCLR 1033 (CC).

<sup>375</sup> Par 68, quoting from *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC) par 44. From this it follows that regard must be had to the extent and impact of historical disadvantage. Furthermore, particularly vulnerable groups may not be neglected. Finally, basic human dignity must be seen to be accorded to everyone when a social security programme is constructed and implemented.

<sup>376</sup> See the discussion in par 5.2 below.

communities. Both the formulation of these provisions and the jurisprudential interpretation given to them confirm the finding that these provisions are often not regarded as protecting enforceable individual and community rights. Further confirmation for such an approach is to be found in the specific leverage given to governments to justify non- or partial compliance on the basis of, amongst others, the lack of available resources.

(b) In some cases, from an interpretation point of view, constitutional principles and values do play an important role in giving meaning and effect to provisions relating to labour rights and social protection, serving as a yardstick to measure statutory instruments and governmental decision-making against.

(c) With perhaps the exception of the South African case, social security is not specifically recognised as a fundamental right worthy of constitutional protection. Broader social protection has to be inferred from other provisions relating to areas supportive of social security, such as housing, education and health. A well-developed integrative approach, which gives true recognition to the interrelated nature of all of these rights/provisions, has yet to develop in most of the SADC countries.

(d) It is, therefore, clear that the constitutional and fundamental rights protection informing the social security position of intra-SADC migrants is weak and unsatisfactory. Much more can be done at the national or country level to improve the constitutional protection of socio-economic rights, in particular social security-related rights, and to enhance the constitutional status and protection of non-citizens, in particular intra-SADC migrants. The value of such an approach is evident from the recent South African experience in this regard.

### **5.1.2 Statutory protection<sup>377</sup>**

The statutory framework provides the core basis for the provisioning of social security in SADC. Legislation would routinely provide for issues such as the setting up and funding of social security schemes, the functioning of social security institutions, criteria for entitlement, and the payment of benefits. There are, however, several important characteristics that appear from an analysis of the statutory framework employed in the different SADC countries.

Firstly, in some cases, framework legislation exists, which deals with several schemes, contingencies and benefit types in a single statutory instrument. The Namibian Social Security Act of 1994, the regulatory instruments which set up the National Institute of

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<sup>377</sup> See Olivier, M "Social protection in SADC: Developing an integrated and inclusive framework – A rights-based perspective" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 32-37.

Social Security (INSS) of Mozambique<sup>378</sup> and the framework for social security in that country,<sup>379</sup> and new social security framework legislation of 2001 in Angola (adopted in 2003)<sup>380</sup> are the typical examples of this kind of approach.

In other cases, secondly, and that appears to be the more prevalent picture within SADC, a range of statutes would each provide for a separate scheme, a separate contingency or set of contingencies, and separate contribution and benefit structures. For example, separate laws provide for unemployment insurance,<sup>381</sup> the unemployment injury scheme<sup>382</sup> and the road accident system<sup>383</sup> in South Africa, while social assistance is also catered for in separate legislation.<sup>384</sup> In some cases several laws would provide for a single contingency, but in respect of different categories of beneficiaries. This is in particular true of retirement provisioning in some of the SADC countries, for example Zambia, Tanzania and South Africa.

In short then, more integration in SADC countries as far as the statutory framework is concerned, would go a long way to the development of a comprehensive system and a clearer understanding of at least the fundamentals of the system.<sup>385</sup>

Thirdly, except for a few SADC countries,<sup>386</sup> the general picture is that social assistance<sup>387</sup> in particular lacks a formal statutory basis in many of the countries.<sup>388</sup> One

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<sup>378</sup> *Ibid*, with reference to the following remarks made by the Mozambique country reporter: "The INSS aims to guarantee social assistance to workers in case of diseases, casualties, maternity, invalidity, old age as well as of their families in case of death, etc."

<sup>379</sup> See the Law on Social Protection of 2007.

<sup>380</sup> The Social Security Framework Bill (Draft Bill) ("Lei de Enquadramento da Protecção Social") was adopted by the Angolan parliament in September 2003. It is in the nature of framework legislation, providing for a three pillar system of social security, consisting of a basic, compulsory and complementary pillar. See Olivier, M & Quive, S *Submission to the Angolan Parliament: Commentary on two Angolan Bills* (September 2003). This approach is also followed in the case of Mozambique – see the Law on Social Protection of 2007.

<sup>381</sup> Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002.

<sup>382</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993, and the Occupational Diseases in Mines and Works Act 78 of 1977.

<sup>383</sup> Road Accident Fund Act 56 of 1996.

<sup>384</sup> Primarily the Social Assistance Act 13 of 2004.

<sup>385</sup> See Olivier, M "Social protection in SADC: Developing an integrated and inclusive framework – A rights-based perspective" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 33.

<sup>386</sup> E.g. South Africa (Social Assistance Act), Zimbabwe (Social Welfare Assistance Act) and Mauritius (Social Aid Act).

<sup>387</sup> As well as related services and facilities.

<sup>388</sup> In Zambia, two such non-statutory social assistance programmes are available: the Public Welfare Assistance Scheme (PWAS) (a safety net programme aimed at cushioning vulnerable groups), and the Programme against Malnutrition. In the case of Swaziland it has been reported that in an attempt to address poverty alleviation the Ministry of Health and Social Welfare has what is known as the Subsistence Allowance Grant – this grant has no legal backing, but the Ministry in its budgetary allocation is sometimes given this money. The same essentially applies to Botswana, as no statutory protection is available for vulnerable groups – only so-called policy provisions are available for these groups, but no legal arrangements. See Olivier, M "Social protection in SADC: Developing an integrated and inclusive

of the implications of this is there is no legal obligation on the part of governments to take action in this area, or to allocate part of the budget to social assistance.<sup>389</sup> In the fourth instance, in almost all the SADC countries<sup>390</sup> social security legislation tends to be very categorical and exclusionary, especially as far as coverage is concerned, in the sense that a few benefit, while large pockets of people are excluded from protection. Several devices are utilised to obtain this result.<sup>391</sup> However, it is evident that all of these devices cumulatively have a devastating effect on social security coverage. In many of the SADC countries coverage remains restricted to the privileged few, while the majority of the population remains excluded.<sup>392</sup>

In summary then, one is left with the clear impression that while interesting developments, in particular of recent origin, are taking shape, the statutory framework still generally mirrors what have become characteristic hallmarks of the social security systems obtaining in most of the SADC countries: regulated in detail, at least as far as part of the system is concerned; a patchwork approach which emphasises the fragmented nature of most of the systems; a lack of overarching and common goals, objectives and direction; the absence of proper regulation in areas of social security which affect in particular the position and plight of the poor and vulnerable (especially social assistance); excluding and marginalising large pockets and often the majority of the population from coverage; and failing to accommodate within the framework of the system core elements of social security protection, in particular as far as prevention and (re)integration, and informal social security are concerned.

Intra-SADC migrants in particular can benefit from a streamlined and refocused social security statutory framework, also given the unsatisfactory state of social security and immigration laws pertaining to migrating non-citizens in SADC. There is an evident need to clarify the legal position and protection of migrating non-citizens by way of clear and consistent statutory provisions. Of course, all of this needs to be underpinned by an appropriate accommodating and responsive policy framework.

## **5.2 Non-citizens and social security: constitutional, statutory and jurisprudential perspectives**

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framework – A rights-based perspective" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 33 note 74. Several implications flow from this.

<sup>389</sup> *Ibid* 34.

<sup>390</sup> With the exception of Mauritius, whose system is for most part residence- and not formal sector employment-based. For example, self-employed people may, in terms of the National Pensions Act, join the public pension system. Namibia also has a partly residence-based system, which effectively broadens the basis of social protection.

<sup>391</sup> See Olivier, M "Social protection in SADC: Developing an integrated and inclusive framework – A rights-based perspective" in Olivier, M & Kalula, E *Social protection in SADC: Developing an Integrated and Inclusive Framework* (Centre for International and Comparative Labour and Social Security Law (CICLASS) & Institute of Development and Labour Law 2004) 34-35.

<sup>392</sup> *Ibid* 35.

Since the statutory framework relating to the position of non-citizens has largely been addressed above,<sup>393</sup> it is opportune to investigate the jurisprudential evidence pertaining to the constitutional and statutory framework of regulation and protection of non-citizens in social security.

In the South African constitutional context it has been accepted that non-citizens constitute a vulnerable group in society. Referring to its earlier judgment in the *Larbi-Odam* case,<sup>394</sup> the Constitutional Court recently reiterated this much. In determining whether excluding permanent residents from the social assistance system would amount to *unfair* discrimination, the Court held:<sup>395</sup>

*"There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect. Because both permanent residents and citizens contribute to the welfare system through the payment of taxes, the lack of congruence between benefits and burdens created by a law that denies benefits to permanent residents almost inevitably creates the impression that permanent residents are in some way inferior to citizens and less worthy of social assistance."*

In the matter of *Larbi-Odam v Member of the Executive Council for Education (North-West Province) and the Minister of Education*<sup>396</sup> the Constitutional Court had to rule on the constitutionality of a regulation<sup>397</sup> made under the applicable legislation, which restricted permanent appointments in public education to South African citizens. In overturning the decision of the court *a quo*, the Court found that the regulation amounts to an unjustified infringement of the alien teachers' right to equality. Restricting permanent employment to South African citizens could also not be saved by the general provision in the Bill of Rights which allows for the limitation of fundamental rights. The Constitutional Court made short shrift of the main argument on justification, namely that it is the interest of a government to provide employment to its own nationals. While the Court agreed that it must be a legitimate purpose for a government department to reduce unemployment among South African citizens, that must never be permitted to compromise the primary aim, namely the provision of quality education. The Court expressed itself on this in the following important terms:

*"Permanent residents should, in my view, be viewed no differently from South African citizens when it comes to reducing unemployment. In other words, the government's aim should be to reduce unemployment among South African citizens and permanent residents. As explained above, permanent residents have been invited to make their home in this country. After a few years, they become eligible for citizenship. In the interim, they merit the full concern of the government concerning the availability of employment opportunities. Unless posts require citizenship for some*

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<sup>393</sup> See paras 4.2.2 and 4.2.3 above – dealing with the social security and immigration laws respectively. See also par 5.1.2 above.

<sup>394</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province) v The Minister of Education* 1997 BCLR 1655 (CC).

<sup>395</sup> *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others* 2004 6 BCLR 569 (CC) par 74.

<sup>396</sup> 1997 BCLR 1655 (CC).

<sup>397</sup> Regulation 2(2) of the Regulations Regarding the Terms and Conditions of Employment in Education.

*reason, for example due to the particular political sensitivity of such posts, employment should be available without discrimination between citizens and permanent residents. Thus it is simply illegitimate to attempt to reduce unemployment among South African citizens by increasing unemployment among permanent residents. Moreover, depriving permanent residents of posts they have held, in some cases for many years, is too high a price to pay in return for increasing jobs for citizens."*

Therefore, so the Court argued, while the problem of oversupply of teachers may be relevant to immigration policy and to decisions to be taken where the competition for a post is between a citizen and a temporary resident, an exclusion of permanent residents from the competition on the grounds that they do not hold citizenship is purely discriminatory and has no valid justification.

Does this mean that refugees and asylum-seekers have unrestricted access to the labour market? A blanket prohibition would certainly not pass constitutional muster. This much appears from, for example, the striking down by the Supreme Court of Appeal of regulations<sup>398</sup> which purported to place a prohibition on asylum-seekers awaiting procession of their applications to work or study, as being *ultra vires* the Constitution.<sup>399</sup> In the Constitutional Court case of *The Union of Refugee Women & others v The Director: The Private Security Industry Regulatory Authority & others*<sup>400</sup> the majority upheld the constitutionality of the statutory provision<sup>401</sup> which restricted access to the private security industry to citizens and permanent residents. However, the Court made it clear that this provision should not be used as a blanket exclusion of, for example, all refugees from all private security activity. Noting that it is a primary object of the legislation that entrants to the security industry be screened, the Court held that the exemption provision of the relevant law<sup>402</sup> should be applied in such a way that it be considered in cases where an application for exemption is brought whether the employment of the applicant for exemption would frustrate the objects of the legislation. The Court also ordered that the respondents must ensure that all applicants and potential applicants for exemption as security service providers are made aware of the nature of the information that must be furnished in their applications for exemption.

The case of *Khosa & others v The Minister of Social Development & others; Mahlaule & others v The Minister of Social Development & others*<sup>403</sup> concerned the exclusion of permanent residents, in particular the old and the young, from the purview of the South African social assistance system.

Having found that the constitutional entitlement to access to social security accruing to "everyone" includes "all people in our country",<sup>404</sup> the court reasoned, however, that it might be reasonable to exclude citizens from other countries, visitors and illegal

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<sup>398</sup> See regulation 7 of the Refugee Regulations (Forms and Procedure) 2000.

<sup>399</sup> *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA), upholding the judgment in *Watchenuka and Another v Minister of Home Affairs and Others* 2003 (1) BCLR 62 (C).

<sup>400</sup> 2007 (4) BCLR 339 (CC).

<sup>401</sup> Section 23(1), read with section 20 of the Private Security Industry Regulation Act 56 of 2001.

<sup>402</sup> Section 23(6) allows for exemption on good cause shown.

<sup>403</sup> 2004 6 BCLR 569 (CC).

<sup>404</sup> *Khosa* pars 46-47.

residents, who have only a tenuous link with the country (e.g., non-citizens in South Africa who are supported by sponsors who arranged their immigration). Temporary residents are, therefore, excluded from this case, the Court found.<sup>405</sup> Permanent residents though have been residing in South Africa for some time, they have made South Africa their home, their families might be with them and their children might have been born in South Africa. They have a right to work and they owe a duty of allegiance to the state.<sup>406</sup>

To exclude permanent residents from entitlement to social assistance would fundamentally affect their human dignity (which is both a constitutional right – see section 10 – and a constitutional value) and equality (which is likewise both a constitutional right – see section 9 – and a constitutional value).<sup>407</sup> Also, to use the non-availability of social grants as a tool to regulate immigration (in the sense that this could be seen as part of the immigration policy of the state that aims to exclude persons who may become a burden on the state and to encourage self-sufficiency), is of no avail. Instead, so the Court argued, through careful immigration policies the state could ensure that those people who are admitted will not be a burden on the state. The Court also noted that in this particular case one is concerned with the aged and children and they are unlikely to provide for themselves: the self-sufficiency argument does not hold up in such a case.<sup>408</sup>

More recently, the right to access to appropriate social assistance was considered in an unreported High Court matter dealing with the rights of child refugees. This case<sup>409</sup> dealt with the state's obligation to treat unaccompanied foreign children *as children in need of care* through the formal child protection system as opposed to processing them through the immigration system. As was the case in a related matter,<sup>410</sup> the High Court issued a supervisory interdict, which compelled government departments within the so-called social cluster of departments to address the problem collectively, to coordinate action and submit regular progress reports on specified dates to all parties concerned. This particular and until now unusual remedy in the South African constitutional context clearly illustrates the need for an intersectoral and integrated national policy framework. Employing this remedy in this particular context is evidently aimed at preventing the marginalisation of children in need of proper protection.

Several of the court cases dealing with the protection of non-citizens relate to the constitutional protection available to irregular/undocumented non-citizens<sup>411</sup> and

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<sup>405</sup> *Khosa* pars 58-59.

<sup>406</sup> *Khosa* par 59.

<sup>407</sup> *Khosa* par 76-84.

<sup>408</sup> *Khosa* par 65.

<sup>409</sup> Referred to as the *Lindela* case (*Centre for Child Law & Another (Lawyers for Human Rights) v Minister of Home Affairs & Others* 2005 (6) SA 50 (T)), after the (notorious) holding camp for refugees in the Gauteng province.

<sup>410</sup> The *Zuba* case (*The State v Mfezeko Zuba and 23 Similar Cases* unreported judgment of the Eastern Cape High Court) dealt with the state's approach towards sentencing options for juvenile offenders where the Criminal Procedure Act creates sentencing options for juvenile offenders, namely two years in reform school, instead of a prison.

<sup>411</sup> See the discussion in par 3.2 above.

refugees. These judgments impact either directly or indirectly on the social security position of these migrant categories. For example, these cases included instances where the release of unlawfully detained refugees,<sup>412</sup> the processing of applications for refugee status within reasonable time and in accordance with national and international refugee law,<sup>413</sup> the removal of unlawful conditions from the asylum-seeking process,<sup>414</sup> and the incorporation of refugees who are disabled within the framework of the social assistance grants,<sup>415</sup> were ordered. More recently, the High Court ordered the release of refugees detained unlawfully in a police raid on a church.<sup>416</sup>

Access to employment for non-citizens is an important tool to ensure social insurance-based entitlements for migrants. The court judgments emanating from South Africa which confirmed access to private and public employment for at least certain categories of foreigners<sup>417</sup> and the right of refugees and asylum-seekers to work,<sup>418</sup> effectively implies access to unemployment insurance (at least for permanent residents not employed in government), compensation for occupational injuries and diseases, occupational-based retirement and health insurance. This access is potentially also available to irregular migrants whose work permits may have expired. According to recent case law the expiry of their work permits does not affect the validity of the employment contract between such a migrant and his/her employer.<sup>419</sup>

From these judgments it is clear that non-citizens are generally regarded as a vulnerable group which, from the perspective of the constitutional framework, is entitled to legal protection. Save for those rights in the Constitution which are reserved for citizens only,<sup>420</sup> the whole gamut of fundamental rights, including the right to access to social security and appropriate social assistance, as well as the right to fair labour practices, is therefore available to non-citizens migrating to South Africa.<sup>421</sup>

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<sup>412</sup> Cf *South African Human Rights Commission & Forty Others v Minister of Home Affairs and Dyambu (Pty) Ltd* (Case no. 28367/99, Witwatersrand High Court).

<sup>413</sup> Cf *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); [2007] 1 All SA 97 (C): the Court held the policy at refugee reception offices to accept only a predetermined number of applications for asylum to be unconstitutional. See also *Somali Refugee Forum and Another v The Minister of Home Affairs and Others* (Case no. 32849/2005, High Court).

<sup>414</sup> See FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 24-25 for details.

<sup>415</sup> *Ibid* 24.

<sup>416</sup> See [http://www.lrc.co.za/Articles/Articles\\_Detail.asp?art\\_ID=400](http://www.lrc.co.za/Articles/Articles_Detail.asp?art_ID=400), accessed on 11 March 2008.

<sup>417</sup> *Larbi-Odam v Member of the Executive Council for Education (North-West Province) v The Minister of Education* 1997 BCLR 1655 (CC); *The Union of Refugee Women & others v The Director: The Private Security Industry Regulatory Authority* 2007 (4) BCLR 339 (CC).

<sup>418</sup> *Minister of Home Affairs and Others v Watchenuka and Another* 2004 (2) BCLR 120 (SCA), upholding the judgment in *Watchenuka and Another v Minister of Home Affairs and Others* 2003 (1) BCLR 62 (C).

<sup>419</sup> *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

<sup>420</sup> I.e. sections 19 (political rights), 20 (citizenship), 21(3) & (4) (the right to enter, to remain in and to reside anywhere in the Republic, and to a passport), 22 (right to choose their trade, occupation or profession freely), and 25(5) (access to land on an equitable basis).

<sup>421</sup> See *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C); [2007] 1 All SA 97 (C).

From a statutory perspective, it appears that limited, but on the face of it, growing provision for the treatment of non-citizens within the framework of social security is made in the laws in some SADC countries. For example, in Tanzania the recently promulgated Social Security (Regulatory Authority) Act, 2008 provides for the making of regulations in relation to portability of benefit rights and international reciprocal agreements for transfer of benefits.<sup>422</sup> In South Africa, similar provisions relating to entering into of reciprocal bilateral agreements are contained in the workers compensation<sup>423</sup> and social assistance legislation.<sup>424</sup>

## 6. Inter-country responses: The impact of bilateral arrangements

In the absence of a multilateral arrangement regulating co-ordination and portability issues in SADC, SADC countries have had to rely on bilateral arrangements. However, only a few such agreements are in existence, mostly involving South Africa as one of the parties. As appears from the discussion below, the scope of these agreements is limited and, with the exception of the 2003 agreement between Zambia and Malawi and an agreement between South Africa and Mozambique regulating payment of workers compensation benefits, does not cover public social security schemes, but merely employer-based occupational arrangements.

A recent bilateral agreement between Zambia and Malawi essentially deals with problems experienced by Malawi nationals who worked in Zambia. It provides that the Workers Compensation Fund in Zambia undertakes to identify a medical practitioner in Malawi to administer medical examinations or assessment for pneumoconiosis/silicosis for Malawian miners who worked in Zambia.<sup>425</sup> The agreement also foresees the establishment of a mechanism to facilitate, where applicable, the remittance of monthly pension through the Malawi High Commission in Lusaka.<sup>426</sup>

South Africa has entered into so-called labour agreements with a range of SADC countries,<sup>427</sup> including Botswana,<sup>428</sup> Lesotho,<sup>429</sup> Malawi,<sup>430</sup> Swaziland,<sup>431</sup>

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<sup>422</sup> Section 54(2)(h).

<sup>423</sup> Section 94 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>424</sup> Section 2(1) of the Social Assistance Act 13 of 2004.

<sup>425</sup> See par C(g) of the social security bilateral Malawi/Zambia agreement (2003).

<sup>426</sup> Par D(c) of the agreement.

<sup>427</sup> The agreements specify conditions and obligations on issues such as:

- recruitment – including right to recruit, length of contract, length of time between contracts, quotas, payment of recruiting fees, the need for written contracts, and provision of facilities for recruiting and processing contracts;
- contracts – including identification of employer and employee, home address of recruit, place of employment, contract length, minimum wage, food and in-kind provision by employer, transport to and from work, and written contracts;
- remittances and deferred pay - provision for compulsory deduction of a proportion of wages and transfer to the home country;
- taxation – exempting contract workers from paying tax in South Africa;

Mozambique<sup>432</sup> and, apparently, more recently, Zimbabwe.<sup>433</sup> Whether these bilateral agreements are consistently applied and enforced,<sup>434</sup> is unclear. There is some indication that they may have, at least for some time, become obsolete. In January 2006, for example, it was reported that the South African and Lesotho governments had agreed to revive the 1973 agreement, and that arrangements were made to settle outstanding pensions and compensation claims of Lesotho migrant workers who had been employed

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- documentation – including valid contracts, passports and vaccination certificates; endorsement in passport to show purpose and period of entry; employment record books;
  - unemployment insurance;
  - length of agreements; and
  - appointment of labour officials to be stationed in South Africa. The labour offices are nominally responsible for *inter alia* "protecting the interests of workers", registration of undocumented workers, transfer of money, providing information on conditions of employment; and consulting with the South African government on repatriation of sick or destitute workers.

<sup>428</sup> *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 the Republic of South Africa, Botswana citizens in the Republic of South Africa and the Movement of such Persons across the International Border – Treaty Series 3/1973.* The agreement entered into force on 24 December 1973.

<sup>429</sup> *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, Lesotho Citizens in the Republic of South Africa and the Movement of such Persons across the International Border – SA Treaty Series 1/1973.* The agreement entered into force on 24 August 1973.

<sup>430</sup> *Agreement between the Governments of the Republic of South Africa and Malawi relating to the employment and documentation of Malawi nationals in South Africa – SA Treaty Series 10/1967.* The agreement entered into force on 1 August 1967.

<sup>431</sup> *Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a Swaziland government Labour Representative in the Republic of South Africa, certain Swaziland citizens in the Republic of South Africa, the movement of such persons across the common border and the movement of certain South African citizens across the common border, and addendum thereto – SA Treaty Series 3/1986.* The agreement entered into force on 22 August 1975.

<sup>432</sup> *Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal regulating the employment of Portuguese workers from the Province of Mozambique on certain mines in the Republic of South Africa – SA Treaty Series 11/1964.* The agreement was entered into between the Government of the Republic of South Africa and the then colonial government, the Government of the Republic of Portugal, and entered into force on 1 January 1965. The 1964 agreement followed on a range of earlier agreements with the Portuguese colonial government regulating the provision of temporary labour from Mozambique, dating back to 1875, 1876, 1901, 1909 and 1928: see Plender, R *International Migration Law* (Martinus Nijhoff 1988) 339.

See also <http://www.queensu.ca/samp/sampresources/policy.html>, accessed on 7 April 2008.

<sup>433</sup> According to February 2007 news reports, an agreement between the South African and Zimbabwean governments was recently signed: information obtained from <http://www.queensu.ca/samp/> on 27 June 2007. Formerly, in the absence of a formal labour arrangement/agreement with the South African government, farming areas in the far north of South Africa were designated as a "special employment zone". A special permit was issued which would enable migrant workers from Zimbabwe to work on these farms under this scheme (see Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 10).

<sup>434</sup> See the remarks made by Fultz and Pieris (quoted in par 8.4 below), concerning the lack of proper implementation as regards the South African-Mozambique agreement, pertaining to the transfer of workers compensation payments.

in South African mines. The report also indicated that similar agreements had been entered into with Zimbabwe and Mozambique.<sup>435</sup>

Nevertheless, an analysis of the agreements reveals that they were entered into to (tightly) regulate the flow of migrant labour from these countries to South Africa.<sup>436</sup> Social security and related arrangements, in particular portability issues, are purely dealt with as a byproduct of the agreements. In this regard the agreements typically arrange for the payment of taxes to the government of the sending country,<sup>437</sup> and in particular for the following deductions:

- deferred pay to be paid to the foreign national in the sending country upon return to that country;
- allowances payable to family members; and
- monies to be paid into a welfare fund which may be set up by the government of the sending country for the purpose of supporting such citizens during periods of their disablement upon return to the sending country

However, it is clear that the obligations outlined above are primarily imposed upon the relevant employers, and not the South African government – the agreements invariably refer to the fact that the South African authorities "shall endeavour to ensure ..." compliance by employers.

There are several other reasons why these agreements, to the extent that they may still be operational, must be seen as limited in scope and effect, and as insufficient from a co-ordination and portability perspective:

- (a) The agreements, including the Zambia-Malawi agreement, are not reciprocal in nature, as they stand to regulate the position of nationals of one of the respective countries only.
- (b) Repatriation regulation is dealt with together with labour migration. For example, in terms of the agreement between Swaziland and South Africa, the Government Labour Offices and Representatives established under the agreement have the function to "assist the Government of the Republic of South Africa with the repatriation<sup>438</sup> of sick, injured or destitute Swaziland citizens who are or were

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<sup>435</sup> Information obtained from <http://www.queensu.ca/samp/> on 27 June 2007.

<sup>436</sup> The agreements typically provide that employment may only occur in accordance with the provisions of the agreement, that a citizen of the sending country entering South Africa for purposes of employment must also have in possession a written employment contract attested in the home country, and that the period of employment may not exceed 24 months. With some exceptions, recruitment is limited to agencies which have been authorised to do so. Entering into or remaining in South Africa in contravention of the agreements is made subject to repatriation.

<sup>437</sup> The agreement with Malawi contains one exception, relating to Malawi nationals who had been in South Africa "for a considerable period".

<sup>438</sup> Article 5 requires prior consultation.

employed in the Republic of South Africa and of other such citizens whose presence in the Republic of South Africa is or has become unlawful."<sup>439</sup>

- (c) As suggested, as a rule they do not cover public social security transfers, but only employer-based occupational-based payments.
- (d) In view of the above, and given the overly control and restriction orientation and purpose of the agreements, apart from providing for some measure of portability, these agreements do not provide for other arrangements typical of co-ordination regimes, such as maintenance of acquired rights, aggregation of insurance periods, and equality of treatment with nationals of the receiving country in social security matters.

In fact, these agreements have the effect of excluding nationals of the sending country from entitlement to benefit from unemployment insurance in South Africa: migrant workers who have to return to their home country as a result of the agreements are not regarded as contributors to, and could therefore not benefit from, the Unemployment Insurance Fund. While this may be seen as an arrangement which benefits employers of such migrant workers,<sup>440</sup> this may leave returning migrants in a precarious position upon return to their home country.

South Africa signed an agreement with Mozambique which allows for payments in respect of employment injuries and diseases to be made in Mozambique. The agreement has been widely criticised in view of the fact that payments seldom reach beneficiaries. Commenting on the position in Southern Africa in relation to workers compensation schemes, Fultz and Pieris remark:<sup>441</sup>

*"... The most developed employment injury payment arrangements exist in South Africa, where benefits may be remitted through government-to-government agreements or through the mines' major recruitment agency, The Employment Bureau of Africa (TEBA), in those countries where it has offices. In the former arrangement, government corruption in the receiving country has sometimes prevented payments from reaching beneficiaries. This has been a particular problem in Mozambique, where a small survey undertaken in 1996 by Rand Mutual, the private firm which administers workers compensation for the mining industry, showed that 70 percent of compensation payments remitted in this manner had not reached the beneficiary."<sup>442</sup>*

South Africa also signed a labour agreement with Lesotho in October 2006. The agreement addresses issues relating to progress made on compensation issues, the general welfare of migrant workers, difficulties encountered by widows in trying to access death benefits for their husbands, repatriation of funds to Lesotho, and unemployment

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<sup>439</sup> Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 62: They also indicate that dealing with repatriation and labour policy together implies that, from the South African perspective, it will not be possible to roll over the existing bilateral agreements as the agreements contemplated in section 21(4) of the Immigration Act.

<sup>440</sup> As they would otherwise have been liable to pay contributions to the Fund as well.

<sup>441</sup> Fultz, E & Pieris, B *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* (ILO/SAMAT Policy Paper No. 7) (ILO Harare, Zimbabwe, 1998) 19-20.

<sup>442</sup> See Fultz, E *Social Protection of Migrant Workers in South Africa* (ILO/SAMAT Policy Paper No. 3) (ILO Harare, Zimbabwe, 1997).

insurance fund deductions. Other issues pertain to the non-support of dependents of deceased workers, review of the labour law agreement between the two countries, capacity building, health and safety, national employment services, skills development, and HIV and AIDS partnership programme.<sup>443</sup>

A 2004 memorandum of understanding between Zimbabwe and South Africa provided for the payment of financial claims by Zimbabwean former mine and farm workers who did not receive proper severance packages from South African employers because of their foreign status. It further outlined policy and guidelines that farmers, especially around South Africa's borders, must follow before employing foreign workers.<sup>444</sup>

It has to be noted that recent bilateral agreements and arrangements between some of the SADC countries provide for the regulation of movement across country borders. To some extent this is a reflection of the impact of the considerable migration flows between, for example, South Africa and some of its neighbouring countries, notably Lesotho, Mozambique and Zimbabwe, as well as between Namibia and Angola. Simultaneously it underscores the need for arrangements which qualify the strict provisions of the immigration legislation, particularly in South Africa.

For example, in June 2007 South Africa and Lesotho concluded a bilateral agreement on the facilitation of cross border movement of citizens.<sup>445</sup> The objective of the agreement is to facilitate the movement of citizens of the RSA and Lesotho; and to minimise the escalating costs related to improving service delivery regarding immigration clearance of their citizens who routinely cross the borders between the two countries. The agreement allows the citizens of the two countries to freely move between them without reporting to the migration officers for examination.<sup>446</sup> However, the citizens are required to possess a valid passport to do so. Provision is made for the respective countries to permit bona fide citizens to enter and sojourn for the purposes of holiday, business and transit without producing visas and/or temporary residence permits. The citizens of these countries are excluded from obtaining the required visas for permission to be in the country. However, their passports would still be subject to verification for validity and authenticity.

However, the agreement requires that a citizen apply for a visa and/or permit in a situation where the person enters a country for purposes other than visiting.<sup>447</sup> Article 4 on labour agreements subjects the citizens to the laws of the respective countries. Thus, the citizens would then be governed by the laws of the chosen country to work in. On

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<sup>443</sup> As reported by the Southern Africa Migration Project (SAMP) in October 2006 at [http://www.queensu.ca/samp/migrationnews/article.php?Mig\\_News\\_ID=3964&Mig\\_News\\_Issue=22&Mig\\_News\\_Cat=8](http://www.queensu.ca/samp/migrationnews/article.php?Mig_News_ID=3964&Mig_News_Issue=22&Mig_News_Cat=8)

<sup>444</sup> As reported by the Southern Africa Migration Project (SAMP) in October 2004 at <http://www.queensu.ca/samp/migrationnews/2004/oct.htm>

<sup>445</sup> Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho on the Facilitation of Cross-Border Movement of Citizens of the Republic of South Africa and the Kingdom of Lesotho. The agreement does not apply to citizens of the countries who enter or depart from their respective territories through designated international airports

<sup>446</sup> Article 2 of the Agreement.

<sup>447</sup> Article 3.

first entry after the issuance of the contract, the citizen is required to report to an immigration officer for examination.

A similar arrangement, allowing visa-free entry across the Mozambican-South African borders, was entered between South Africa and Mozambique into some years ago. In May 2009, a statement was issued by the South African Minister for Home Affairs to the effect that Zimbabweans no longer need to apply and pay for visas before travelling to South Africa. Instead, they can apply for a free 90-day visitor's permit at the border.<sup>448</sup> The statement also announced that Zimbabwe citizens could apply to do casual work while in South Africa. Already in April 2009, the South African Department of Home Affairs announced that Zimbabweans, who have entered South Africa seeking political asylum and employment, will be given a "special dispensation" permit. The permit confers on them the right to stay in South Africa for a period of six months, as well as the right to schooling or education, the right to work and access to basic health care.<sup>449</sup>

Namibia and Angola have signed an agreement allowing citizens in border communities to travel freely with only a border pass within a range of sixty kilometres in each country.<sup>450</sup>

## **7. Regional level responses: The impact of institutional structures and regional (SADC) measures<sup>451</sup>**

### **7.1 Introduction**

Southern African Development Community (SADC) objectives as set out in the founding Treaty aim at the promotion of economic and social development, and the establishment of common ideals and institutions, among other objectives.<sup>452</sup> While SADC is, unlike the European Union, not a supra-national institution, but a regional organisation, its emphasis has shifted decisively from "development coordination" to developmental, economic<sup>453</sup>

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<sup>448</sup> [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2510886,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2510886,00.html), accessed on 4 May 2009.

<sup>449</sup> Announcement by the Director-General of the Department of Home Affairs (Immigration Services): see [http://www.news24.com/News24/South\\_Africa/News/0,,2-7-1442\\_2495990,00.html](http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2495990,00.html), accessed on 2 April 2009.

<sup>450</sup> MIDSAs Report and Recommendations of the MIDSAs Workshop on: Migration, Poverty and Development 24-25 April, 2006 Windhoek, Namibia; accessed at [http://www.queensu.ca/samp/midsa/downloads/MIDSAs\\_Report\\_Namibia\\_Final24May1.doc](http://www.queensu.ca/samp/midsa/downloads/MIDSAs_Report_Namibia_Final24May1.doc)

<sup>451</sup> See also Olivier, MP & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 22.

<sup>452</sup> See generally article 5.

<sup>453</sup> The Preamble of the Treaty emphasises the importance of economic interdependence and integration, while SADC is defined as "the organisation for economic integration established by article 2 of the Treaty" (see article1).

and regional<sup>454</sup> integration". The Treaty, as is the case with its antecedent Protocols,<sup>455</sup> is a legally binding document providing an all-encompassing framework, by which countries of the region shall co-ordinate, harmonise and rationalise their policies and strategies for sustainable development in all areas of human endeavour. The Treaty commits Member States to fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit.<sup>456</sup> According to article 5 of the Treaty, some of SADC's objectives are to achieve development and economic growth, *alleviate poverty*, enhance the quality of life of the peoples of Southern Africa and *support the socially disadvantaged through regional integration*.<sup>457</sup> "Human resources development" and "social welfare" are specifically mentioned as areas on which SADC Member States agreed to co-operate with a view to foster regional development and integration, and in respect of which the Member States undertook, through appropriate institutions of SADC, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.<sup>458</sup>

## **7.2 Relevant regional instruments and responses**

### **7.2.1 General framework<sup>459</sup>**

SADC Protocols do not, as such, regulate matters pertaining to social security. However, from a holistic perspective, it is clear that the Protocols achieve a number of objectives in relation to the SADC agenda, and its impact on social security, also for intra-SADC migrants. This applies in particular to Protocols such as the Protocol on Gender and Development; Protocol on Energy; Protocol on Extradition; Protocol on the Facilitation of Movement of Persons; Protocol on Health; Protocol on Immunities and Privileges; Protocol on Legal Affairs; Protocol on Mining; Revised Protocol on Shared Watercourses; Protocol on Tourism; Protocols on Trade; Protocol on Tribunal and Rules of Procedure Thereof. Some of the protocols evidently stress the developing social dimension of SADC. The objectives include the strengthening of the regional integration agenda, as well as the promotion of sustainable and equitable economic growth and

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<sup>454</sup> See article 5(1)(a). The Preamble also refers to the "need to mobilise our own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration".

<sup>455</sup> The definition of "Protocol" in article 1 of the Treaty refers to a Protocol as an instrument of implementation of the Treaty, having the same legal force as the Treaty.

<sup>456</sup> Article 4.

<sup>457</sup> Emphasis added.

<sup>458</sup> Article 21.

<sup>459</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 39-41, from where this part has been taken.

socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration. For example, the establishment in 2008 of the SADC Free Trade Area, based on the provisions of the Protocol on Trade, should lead to an increase in trade amongst the Member States of SADC, as well as between the region and the rest of the world. It is also the first step towards deeper regional integration in SADC. It is envisaged that the successful implementation of the free trade area will facilitate the implementation of the other stages towards eventual integration. Therefore, although not having direct social security implications, the free trade area/agreement facilitates the achievement of SADC's overall objectives referred to above.

Of potential significance are the provisions of the SADC Draft Protocol on the Facilitation of Movement of Persons. In terms of Article 2, the overall objective of the protocol is to develop policies aimed at the progressive elimination of obstacles to the movement of persons of the Region generally into and within the territories of State Parties. This overall objective of the Protocol will be achieved by facilitating entry, for a lawful purpose and without a visa, into the territory of another State Party for a maximum period of ninety (90) days per year for bona fide visit and in accordance with the laws of the State Party concerned; permanent and temporary residence in the territory of another State Party; and establishment of oneself and working in the territory of another State Party.<sup>460</sup>

Residence and establishment are routinely made subject to the *restrictions contained in national laws*.<sup>461</sup> Article 20 states that a citizen of a State Party who acquires residence or establishment in the territory of another State Party shall enjoy those rights and privileges as determined by the laws of a host State and shall also fulfil his or her obligations, accordingly. The Protocol prohibits the removal of persons from the territory of a member state except in certain specifically defined situations.<sup>462</sup>

The Charter of Fundamental Social Rights in SADC ("Social Charter") contains important provisions relating to labour law and social security protection. As regards labour rights, it requires of Member States to observe the basic rights enshrined in the Charter, relating to freedom of association and collective bargaining, equal treatment for men and women, and the protection of children and young people, as well as persons with disabilities. It also requires the improvement and harmonisation of working and living conditions, and the creation of an enabling environment for purposes of the

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<sup>460</sup> Article 3 of the SADC Draft Protocol on the Facilitation of Movement of Persons.

<sup>461</sup> Own emphasis. See article 17.4 and 17.5 (in respect of right of residence) and article 19 (in respect of the right of establishment) respectively.

<sup>462</sup> See article 22: where reasons of national security, public order or public health of the host State so dictate; an important essential condition of the issue or validity of such person's residence or establishment permit has ceased to exist or cannot be fulfilled or complied with any longer; a citizen of another State Party acts in conflict with the purposes for which such permit was issued or contravenes or fails to comply with any such conditions subject to which it was issued; or the person refuses to comply with a lawful order of an appropriate public health authority issued for the protection of public health in circumstances where the consequences of such refusal have been explained.

protection of health, safety and environment, information, consultation and participation of workers, employment and remuneration, and education and training of workers. Apart from observance of the rights contained in the Charter, it also requires of Member States to take appropriate action to ratify and implement ILO instruments and as a priority the core ILO Conventions.<sup>463</sup>

The Charter further contains provisions relating to the social protection of both workers and those who are not employed – and regulates the position of workers (in terms of social protection) more comprehensively than those who do not work. Article 10 is the lead article in this regard, and stipulates as follows:

*"SADC Member States shall create an enabling environment such that every worker in the SADC Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance."*

Member States also undertake to create an enabling environment in accordance with arrangements applying to each country to protect the elderly. This protection relates to both workers in respect of whom retirement provision exists, and every other worker who has reached retirement age, but in respect of whom no entitlement to a pension exists and who does not have other means of subsistence. As far as the former are concerned, the Charter stipulates that every worker of the SADC region shall at the time of retirement be able to enjoy resources affording him or her a decent standard of living, including equity in post employment security schemes.<sup>464</sup> With regard to the latter, the Charter determines that such a person shall be entitled to adequate social assistance to cater specifically for basic needs including medical care.<sup>465</sup>

Of importance is also the identification of the actors in the process of developing and implementing these standards. Ideally, according to the Charter, these should be national tripartite institutions and existing regional structures.<sup>466</sup> All Member States are required to submit regular progress reports to the annual regional tripartite sectoral meeting.<sup>467</sup>

Taking its cue from the SADC Treaty, the Social Charter and the SADC Regional Indicative Strategy Development Plan (RISDP), the Code on Social Security in the SADC, adopted in 2007, contains crucial provisions for the further development of social security in SADC, in particular at a country level. It provides strategic direction, including guidelines, a set of principles and standards, a monitoring framework, and an instrument for co-ordination, harmonisation and convergence of social security.<sup>468</sup> It

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<sup>463</sup> Article 5.

<sup>464</sup> Article 8(a).

<sup>465</sup> Article 8(b).

<sup>466</sup> Article 16.

<sup>467</sup> Article 16(1): The most representative organisation of employers and workers must be consulted in the preparation of the report. Article 16(2) stipulates that these institutions and structures must promote social legislation and equitable growth within the Region and prevent non-implementation of the Charter.

<sup>468</sup> Article 3 of the Code on Social Security in the SADC describes the purposes of the Code to be: firstly, to provide Member States with strategic direction and guidelines in the development and improvement of

supports social dialogue as an important mechanism to assist with the development of social security, as it suggests the utilisation of national tripartite and regional structures, and the involvement of civil society and other non-state entities such as NGO's and CBO's in the formulation, implementation and monitoring of social security policies. Instead of enforcing standards in the way international monitoring and supervisory institutions have traditionally done, the Code introduces a promotional independent committee of experts: this committee is tasked with monitoring compliance with the Code and making recommendations to the relevant SADC structures and the respective national structures on the progressive attainment of its provisions.<sup>469</sup>

The Code employs concepts and principles which reflect the reality of the SADC region and which are flexible.<sup>470</sup> For example, it stresses the importance of solidarity and redistribution as key components of a social security system aimed at bringing about more equilibrium between the rich and the poor. It further recognises that the State is not able, on its own, to fully provide in the social security needs of the SADC populations. It stresses, therefore, the importance of a multi-actor approach. It also incorporates the principle of variable geometry, i.e. the principle, according to which a group of Member States could move faster on certain activities and the experiences learnt are replicated in other Member States. The Code further recognises the important role played by informal forms of social security,<sup>471</sup> as well as the fact that the notion of "family" in at least the African context includes the extended family.<sup>472</sup>

A right to social security is recognised in article 4 of the Code. The Code further draws a distinction between social insurance and social assistance.<sup>473</sup> It then covers a range of (traditional) contingencies in a SADC-sensitive manner – such as health; maternity and paternity; death and survivor benefits; retirement and old age; unemployment and underemployment; and occupational injuries and diseases.<sup>474</sup> Special contingencies operative in SADC, such as political conflict and natural disasters, are specifically mentioned.<sup>475</sup> The Code then deals with the social security position of certain marginalised groups, such as females (the gender framework), people with disabilities, families, children and young people, migrants, foreign workers and refugees.<sup>476</sup> The Code finally incorporates prevention and integration as core elements of social security, alongside the payment of compensation.<sup>477</sup> It also stresses the relationship between social security and the broader social protection framework in the country – with the aim to

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social security schemes, in order to enhance the welfare of the people of the SADC region (article 3.1); secondly, to provide SADC and Member States with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels (article 3.2); and, thirdly, to provide SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region (article 3.3).

<sup>469</sup> See article 21.

<sup>470</sup> Article 2.2.

<sup>471</sup> See article 20.3.

<sup>472</sup> Article 15, in particular article 15.2.

<sup>473</sup> Articles 5 & 6.

<sup>474</sup> Articles 7-12.

<sup>475</sup> Article 18.

<sup>476</sup> Articles 13-17.

<sup>477</sup> Article 19.

ensure that, among others, indirect forms of support, such as those related to health, education, transport, housing, water and electricity, complement direct forms of social security.<sup>478</sup>

## 7.2.2 Impact on the social security position of migrants

In foundational instruments of SADC there are several indications pointing towards the creation of a special regime of SADC-wide social security coverage for citizens and residents of the different member states. Recalling the above objectives of the SADC Treaty, the Charter of Fundamental Social Rights in SADC ("Social Charter") imposes on SADC Member States the obligation<sup>479</sup> to create an enabling environment so that every worker in the region shall have a right to adequate social protection.<sup>480</sup> Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.<sup>481</sup> No distinction is drawn between citizens and non-citizens. Such a distinction is also not contemplated, given the Treaty emphasis on regional integration<sup>482</sup> and Charter focus on harmonisation of social security schemes.<sup>483</sup>

Even more explicit are the provisions of the Code on Social Security in SADC, which do not allow disparate treatment of foreigners,<sup>484</sup> and encourage Member States to ensure that all lawfully employed immigrants<sup>485</sup> are protected through the promotion of certain core principles.<sup>486</sup> In terms of two of these principles migrant workers should, firstly, be able to participate in the social security schemes of the host country<sup>487</sup> and, secondly, enjoy equal treatment alongside citizens within the social security system of the host country.<sup>488</sup> Member States are further encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border co-ordination principles – such as maintenance of acquired rights, aggregation of insurance periods, and exportability of benefits.<sup>489</sup>

The Code further suggests that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the

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<sup>478</sup> Article 20.

<sup>479</sup> Article 3.2 requires of member states to observe the basic rights referred to in the Charter.

<sup>480</sup> Article 10.1.

<sup>481</sup> Article 10.2.

<sup>482</sup> See article 5(1)(a) of the Treaty.

<sup>483</sup> Cf article 2(e) of the Charter.

<sup>484</sup> Article 17.2(b) of the Code on Social Security in the SADC: "Migrant workers should enjoy equal treatment alongside citizens within the social security system of the host country." See also article 4.1.

<sup>485</sup> As well as self-employed migrant workers – article 17.2(f).

<sup>486</sup> Article 17 of the Code.

<sup>487</sup> Article 17.2(a).

<sup>488</sup> Article 17.2(b).

<sup>489</sup> Article 17.2(d) & (e). This is also made clear as far as pension arrangements in the region are concerned: According to article 10.5: "Member States should aim at achieving equality of access, as well as the maintenance and aggregation of social security contributions and benefits and the aggregation of insurance periods on a cross-country basis among Member States, through national laws and bilateral and other arrangements."

laws of the host country.<sup>490</sup> As regards refugees, it stipulates that social protection extended to them should be in accordance with the provisions of international and regional instruments.<sup>491</sup>

While the Code, unlike the provisions of the Charter,<sup>492</sup> does not attempt to lay down binding norms,<sup>493</sup> there is a clear tendency in both these documents to create a regime within SADC which ensures minimum levels of social protection on the basis of equality, regardless of, amongst others, citizenship.

Finally, it is necessary to reflect on the provisions of the adopted (in 2006) but not yet implemented SADC Draft Protocol on the Facilitation of Movement of Persons,<sup>494</sup> also from the perspective of a lack of a proper guarantee of the freedom of movement principle in other SADC foundational documents. The freedom of movement principle in SADC is couched in much weaker terms than the EU counterpart. Article 5(2)(d) of the SADC Treaty does not regulate the matter conclusively, but requires of SADC to "develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States". It is suggested that neither the Free Trade Protocol nor the Draft Protocol on the Facilitation of Movement of Persons guarantees freedom of movement in any way which is potentially significant for purposes of enhancing the social security position of intra-SADC migrants. The reason is that the latter document does recognise visa free travel for up to 90 days, but subjects the right to residence and establishment (in the occupational sense of the word) to *restrictions contained in national laws*.<sup>495</sup>

Finally, the SADC Treaty and, with the exception of the Code on Social Security in the SADC, other SADC multilateral instruments do not display strong incentives for the development of social security coordination measures. The principle of non-discrimination contained in Article 6(2) is a closed list, and does not include the prohibition of discrimination based on nationality/citizenship. In addition, the Treaty does not guarantee freedom of movement, but merely the facilitation of movement of persons.

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<sup>490</sup> Article 17.3.

<sup>491</sup> Article 17.4.

<sup>492</sup> In terms of article 3.2 of the Charter Member States are required to observe the basic rights contained in the Charter, while article 17 stipulates that the Charter enters into force upon signature by the Member States. The Charter is already in force – the SADC heads of state and government signed the document in August 2003.

<sup>493</sup> Article 3 describes the purposes of the Code to be: firstly, to provide Member States with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region (article 3.1); secondly, to provide SADC and Member States with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels (article 3.2); and, thirdly, to provide SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region (article 3.3).

<sup>494</sup> See Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 21 on the background to the development of the Draft Protocol.

<sup>495</sup> Own emphasis. See article 17.4 and 17.5 (in respect of right of residence) and article 19 (in respect of the right of establishment) of the Draft Protocol respectively. See also article 20.

Article 5(2)(d) merely compels Member States to develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States.

### **7.2.3 Evaluation<sup>496</sup>**

Despite its limited coverage of the social security position of migrating SADC citizens, the regional framework offers significant potential for the further unfolding of appropriate regulatory and social security regimes in Southern Africa, also in relation to the position of migrants in social security. This flows from among others the following:

- (a) The emphasis placed by the regional instruments on international labour (and effectively also social security) standards provides a tool not only for the incorporation of relevant international social security standards in relation to migrants, but also for the regional application of these standards.
- (b) From a regional perspective, and bearing in mind the objective of regional integration, norms and standards need to be implemented in a manner which is sensitive to the socio-economic, labour market and poverty context of the Southern African region. Bringing about regional equilibrium, and avoiding a race to the bottom, are clearly objectives to be served by the regional application and development of norms, standards and benchmarks, also in relation to the development of migration policy and the links between migration and social security.
- (c) It is therefore of interest to note that SADC regional instruments adopt a variety of approaches to ensure Southern African-specific and -sensitive standard-setting and implementation – the potential of employing these approaches for the development of a coherent SADC migration policy, enhancing the social security position of intra-SADC migrants, and establishing links between migration and social security is self-evident:
  - (i) Firstly, as indicated, SADC regional instruments foresee the development of minimum standards and the establishment of harmonised programmes of social security and labour law protection throughout the region. This it does by stipulating goals and the principles which should apply with regard to labour law and social security coverage and provision, and not, barring certain limited areas where a different approach is required, by enumerating and detailing specific measures that Member States should take. That would, in any event, be nearly impossible to achieve, given the divergent framework and status, as well as the un- and underdeveloped nature of many of the different country systems.
  - (ii) Secondly, in line with the approach outlined above, the instruments provide for unique and innovative implementation and monitoring mechanisms:

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<sup>496</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 41-42, from where this part has (in adjusted format) been taken.

- a. Both the Social Charter<sup>497</sup> and the Code<sup>498</sup> suggest the involvement of national tripartite and regional structures, while the Code extends this to involvement of civil society and other non-state entities such as NGO's and CBO's in the formulation, implementation and monitoring of social security policies;
  - b. Instead of enforcing standards in the way international monitoring and supervisory institutions have traditionally done, the Code introduces a promotional independent committee of experts: this committee is tasked with monitoring compliance with the Code and making recommendations to the relevant SADC structures and the respective national structures on the progressive attainment of its provisions.
- (iii) In an attempt to ensure a SADC region-sensitive formulation and application of standards, the instruments also:
- a. Introduce standards and principles which are not usually embedded in international instruments yet are relevant to the region, also from a migration perspective – such as recognising and strengthening the extended family support system within the framework of family protection,<sup>499</sup> the regulation of special and collective contingencies, including political conflict and natural disasters,<sup>500</sup> and recognising, strengthening and rationalising informal modes of social security;<sup>501</sup> and
  - b. Employ concepts which suggest a flexible approach to the application of norms and standards – such as the concept of variable geometry,<sup>502</sup> that is, the principle, according to the Regional Indicative Strategic Development Plan (RISDP), where a group of Member States could move faster on certain activities and the experiences learnt are replicated in other Member States.
- (iv) Specifically as far as migration and social security are concerned, it needs to be emphasised that despite obvious shortcomings, in relation to the absence of a binding freedom of movement norm and of an enforceable prohibition on nationality discrimination, the following building blocks for the development of a proper migration and social security policy in SADC are nevertheless discernable:
- a. Access to social security for migrants on the basis of equality, enshrined in particular in the provisions of the Code on Social Security in the SADC;<sup>503</sup>
  - b. Provision of minimum or basic protection, to be extended to everyone in SADC, contained in the Social Charter;<sup>504</sup>

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<sup>497</sup> See par 7.2.2 above.

<sup>498</sup> Article 21.1 and 21.2.

<sup>499</sup> Article 15.2 of the Code.

<sup>500</sup> Article 18 of the Code.

<sup>501</sup> Article 20.3 of the Code.

<sup>502</sup> Article 2.2(b) of the Code.

<sup>503</sup> See in particular article 17 of the Code.

<sup>504</sup> See the provisions of the Social Charter.

- c. Special measures relevant to the protection of specific categories of vulnerable non-citizens, such as refugees and (even) undocumented non-citizens.<sup>505</sup>

### **7.3 Implications for Southern Africa**

In its recent report submitted to Cabinet, the *Committee of Inquiry into a Comprehensive System of Social Security for South Africa*,<sup>506</sup> noted that the growing interdependence in the region, and the more extensive migration of the region's workforce and residents, suggests the need for a common response. The Committee also noted that provisions in South African social assistance and in some social insurance laws distinguish between nationals and non-nationals. It is, therefore, necessary, firstly, to consider these distinctions between South African citizens and citizens of other SADC member states.<sup>507</sup> Secondly, the Committee suggested, it is necessary:

*"... to develop a common framework and charter on social protection and to ensure a consistent approach is implemented. Thirdly, it will be necessary for South Africa as a SADC member state to engage actively in promoting the social protection dimension of SADC integration and interdependence. Fourthly, active involvement in developing acceptable baseline standards in the area of social protection for the region is required. These standards should be implemented with reference to the particular socio-economic status of each of the member countries, as suggested above. Finally, it will be necessary for South Africa to adopt measures aimed at co-ordinating its social security system with those of the other SADC member states. This can be done either bilaterally and/or (preferably) multilaterally."<sup>508</sup>*

It is suggested that the development of policy concerning the social security status of non-citizens in Southern African countries should heed these sentiments and the provisions and intentions of the regional instruments referred to above. The reality, though, is that apart from the provisions of the Code on Social Security in the SADC, none of the other SADC instruments provide in any real sense of the word for the vision expressed above in relation to migration and social security. It would therefore appear necessary to adopt special policy interventions and measures, based on the framework provided for in article 17 of the Code, to ensure the protection and enhancement of the position of migrants in relation to social security. This should also imply that the said policy – as well as the legal – interventions and measures should develop minimum levels of social protection for different categories of beneficiaries, on the basis of equality within SADC, and (at least as far as social insurance coverage is concerned) with reference to cross-border co-ordination arrangements, to be adopted by way of national legislation and bi- and/or multilateral agreements. This is discussed in more detail below.<sup>509</sup>

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<sup>505</sup> See, once again, the provisions of article 17 of the Code.

<sup>506</sup> *Transforming the Present – Protecting the Future (Draft Consolidated Report)* (March 2002) 151.

<sup>507</sup> *Ibid.*

<sup>508</sup> *Ibid.*

<sup>509</sup> See par 8.4 and par 9.2 below.

## 8. International level responses

### **8.1 Role of international law in setting minimum standards: the SADC framework<sup>510</sup>**

International norms and standards have already had a significant influence on the regulation of labour markets and to a more limited extent the social security framework in Southern African countries. It is suggested that much more could be achieved in this regard to further strengthen social security systems in SADC, also as far as the position of non-citizens is concerned. There is indeed a range of relevant norms in the international realm available, in addition to extensive and specialised technical support provided by international agencies, which could be of assistance. However, in order for these to have the desired effect, certain shortcomings on the part of the country systems and deficiencies in the international regulatory framework need to be factored in and, where possible, appropriately addressed.

A conspectus of the legal framework and practice of SADC Member States clearly reveals an increasing sensitivity towards the role of international law in social security and related labour law matters. So much appears from:

- the specific references being made to the role of international law in regional instruments, constitutions and statutory frameworks;
- the reliance on and references to international law in court judgments dealing with social security and labour law issues;
- the extent of ratifications of relevant international instruments – increasingly extensive in the labour law context but weak as far as social security is concerned;<sup>511</sup> and
- the advisory and supportive role played by international organisations in the shaping of country labour law and social security systems, and in initiating regional projects and studies.

Regional instruments at the SADC level invariably promote the adoption of international standards. Article 3(1) of the Charter of Fundamental Social Rights in SADC (the Social Charter)<sup>512</sup> sets the baseline by stipulating that "This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the

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<sup>510</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 31-35, on which this part is based.

<sup>511</sup> See par 8.3 below.

<sup>512</sup> Of 2003. See <http://www.sadc.int>.

Constitution of the ILO, the Philadelphia Declaration and other relevant international instruments". In addition to referring in many of its particular provisions to the specific relevant ILO norms, the Charter imposes on Member States to do the following in order to attain the objectives of the Charter:<sup>513</sup>

- (a) To establish a priority list of ILO Conventions which shall include the so-called core Conventions forming part of the ILO Declaration on Fundamental Principles and Rights at Work of 1998<sup>514</sup> and other relevant instruments;
- (b) To take appropriate action to ratify and implement relevant ILO instruments and as a priority the core ILO Conventions; and
- (c) To establish regional mechanisms to assist Member States in complying with the ILO reporting system.

Similarly, the Code on Social Security in the SADC<sup>515</sup> often refers to specific ILO standards in particular social security areas and requires specifically of every Member State to maintain its social security system at a satisfactory level at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security 102 of 1952.<sup>516</sup>

Constitutions in the region do sometimes make provision for the role of international law, potentially impacting on the terrain of labour law and social security – in particular as far as the contents of bi- and multilateral agreements concerning social security are concerned. This appears to be the case in countries such as Malawi<sup>517</sup> and South Africa.<sup>518</sup> In fact, an international law-friendly approach could be apparent from these provisions.<sup>519</sup> These Constitutions also foresee that international law should play a significant role as regards the interpretation of the relevant constitutional rights and the supporting legislative framework.<sup>520</sup> They further provide for relatively uncomplicated mechanisms for the application of international law. The Constitution of Malawi recognises both incorporation and transformation as legitimate methods of deriving

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<sup>513</sup> Article 5.

<sup>514</sup> I.e. on abolition of forced labour (ILO Conventions 29 and 105), freedom of association and collective bargaining (ILO Conventions 87 and 98), elimination of discrimination in employment (ILO Conventions 100 and 111), and the minimum age of entry into employment (ILO Convention 138) as well as the abolition of child labour (ILO Convention 182).

<sup>515</sup> Of 2007.

<sup>516</sup> Article 4.3.

<sup>517</sup> Section 44(2) of the Malawi Constitution.

<sup>518</sup> Sections 231-233 of the South African Constitution.

<sup>519</sup> For example, section 233 of the South African Constitution provides that "... when 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."

<sup>520</sup> See section 11(2) of the Malawi Constitution and section 39(1)(b) of the South African Constitution, which stipulates that a court, tribunal or forum must, when interpreting the Bill of Rights, consider international law. According to the Constitutional Court decision in *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 6 BCLR 665 (CC) par 35, quoted with approval in *The Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC), in the context of this provision, public international law would include non-binding as well as binding law.

domestic effects from the state's international obligations. In respect of treaties, for example, the Constitution provides that:

"Any international agreement ratified by an Act of Parliament shall form part of the law of the Republic if so provided for in the Act of Parliament ratifying the agreement."<sup>521</sup>

This is also true for Namibia<sup>522</sup> and South Africa.<sup>523</sup>

There is also a tendency in the region for labour law and social security statutory instruments to include references to international law. For example, section 4(c) of the Lesotho Labour Code provides that in interpreting provisions of the Code, and in cases of ambiguity, the court should take into account ILO Conventions, irrespective of whether or not Lesotho has ratified them. Similarly, section 3(c) of the South African Labour Relations Act<sup>524</sup> stipulates that any person applying this Act must interpret its provisions in compliance with the public international law obligations of the Republic.<sup>525</sup> In some cases provisions in the laws themselves may be based on specific international instruments, or drafted in a manner which gives effect to international obligations.<sup>526</sup> Especially in those countries where the Constitution and/or the relevant labour and social security law(s) provide for an international law-friendly approach, court judgments would reflect this particular approach. For example, in South Africa the courts have not hesitated to invoke the provisions of international instruments when interpreting fundamental rights, including those rights which have a socio-economic character.<sup>527</sup> This also appears to be the case in Lesotho.<sup>528</sup>

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<sup>521</sup> Section 211(1) of the Constitution of Malawi.

<sup>522</sup> Section 144 of the Constitution of Namibia.

<sup>523</sup> Sections 231-233 of the South African Constitution.

<sup>524</sup> 66 of 1995. Section 1(c) of the Act stipulates that it is the purpose of the Act to give effect among others to obligations incurred by the Republic as a member state of the International Labour Organisation.

<sup>525</sup> See also section 3(d) of the Employment Equity Act (EEA) 55 of 1998 and section 2(b) of the Basic Conditions of Employment Act (BCEA) 75 of 1997; as well as the preambles of the LRA, BCEA and EEA.

<sup>526</sup> E.g., in the case of Lesotho section 79 of the Labour Code Order 1992 and section 8 of the Labour Code (Amendment) Act of 1997 have been couched in line with the provision of article 12(1)(a) of ILO Convention 158 of 1982 on termination of employment. Similarly, section 1(b) of the South African LRA states that one of the primary objects of the Act is to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation. A perusal of the provisions of the LRA makes it clear that the chapter on freedom of association (chapter 2 of the Act) in particular has been drafted to give effect to the relevant ILO Conventions in this regard.

<sup>527</sup> See in particular *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC): the court referred extensively to international law instruments, especially the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the General Comments of the Committee on Economic, Social and Cultural Rights (UNCESCR) for purposes of interpreting section 26(2) (limitations in respect of the right to access to housing) and section 27(2) (limitations in respect of the right to access to, amongst others, social security) and the manner in which the courts are prepared to enforce socio-economic rights. The import of ILO Conventions and the views expressed by ILO supervisory organs have also been referred to in the Constitutional Court case of *NUMSA & others v Bader Bop (Pty) Ltd & another* 2003 2 BCLR 182 (CC). With reference to principles which could be distilled from ILO Conventions 87 of 1948 (on freedom of association and the right to organise) and 98 of 1949 (on the right to organise and collective bargaining), the Court ruled that minority unions and their members do indeed have the right to strike in order to compel an employee to recognise the union's shop stewards.

<sup>528</sup> Cf the Labour Court case of *Labour Commissioner v HWV* LC/144/95. In this case, the applicant sued the respondent for suspending her from work for unauthorised absence from work whereas the applicant

The supportive and advisory role of international organisations such as the ILO and the World Bank has been extensive. For example, the ILO rendered important advisory functions with regard to the setting up of the new social security framework for Namibia a few years ago, and the reform of a host of SADC country labour laws.<sup>529</sup> Similar services have been provided by the World Bank, in particular in the area of pension reform. At a regional level, the ILO has been involved in the promotion of two major projects concerned with the legal regulation of labour markets in the SADC region.<sup>530</sup> Similarly, the World Bank currently supports a project on the social security position of migrating SADC citizens, also with reference to one of the largely underdeveloped areas, namely that of the co-ordination of the social security systems in the region.

## **8.2 The impact of international standards on migrants and their social security status<sup>531</sup>**

The general principle contained in international human rights instruments pertaining to non-citizens is that all persons, by virtue of their essential humanity, should enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective.<sup>532</sup> In its General Comment 15 the UN Human Rights Committee explained that "the rights set forth in the Covenant [on Civil and Political Rights] apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness . . . . The general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens."<sup>533</sup>

Various UN and ILO instruments regulate the rights of non-citizens, also in the area of social security. The International Covenant on Economic, Social and Cultural Rights of 1966 provides for the right to social security for everyone.<sup>534</sup> However, article 2(3) of the Covenant contains a specific exception to the general rule of equality for developing countries, by stipulating that, "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the

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had delivered a valid sick leave certificate certifying that the applicant would be unable to report for work as she had to take care of her sick child. The court held the suspension to be unfair and relied on Convention 156 of the ILO on workers with family responsibilities.

<sup>529</sup> E.g. in Swaziland as far as the workers' compensation legislation is concerned. In the case of South Africa such influence is evident from the provisions of the Labour Relations Act (LRA): the ILO gave particular supportive inputs in the drafting of the LRA.

<sup>530</sup> I.e. the "ILO/Swiss Project to Advance Social Partnership in Promoting Labour Peace in Southern Africa" and the "ILO/USDOL Project on Strengthening Labour Administration in Southern Africa". See Fenwick & Kalula 25.

<sup>531</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 31-35, on which this part is based.

<sup>532</sup> Weissbrodt, D *Final report on the rights of non-citizens* (UN Doc. E//CN.4/Sub.2/2003/23 (2003)) accessed at <http://www1.umn.edu/humanarts/demo/noncitizenrts-2003.html> (June 2004) 4.

<sup>533</sup> See E/CN.4/Sub.2/2002/25/Add.1 paras 14, 50, 51, 63, 66.

<sup>534</sup> Article 9.

economic rights recognized in the present Covenant to non-nationals." Since this provision constitutes an exception to the general rule of equality, it should be narrowly construed, may be relied upon only by developing countries, and only with respect to economic rights. States may not draw distinctions between citizens and non-citizens as to social and cultural rights.<sup>535</sup>

Of particular importance is also the recent adoption of a specific UN General Comment No 19 (2008)<sup>536</sup> on the right to social security enshrined in article 9 of the International Covenant on Economic, Social and Cultural Rights of 1966. General Comment No 19 contains principles which are important for the understanding of the scope and content of the right to social security, also in relation to non-citizens. The salient principles which appear from the General Comment in this regard can be summarised as follows.

Alongside the prohibition of discrimination on grounds of nationality<sup>537</sup> contained in the Covenant, is the associated requirement that particular attention should be paid to ensuring that migrants have physical access to social security services in order to access benefits and information, and make contributions where relevant. In other words, migrants should have access to social security in law and practice/implementation.<sup>538</sup> Special attention should be paid to individuals and groups who traditionally face difficulties in exercising the right to social security, including refugees, asylum-seekers, returnees and non-nationals generally.<sup>539</sup>

Important rules are laid down in the General Comment in relation to the right of non-nationals to access non-contributory schemes. Firstly, non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. This right is of course not absolute. Any restrictions, including a qualification period, must be proportionate and reasonable.<sup>540</sup> Secondly, all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.<sup>541</sup> It would appear that this is an unqualified entitlement, given the vulnerable status of those in need of, in particular, emergency medical care. It needs to be recollected that the constitutional analysis outlined above produced much the same inference.

Thirdly, special categories of vulnerable migrants, in particular refugees, stateless persons and asylum-seekers, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to health care and family support,

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<sup>535</sup> Weissbrodt, D *Final report on the rights of non-citizens* (UN Doc. E//CN.4/Sub.2/2003/23 (2003)) accessed at <http://www1.umn.edu/humanarts/demo/noncitizenrts-2003.html> (June 2004) 9.

<sup>536</sup> E/C.12/GC/19 of 4 February 2008.

<sup>537</sup> Article 2(2). Of particular significance is the provision in the Covenant which requires that the right to social security indicators used by country to monitor compliance with the right, should cover all persons residing in the territorial jurisdiction of the State party or under its control – see par 75.

<sup>538</sup> Par 27; see also par 36.

<sup>539</sup> Par 31.

<sup>540</sup> Par 37. Own emphasis.

<sup>541</sup> *Ibid.* Own emphasis.

consistent with international standards.<sup>542</sup> For these groups, the bar of entitlement is significantly lowered – they are not only entitled to access non-contributory schemes, but also enjoy this entitlement on the basis of equal access. The position of these groups is discussed in more detail below.

In the case where non-citizens, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country.<sup>543</sup> In other words, leaving the host country may not disentitle non-citizens from benefiting or retrieving their contributions. Also, a migrant worker's entitlement should not be affected by a change in workplace.<sup>544</sup> This is an important principle which should qualify the operation of country-based immigration rules to the contrary. As indicated above,<sup>545</sup> a similar rule appears to be developing in the South African labour law as far as entitlement to forms of statutory labour law protection (e.g. protection against unfair dismissal) is concerned. The extent to which this development is also relevant for entitlement to protection under social security, would clearly be influenced by the ambit of the above-mentioned principle laid down in the General Comment in this regard.

While the Covenant entrenches the principle that the rights enshrined in the Covenant should be progressively realised, obligations imposed on States parties could be of immediate effect – for example, when it is necessary to ensure that the right to social security will be exercised without discrimination of any kind.<sup>546</sup> In other words, reliance on progressive realisation is likely to fail if a finding of discrimination based on nationality has been made. It is suggested that this is very much in line with the South African constitutional approach, as discussed above.

The Covenant also covers so-called posting situations – where persons work temporarily in another country. The principle laid down in the Covenant is that such persons should be covered by the social security scheme of their home country.<sup>547</sup>

The General Comment requires that States parties develop a national strategy for the full implementation of the right to social security, and allocate fiscal and other resources at the national level.<sup>548</sup> This national strategy and plan of action to realise the right to social security should among others take into account the rights of the most disadvantaged and marginalised groups – therefore including categories of non-citizens as well.<sup>549</sup>

Finally, the General Comment notes the importance of establishing bi- and multilateral agreements or other instruments for coordinating or harmonising contributory social

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<sup>542</sup> Par 38.

<sup>543</sup> Par 36.

<sup>544</sup> *Ibid.*

<sup>545</sup> Par 4.2.3, with reference to the Labour Court matter of *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633.

<sup>546</sup> Par 40.

<sup>547</sup> Par 56.

<sup>548</sup> Par 41.

<sup>549</sup> Par 68.

security schemes for migrant workers,<sup>550</sup> and stresses the importance to take into account the obligations of a State party under the Covenant when entering into a bi- or multilateral agreement.<sup>551</sup> This issue is discussed in more detail below.

The International Convention on the Protection of All Migrant Workers and Members of Their Families (the UN Migration Convention) of 1990<sup>552</sup> protects all migrant workers and their families, safe particular categories of workers, most of whom are protected in terms of other specific international instruments.<sup>553</sup> This Convention amongst others provides for non-discrimination,<sup>554</sup> equality of treatment between nationals and migrant workers as to work conditions and pay,<sup>555</sup> equal access to social security,<sup>556</sup> and the right to repatriate earnings, savings and belongings.<sup>557</sup> The Convention confers specific rights on documented workers,<sup>558</sup> and sets out core rights<sup>559</sup> for both documented and undocumented/irregular migrant workers.

Other United Nations human rights instruments, treaties and conventions, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Racial Discrimination, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the Convention on the Elimination of All Forms of Discrimination against Women confer protection on migrants as well. These instruments are of significant importance for the debate in Southern Africa on the position of non-nationals generally and in social security specifically, as these UN agreements have been ratified by most SADC countries.<sup>560</sup> The same applies to the provisions of the African Charter of Human and People's Rights, ratified by South Africa in 1996.<sup>561</sup>

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<sup>550</sup> Par 56.

<sup>551</sup> Par 65.

<sup>552</sup> Doc. A/RES/45/158. This Convention entered into force on 1 July 2003, with ratification by 20 countries: Weissbrodt 3. According to the last update on 13 March 2007, 36 countries have ratified this Convention: information accessed at <http://www.ohchr.org/english/countries/ratification/13.htm> on 8 April 2007. By 9 March 2008 a total of 37 countries that have ratified or acceded to the Convention: see [http://portal.unesco.org/shs/en/ev.php-URL\\_ID=3693&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=3693&URL_DO=DO_TOPIC&URL_SECTION=201.html) accessed on 9 March 2008.

<sup>553</sup> Namely international organisation employees, foreign development staff, refugees, stateless persons, students and trainees: articles 1 & 3.

<sup>554</sup> Article 7.

<sup>555</sup> Article 25.

<sup>556</sup> Article 27.

<sup>557</sup> Article 32.

<sup>558</sup> E.g. access to social services, unemployment benefit, and freedom to choose one's occupation: see FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 22.

<sup>559</sup> Including the right to life, the right to a fair trial, treatment equal to that of nationals in matters of working conditions, the right to urgent medical care and treatment equal to that of nationals for children's access to education: articles 8-35; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 22.

<sup>560</sup> See par 8.3 below.

<sup>561</sup> The Convention provides among others for the right to work under equitable and satisfactory conditions (article 15), and the right to enjoy the best attainable state of physical and mental health (article 16), as well as the right to family life (article 18): *Ibid.*

Targeted international human rights instruments deal with the position of refugees and asylum-seekers. For example, the Convention<sup>562</sup> and Protocol<sup>563</sup> relating to the Status of Refugees provide that refugees should be entitled to treatment at least as favourable as that accorded to citizens of the country concerned with respect to, amongst others, labour legislation and social security,<sup>564</sup> wage earning employment,<sup>565</sup> self-employment,<sup>566</sup> professions,<sup>567</sup> and freedom of movement.<sup>568</sup> Asylum seekers should also be granted the right to work,<sup>569</sup> while employment and social assistance,<sup>570</sup> amongst others, should not be denied to recognised refugees.

Relevant ILO Conventions and Recommendations protect the rights of all workers irrespective of citizenship.<sup>571</sup> As remarked, "[A]ll *current* ILO social security standards define personal scope of coverage irrespective of nationality and almost all contain similar clauses on equality of treatment between nationals and foreign workers in the host country, and most of them contain special non-discrimination clauses, such as, for example, Convention 102 of 1952."<sup>572</sup> Specific ILO instruments protect migrant workers and their families,<sup>573</sup> although only a few SADC countries (among which South Africa does not count) have ratified these instruments.<sup>574</sup> Usually certain rights, which also have a social security application, are extended only to those lawfully within a territory. For example, article 6(1)(b) of Convention 97 of 1949 on the Migration for Employment (Revised Convention) provides that ratifying countries undertake to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of, amongst others, but subject to certain limitations,<sup>575</sup> social

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<sup>562</sup> Of 1951.

<sup>563</sup> Of 1966.

<sup>564</sup> Article 24.

<sup>565</sup> Article 17.

<sup>566</sup> Article 18.

<sup>567</sup> Article 19.

<sup>568</sup> Article 26.

<sup>569</sup> Weissbrodt, D *Final report on the rights of non-citizens* E/CN.4/Sub.2/2003/23/Add.2 (2003) par 26.

<sup>570</sup> *Ibid* par 48.

<sup>571</sup> See FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 23.

<sup>572</sup> See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) (2006) 154-155.

<sup>573</sup> E.g. Convention 118 of 1962 on Equality of Treatment (Social Security) and article 10 of Convention 143 of 1975 on Migrant Workers (Supplementary Provisions).

<sup>574</sup> FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 23.

<sup>575</sup> Article 6(1)(b)(i) and (ii) of Convention 97 of 1949 provide that there may be appropriate arrangements for the maintenance of acquired rights and rights in the course of acquisition; as well as that national laws or regulations of immigration countries may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfill the contribution conditions prescribed for the award of a normal pension.

security. This also applies to other rights, which have a social security application, such as the right to equal opportunities and vocational training.<sup>576</sup>

Finally, a range of regional human rights instruments would similarly extend protection to migrant workers and their families, also in the area of social security. However, regional adjudicative bodies<sup>577</sup> have held that instruments that draw a distinction between nationals of particular countries bound together in a regional framework (such as the European Union) are in principle permissible, on the basis, for example, that member states of a particular regional or supra-national entity (such as the European Union) form a special legal order, which has established its own citizenship.<sup>578</sup> Such a distinction would be an expression of the principle that discrimination based on nationality would be permissible if the discrimination is based on objective and reasonable justifications.

The position in terms of the above-mentioned human rights instruments in general terms is clear. Human rights protection is in principle extended to everyone, regardless of nationality.<sup>579</sup> In social security terms, discrimination against lawfully residing non-national workers and their families is not tolerated. However, co-ordinating measures adopted at either bilateral or multilateral level may be needed to ensure, in addition, the maintenance of acquired rights and the exportability of benefits of migrating workers. The relevant principles are contained in a wide range of international,<sup>580</sup> and regional<sup>581</sup> and supra-national<sup>582</sup> instruments. These principles are incrementally applied to workers engaged in a self-employed capacity<sup>583</sup> as well as to stateless persons and refugees.<sup>584</sup>

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<sup>576</sup> ILO Recommendation 151: Migrant Workers Recommendation, par 8(g). See also article 1(3) of Convention 111 of 1958 on Discrimination (Employment and Occupation).

<sup>577</sup> Such as the European Court of Human Rights and the Inter-American Court of Human Rights.

<sup>578</sup> See Weissbrodt 10; *C. v. Belgium*, Eur. Ct. H.R., Reports 1996-III (1996) (European Court of Human Rights) and *Belgian Linguistic Case*, 6 Eur. Ct. H.R. (ser. A) (1968) (European Court of Human Rights); Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica (OC- 4/84) (Advisory Opinion of the Inter-American Court on Human Rights); and Communication 964/2000, CCPR/C/74/D/965/2000 (2002) cited in E/CN.4/Sub.2/23/Add.1 (2003) par 27-29 (Human Rights Committee).

<sup>579</sup> FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 21.

<sup>580</sup> See, amongst others, ILO Convention 157 of 1982 (Maintenance of Social Security Rights Convention).

<sup>581</sup> See, amongst others, the European Convention on Social Security of 1972 (European Treaty Series 78) (Council of Europe), the Caricom Agreement on Social Security (Caribbean countries) of 1996 and article 17 of the Code on Social Security in the SADC.

<sup>582</sup> See in particular Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community and EC Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (not yet in force), as well as EU Council Directives 79/7/EEC on the progressive implementation of the principle of equal treatment for men and women in matters of social security and 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes.

<sup>583</sup> See, amongst others, EU Council Directive 86/613/EEC of 11 December 1986 on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood, as well as the provisions of the Caricom Agreement on Social Security of 1996.

<sup>584</sup> See, in the EU context, EC Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Special protection is at times extended in an attempt to deal with irregular migration, as is evident from the discussion above on the United Nations Migrant Workers Convention (the UN Migration Convention) of 1990. One of the relevant ILO Conventions also extends protection, both indirectly and indirectly. ILO Convention 143 of 1975 provides that the "migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation or residence or, as the case may be, work permit."<sup>585</sup> It further stipulates that irregular migrant workers shall have the same rights as regular migrant workers concerning social security benefits arising out of past employment.<sup>586</sup>

### 8.3 The SADC ratification record

Mere ratification of international law instruments provides no guarantee of compliance and adherence. Nevertheless, ratification is important, as it serves as an expression on the part of the country concerned of its willingness to implement international law minimum standards, and provides an opportunity for external monitoring.<sup>587</sup>

Most of the important UN instruments which impact on social rights have been ratified relatively widely by SADC countries. Furthermore, some attempt has been made to ratify ILO Conventions in the area of labour law (in particular the so-called eight core Conventions). However, the clear picture that emerges is that SADC countries have generally failed to ratify social security Conventions, in particular the main social security Convention, Convention 102 of 1952 on Minimum Standards in Social Security, and most of the other post-World War II social security conventions.

Several international agreements in the area of socio-economic rights generally and labour law and social security specifically have been ratified by a number of countries in the SADC region. For example, the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) has been ratified or acceded to by no less than 12 SADC member states.<sup>588</sup> In 1994 South Africa signed the ICESCR, and is yet to ratify it.<sup>589</sup> All

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<sup>585</sup> Article 8.

<sup>586</sup> Article 9(1). See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office 2006) 156: "This provision particularly must be understood for the purpose of acquiring rights to long-term benefits. Within this context, it appears that the wording "past employment" refers to past periods of legal as well as illegal employment."

<sup>587</sup> See, for example, par 4.2.4 above in relation to South Africa's non-compliance with essential provisions of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

<sup>588</sup> According to information obtained from the relevant UN Website ([http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)) on 9 May 2009 the following SADC countries have already ratified the ICESCR: Angola, DRC, Lesotho, Malawi, Madagascar, Mauritius, Namibia, Seychelles, Swaziland, Tanzania, Zambia and Zimbabwe.

the SADC countries have ratified the UN Convention on the Rights of the Child (CRC) of 1993.<sup>590</sup> Most SADC countries have also become party to UN treaties in the area of the protection of refugees.<sup>591</sup> Some of the provisions of these treaties deal with social security issues.<sup>592</sup> However, only one SADC country<sup>593</sup> has ratified the UN International Migration Convention (the UN Migration Convention)<sup>594</sup> of 1990, which entered into force in 2003.<sup>595</sup>

ILO Convention 102 of 1952 on minimum standards in social security has only been ratified (in part) by the DRC.<sup>596</sup> For the rest ratification by SADC member states of this Convention is conspicuous by its absence. It may be that domestic systems are not yet in line with the requirements of this Convention. At regional level the ratification of this Convention is high on the agenda of policymakers.<sup>597</sup> Ratification of the Convention is more than a mere formality. The impression one is left with is that the failure of ratifying this Convention implies that a government is under no obligation to meet the minimum standards and this makes the right to social security hollow. Several other ILO Conventions in specific areas of social security have been ratified by a range of SADC

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<sup>589</sup> However, even though it has not yet been ratified, as is evident from the judgment in *Grootboom*, the courts do take into account the provisions of this important instrument when interpreting socio-economic rights contained in the Constitution.

<sup>590</sup> According to information obtained from the relevant UN Website (<http://www.ohchr.org/english/countries/ratification/11.htm>) on 8 July 2007 and again on 9 March 2008.

<sup>591</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 13-14. See also IOM *Current migration themes in Southern Africa: An IOM perspective* (IOM (International Organisation for Migration 2005) 5).

<sup>592</sup> UN Convention relating to the Status of Refugees - 28 July 1951 (South Africa acceded on 12 January 1996); UN Protocol relating to the Status of Refugees - 31 January 1967 (South Africa acceded on 12 January 1996); and OAU Convention Governing Specific Aspects of Refugee Problems in Africa - 10 September 1969 (South Africa signed the Instrument of Accession on 15 December 1995 - the Instrument of Accession was deposited on 15 January 1996).

<sup>593</sup> I.e. Lesotho.

<sup>594</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990).

<sup>595</sup> Information obtained from the relevant UN Website ([http://portal.unesco.org/shs/en/ev.php-URL\\_ID=3693&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=3693&URL_DO=DO_TOPIC&URL_SECTION=201.html)) on 8 July 2007, and again from

[http://portal.unesco.org/shs/en/ev.php-URL\\_ID=3693&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/shs/en/ev.php-URL_ID=3693&URL_DO=DO_TOPIC&URL_SECTION=201.html) on 9 March 2008, which lists Seychelles as another Southern African country (but currently not a SADC Member State) as having acceded to the Convention; it also lists a total of 37 countries that have ratified or acceded to the Convention.

<sup>596</sup> In 1987 (Parts V, VII, IX and X) – information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007, and again on 9 March 2008.

<sup>597</sup> According to the co-ordinator of the (now transformed) SADC ELS Co-ordinating Unit of SADC, Mr Arnold Chitambo, ministers and social partners have approved as one of the activities to be undertaken in order to improve the delivery of social security in the region, the development of guidelines on ratification of ILO Convention No. 102 on social security and other relevant instruments (Chitambo, A *SADC Policy Dimensions of social protection* (Paper presented at the SADC Social Security Consultative Workshop *Towards the Development of Social Protection in the SADC Region* (Helderfontein Conference Centre, Johannesburg, South Africa, 17-19 October 2001)) par 3.3.5. See also, to the same effect, article 4.3 of the Code on Social Security in the SADC referred to above.

Member States, for example on workers' compensation,<sup>598</sup> occupational health and safety,<sup>599</sup> and unemployment.<sup>600</sup> A few countries have also ratified migration-related Conventions, which affect the area of social security as well.<sup>601</sup> However, with the possible exception of ILO Convention 176 of 1995 on Safety and Health and Mines, virtually all the other ratified social security-specific Conventions date back to many years ago, in fact to the pre-World War II era: SADC members have not kept pace with most of the modern ILO Conventions on social security.<sup>602</sup>

The ratification picture improves when it comes to the ratification of the fundamental labour law Conventions<sup>603</sup> on freedom of association,<sup>604</sup> collective bargaining,<sup>605</sup> and employment equity.<sup>606</sup> In fact, it has to be specifically noted that the ratification by SADC Member States, in some instances recently, of all eight ILO Conventions<sup>607</sup> that make up the ILO Declaration on Fundamental Principles and Rights at Work of 1998, is a remarkable achievement – whereas only 9<sup>608</sup> of the 14 countries had done so by early January 2003,<sup>609</sup> the present number of SADC countries which have ratified all eight core Conventions is 13. Only 1 SADC country, namely Namibia, has ratified seven of the eight fundamental Conventions.<sup>610</sup> It is clear that the provision of the Social Charter imposing on Member States to ratify and implement as a priority the core ILO Conventions, referred to above,<sup>611</sup> has had the desired effect.

The poor ratification of ILO and to some extent UN Conventions within SADC has been deplored, in view of the seriousness of migration issues.<sup>612</sup> In addition, it is clear that the

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<sup>598</sup> E.g. Conventions 12 of 1921, 17 of 1925, 18 of 1925, 19 of 1925, 42 of 1932 – information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007 and again on 9 March 2008.

<sup>599</sup> E.g. Convention 176 of 1995 – information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007 and again on 9 March 2008.

<sup>600</sup> E.g. Convention 2 of 1919 – information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007 and again on 9 March 2008.

<sup>601</sup> ILO Conventions 97 and 143 have been ratified by only two SADC countries, namely Malawi and Zambia: see also Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 19.

<sup>602</sup> For example, only one SADC country (DRC) ratified ILO Convention 121 of 1964 on Employee Injury Benefits – information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007, and again on 9 March 2008.

<sup>603</sup> Some of the issues regulated by these Conventions relate to social security issues as well – this is in particular true of Convention 111 of 1958 (Equality in Employment and Occupation)

<sup>604</sup> Convention 87 of 1948.

<sup>605</sup> Convention 98 of 1949.

<sup>606</sup> Conventions 100 of 1951 and 111 of 1958.

<sup>607</sup> I.e. the two Conventions on Forced Labour (Conventions 29 of 1930 and 105 of 1957), on Freedom of Association (87 of 1948 and 98 of 1949), on Discrimination (100 of 1951 and 111 of 1958) and on Child Labour (138 of 1973 and 182 of 1999).

<sup>608</sup> I.e. Angola, Botswana, DRC, Lesotho, Malawi, Seychelles, South Africa, Swaziland and Tanzania.

<sup>609</sup> Information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007.

<sup>610</sup> Information obtained from the ILO Website (<http://www.ilo.org>) on 6 July 2007, and again on 9 March 2008.

<sup>611</sup> Par 7.2.1 above.

<sup>612</sup> At the ILO Tripartite Forum on Labour Migration in Southern Africa held in Pretoria, 26-29 November 2002. The Forum identified migration issues as serious. See Kanyenze, G *African Migrant Labour*

adoption of some of the regional instruments covering social security, such as the Social Charter, is only to a limited extent helpful (with the exception of the Code on Social Security in the SADC), since they do not speak to migration directly.<sup>613</sup> The conclusion is clear: specific and concrete measures need to be adopted at the regional level to deal with the social security plight of intra-SADC migrants, in addition to required changes to national law and practice. Entering into appropriate inter-country arrangements, in particular via bilateral and multilateral agreements, based on accepted international law principles, as contained in the Code on Social Security in the SADC as well, provides a method to achieve this result.

## **8.4 Co-ordination arrangements**

Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers comprehensive and continuous protection on the basis of effective equality and reciprocity.<sup>614</sup> In this regard the role of bilateral and multilateral agreements or treaties between states is important in relation to the position of non-citizen workers in social security. These agreements relate primarily to the handling of social security provision for individuals who have worked, or resided, in more than one of the countries. They vary widely. These agreements mostly follow a regular pattern: they guarantee the equality of treatment between nationals and non-nationals, provide rules which determine the applicable national legislation in case of cross-border activities and provide for the maintenance of rights, both in terms of establishing entitlement to benefits (aggregation of insurance periods) and in terms of payment of acquired rights (exportability of benefits).<sup>615</sup> The material rules based upon these principles are sometimes referred to as international co-ordination law. The material scope of the treaties co-ordinating national social security schemes for non-citizen migrants is mostly confined to statutory social insurance schemes. In terms of comparative approaches, the territorial principle operative in social security is consequently replaced by a personal entitlement to benefits, which follows the beneficiary.

However, particular problems are experienced in developing countries' contexts. Commenting on the position in Southern Africa in relation to workers compensation schemes, Fultz and Pieris remark:<sup>616</sup>

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*Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 19.

<sup>613</sup> *Ibid.*

<sup>614</sup> Cf e.g. the Maintenance of Social Security Rights Convention (No 157 of 1982) and the supplementing Recommendation (No 167 of 1983). These Conventions call for reciprocal agreements among governments to ensure that migrants can receive compensation either at home or abroad: See Fultz, E & Pieris, B *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* (ILO/SAMAT Policy Paper No. 7) (ILO Harare, Zimbabwe 1998) 4.

<sup>615</sup> See, amongst others, ILO *Introduction to social security* (ILO, Geneva 1989) 151-159; Barnard, C *EC Employment Law* (Oxford: OUP 2002) 302-305 (commenting on the position in the EU).

<sup>616</sup> Fultz, E & Pieris, B *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* (ILO/SAMAT Policy Paper No. 7) (ILO Harare, Zimbabwe 1998) 19-20.

*"In addition, schemes typically offer little help to migrant workers who return home after being injured on the job or who develop an employment-related occupational disease caused by work in another country. The most developed employment injury payment arrangements exist in South Africa, where benefits may be remitted through government-to-government agreements or through the mines' major recruitment agency, The Employment Bureau of Africa (TEBA), in those countries where it has offices. In the former arrangement, government corruption in the receiving country has sometimes prevented payments from reaching beneficiaries. This has been a particular problem in Mozambique, where a small survey undertaken in 1996 by Rand Mutual, the private firm which administers workers compensation for the mining industry, showed that 70 percent of compensation payments remitted in this manner had not reached the beneficiary.<sup>617</sup> In other countries, some schemes will send benefits overseas and will sometimes transmit an application or medical evidence to a neighbouring scheme on behalf of a worker.<sup>618</sup> In no case, however, will a scheme assist a worker in developing an application for another scheme, advocate on his or her behalf for a decision, help file an appeal, pay a worker on another scheme's behalf, or advance the worker funds while he is awaiting a payment."*

Internationally the broad possibilities in terms of extending social protection to migrants are fairly well known and generally applied.<sup>619</sup> These measures apparently distinguish between social insurance (security) and social assistance measures. Vonk succinctly sums up the position:<sup>620</sup>

*"The international community has a long standing tradition in protecting the social security of migrants through a network of instruments for the co-ordination of social security schemes. These instruments provide for the equal treatment of national and foreign subjects, for the exportability of certain types of benefits, and for the aggregation of insurance periods fulfilled under different national social insurance schemes. Furthermore, they establish a choice for the competent legislation which is applicable in transnational situations. However, it appears that these co-ordination instruments can do little to improve the position of migrants within minimum subsistence benefit schemes. Traditionally, they only cover social insurance schemes which are related to a number of internationally recognised social risks, such as sickness, unemployment, invalidity, and old age."*

In the European Community, Regulation 1408/71 contains a comprehensive regulation on the application of social security schemes to employed persons and their families moving within the European Community.<sup>621</sup> This regulation recognised the considerable

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<sup>617</sup> See Fultz, E *Social Protection of Migrant Workers in South Africa* (ILO/SAMAT Policy Paper No. 3) (ILO Harare, Zimbabwe 1997).

<sup>618</sup> For example, Zimbabwe remits compensation payments to workers living in Malawi through the Malawi High Commission; to Europeans, through the Bank of England; and to residents of South Africa, through the South African Standard Bank.

<sup>619</sup> See, amongst others, ILO *Introduction to Social Security* (Geneva, ILO 1989) 151-159.

<sup>620</sup> Vonk, G *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap* (Kluwer 1991) 483-484.

<sup>621</sup> Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ L149, 5.7.71, p 2), and replaced EC Council Regulations No 3 OJ No 30, 16.12.58, p 561/58 which had come into force on 1 January 1959. See also Case 83/87 *Viva v Fonds National de Retraite des Ouvriers Mineurs (FNROM)* 1988 ECR 2521, 1990 1 CMLR 220, ECJ. EC Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (OJ L149, 5.7.71, 2) was published in consolidated and updated version in 1997: see EC Council Regulation 118/97 OJ L28, 30.1.97, 1. Council Regulation 574/72 deals with the procedure for implementing Regulation 1408/71. See now EC Regulation 883/2004 of the

differences existing between the national legislation of member states. For this reason, it sought to guarantee within the European Community equality of treatment for all workers and self-employed nationals of member states, and their families and survivors. Regulation 1408/71 and the antecedent Community provisions pertaining to the position of EU member states migrants are premised on several basic principles:<sup>622</sup>

- (a) Choice of law, identifying the legal system which is applicable (as a rule the law applicable is that of the place of employment, the *lex loci laboris*);
- (b) Equal treatment (all discrimination based on nationality is prohibited);
- (c) Aggregation of insurance periods (all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining entitlement to benefits, and of calculating such benefits); and
- (d) Maintenance of acquired benefits and payment of benefits to Community residents, irrespective where in the Community they reside (exportability principle).

What these measures effectively do is to replace the territorial principle with a personal entitlement to benefits, which follow the beneficiary.<sup>623</sup> However, the objective of the regulations, which must be interpreted in the light of the principle of freedom of movement,<sup>624</sup> is merely co-ordination of the social legislation of member states; there is no attempt to establish a unified European Community social security scheme or to harmonize the national systems.<sup>625</sup> The social protection laws of the member states therefore remain diverse, although some approximation has recently taken place.

Regulation 1408 applies to social security/insurance schemes, as well as to mixed benefits,<sup>626</sup> but not to social assistance schemes, although the latter still remain subject to the non-discrimination principle of Regulation 1612.<sup>627</sup> Social assistance, therefore, falls squarely within the domain of national jurisdiction, despite calls to have the Regulation extended to this area as well and subject to the equal treatment rule of Regulation 1408/71.<sup>628</sup> However, certain measures of recent origin attempt to foster some measure of synergy and co-ordination in the area of social assistance.<sup>629</sup> As measures aimed at eradicating social exclusion and supporting social justice and the dignity of human beings, these measures suggest the adoption of a minimum level of protection for all

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European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (not yet in force).

<sup>622</sup> See generally Barnard, C *EC Employment Law* (Oxford: OUP 2002) 303-305; Eichenhofer, E. (ed) *Social Security of Migrants in the European Union of Tomorrow* (1997, Osnabrück: Universitätsverlag Rasch 1997) 3-4.

<sup>623</sup> Barnard 302.

<sup>624</sup> See article 39 (ex article 48) of the Treaty (Consolidated version of the Treaty establishing the European Community of 1992).

<sup>625</sup> See Case C-227/89 *Rönfeldt v Bundesversicherungsanstalt für Angestellte* 1991 ECR I-323, 1993 1 CMLR 73, ECJ.

<sup>626</sup> Subject to the rule that a mixed benefit is not exportable – see the recently introduced article 10a of Regulation 1408/71.

<sup>627</sup> Council Regulation 1612/68 OJ L257, 19.10.68, 2; *Inzirillo* [1976] ECR 2057 par 21; Barnard 313.

<sup>628</sup> Article 7(2).

<sup>629</sup> See Barnard 2000: 326-327

residents,<sup>630</sup> the establishment of common criteria concerning sufficient resources and social assistance in social protection systems,<sup>631</sup> and the convergence of social policy objectives.<sup>632</sup> Country-specific indicators are suggested as a benchmark, which implies that harmonisation in the true sense of the word is not contemplated.

EU member states citizens who migrate within the EU are, therefore, entitled to the protection afforded by these instruments. For example, article 7(2) of Regulation 1612/68 requires that migrant workers and their families enjoy the same social and tax advantages as nationals.<sup>633</sup>

## 9. Conclusions and recommendations

### ***9.1 Developing an appropriate SADC migration agenda and policy framework***

Migrants in SADC, in particular intra-SADC migrants, invariably find themselves in a precarious position, also in relation to social security. They face seemingly insurmountable difficulties due to the operation of several legal restrictions, inappropriate and inchoate policies, and treatment they are generally exposed to, in particular in the host country. With regard to the legal and supporting policy framework, the legal principle of territorial application of national laws generally prevalent in SADC countries causes the exclusion of migrants from the operation of social security laws of the home country, while nationality and residence requirements often exclude foreigners from the sphere of application of social security laws in the host country. Other legal restrictions, for example in relation to the portability of benefits, also exist. In short, in the absence of legal and policy frameworks and special measures which provide an appropriate response to their precarious position in social security, and in the absence of suitable bilateral treaties or enforceable regional standards, migrants are the subjects of discrimination in

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<sup>630</sup> See the Community Social Charter of 1989.

<sup>631</sup> Council Recommendation 92/441/EEC.

<sup>632</sup> Council Recommendation 92/442/EEC.

<sup>633</sup> Council Regulation 1612/68 OJ L257, 19.10.68, p 2 art 7 (2). This provision applies to every social and tax advantage, whether or not linked to a contract of employment, generally granted to claimants as a result of their objective status as workers or due to the fact that they reside in national territory: Case 63/77 *Inzillo v Caisse d'Allocations Familiales de l'Arrondissement de Lyon* 1976 ECR 2057, 1978 3 CMLR 596, ECJ. 'Social advantages' include not only benefits granted by right but also benefits of a discretionary nature: Case 65/81 *Reina v Landeskreditbank Baden-Württemberg* 1982 ECR 33, 1982 1 CMLR 744, ECJ; Case 249/83 *Hoeckx v Openbaar Centrum voor Maatschappelijk Welzijn* 1985 ECR 973, 1987 3 CMLR 638, ECJ; and Case 122/84 *Scrivner and Cole v Centre Public d'aide Sociale de Chastre* 1985 ECR 1027, 1987 3 CMLR 638, ECJ. The derived rights of members of a worker's family under EC Council Regulation 1408/71 on the application of social security schemes to employed persons and their families moving within the Community are a social advantage to the worker and may not be taken away on the ground of nationality: Case C-310/91 *Schmidt v Belgium* 1993 ECR I-3011, 1995 2 CMLR 803, ECJ.

law and practice.<sup>634</sup> Immigration laws and policy in SADC countries generally focus on the effects, rather than the underlying causes of migration. The policy and legal framework in this regard emphasises the tightening of controls, the monitoring of borders and, particularly in South Africa, the establishment of detention centres and increased deportation of irregular migrants.<sup>635</sup> A recent study remarked that "[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books."<sup>636</sup> An increasingly forceful line on enforcement is adopted.<sup>637</sup>

In essence, immigration laws and practice in SADC are not geared towards honouring a human rights approach and towards encouraging and supporting migration, but towards restricting access, controlling movement and regulating presence in the host country.<sup>638</sup> In addition, primacy is given to immigration laws and policy, at the expense of social security laws and labour laws.<sup>639</sup>

The maltreatment of many intra-SADC and African migrants, also in the form of xenophobic utterances and actions, especially in South Africa, has been widely reported.<sup>640</sup> This applies in particular to specific vulnerable groups, including asylum-seekers and refugees, women involved in informal cross-border trade, and irregular migrants.<sup>641</sup>

It would therefore appear that governments in Southern Africa, as is also the case in other parts of Africa, do not as a rule comprehend that migration is a livelihood strategy and therefore crucial for the welfare of migrants, in addition to serving the developmental needs of in particular the host country. As remarked by Black, "[T]raditional countries of immigration, such as South Africa, Côte d'Ivoire and Gabon have become more intolerant

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<sup>634</sup> Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office 2006) 154.

<sup>635</sup> See par 4.2.3 and par 4.2.4 above; Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1, 2004) 23; Siddique, M *South African Migration Policy: A Critical Review* (University of Western Australia Business School) 32.

<sup>636</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 10, 24.

<sup>637</sup> *Ibid* 25.

<sup>638</sup> According to Williams, all SADC Member States have immigration laws and policies based on three fundamental principles: (a) the sovereignty of the nation-state; (b) the integrity of national boundaries; and (c) the right to determine who may enter its national territory and to impose any conditions and obligations upon such persons: Williams, V *An overview of migration in SADC region* (Paper presented at SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002) 65.

<sup>639</sup> See par 4.2.4 above; Mitchell, S *Migration and the remittance euphoria: Development or dependency?* (NEF (New Economic Foundation) 2006) 22. See now, however, the judgment of the South African Labour Court in *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

<sup>640</sup> Landau, L *Democracy and discrimination: Black African migrants in South Africa* (Global Migration Perspectives No. 5, 2004); par 3.1 above. See also FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008). Xenophobic attacks in South Africa during May 2008 left more than 60 dead.

<sup>641</sup> See par 3.2 and par 3.3 above.

of migrant workers."<sup>642</sup> Most governments in the SADC region tend to view migration to their countries as a threat rather than an opportunity and few, if any, have pro-active immigration policies.<sup>643</sup>

It is also clear the gender and poverty are two areas closely related to the social security position of migrants, which are not properly provided for in existing country and regional migration policy frameworks. As indicated above, migration in SADC, as is also the case with social security, is deeply gendered. Appropriate policy responses are required to deal in particular with the plight of female spouses who migrate and those who stay behind in the home country.<sup>644</sup> Similarly, migration plays a profound role in the areas of preventing, redressing and alleviating poverty in SADC.<sup>645</sup> However, proper integration of poverty within the migration policy framework is lacking in SADC:

*"There is a profound disjuncture between immigration policies and poverty reduction strategies in most countries in the Southern African region. Migration is not systematically factored into national poverty reduction strategies throughout the region. Nor has immigration policy been integrated systematically with pro-poor policies..... To the extent that migration is sidelined or ignored in policy thinking, so pro-poor policy frameworks will fall short in their attempts to alleviate poverty and minimise inequalities in the region."*<sup>646</sup>

From a regional perspective, the policy and instrumental framework for dealing with the plight of migrants, also in relation to social security, is weakly developed. While the adoption and implementation of in particular the Code on Social Security in the SADC and to a lesser extent the Social Charter, are important elements in standardising and improving the social security position of migrants, the undergirding migration policy framework is clearly lacking. SADC has yet to develop a policy which guarantees free movement of labour – despite the adoption of the inadequate Draft Protocol on the Facilitation of Movement of Persons.<sup>647</sup> In this area, unlike in other areas such as trade,<sup>648</sup> education<sup>649</sup> and transportation,<sup>650</sup> there has been considerable reluctance to develop a

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<sup>642</sup> Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 14.

<sup>643</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 8-9.

<sup>644</sup> See par 3.3 above and par 9.3.1 below.

<sup>645</sup> See par 3.1 above – e.g., via remittances (see par 3.4 above).

<sup>646</sup> Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration, Geneva 2004) 27-28, 29.

<sup>647</sup> See par 7.2.2 above, as well as Black, R *Migration and Pro-Poor Policy in Africa* (Working Paper C6) (Development Research Centre on Migration, Globalisation and Poverty, University of Sussex 2004) 14; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 19.

<sup>648</sup> Cf the Free Trade Protocol of 1996 which envisages, among others, the establishment of a free trade area in SADC (see article 2.5 of the Protocol), accessible at [www.sadc.int](http://www.sadc.int).

<sup>649</sup> Cf the Protocol on Education and Training of 1997, accessible at [www.sadc.int](http://www.sadc.int). Article 3(a) provides for the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the Region.

<sup>650</sup> Cf the Protocol on Transport, Communications and Meteorology of 1996, accessible at [www.sadc.int](http://www.sadc.int).

SADC-wide policy on the free movement of people.<sup>651</sup> As aptly remarked by Crush *et al*: "Freeing up flows of goods and capital while simultaneously trying to shut down the movement of people makes limited economic sense."<sup>652</sup> Also, the Regional Indicative Strategic Development Plan (RISDP)<sup>653</sup> does not explicitly identify migration as a key area for intervention, even though the importance of migration is highlighted for cross-cutting areas such as informal trade and mobility of factors of production.<sup>654</sup>

The recently adopted UN General Comment No 19 on the right to social security requires that States parties develop a *national strategy* for the full implementation of the right to social security, and allocate fiscal and other resources at the national level.<sup>655</sup> This national strategy and plan of action to realise the right to social security should among others take into account the rights of the most disadvantaged and marginalised groups – therefore including categories of non-citizens as well.<sup>656</sup>

At the continental level several recent Africa Union (AU) documents stress the need to develop appropriate migration policies. Already in 2001, the Council of the AU recommended to Member States to:<sup>657</sup>

- work towards the free movement of people and to strengthen intra-regional and inter-regional co-operation in matters concerning migration on the basis of the established processes of migration dialogue at regional and sub-regional levels and to create enabling conditions for the participation of migrants, in particular, African Diaspora in the development of their home countries;

and encouraged

- Member States to work towards the development of a strategic framework for migration policy in Africa that could contribute to addressing the challenges posed by migration.

More recently, the AU Executive Council expressed the need and its support for a comprehensive migration policy strategy in Africa by the adoption of the AU Migration Policy Framework for Africa<sup>658</sup> and of a common position on migration and

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<sup>651</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 24. On p 28 the authors remark: "Cross-border migration in the region is, therefore, governed by national migration and refugee legislation."

<sup>652</sup> *Ibid* 26-27.

<sup>653</sup> Of 2003: accessible at [www.sadc.int](http://www.sadc.int).

<sup>654</sup> Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration 2005) 26-27.

<sup>655</sup> Par 41.

<sup>656</sup> Par 68.

<sup>657</sup> See paras 4 and 5 respectively of the Resolution (regulation) on the Establishment of a Strategic Framework for a Policy of Migration in Africa (CM/Dec. 34 (LXXIV) 2001).

<sup>658</sup> Africa Union *The Migration Policy Framework for Africa* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/276 (IX)).

development.<sup>659</sup> The policy document essentially provides in broad terms for a framework which should be employed by Member States and regional organisations such as SADC to deal with a range of issues, including labour migration, irregular migration, forced displacement, migration and development, and inter-state and inter-regional co-operation. Social issues deserving attention are also mentioned, such as poverty and gender. Specific reference is made to recommended strategies relating to migration and social security, with an emphasis on equality of treatment and the provision of a range of social security benefits to migrant workers, also on the basis of portability. The policy framework suggests in this regard that it is necessary to:<sup>660</sup>

- (a) "Incorporate equality of opportunity measures that ensure equal access for labor migrants and nationals in the areas of employment, occupation, working condition, remuneration, social security, education and geographical mobility"; and
- (b) "Provide social protection and social security benefits particularly unemployment insurance, compensation for employment injury and old age pension for labor migrants while working abroad and/or upon their return."

Several pointers for the way forward are provided by the said document. These include actions such as:<sup>661</sup>

- Introducing national laws and policies based on international and regional umbrella principles which are appropriate instruments to properly manage migration – Member States are accordingly encouraged to adopt migration policies and laws which are "open and transparent";<sup>662</sup>
- Adopting a comprehensive approach to migration management to address the various issues emerging as a result of migration<sup>663</sup> Member States should adopt the various recommendations made above under different categories of labour migration, border management/integrity, irregular migration, national/regional security, human rights, etc.;
- In view of the fact that migration is a multi-actor process, facilitating the involvement of different stakeholders such as NGOs, community organisations, migrants, government agencies, etc. in policy formulation and designing and implementation of programmes and projects;
- Co-operating on inter-State, inter- and intra-regional level to manage migration, as migration involves origin, transit and destination States. As a result, governments should look for collective solutions to migration through bilateral, multilateral and regional agreements and dialogue in a manner that benefits all parties to migration: origin country, destination country and migrants; and

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<sup>659</sup> Africa Union *African Common Position on Migration and Development* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/277 (IX)).

<sup>660</sup> P 9.

<sup>661</sup> See par 7 of the document on the way forward.

<sup>662</sup> Par 7.1.

<sup>663</sup> Par 7.2.

- Resolving the migration-related conflict between national security/integrity and migrants' rights, by striking a balance between the two, *inter alia*, by harmonising national laws and policies with international standards and norms.

The rationale for adopting migration policies in SADC which integrate social security and related imperatives is compelling. This flows among others from factors such as the:

- long history of cross-border migration within SADC and the strategic impact this has had on the economic and to some extent social development of both the home and host countries;
- family-based tradition of migration affecting numerous households in the region, and the impact this has had on household survival and poverty reduction;
- need to deal effectively with issues such as human trafficking and xenophobia and with the plight of large numbers of marginalised groups, such as women, irregular migrants and asylum-seekers and refugees;
- imperative of aligning immigration policies and laws with international and regional standards and with those of other countries in the SADC region;
- need to remove unnecessary restrictions in and regulation of the social security and labour law frameworks pertaining to migrants;
- need to develop integrated and co-ordinated strategies, approaches, responses and arrangements to deal in a coherent manner with the situation, also in social security terms, of different categories of migrants (such as bilateral agreements); and
- imperative of regional integration and harmonisation.

In short, the precarious position of migrant workers and their families<sup>664</sup> demands an appropriate response in the form of special protection embedded in or foreseen by a proper policy framework. Such a migration policy framework in SADC needs to be developed and implemented at both the country and regional level, and should have several building blocks. From a sending country perspective, much can be achieved in terms of institutional monitoring and oversight by establishing institutions that are competent to deal with the affairs of citizens outside the borders of the home country. Some examples are already in existence, also elsewhere in the developing world.<sup>665</sup> Angola and Mozambique have a government body that is competent to deal with the affairs of their citizens abroad.<sup>666</sup> Institutions such as these could liaise with relevant institutions in the host country, and ease contact and communication between migrants from the sending country and institutions in both the sending and the host country. They could also assist with the implementation and/or monitoring of compliance with social security agreements, and with portability arrangements.

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<sup>664</sup> Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005)(Paper prepared for the Global Commission on International Migration) 3: they maintain that special protection is needed, given the atypical lifecycle of migrant workers.

<sup>665</sup> For example, India, Bangladesh and the Philippines.

<sup>666</sup> E.g., INAME of Mozambique looks after the well-being of Mozambican nationals in South Africa and elsewhere: Klaaren, J & Rutinwa, B "Towards the harmonisation of immigration and refugee law in SADC" in Crush J *MIDSA Report No 1* (IDASA & Queens University 2004) 75.

At a more fundamental level though, country-specific policies should have due regard to the range of migration-influencing factors indicated above. In terms of their broad aim, these policies should strive to support freedom of movement of at least those migrants, and their families, who could make a contribution to the host country, and of special vulnerable groups, such as asylum-seekers and refugees and female migrants. These policies should be aligned with development and anti-poverty policies,<sup>667</sup> and should also be co-ordinated with those of other SADC countries<sup>668</sup> and give expression to the overarching SADC and AU objectives. They should, furthermore, remove unnecessary restrictions in the legal system and be properly aligned with the ethos and specific requirements of international and regional standards pertaining to both migration and social security. There is an evident need to support the ratification of relevant UN and ILO standards. It is significant that the AU Migration Policy Framework recommends the incorporation of provisions from ILO Conventions No. 97 and No. 143 and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families into national legislation.<sup>669</sup>

At the SADC regional level, there is a clear need for the development of social security-linked migration policies which equally take into account the factors listed above. In particular, heed should be paid to the overarching SADC objectives of regional integration, alleviation of poverty, and the prioritisation of the plight of the socially disadvantaged.<sup>670</sup> Provided that Member States have established mechanisms to implement this, the adoption of a Migration Protocol, based on the AU Migration Policy Framework, may go a long way towards standardising and improving the position of migrants.<sup>671</sup> In fact, developing at the SADC level an integrated vision and harmonised policy framework with regard to migration needs to be supported at the country level by a coherent and relevant migration policy.<sup>672</sup> Prudent regional co-ordination policies and strategies would also attempt to minimise the flow of irregular migrants. As remarked by Kanyenze, who argues that it is necessary to distinguish between short-term and irregular migrants (for example, informal traders) and long-term irregular workers, and suggests that it is necessary to issue the former with trade visas and to developed harmonised strategies:

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<sup>667</sup> Ammassari, S *Migration and Development: New Strategic Outlooks and Practical Ways Forward – the Cases of Angola and Zambia* (IOM, 2005) 79.

<sup>668</sup> The IOM has offered its assistance in this regard: See IOM *Current Migration Themes in Southern Africa: An IOM Perspective* (IOM Regional Office for Southern Africa, 2005) 7. One practical example of meaningful co-ordination would be to establish customs and immigration task teams to harmonise border crossing and visa procedures: *The New Partnership for Africa's Development (NEPAD)* (Framework Document) (Abuja, Nigeria 2001) par 112.

<sup>669</sup> Par 1.1.

<sup>670</sup> See article 5 of the SADC Treaty.

<sup>671</sup> See IOM *Current Migration Themes in Southern Africa: An IOM Perspective* (IOM Regional Office for Southern Africa 2005) 7.

<sup>672</sup> IOM *Current migration themes in Southern Africa: An IOM perspective* (IOM (International Organisation for Migration 2005) 7; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 7.

*"[S]ince undocumented migrancy is linked to conditions in the home country, it is necessary that the 'push' factors be addressed, through for instance regional economic co-operation.... It is therefore essential that policies are harmonized to minimise continued uneven development."*<sup>673</sup>

Finally, one of the primary areas of regional intervention in terms of social security-linked policy and practice, relates ideally to the adoption of a multilateral instrument that standardises the position of intra-SADC migrants in social security, and co-ordinates the relevant schemes. This could then serve as the basis of and benchmark for possible bilateral arrangements between individual SADC countries.

## **9.2 Co-ordination of social security schemes and systems: the import of multilateral and bilateral agreements and changes to the national system**

### **9.2.1 General considerations**

From comparative experience it is evident that the best way to ensure the protection of migrant workers is through the conclusion of multilateral or bilateral social security agreements. According to Baruah and Cholewinski, multilateral agreements "[h]ave the advantage that they generate common standards and regulations and so avoid discrimination among migrants from various countries who otherwise might be granted differing rights and entitlements through different bilateral agreements."<sup>674</sup> A multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement.<sup>675</sup>

It is generally accepted that bilateral agreements are seemingly the current best practice in benefit portability.<sup>676</sup> There are several important advantages of bilateral agreements, flowing from the fact that these agreements are designed to avoid both double coverage and a situation where no coverage at all is available, and also aim at totalisation of periods of contribution.<sup>677</sup> Added advantages could be available to the national law as far

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<sup>673</sup> Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 20.

<sup>674</sup> See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) (2006) 156.

<sup>675</sup> *Ibid.*

<sup>676</sup> See Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 32, where they remark: "The administrative approach to achieve the portability for both pension and health care benefits seems to be reasonable cost-effective after a bilateral or multilateral agreement has been successfully concluded."

<sup>677</sup> The recently concluded Mexico-US agreement is an example of a totalisation arrangement: Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank, 2005) (Paper prepared for the Global Commission on International Migration) 13, 16.

as coverage relating to portability<sup>678</sup> is concerned – for example, by fixing the replacement rate in the agreement.<sup>679</sup> Usually the agreements avoid transfers of contributions or the export of a pension between social security institutions of the home and host country: "[I]nstead, all pensions are paid directly from the various social security institutions to the migrant" (the so-called double stream mechanism), as the aim of bilateral social security agreements is to co-ordinate national social security law, and not to create any form of supranational social security system."<sup>680</sup> Also, the non-discrimination clause in bilateral social security agreements would effectively prevent a country<sup>681</sup> from applying reduction rates if the pension is paid to nationals or residents of countries with which a bilateral social security agreement has been concluded and who are residing outside their former host country.<sup>682</sup>

Bilateral agreements are in particular effective if they are combined with other supporting mechanisms, in particular at national level, aimed at extending further protection to the migrant concerned. For example, the Philippines not only seeks to conclude bilateral agreements with main migrant-receiving countries, but also offers continuous coverage under the Philippine social security system while staying abroad.<sup>683</sup> In fact, recent legislation in Mozambique to some extent contains a similar provision. It provides that Mozambican workers abroad who are not covered by the compulsory social security system of the host country may register for compulsory social security in Mozambique, but the more limited scheme for self-employed persons will be applicable to them.<sup>684</sup> In addition, a bilateral agreement could be accompanied by an arrangement which enables irregular migrants to claim unclaimed benefits during a grace period or before a cut-off date. For example, in order to provide for claims by irregular Mexican migrants in the wake of the conclusion of the recent Mexico-US bilateral agreement,<sup>685</sup> the US Congress passed legislation<sup>686</sup> which granted anyone who had made contributions to the US Social Security Administration prior to 2004 a legal entitlement to benefits associated with these contributions, independent of residence status and work permit status.<sup>687</sup>

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<sup>678</sup> With reference to Cruz, Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 3 define portability as the migrant worker's ability to "preserve, maintain and transfer acquired social security rights" independent of nationality and country of residence.

<sup>679</sup> *Ibid* 16-17.

<sup>680</sup> *Ibid* 18.

<sup>681</sup> As is the case with Germany: *Ibid* 15.

<sup>682</sup> *Ibid*.

<sup>683</sup> *Ibid* 13.

<sup>684</sup> Article 14.4 of the Law on Social Protection, read with article 18.2. For a discussion of this principle, see Olivier, M "Review of the Mozambican social security legal framework; extension of social security coverage in Mozambique" – (Report to the INSS, the government of Mozambique and the Mozambican social partners 2007) 34-35 (par 3.1.2).

<sup>685</sup> U.S.-Mexico Social Security totalization agreement of 2004.

<sup>686</sup> Aimed at prohibiting practices involving fake social security numbers.

<sup>687</sup> Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 27.

Worldwide a large number of bilateral social security agreements have been entered into. While this is generally seen as the preferred way to guarantee social security entitlements of migrants, this practice, as noted by Holzmann *et al*, "[n]ecessarily results in a highly complex and hardly administrable set of provisions on the portability of social security benefits" – unless there is a primary legal source which serves as the model for bilateral agreements entered into in, for example, a regional framework. This is the case within the EU as far as bilateral agreements between EU Member States are concerned, as they are all based on a central EU instrument, namely Regulation 1408/1971.<sup>688</sup> There is therefore a need for a standardised framework. This could be achieved by entering into a multilateral agreement, as happened in the Caribbean.

And yet it has to be understood that the principles affirmed at multilateral level, also in international conventions dealing with the social security implications of migration, find only partial application in the bilateral agreements concluded by countries. There are several reasons why this is so. Firstly, bilateral agreements are usually founded on the reciprocity principle, "which was formulated in a historical context when migration was of much smaller proportions than today."<sup>689</sup> However, in terms of this principle, "immigrant workers are not guaranteed the effective enjoyment of all the benefits to which they are entitled in host countries."<sup>690</sup>

Secondly, developments in the social security system of the host or immigrant country do not necessarily lead to a subsequent revision of the text of the agreement – as a consequence, disparities in access to benefits between immigrants and native workers may increase even further.<sup>691</sup> Thirdly, voluntary membership schemes (such as the US health insurance system), in particular where the scheme is not a public one (as is the case with pensions and health insurance in South Africa), create an incompatibility with other compulsory schemes, in particular public schemes. It is difficult to conclude a bilateral agreement under these circumstances.<sup>692</sup> Finally, as is apparent from the discussion below, these agreements are often restricted as far as their personal sphere of coverage is concerned, as non-standard forms of employment<sup>693</sup> and public-sector employment usually do not fall within the scope of bilateral agreements.<sup>694</sup>

Nevertheless, it is evident that multilateral and bilateral agreements play a profound role in cementing the protection of migrants' social security entitlements. To illustrate the point: had it not been for the incorporation of the exportability principle in most multi- and bilateral agreements, fewer than the 30% of migrants worldwide who return to their

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<sup>688</sup> *Ibid* 8, 12, 25.

<sup>689</sup> Paparella, D *Social security coverage for migrants: Critical aspects* (ISSA European regional meeting: Migrants and social protection, 21-24 April 2004) 12.

<sup>690</sup> *Ibid*.

<sup>691</sup> *Ibid*.

<sup>692</sup> Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An Analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 28.

<sup>693</sup> Such as new forms of temporary work.

<sup>694</sup> Paparella, D *Social security coverage for migrants: Critical aspects* (ISSA European regional meeting: Migrants and social protection, 21-24 April 2004) 12-13.

home country would have done so.<sup>695</sup> Also, the majority of migrants face major obstacles in the portability of their pension and health care benefits. Only some 20-25% of them work in host countries with bilateral or multilateral social security agreements.<sup>696</sup>

### **9.2.2 Developments in comparative systems: the EU and the Caribbean, Mercosur and the East African Community**

The regulation of the social security implications of intra-EU migration, in particular via the operation of Regulation 1408/1971, has already been alluded to. However, it needs to be stressed that the conditions regulating the entry of immigrants into individual countries are decided by national laws, while EU norms regulate the intra-European mobility of immigrants. In this regard the concept of "legal residence" has been elevated to be the decisive criterion. This follows from the EU norms which aim at reducing the obstacles against the free movement of – and extension of social security coverage to – immigrant workers who are "legally staying" in a European country, including their families.<sup>697</sup> Furthermore, these principles have been extended to certain categories of third country nationals. Rights analogous to those of European citizens, including family reunification rights, are granted if a migrant is legally staying.<sup>698</sup> Agreements in particular with Mediterranean countries make provision for similar arrangements.<sup>699</sup> Also, the Barcelona Declaration in 1995 founded the European Mediterranean Partnership (EMP), making ten Mediterranean countries official partners of the EU. Since then, the EU has negotiated multi-lateral Association Agreements with all Euro-Mediterranean partners.<sup>700</sup>

The protection of the social security position of intra-regional migrants in the Caribbean is essentially provided for in terms of the provisions of the CARICOM Agreement on Social Security of 1996, which entered into force in 1997. This regional instrument is largely based on the model provisions for the conclusion of bilateral or multilateral social security instruments set out in ILO Maintenance of Social Security Rights Recommendation 167 of 1983. Three fundamental principles constitute the cornerstone

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<sup>695</sup> *Ibid* 3, 6.

<sup>696</sup> *Ibid* 36.

<sup>697</sup> Paparella, D *Social security coverage for migrants: Critical aspects* (ISSA European regional meeting: Migrants and social protection, 21-24 April 2004) 12.

<sup>698</sup> See Paparella, D *Social security coverage for migrants: Critical aspects* (ISSA European regional meeting: Migrants and social protection, 21-24 April 2004) 7; Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank, 2005) (Paper prepared for the Global Commission on International Migration) 9; Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) 2006) 156.

<sup>699</sup> See the European-Mediterranean agreements from the 1990s between the EU, its Member States and the Maghreb countries of Algeria, Morocco and Tunisia. These contain far-reaching provisions on the portability of social security benefits for migrant workers from the Maghreb countries who live and work in the EU: See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office 2006) 156.

<sup>700</sup> *Ibid*.

of the protection of intra-regional migrants in relation to social security: equality; maintenance; and exportability.<sup>701</sup> The Agreement has been widely signed and ratified.<sup>702</sup> Its impact and effect also has to be understood against the background of the establishment of the CARICOM Single Market and Economy (CSME):<sup>703</sup> Free movement of skills, alongside the free movement of services,<sup>704</sup> is one of the key pillars of the CSME and essentially entails the elimination of the requirement for permits for work and residency, incorporated in the Revised Treaty of Chaguaramas (of 2001) in article 45. This essentially entails that Member States commit themselves to the goal of free movement of their nationals within the Community.<sup>705</sup>

However, as noted by MacAndrew, the "[H]eads of Government decided to implement free movement in a phased manner, starting with categories, which were granted the right to seek employment or to engage into gainful employment, either as wage earner or non wage earner. Freedom of movement is thus linked to some kind of economic activity."<sup>706</sup> The approved categories of wage earners are currently:<sup>707</sup> graduates, artists, musicians, sports persons and media persons (although this not yet fully operational everywhere in

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<sup>701</sup> Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office) 2006) 156.

<sup>702</sup> *Ibid*: 13 Member States have so far signed and ratified the Agreement, while 12 have enacted domestic legislation to give legal effect to it. The Agreement is one of the best, if not the best implemented CSME-related measure, since all Member States with an existing social security organisation has fully operationalised the Agreement, ensuring benefits to nationals across the region: MacAndrew, S *The CARICOM Single Market and Economy (CSME) and the Free Movement of Labour Across the Region and its Implications for Social Security* (Keynote address, 37<sup>th</sup> Anniversary of the National Insurance Office, Bridgetown, Barbados, 8 June 2004) 10.

<sup>703</sup> 13 Caricom Member States of the Caribbean Community have committed to deepen and strengthen the regional integration process by establishing the CSME. The focus of the Community was to establish the Single Market with effect of 1 Jan 2006 or shortly thereafter. The other major component of the CSME, i.e. the Single Economy, must be completed by 31 Dec. 2008 based on the Revised Treaty of Chaguaramas of 2001 – *Report of the Expert Group Meeting on Migration, Human Rights and Development in the Caribbean* (Report LC/CAR/L.57) (Caribbean Expert Group Meeting on Migration, Human Rights and Development in the Caribbean, Port of Spain, Trinidad and Tobago, 14-15 September 2005) 11.

<sup>704</sup> The Revised Treaty of Chaguaramas of 2001 includes the movement of services against remuneration other than wages: see also the *Report of the Expert Group Meeting on Migration, Human Rights and Development in the Caribbean* (Report LC/CAR/L.57) (Caribbean Expert Group Meeting on Migration, Human Rights and Development in the Caribbean, Port of Spain, Trinidad and Tobago, 14-15 September 2005) 11.

<sup>705</sup> MacAndrew, S *The CARICOM Single Market and Economy (CSME) and the Free Movement of Labour Across the Region and its Implications for Social Security* (Keynote address, 37<sup>th</sup> Anniversary of the National Insurance Office, Bridgetown, Barbados, 8 June 2004) 5. See also Article II of the Charter of Civil Society for the Caribbean Community, which guarantees as a fundamental right and freedom: "Freedom of movement within the Caribbean Community, subject to such exceptions and qualifications as may be authorized by national law and which are reasonably justifiable in a free and democratic society": *Ibid*.

<sup>706</sup> *Ibid*.

<sup>707</sup> See also the *Report of the Expert Group Meeting on Migration, Human Rights and Development in the Caribbean* (Report LC/CAR/L.57)(Caribbean Expert Group Meeting on Migration, Human Rights and Development in the Caribbean, Port of Spain, Trinidad and Tobago, 14-15 September 2005) 11.

the Caribbean).<sup>708</sup> All other wage earners still need a work permit to work in another Member State. Self-employed service providers and persons, who are establishing commercial presence, are the approved categories of non-wage earners.<sup>709</sup> Also, article 46 of the Revised Treaty provides for the enlargement of classes of persons who are entitled to move freely.<sup>710</sup>

MacAndrew further indicates that the purpose of the Agreement is to protect the entitlement to benefits of CARICOM nationals and to give them equality of treatment when they move from one Member State to another. It provides for the totalisation of all contributions made to several social security organisations in order to determine benefits and the payment of benefits to beneficiaries free of any deduction for administrative or other expenses anywhere in the single space. The Agreement covers the following payments:

- (a) invalidity payments;
- (b) disablement pensions;
- (c) old age or retirement pensions;
- (d) survivors' pensions; and
- (e) death benefits in the form of pensions.<sup>711</sup>

According to the Treaty of Chaguaramas a wage earning CARICOM national must be insured in the Member State where he or she was employed and is, therefore, required to contribute to the respective social security system. Given the operation of the equality principle, this entitles him/her to the same benefits than nationals of the host country.<sup>712</sup> Furthermore, dependants of those who are allowed to move freely have the right to join the principal mover. However, most Member States have not removed the work permit restrictions for dependants.<sup>713</sup>

The CARICOM agreement of 1996 provides the framework for intra-regional co-ordination of social security. Nevertheless, the agreement has to be complemented by the conclusion of bilateral intergovernmental agreements.<sup>714</sup> This flows partly from the fact

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<sup>708</sup> MacAndrew, S *The CARICOM Single Market and Economy (CSME) and the Free Movement of Labour Across the Region and its Implications for Social Security* (Keynote address, 37<sup>th</sup> Anniversary of the National Insurance Office, Bridgetown, Barbados, 8 June 2004) 6.

<sup>709</sup> *Ibid* 5. They could also move their managerial, supervisory and technical staff. According to *Report of the Expert Group Meeting on Migration, Human Rights and Development in the Caribbean* (Report LC/CAR/L.57) (Caribbean Expert Group Meeting on Migration, Human Rights and Development in the Caribbean, Port of Spain, Trinidad and Tobago, 14-15 September 2005) 11 this was discussed by the Caricom Member States in early 2005, but no final decision has yet been taken.

<sup>710</sup> *Ibid* 5.

<sup>711</sup> *Ibid* 9.

<sup>712</sup> *Report of the Expert Group Meeting on Migration, Human Rights and Development in the Caribbean* (Report LC/CAR/L.57)(Caribbean Expert Group Meeting on Migration, Human Rights and Development in the Caribbean, Port of Spain, Trinidad and Tobago, 14-15 September 2005) 11.

<sup>713</sup> MacAndrew, S *The CARICOM Single Market and Economy (CSME) and the Free Movement of Labour Across the Region and its Implications for Social Security* (Keynote address, 37<sup>th</sup> Anniversary of the National Insurance Office, Bridgetown, Barbados, 8 June 2004) 9.

<sup>714</sup> *Ibid* 5.

that CARICOM is not a supranational organisation such as the EU, which can stipulate binding norms at the central (European) level.<sup>715</sup> The Revised Treaty of 2001 therefore calls for the harmonisation and transferability of social security benefits<sup>716</sup> and the "conclusion of reciprocal social security agreements among Member States in order to facilitate the movement of skills."<sup>717</sup>

Two other regions in the developing world also deserve brief mention. Firstly, in South America the Mercosur countries developed their own multilateral social security co-ordination regime. More recently, this has been extended to all South American countries. By the end of 2008 a further extension has been effected, by including Portugal and Spain in a comprehensive multi-lateral social security framework covering these two countries as well as the South American countries.<sup>718</sup>

Innovative steps are taken in the East African Community (EAC) to introduce a multilateral social security cross-border co-ordination regime. In the EAC a broad framework for the adoption and implementation of cross-border arrangements does already exist. This flows from the provisions of article 104 of the EAC Treaty of 1999, which stipulate that the Partner States agree to adopt measures to achieve the free movement of persons, labour and services and to ensure the employment of the right of establishment and residence of their citizens within the Community.<sup>719</sup> The EAC Treaty in article 120, while not requiring cross-border social assistance payments, does foresee close co-operation amongst the Partner States in the field of social welfare. More importantly, the new Draft Protocol on the Establishment of the East African Community Common Market contains several core provisions which should facilitate the entering into of cross-border arrangements. These include the recognition of freedom of movement of workers, also for social security purposes;<sup>720</sup> social security of workers;<sup>721</sup> and social security of self-employed persons.<sup>722</sup> The Council of Ministers of the EAC has been tasked with issuing directives and making regulations on aggregation and portability of social security benefits for purposes of social security for workers and self-employed persons respectively. The relevant provisions further enshrine the principle of equality of treatment of citizens and (EAC) non-citizens alike.

### **9.2.3 SADC-specific application<sup>723</sup>**

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<sup>715</sup> I.e., for example, Regulation 1408/1971 on the application of social security schemes to employed persons and their families moving within the Community.

<sup>716</sup> Article 46.2.b.(iv).

<sup>717</sup> Article 75.2.(b); see MacAndrew, S *The CARICOM Single Market and Economy (CSME) and the Free Movement of Labour Across the Region and its Implications for Social Security* (Keynote address, 37<sup>th</sup> Anniversary of the National Insurance Office, Bridgetown, Barbados, 8 June 2004) p 8-9.

<sup>718</sup> See [http://www.oiss.org/article.php?id\\_article=4697](http://www.oiss.org/article.php?id_article=4697) and <http://english.peopledaily.com.cn/90001/90777/90852/6300431.html>.

<sup>719</sup> See article 103(1) of the EAC Treaty.

<sup>720</sup> Article 7.

<sup>721</sup> Article 11.

<sup>722</sup> Article 15.

<sup>723</sup> See Olivier, M & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (LexisNexis Butterworths 2003) chapter 22, on which this part is to some extent based.

The position in social security law of SADC citizens migrating within the region is poorly regulated. It would also appear, barring a limited number of exceptions, that SADC Member States are not yet linked to the network of bilateral and multilateral conventions on the co-ordination of social security. This may operate to the disadvantage of SADC citizens, both when they take up temporary or permanent employment or residence in other SADC countries and when they return home after working as migrants elsewhere in the region. This leaves migrating SADC citizens marginalised due to their exposure to the largely nationality-based social security systems of most of the SADC Member States.<sup>724</sup>

The principles of choice of law, non-discrimination, aggregation, maintenance of acquired rights and exportability of benefits are generally widely known and applied, even elsewhere in the African context,<sup>725</sup> albeit sometimes on a qualified basis.<sup>726</sup> These principles are also embedded in regional instruments of another important developing region of the world, namely the Caribbean countries.<sup>727</sup>

And yet, both on a bilateral and multilateral basis these arrangements are conspicuous by their almost total absence in the SADC context. This may be ascribed partly to the colonial heritage of these countries, partly to the lack of a history of regional and economic integration (at least before the 1990s), and partly to the sheer extent of poverty in the member countries, which tended to shift the focus in social matters to domestic needs and solutions.

Based on the general framework and the comparative experiences indicated above, it would appear that there are several considerations and principles which could be employed to improve and better regulate the position of intra-SADC migrants in social security. The following can be mentioned in particular:

- (a) The conclusion of bilateral agreements with suitable content could go a long way towards extending social security protection to intra-SADC migrants on the basis of equality of treatment, totalisation or aggregation of insurance periods, maintenance of acquired rights, and portability of benefits. However, given the tendency of bilateral agreements to rely on the reciprocity principle and the administrative complexity of dealing with a large number of bilateral agreements, it is clearly advisable and preferable to either have a model bilateral agreement available or, even better, to have an appropriate multilateral arrangement in place.

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<sup>724</sup> See par 6 above.

<sup>725</sup> Cf Kaufmann, O "Social Security in the Context of French-African and intra-African labour migration" in Von Benda-Beckmann, F *et al Between Kinship and the State* (Foris, 1988) 399-417. However, as noted by Holzmann, R, Koettl, J & Chernetsky, T *Portability Regimes of Pension and Health Care Benefits for International Migrants: An analysis of Issues and Good Practices* (Social Protection Discussion Paper No. 0519, World Bank 2005) (Paper prepared for the Global Commission on International Migration) 8, African migrants are mostly covered by agreements with European countries, and not with other African countries.

<sup>726</sup> Kaufmann 400 indicates that non-contributory benefits are often not made available to foreigners.

<sup>727</sup> See the Caricom Agreement on Social Security of 1996 and par 9.2.2 above.

- (b) It is further suggested that the legal residence concept, which is being used in the EU context, could help to define the proper context for the application of co-ordination principles in SADC. This would also be in line with the principle expressed in the Code on Social Security in the SADC, which states that "[M]ember States should ensure that *all lawfully employed immigrants* are protected through the promotion of the following core principles [i.e. the principles referred to in (a) above].<sup>728</sup>
- (c) It is necessary to define the categories of persons who will benefit from the co-ordination arrangement. To link this initially to those migrants who are contributing wage earners, could assist with cementing the co-ordination regime, as long as a gradual extension or broadening of the range of benefiting categories is foreseen. It is suggested that special consideration should be given to make an appropriate arrangement for the family members of migrating workers, as appears to be the international practice.
- (d) The range of benefits covered has to be developed sensitively, bearing in mind the specific characteristics of the social security systems obtaining in SADC – it may be necessary to embark upon innovative approaches in this regard, as is discussed below.
- (e) Other supportive measures may have to be introduced, in particular at the national level, for example to regulate the position of those who migrated irregularly, but nevertheless contributed.
- (f) The link with the wider regional policy framework should always be borne in mind. It is evident that the regional integration agendas of the EU and the CARICOM respectively have played an important role in the development of appropriate multi- and bilateral arrangements.
- (g) Appropriate adjustments would have to be made in the national legal and policy framework to enable the entering into of the multi- and bilateral arrangements suggested above, and to give effect to these principles and the provisions of such agreements.

However, the application of these principles in SADC may encounter some difficulty. On the one hand, strong incentives to develop measures of co-ordination as far as regional migration is concerned, may be less apparent in the SADC Treaty than in the EU counterpart instruments. For example, the non-discrimination rule contained in the Treaty does not cover discrimination based on nationality or citizenship.<sup>729</sup> Furthermore, the freedom of movement principle is couched in much weaker terms than the EU counterpart. Article 5(2)(d) of the Treaty does not regulate the matter conclusively, but requires of SADC to "develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States". The SADC response in the form of the Draft Protocol on the Facilitation of Movement of Persons of 2006 made clear what the current policy approach is: the movement of persons within the SADC region is (save for the 90 days visa-free travel arrangement) subject to restrictions imposed by the host state. Moreover, the institutions of SADC are still not well developed or only newly

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<sup>728</sup> Article 17.2 of the Code. Own emphasis.

<sup>729</sup> See article 6(2).

established.<sup>730</sup> Finally, the un- and underdeveloped state and diverse nature of the social security and protection systems of the Region can only complicate an already immensely difficult task of co-ordinating the systems.

And yet, on the other hand, there is ample reason why it is imperative to adopt measures to co-ordinate the said systems. The growing extent of regional integration and migration and the realisation that collective and co-ordinated approaches are needed to foster integration and to deal effectively with the region's massive problems, would require adopting innovative approaches. Extending protection to (lawful) migrants within the Region who are citizens of member states is an indispensable part of this. Without making any attempt to exhaust the issues, it is suggested that both regional and unilateral approaches would be required.<sup>731</sup> As indicated above, the activities to be undertaken in the Region in the area of social protection also foresee the harmonisation of social security schemes in the Region, and the introduction of conditions and methods of cross-border payments of social security benefits.<sup>732</sup>

From a regional perspective, as far as social insurance is concerned, as a matter of policy and principle, it is certainly possible to introduce principles relating to choice of law, aggregation of insurance periods, maintenance of acquired rights and exportability of benefits, at least, but not necessarily restricted to, same or similar schemes. Inequality in benefit levels can be addressed by reliance on a principle operative in the EU context, namely that the beneficiary can claim the difference from the State which has the more generous arrangement, even though the base amount is paid by the State indicated by the choice of law provisions according to that State's social security laws.<sup>733</sup> Alternatively, the replacement rate for a particular benefit could be fixed in a multi- or bilateral agreement, and payment effected on a pro rate or other basis with reference to the so-called double stream mechanism.<sup>734</sup>

Given the diversity of schemes in the region, as a starting point one would have to identify those areas where common elements are present. Employment injury schemes could be the ideal first candidate. These schemes are present in all the member states, sometimes as a public system, sometimes outsourced to private insurers, and sometimes treated as an individual employer liability. Commenting on the possibilities within the SADC region, Fultz and Pieris remark:<sup>735</sup>

*"To ensure that employment injury protection reaches eligible migrant workers and their families, schemes should develop reciprocal agreements for the acceptance of applications and payment of benefits across national borders. The European Union (EU), which extends reciprocity with*

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<sup>730</sup> As is the case with the Tribunal.

<sup>731</sup> See also Fultz and Pieris *The Social Protection of Migrant Workers in South Africa* 13-20; Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future (Draft Consolidated Report)* (March 2002) 151.

<sup>732</sup> See par 7.2.1 above.

<sup>733</sup> Barnard 307; *De Felice v INASTI* [1989] ECR 923.

<sup>734</sup> See par 9.2.1 above.

<sup>735</sup> Fultz, E & Pieris, B *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* (ILO/SAMAT Policy Paper No. 7) (ILO Harare, Zimbabwe, 1998) 22-23.

*respect to most forms of social security, provides a model for such cooperation within SADC. The logical starting point is employment injury since it is the single form of social protection which exists throughout the region. The ILO Conventions on Social Security for Migrant Workers provide guidelines for reciprocal agreements, which should stipulate how benefits will be paid, how funds will be transmitted and accounted for, and how provision of medical care will be organized (see Table 2).<sup>736</sup> The recently-established SADC Technical Subcommittee on Social Security and Occupational Safety and Health could serve as a resource to governments in negotiating agreements and overseeing their implementation. Over the longer term as more schemes convert to social insurance, this Subcommittee could also provide a forum for harmonizing benefits across the region."*

It may also be possible, if not necessary in the long run, given the varied public/private nature of some of schemes in the region (e.g. retirement), to enter into some kind of asymmetrical reciprocity on a bi- or multilateral basis, whereby different types of benefits are linked despite the inherent difficulties posed by such an approach.<sup>737</sup> For example, as Fultz and Pieris indicate,<sup>738</sup> it may be possible that countries that have contributory pension schemes of a public nature, may negotiate with South Africa on (other) benefits it provides.

However, one would think that the need for appropriate regional social protection responses in the area of social assistance is of even greater importance than co-ordinating social security/insurance schemes. This flows from the extreme poverty in certain SADC countries, the vast number of those who are presently excluded from protection, the emphasis in the SADC Treaty on poverty alleviation and social welfare, and the focus in the Charter of Fundamental Social Rights on a decent standard of living for (ex) employees and adequate social assistance for (at least) those who retire. Here again, innovative thinking may be required. It would appear that it might be required to adopt certain regional minimum standards (using a measurable or fixed criterion such as a (percentage of) minimum wage as the appropriate benchmark), preferably on a multi-lateral basis, and extend this to citizens of other SADC Member States (and their families/dependants) who migrate within the region. The EU soft law instruments referred to above may be particularly helpful in this regard. This would probably require a stronger anti-discrimination principle than the one contained in the SADC Treaty.<sup>739</sup>

### **9.3 Addressing the precarious social security position of certain particularly marginalised migrant groups – in particular female and irregular migrants**

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<sup>736</sup> "They could also address additional matters such as information dissemination to migrant workers, the transmittal of applications, hearings and appeals, and the coverage of special categories of workers such as those sent out on a foreign contract and 'frontier workers' who live in one country and work in another."

<sup>737</sup> See par 9.2.1 above.

<sup>738</sup> At 15.

<sup>739</sup> See par 8.4 above.

Within the SADC context there are different groups whose position in social security is particularly precarious. Two of the groups who are most marginalised as a result of the migration experience are women and irregular/undocumented migrants.

### 9.3.1 Females

#### 9.3.1.1 Females exposed to migration: double disadvantage and intersecting vulnerabilities

Women in SADC, in particular female spouses, who are exposed to migration effectively suffer a double disadvantage – firstly, in terms of their position in society and the labour market and, secondly, in terms of their labour law and social security status. This appears to be the case irrespective of whether women actively migrate, or stay behind as caretakers of the household in the event that the male spouse has migrated.

In a recent report on dimensions of gender discrimination in SADC social security systems, it is remarked that,<sup>740</sup>

*"Firstly, social insurance, which is the preferred form of social protection, is oriented towards protecting workers in formal employment. However, in the majority of SADC Member States women's participation in formal employment is significantly lower than that of men for historical reasons. Consequently, the majority of women are excluded from participating in social insurance schemes. Women tend to be dominant in the informal economy which is not covered by social insurance schemes. Secondly, in some cases maternity protection is provided in terms of labour law provisions only, placing the burden of social protection on employers. The consequence of this is that some employers may become reluctant to hire women who are of a child-bearing age. Thirdly, the temporary exit of females from the formal labour market for family-related reasons would invariably affect their entitlement to long-term social security benefits (for example, retirement benefits), in the event where entitlement to these benefits is dependent on the completion of a continuous period of employment or contributions."*

Within the migration context, women are exposed to intersecting vulnerabilities. For those who migrate, the following constitute some of the core elements of disadvantage and marginalisation:

- Their involvement in informal cross-border trade and informal sector activities leaves them at the bottom end of labour market activity and therefore at the margins of poverty and poor working conditions;<sup>741</sup>

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<sup>740</sup> Olivier, M & Kaseke, E *Labour market participation and social security protection of females: Recent developments in SADC* (Paper presented at the 5<sup>th</sup> ISSA International Research Conference on Social Security, Warsaw, Poland 5-7 March 2007). The paper is largely based on country reports prepared for and general rapporteur reports submitted at a SADC Social Security Specialists Conference on "Gender and social security in SADC", held in Windhoek, Namibia, 5<sup>th</sup> – 7<sup>th</sup> July 2006, jointly organised by the *Friedrich Ebert Stiftung*, Windhoek, Namibia and the Centre for International and Comparative Labour and Social Security Law (CICLASS), Law Faculty, University of Johannesburg) par 1. See also par 6 of the report.

<sup>741</sup> See par 3.3 above.

- The inappropriate permit regime obtaining in SADC countries relating to informal cross-border trade<sup>742</sup> forces them to migrate irregularly – as noted, a clear policy framework which sufficiently accommodates this important form of migration, and which is sensitive to the particular impact this has on females, has yet to develop;<sup>743</sup>
- Due to the overly strong focus on formal sector employment-based social security coverage in SADC,<sup>744</sup> most women who migrate within SADC do not enjoy social security coverage in the receiving country. They are often unable to participate in social insurance arrangements, and would as a rule not be eligible for social assistance support;
- Access to regular entry into the host country may be denied to women, partly because their skills may not be needed from an official immigration policy perspective and partly because they may not qualify in terms of the financial threshold otherwise set for lawful entry into the receiving country;<sup>745</sup>
- In addition, their involvement in the care economy<sup>746</sup> is not recognised, neither in SADC nor in terms of international instruments such as the UN Migration Convention,<sup>747</sup> as work which would make them eligible in their own right for entry into and participation in the social security system of the receiving country;<sup>748</sup>
- Family reunification does not appear to be an immigration policy priority in SADC countries, as is evident from, among others, the South African case;<sup>749</sup> and
- Migrating female spouses rarely benefit from bilateral social security coverage, given the limited categories of migrants traditionally covered by these agreements.<sup>750</sup>

For those who remain behind in the home country, intersecting vulnerabilities of a different kind may be a reality: with reference to, for example, the increased household burden, also in the event that an injured or diseased returning male migrant would require care, as well as the traditionally limited role of women in society and in terms of the exercise of marital power.<sup>751</sup>

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<sup>742</sup> E.g., within the South African context, these permits do not specifically allow women to trade. In addition, they have to have a passport or must be registered with the Department of Home Affairs. Finally, another impediment is that these permits are prohibitively expensive and may not authorise long enough stays in South Africa: FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 19.

<sup>743</sup> *Ibid.*

<sup>744</sup> See par 4.1.1.4.1 above.

<sup>745</sup> See par 3.3 above.

<sup>746</sup> I.e. by being responsible for the bearing and rearing of children, and by taking care of the household.

<sup>747</sup> Article 2 of the Convention defines a migrant worker as a "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" (own emphasis).

<sup>748</sup> See generally Lund, F & Srinivas, S *Learning from Experience: A Gendered Approach to Social Protection for Workers in the Informal Economy* (ILO 2000) 13.

<sup>749</sup> See par 4.2.3 above.

<sup>750</sup> See par 9.2 above.

<sup>751</sup> See paras 3.3 and 3.4 above.

### 9.3.1.2 The need for appropriate policy responses

It is submitted that a range of policy and legal measures are required to address the marginalised position of intra-SADC female migrants in social security. The report on dimensions of gender discrimination in social security in SADC referred to above notes that certain positive steps have recently been taken by SADC Member States to address some of the above deficiencies,<sup>752</sup>

*"Responses to these phenomena in SADC have been varied, .... Firstly, several countries have in recent years taken steps to outlaw all forms of discrimination against women in the social security and labour market contexts, and to adopt so-called affirmative action measures which give priority to the employment of females. These steps have included the adoption of national gender policies, anti-discrimination legislation, and constitutional protection of the right of equality. Certain instruments dealing with the same matters have also been adopted at the level of SADC as a regional organisation. Secondly, in certain SADC Member States the responsibility to provide maternity protection has effectively been shifted to social security schemes. Thirdly, some SADC Member States have adopted measures to ensure that women who are temporarily absent from the labour market due to family-related responsibilities are not negatively affected as regards their entitlement to (long-term) social security benefits by, for example, ignoring certain periods of absence for family-related reasons."*

From a policy perspective there is clearly a need to develop immigration and social security policies which address the gendered dimensions highlighted above as well as the role of migration in women's economic and social empowerment – or disempowerment, also in social security terms.<sup>753</sup> The concrete policy and legal measures that need to be developed should among others pay proper attention to sufficiently accommodate informal cross-border trade, prohibit discriminatory arrangements and practices, and allow more flexible access to females to the host country<sup>754</sup> and consequently its labour market and social security systems. On a more fundamental level, the intersecting vulnerabilities in social security terms confronting women who are exposed to migration would require a rethinking and revision not only of country policies and legislation, but also of regional frameworks and even bilateral agreements.<sup>755</sup> Furthermore, from an overall perspective, the need to introduce measures which would extend social security coverage to those in informal employment appears to be crucial to address the plight of women exposed to the migration experience.<sup>756</sup>

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<sup>752</sup> Olivier, M & Kaseke, E *Labour market participation and social security protection of females: Recent developments in SADC* (Paper presented at the 5<sup>th</sup> ISSA International Research Conference on Social Security, Warsaw, Poland 5-7 March 2007) par 6.

<sup>753</sup> Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (In straw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 56; Crush, J, Williams, V & Peberdy, S *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (Global Commission on International Migration) (2005) 35.

<sup>754</sup> Also in terms of arrangements aimed at supporting family reunification.

<sup>755</sup> See par 9.2.3 above.

<sup>756</sup> See paras 9.4.2 and 9.4.3 below.

It is suggested that recent policy pronouncements by the Africa Union may go some way to help set the scene for some of the required policy and legal reforms. The AU Migration Policy Framework notes that,

*"Migrant women's vulnerabilities to exploitation are highlighted by the frequently abusive conditions under which they work, especially in the context of domestic service and sex industries in which migrant trafficking is heavily implicated. It is therefore important to give particular attention to safeguarding the rights (labour, human rights, et al) of migrant women in the context of migration management."*<sup>757</sup>

It therefore recommends the adoption of policies that would promote equality of opportunity by strengthening gender-specific approaches to policies and activities concerning labour migration.<sup>758</sup> It further recommends that migration policies should be gender sensitive, that is, address the particular plight of women who are the victims of human trafficking<sup>759</sup> and accommodate returning women migrants and their children and their spouses.<sup>760</sup>

### 9.3.1.3 International standards

Guidance could also be obtained from the range of international, regional and domestic human rights standards impacting on the position of women, also in relation to social security. On the international level, in addition to the standards emanating from the ILO framework,<sup>761</sup> mention should also be made of the important provisions contained in the UN Convention on the Elimination of All Forms of Discrimination against Women of 1981 (CEDAW). This Convention is of particular relevance to the policy and legal debate on the social security position of intra-SADC migrating females, since it has been ratified or acceded to by all SADC Member States.<sup>762</sup>

Article 2 of the Convention imposes on ratifying countries the obligation to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.<sup>763</sup> In terms of this article countries are *inter alia* required to embody the

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<sup>757</sup> Africa Union *The Migration Policy Framework for Africa* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/276 (IX)) par 6.5 (see also in general par 2.2); see also Africa Union *African Common Position on Migration and Development* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/277 (IX)) par 3.8.

<sup>758</sup> Africa Union *The Migration Policy Framework for Africa* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/276 (IX)) par 1.1.

<sup>759</sup> *Ibid* par 6.1.

<sup>760</sup> *Ibid* par 3.6, where it is also recommended that local women married to migrants in their States, should be enabled to join their spouses without undue restriction.

<sup>761</sup> See par 8.1 above and par 9.5.2 below. For a reflection on these provisions, see Jansen van Rensburg, L & Lamarche, L "The right to social security and assistance" in Heyns, C & Brand, D (eds) *Socio-economic rights in South Africa* (Centre for Human Rights, UP, 2005) 209-248 at 221-222.

<sup>762</sup> Including Seychelles, the other (currently) non-SADC member Southern African country: info obtained from <http://www.ohchr.org/english/countries/ratification/11.htm> on 17 March 2008.

<sup>763</sup> Article 1 of the Convention defines the term "discrimination against women" to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality

principle of equality of men and women in national constitutions or laws, and to prohibit discrimination against women by the adoption of appropriate legislative and other measures.<sup>764</sup> In addition, State parties are required to adopt appropriate measures to suppress all forms of traffic in women.<sup>765</sup> According to article 11 measures need to be adopted, which would guarantee to women equality in employment, both in terms of access and equal opportunities, and benefits.<sup>766</sup> Of particular significance for women's position in social security are the provisions of article 11(1)(e) and (f), which impose on ratifying countries the obligation to adopt measures which would ensure for women:

*"(e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave; and  
(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction."*

Specific provision has to be made by countries in order to ensure equal access to health care services<sup>767</sup> and family benefits,<sup>768</sup> and in the area of maternity protection.<sup>769</sup> Of significant importance, also in terms of their potential relevance for access to social security, are the provisions which are aimed at ensuring equality in relation to access to financial arrangements, social standing and the marital context. As regards access to finance, firstly, the Convention requires the removal of discrimination as regards access to bank loans, mortgages and other forms of financial credit.<sup>770</sup> In this way, it could be argued, a basis is potentially laid for economic activity which could enable (migrating) women and those who stay behind, to participate in public and/or private social security arrangements – especially if this provision is read with pronouncements in the Convention on the right of women to equal access to work and to employment opportunities.<sup>771</sup> Secondly, as regards the role and position of women in society, State parties are required to take all appropriate measures to "[m]odify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."<sup>772</sup> In addition, State parties undertake to take all appropriate legislative and other measures to modify or abolish existing laws, regulations, *customs and practices* which constitute discrimination against women.<sup>773</sup> Without this modification of social and cultural perspectives, which is also required by the Code on Social Security in the

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of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

<sup>764</sup> See in particular article 2(1) and (b).

<sup>765</sup> Article 6.

<sup>766</sup> See article 11(1)(a)-(d).

<sup>767</sup> Article 12(1).

<sup>768</sup> Article 13(a).

<sup>769</sup> See article 11(2), read with article 12(2). See also article 5(b). Special measures aimed at protecting maternity are not deemed to be discriminatory: Article 4(2).

<sup>770</sup> Article 13(b).

<sup>771</sup> Article 11(1)(a) & (b).

<sup>772</sup> Article 5(a).

<sup>773</sup> Article 2(f). Own emphasis.

SADC,<sup>774</sup> women exposed to migration, it is suggested, will hardly be able to participate in social security frameworks and take independent decisions regarding access to and disposition of social security benefits, such as remittances. This is echoed by the findings contained in a recent report on dimensions of gender discrimination in social security in SADC, which concludes that overarching measures need to be adopted, also to address historical perceptions and attitudes.<sup>775</sup>

*"Of course, the measures outlined above will not have the desired effect for as long as traditional values and beliefs concerning the role and status of women do not change. Regarding females as worthy and equal participants in the (formal) labour market is not only legally, but also socially required. Furthermore, the notion that the male authority could demand the surrendering of formal and informal social security transfers accruing to women, needs to be radically addressed too."*

Thirdly, in the marital context far-reaching provisions with important implications for social security are contained in the Convention. For present purposes, two issues need to be highlighted. The first relates to the legal capacity of women. The Convention requires of State parties to accord to women equality with men before the law.<sup>776</sup> In civil matters, State parties must accord to women "a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights *to conclude contracts and to administer property* and shall treat them equally in all stages of procedure in courts and tribunals":<sup>777</sup> all contracts and other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.<sup>778</sup> It is clear that the capacity of women in respect of contractual and benefit arrangements relating to social security is confirmed by this provision. This is of potential significance for women who migrate, as it provides a basis for their (in principle independent) exercise of social security rights and benefits access and disposition in the host country. For those who stay behind, a similarly important rights basis is created.

The second issue concerning the marital context relates to the position of women in marriage and family relationships. The relevant provisions of the Convention essentially accords to women, including women exposed to migration, equal status in decision-making, guardianship and in property acquisition, management and disposition, and independence in decisions relating to profession and occupation. From a social security perspective, the Convention effectively enhances women's access to and disposition of family benefits as well as access to employment-based social security arrangements. State parties are required to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations on a basis of equality of men and women.<sup>779</sup> These measures must in particular ensure:

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<sup>774</sup> Article 13(4) of the Code on Social Security in the SADC.

<sup>775</sup> Olivier, M & Kaseke, E *Labour market participation and social security protection of females: Recent developments in SADC* (Paper presented at the 5<sup>th</sup> ISSA International Research Conference on Social Security, Warsaw, Poland 5-7 March 2007) par 6.

<sup>776</sup> Article 15(1) CEDAW.

<sup>777</sup> Article 15(2). Own emphasis.

<sup>778</sup> Article 15(3).

<sup>779</sup> Article 16(1).

- The same rights and responsibilities during marriage and at its dissolution;<sup>780</sup>
- The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children;<sup>781</sup>
- The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation;<sup>782</sup>
- The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;<sup>783</sup> and
- The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.<sup>784</sup>

Article 14 foresees very important forms of protection for rural women – one would think that these should have been made equally applicable to non-rural women, as they often suffer the same fate, at least in much of the traditional SADC context. Nevertheless, State parties have to take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy.<sup>785</sup> Concrete consequences of an equality nature,<sup>786</sup> also in the area of social security, have to flow from these considerations, which evidently include women's work in the care economy. In particular, appropriate measures need to be adopted which must ensure to such (rural) women access to adequate health care facilities,<sup>787</sup> and to benefit directly from social security programmes.<sup>788</sup> Access to among others agricultural credit and loans, marketing facilities and appropriate technology must also be ensured.<sup>789</sup> Many marginalised women in rural areas in SADC who are exposed to migration, therefore enjoy additional forms of direct and enabling support in social security terms – direct access to core social security benefits, in the areas of health facilities and other forms of (primarily) publicly provided assistance and support, as well as enabling measures<sup>790</sup> which could enhance women's participation in social security programmes.

Finally, the Convention recognises the need for the adoption of (temporary) affirmative action measures, aimed at accelerating *de facto* equality between men and women<sup>791</sup> –

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<sup>780</sup> Article 16(1)(c).

<sup>781</sup> Article 16(1)(d): in all cases the interests of the children shall be paramount.

<sup>782</sup> Article 16(1)(f): in all cases the interests of the children shall be paramount.

<sup>783</sup> Article 16(1)(g).

<sup>784</sup> Article 16(1)(h).

<sup>785</sup> Article 14(1).

<sup>786</sup> In addition to the general obligation on ratifying countries to take all appropriate measures to ensure the application of the provisions of the Convention to women in rural areas: Article 14(1).

<sup>787</sup> Article 14(2)(b).

<sup>788</sup> Article 14(2)(c).

<sup>789</sup> Article 14(2)(f).

<sup>790</sup> E.g. through access to credit, markets and technology.

<sup>791</sup> See also Jansen van Rensburg, L & Lamarche, L "The right to social security and assistance" in Heyns, C & Brand, D (eds) *Socio-economic rights in South Africa* (Centre for Human Rights, UP, 2005) 209-248 at 221.

arrangements which are also allowed in terms of the provisions of the Code on Social Security in the SADC.<sup>792</sup> Article 4(1) states:

*"Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."*

Measures which would grant enhanced access to women in SADC, also those exposed to migration, to the formal labour market and in so doing to social insurance-based schemes are consequently in principle covered by this provision.

It needs to be noted, however, that special measures aimed at protecting maternity are not considered discriminatory and do, therefore, not fall under the restrictive context of article 4(1).<sup>793</sup> This, one would believe, makes it possible to introduce special provisions aimed at the continued coverage in social security arrangements of women who are temporarily absent from the labour market due to maternity-related responsibilities. For example, as appears to be the developing practice in SADC, arrangements can be made to ensure that such women are not negatively affected as regards their entitlement to (long-term) social security benefits by, among other measures, ignoring certain periods of absence for maternity-based family-related reasons.<sup>794</sup>

Another potentially important UN instrument, the International Convention on the Protection of All Migrant Workers and Members of Their Families (the UN Migration Convention) of 1990, rarely accords to migrating women who are not migrant workers themselves or otherwise entitled to reside in the country concerned,<sup>795</sup> protection in their own right. This Convention usually treats them as people who enjoy derivative protection, as part of the "family members" of the migrant workers. Some limited exceptions with implications for the social security status of these women do, however, exist. For example, article 45 stipulates that members of the families of migrant workers must, in the country of employment, enjoy equality of treatment with nationals of that country, *inter alia* in relation to:

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<sup>792</sup> Article 13(3) of the Code on Social Security in the SADC – see the discussion below.

<sup>793</sup> See article 4(2) of CEDAW.

<sup>794</sup> See the quotation from the recent report on dimensions of gender discrimination in SADC in par 9.3.1.2 above.

<sup>795</sup> Article 53(1) stipulates that: "Members of a migrant worker's family who have themselves an authorisation of residence or admission that is without limit of time or is automatically renewable shall be permitted freely to choose their remunerated activity under the same conditions as are applicable to the said migrant worker ...". Article 53(2) stipulates that "With respect to members of a migrant worker's family who are not permitted freely to choose their remunerated activity, States Parties shall consider favourably granting them priority in obtaining permission to engage in a remunerated activity over other workers who seek admission to the State of employment, subject to applicable bilateral and multilateral agreements."

- Access to educational institutions and services, vocational guidance and training institutions and services, provided the criteria for admission and participation have been met;<sup>796</sup> and
- Access to social and health services, provided that requirements for participation in the respective schemes are met.<sup>797</sup>

Finally, article 44(1) requires State parties to take appropriate measures to ensure the protection of the unity of the families of migrant workers. The Convention therefore requires of State parties to take appropriate measures to facilitate the reunification of migrant workers with their spouses or persons who have with the migrant worker a relationship that, according to applicable law, produces effects equivalent to marriage, as well as with their minor dependent unmarried children.<sup>798</sup>

#### 9.3.1.4 Regional frameworks

At a regional level, the framework provisions of the SADC Social Charter give important guidance for the development of appropriate policies to address the precarious social security position of women exposed to migration. In addition, the Charter stresses the adoption of harmonised approaches in SADC as regards minimum requirements laid down in labour legislation and in particular the introduction of equitable basic working and living conditions.<sup>799</sup>

For those who are workers, the Charter requires the creation of an enabling environment to ensure that they have a right to adequate social protection and to enjoy adequate social security benefits, regardless of status and the type of employment.<sup>800</sup> For those who have been unable to either enter or re-enter the labour market and have no means of subsistence there should be an entitlement to receive sufficient resources and social assistance.<sup>801</sup>

The Charter also strengthens the right to equal treatment of women, also women exposed to migration, and men in SADC. An enabling environment at country level is required to ensure gender equity, equal treatment and opportunities for men and women.<sup>802</sup> Of particular significance is article 6(b), which requires that equal opportunities for both men and women shall apply, in particular, to *access to employment, remuneration, working conditions, social protection*, education, vocational training and career development.<sup>803</sup>

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<sup>796</sup> Article 45(1)(a) and (b) of the UN Migration Convention.

<sup>797</sup> Article 45(1)(c).

<sup>798</sup> Article 44(2).

<sup>799</sup> Article 11(a) of the Charter of Fundamental Social Rights in SADC.

<sup>800</sup> Article 10(1).

<sup>801</sup> Article 10(2).

<sup>802</sup> Article 6(a).

<sup>803</sup> Own emphasis.

The Code on Social Security in the SADC contains further provisions aimed at addressing the particular plight of women. It provides for the extension of special maternity protection<sup>804</sup> and emphasises the creation of a framework for the extension of appropriate family benefits, particularly to families in need and to dysfunctional family structures.<sup>805</sup> Article 13 regulates gender equality in social security, and requires that Member States should ensure that there is equal coverage of and access to social security – including equality in receiving social security benefits – between men and women.<sup>806</sup> Member States have to ensure that their social security-related laws are non-discriminatory<sup>807</sup> and abolish all discriminatory laws, customs and practices in their respective social security systems.<sup>808</sup> Affirmative action measures in favour of women are allowed,<sup>809</sup> and Member States are required to introduce programmes and strategies for the eradication of poverty and the economic empowerment of women.<sup>810</sup> The implications of these provisions within the context of intra-SADC migration were alluded to earlier, in the course of the discussion on the relevance of similar provisions contained in international (in particular UN) instruments.<sup>811</sup> As mentioned above, some of these provisions have also found their way into constitutions, laws and policy frameworks in several SADC countries<sup>812</sup> – as is also required by the UN Convention on the Elimination of All Forms of Discrimination against Women of 1981 (CEDAW).<sup>813</sup>

Finally, from the analysis of the core elements of disadvantage and marginalisation suffered by SADC women exposed to migration and the discussion above, it should be evident that the mere adoption of anti-discrimination, including affirmative action laws and policies, is not sufficient. There is a clear need for the introduction of overarching measures aimed at ensuring that social security systems in SADC are sensitive to the differential needs of men and women. As remarked in the recent report on dimensions of gender discrimination in social security in SADC,<sup>814</sup>

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<sup>804</sup> Article 8 of the Code on Social Security in the SADC, which extends anti-discrimination and dismissal protection to women, and requires SADC countries to adopt appropriate working conditions and environments as well as paid maternity leave.

<sup>805</sup> Article 15(3).

<sup>806</sup> Article 13(1).

<sup>807</sup> Article 13(2).

<sup>808</sup> Article 13(4).

<sup>809</sup> Article 13(3).

<sup>810</sup> Article 13(5).

<sup>811</sup> See the discussion in par 9.3.1.3 above.

<sup>812</sup> See the quotation above from the report by Olivier, M & Kaseke, E *Labour market participation and social security protection of females: Recent developments in SADC* (Paper presented at the 5<sup>th</sup> ISSA International Research Conference on Social Security, Warsaw, Poland 5-7 March 2007) par 6.

<sup>813</sup> See article 11(a) of CEDAW.

<sup>814</sup> Olivier, M & Kaseke, E *Labour market participation and social security protection of females: Recent developments in SADC* (Paper presented at the 5<sup>th</sup> ISSA International Research Conference on Social Security, Warsaw, Poland 5-7 March 2007) par 6. See also Ramírez, C, Domínguez, M & Morais, J *Crossing Borders: Remittances, Gender and Development* (Working paper) (Instraw (United Nations International Research and Training Institute for the Advancement of Women 2005)) 54 and article 6.1 of the AU Migration Policy Framework.

*"The challenge, therefore, is to ensure that social security systems are more responsive to the differential needs of men and women. This will enable social security systems in SADC to promote human dignity among both men and women."*

## **9.3.2 Irregular migrants**

### **9.3.2.1 Precarious labour law and social security position**

The precarious position of irregular intra-SADC migrants in labour law and social security is the result of strict definitional approaches, a restrictive legal and policy framework, and negative *de facto* treatment. From a definitional perspective, firstly, those without the required authorisation and documentation to access and remain in a SADC country all fall within the framework of those who are regarded as irregular and consequently illegal – despite the fact that most of them would not be involved in illegal and criminal activities in the strict sense of the word.<sup>815</sup> Secondly, the combination of immigration policies and legislation aimed at tight access and residence control, and at the deportation of those without authorisation as unwanted migrants, emphasises the vulnerable status of irregular migrants.<sup>816</sup> In addition, social security (in particular social assistance) and labour laws would often exacerbate their precarious position by either excluding them from participation or from accessing benefits. Jurisprudential responses in SADC in this regard would usually follow suit, and refuse to accord legality to the work and social security relationships entered into by irregular migrants, thereby effectively barring them from accessing adjudication structures and social security benefits.<sup>817</sup> Thirdly, the well-documented negative official and societal treatment meted out to migrants in SADC (especially South Africa), affects all migrants, in particular irregular migrants.<sup>818</sup>

It is evident that there is a clear need to regulate the immigration and social security status of irregular migrants more appropriately. A range of principled and concrete approaches which could be adopted are available. These emanate from comparative best practices, international standards, continental and regional policy frameworks, and (SADC) country-specific legal and policy responses.

### **9.3.2.2 Available approaches: Comparative best practices**

Comparative best practices would include the proper regulation of cross-country migration. Invariably this should incorporate improved definitional frameworks, in terms of which a more flexible approach towards those (often short-term) migrants who, for example, buy and sell informally is adopted. Allowing them visa-free entry for a limited duration, or providing them with easily accessible visas to be thus involved in the host

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<sup>815</sup> See par 3.2 above.

<sup>816</sup> Paras 4.2.3 and 9.1 above.

<sup>817</sup> Par 4.2.3 above.

<sup>818</sup> See par 3.1 and par 3.2 above.

country, would remove them from the category of irregular migrants, and facilitate important forms of cross-border trade – as appears from the remarks above concerning the need to improve the regulatory framework of informal cross-border trade in SADC.<sup>819</sup> Some comparative evidence of a modified approach may already be discernable in SADC. For example, in 2005 South Africa eased visa restrictions applicable to Mozambicans wanting to visit South Africa for a limited period of time, by introducing a visa waiver arrangement which allows citizens of either country to stay in the other country for up to 30 days without a visa.

It is thus suggested that careful reconsideration of immigration policies should lead to improved regulation which is responsive not merely to nationalistic sentiments but conducive to wider policy objectives, including regional integration goals, and the protection of human rights, also in social security terms, of those who find themselves in the host country irregularly. Statutory and jurisprudential responses in some parts of the world already give effect to a more flexible and human rights-friendly approach. This is evident in, for example, the field of workers compensation. As remarked by Baruah and Cholewinsky,

*"In Belgium, the legislation governing employment injury compensation is a matter of public policy and hence mandatory: the nullity of a contract concluded with a worker in an irregular situation cannot be invoked in order to evade payment of compensation. If the employer is not insured, it is the Employment Injury Compensation Fund that pays and subsequently claims from the employer. If a worker who is to be paid compensation has not been affiliated to the scheme, the employer is liable to pay contributions in arrears."<sup>820</sup>*

In similar vein, Guthrie mentions that the US, UK and Australian courts have adopted different approaches, ranging from statutory interpretation (in the case of the UK and Australia) to policy orientation (in the case of the US), to ensure some measure of protection and benefit entitlement for irregular migrants who suffered work-related injuries.<sup>821</sup> He concludes:<sup>822</sup>

*"The resolution to the dilemma should be resolved along humanitarian and human rights grounds. The human rights approach requires treating injured workers without regard to their contractual status but having regard to their needs following injury. This means that workers should be entitled to rehabilitation and income support following injury. Employers who knowingly engage workers contrary to law should not benefit from their engagement let alone their injury. Employers who are aware that compensation payments might have to be made to illegal workers will also realise that they may not be insured for this contingency and will not take the risk of engaging contrary to law. At the same time the worker should not be immune for the effects of the*

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<sup>819</sup> See par 3.3 and paras 9.3.1 and 9.3.2 above. See also Kanyenze, G *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU-AFRO Conference on "Migrant Labour", Nairobi, 15-17 March 2004) 20.

<sup>820</sup> Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office)) (2006) 155.

<sup>821</sup> In Olivier, M & Guthrie, R *Extending employment injury and disease protection to the non-formal sector and non-citizen workers: The quest for innovative approaches* Paper presented at the 7<sup>th</sup> International Conference on Work Injuries Prevention, Rehabilitation and Compensation, Hong Kong, 27-29 June 2006) par 4.

<sup>822</sup> *Ibid.*

*immigration laws and this may mean deportation where appropriate. In such case the rate of income support should be reduced to that which is appropriate in the country of origin and probably limited to a fixed period of time."*

It may also be necessary to incorporate arrangements aimed at facilitating access to social security benefits in the event that irregular migrants have indeed contributed, in bilateral agreements<sup>823</sup> and/or in legislation.<sup>824</sup> Finally in this regard, granting a period of grace or reprieve within which irregular migrants could regularise their affairs could be an important additional mechanism aimed at streamlining prudent immigration policies and access to social security. South Africa did in the past introduce such periods of reprieve.<sup>825</sup>

### **9.3.2.3 Available approaches: International standards**

Until recently, international standards did not foresee or create any special regime for irregular migrants. One of the limited exceptions is contained in ILO Convention 143 of 1975 on Migrant Workers (Supplementary Provisions). The Convention attempts to achieve a dual purpose as regards the immigration and social security position of irregular workers: disregarding their irregular status in the event that employment and consequently authorisation to work or reside has been lost; and safeguarding acquired rights to long-term benefits. As regards the former issue, the Convention stipulates that the "migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of his employment, which shall not in itself imply the withdrawal of his authorisation or residence or, as the case may be, work permit."<sup>826</sup> As regards the latter issue, it stipulates that irregular migrant workers shall have the same rights as regular migrant workers concerning social security benefits arising out of past employment.<sup>827</sup>

The UN Migration Convention of 1990, which only entered into force in 2003, constitutes a clear attempt at the international level to regulate, for the first time, the position of irregular migrants in principled and relatively comprehensive terms. In its preamble, the Convention recognises that "workers who are non-documented or in an irregular situation are frequently employed under less favourable conditions of work than other workers", and that "the human problems involved in migration are even more serious in the case of irregular migration". However, it effectively creates two human

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<sup>823</sup> See the suggestion made in par 9.2.3 above.

<sup>824</sup> See the reference in par 9.2.1 above to legislation recently adopted by the US Congress, which granted anyone who had made contributions to the US Social Security Administration prior to 2004 a legal entitlement to benefits associated with these contributions, independent of residence status and work permit status.

<sup>825</sup> See, among others, Maharaj, B *Immigration to post-apartheid South Africa* (Global Migration Perspectives No. 1) (GCIM (Global Commission on International Migration,) Geneva 2004) 17.

<sup>826</sup> Article 8.

<sup>827</sup> Article 9(1). See Baruah, N & Cholewinski, R *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (OSCE (Organisation for Security and Co-operation in Europe), IOM (International Organisation for Migration) & ILO (International Labour Office 2006) 156, quoted in par 7.2 above.

rights regimes for different categories of migrants, by distinguishing between documented (regular) and undocumented (irregular) migrants. Both regular and irregular migrants (and their family members) are entitled to a range of human rights mentioned in Part III of the Convention. However, Part IV contains additional rights and benefits which accrue to regular migrants only. The more advantageous treatment accorded to regular migrants is an expression of the fact that, on the one hand, admission to, sojourn in and expulsion from the host country operate within the sphere of national sovereignty of the host country. On the other hand, the treatment of foreigners within the host country is subject to human rights standards developed in the international domain, even though a distinction may be drawn between regular and irregular stay.<sup>828</sup> The *additional* rights to which regular migrants are entitled include freedom of movement, residence and in principle occupation, participation in the public affairs of the host country, social and health services on a basis of equality with nationals, family unification, freedom of association, freedom from double taxation, and other employment protections. Furthermore, in keeping with a similar form of protection extended by ILO Convention 143 of 1975,<sup>829</sup> migrant workers who in the State of employment are allowed freely to choose their remunerated activity shall neither be regarded as in an irregular situation nor shall they lose their authorisation of residence by the mere fact of the termination of their remunerated activity prior to the expiration of their work permits or similar authorisations.<sup>830</sup>

The rights which accrue to regular and irregular migrants, according to Part III, include, among others, the right to:

- Protection of the right to life by law;<sup>831</sup>
- Be free from subjection to torture or to cruel, inhuman or degrading treatment or punishment;<sup>832</sup>
- Freedom of thought, conscience and religion;<sup>833</sup>
- Privacy,<sup>834</sup> not to be arbitrarily deprived of property,<sup>835</sup> and to liberty and security of person;<sup>836</sup>
- Access to justice and the courts;<sup>837</sup>
- Not to be subject to measures of collective expulsion;<sup>838</sup>

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<sup>828</sup> See Bosniak, L "Human rights, state sovereignty and the protection of undocumented migrants under the International Migrant Workers Convention" (1991) 25 *International Migration* 753; Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS), 2008) 14-56 at 29-30.

<sup>829</sup> See above.

<sup>830</sup> Article 49(2) of the UN Migration Convention.

<sup>831</sup> Article 9.

<sup>832</sup> Article 10.

<sup>833</sup> Article 12.

<sup>834</sup> Article 14.

<sup>835</sup> Article 15.

<sup>836</sup> Article 16.

<sup>837</sup> Article 18.

<sup>838</sup> Article 22.

- Equal treatment with nationals in relation to remuneration and employment conditions:<sup>839</sup>
  - It is not lawful to derogate in private contracts of employment from the principle of equality of treatment contained in this provision;<sup>840</sup>
  - Migrant workers may not be deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers are not relieved of any legal or contractual obligations, nor are their obligations limited in any manner by reason of such irregularity; and<sup>841</sup>
  - While host countries may take all adequate and effective measures to eliminate employment in their territory of migrant workers in an irregular situation, including, whenever appropriate, sanctions on employers of such workers, *the rights of migrant workers vis-à-vis their employer arising from employment shall not be impaired by these measures*;<sup>842</sup>
- Membership of and participation in activities of trade unions;<sup>843</sup>
- Transfer their earnings and savings, upon termination of their stay.<sup>844</sup>

Of particular significance are the provisions of article 27, which relates to social security:

*"1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm.*

*2. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances."*

The interpretation of article 27 is not uncontroversial.<sup>845</sup> Several matters of interpretation need to be raised. Firstly, while the scope of the article refers to "social security", it is by no means clear that social assistance is indeed included within its purview, given the tendency to generally exclude migrants from this form of protection. And yet, in terms of article 28 emergency medical care may not be denied irregular migrants – however, this does not mean that irregular migrants are entitled to non-subsidised emergency care.<sup>846</sup>

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<sup>839</sup> Article 25.

<sup>840</sup> Article 25(2).

<sup>841</sup> Article 25(3).

<sup>842</sup> Article 68(2). Own emphasis.

<sup>843</sup> Article 26.

<sup>844</sup> Article 32.

<sup>845</sup> See Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS), 2008) 14-56 at 30-31.

<sup>846</sup> It provides that "(M)igrant workers and their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their life on

Secondly, certain social security entitlements apparently accrue to regular migrants only,<sup>847</sup> which presumably allows an interpretation that irregular migrants may be excluded from these forms of social protection. Thirdly, article 27 is essentially a framework provision. Since it makes the enjoyment of these rights subject to requirements set in applicable legislation and applicable bilateral and multilateral agreements, it is possible that more onerous conditions for entitlement may be imposed on irregular migrants. Fourthly, also as a result of its framework nature, it is unclear, if not unlikely, that in the absence of statutory incorporation, a subjective right accrues to an irregular migrant to enforce these rights directly against employers or, for that matter, social security institutions. In the fifth instance, State parties are allowed to ratify the Convention with reservations as to specific articles, which could affect the adoption and implementation of the provisions relating to irregular migrants. Finally, article 27(2) explicitly does not require portability of benefits and must, therefore, be seen as a rather weak form of protection.

Nevertheless, despite these interpretation restrictions and despite the fact that the Convention has not yet been ratified or acceded to by the major migrant-receiving countries, the protection extended to irregular migrants in terms of this Convention, and in particular article 27, goes much further than any other multilateral international instrument. This much also appears from the fact that entitlement to social security protection is not made subject to the reciprocity principle.<sup>848</sup> It already has had some influence on international and even national policy formulation. For example, the recent *ILO Multilateral Framework on Labour Migration: Non-binding Principles and Guidelines for a Rights-based Approach to Labour Migration*,<sup>849</sup> adopted by a tripartite meeting of experts in November 2005, proposes that "where appropriate", social security coverage, benefits and portability of benefits should be extended to "migrant workers in an irregular situation" via the mechanisms of bilateral, regional or multilateral agreements.<sup>850</sup> Even though the Multilateral Framework is not binding, it is meant to supplement and not replace any of the existing ILO instruments.<sup>851</sup>

#### **9.3.2.4 Available approaches: Continental, regional and country-specific policy and legal responses**

At the continental level, as part of the measures to be adopted to give effect to regional co-operation and harmonisation of labour migration policies, the AU Migration Policy Framework calls for bilateral and multilateral efforts aimed at strengthening co-operation on labour migration which would assist in ensuring systematised and regular movements

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the basis of equality of treatment with nationals of the State concerned ... [and] ... [s]uch emergency care shall not be refused them by reason of any irregularity with regard to stay and employment."

<sup>847</sup> E.g. unemployment benefits – see article 54, read with article 49(3).

<sup>848</sup> See par 8.4 and par 9.2.1 above.

<sup>849</sup> See <http://www.ilo.org/public/english/standards/relm/gb/docs/gb295/pdf/tmmflm-1.pdf>.

<sup>850</sup> Par 9.9.

<sup>851</sup> See the *Introduction to the Multilateral Framework* par 4.

of workers, promote labour standards, and reduce recourse to irregular movements.<sup>852</sup> It also recommends the encouragement of regional consultative processes and dialogue on irregular migration to promote greater policy coherence at the national, sub-regional and regional levels.<sup>853</sup> It further notes that large spontaneous and unregulated flows can have a significant impact on national and international stability and security, including by hindering States' ability to exercise effective control over their borders, and creating tensions between States of origin and destination, as well as, within local host communities. It therefore states that combating irregular migration and establishing comprehensive migration management systems can contribute to enhancing national and international security and stability.<sup>854</sup>

The specific policy recommendations contained in the Policy Framework appear to be informed by the different modalities of irregular migration. As a response to smuggling and trafficking activities, the document recommends the development of measures that incorporate considerations to encourage more legal channels and orderly migration.<sup>855</sup> Special measures are suggested by the Policy Framework to deal with the effective and sustainable return and re-admission of irregular migrants. These require co-operation and mutual understanding between States of origin and destination.<sup>856</sup>

Further policy perspectives are contained in the AU African Common Position on Development and Migration. This document notes with concern that the emphasis on addressing illegal or irregular migration has been only on security considerations rather than on broader development frameworks and on mainstreaming migration in development strategies.<sup>857</sup> It appeals for the adoption of a human rights approach as far as the treatment of irregular migrants is concerned:<sup>858</sup>

*"The fight against illegal or irregular migration must be waged within the context of strict observance of human rights and human dignity, of regional and international cooperation and shared responsibility among the countries of origin, transit and destination. This can be achieved, through among others, working together to secure the dignified return of their bona fide nationals who no longer have the right to remain or enter the territory of the other party (returnees) and whose in-country legal appeal rights have been exhausted."*

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<sup>852</sup> Africa Union *The Migration Policy Framework for Africa* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/276 (IX)) par 1.2. See also par 3.11 of the Africa Union *African Common Position on Migration and Development* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/277 (IX)).

<sup>853</sup> *Migration Policy Framework* par 1.2.

<sup>854</sup> *Ibid* par 2.4: It consequently recommends the strengthening of national and inter-state efforts to prevent persons from moving across boundaries for illegal purposes. See also par 3.6 of the Africa Union *African Common Position on Migration and Development* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/277 (IX)).

<sup>855</sup> *Migration Policy Framework* par 1.2.

<sup>856</sup> *Ibid* par 2.3.

<sup>857</sup> See the preamble to the Africa Union *African Common Position on Migration and Development* (Executive Council, Africa Union, Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia) (Document EX.CL/277 (IX)).

<sup>858</sup> *Ibid* par 3.7.

In particular, at the international level it calls for the easing of the movement of persons through more flexible visa procedures in order to reduce illegal and irregular migration, and thereby also the role of syndicates dealing in the trafficking of human beings.<sup>859</sup>

From a regional perspective, as mentioned above,<sup>860</sup> the policy and instrumental framework for dealing with the position of migrants, also in relation to social security, is weakly developed. This clearly applies to irregular migrants as well. A migration policy framework in SADC has yet to be developed – given the limited ambit of the Draft Protocol on the Facilitation of Movement of Persons.<sup>861</sup> In this regard the range of international norms and standards, as well as comparative best practices and the AU continental policy framework could be of assistance to better regulate the position of irregular migrants within the immigration, social security and labour law contexts. The need to do so flows not only from the increasing extent of intra-SADC migration, but also from the SADC objective to foster and promote regional integration in order to "achieve development and economic growth, alleviate poverty, enhance the quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration."<sup>862</sup> It also flows from the commitment by SADC Member States, *inter alia* in the areas of human resources development and social welfare, to coordinate, rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.<sup>863</sup>

The only SADC provision which currently deals with the position in social security of irregular migrants, is article 17.3 of the Code on Social Security in the SADC. It provides that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country. As a minimum, an entitlement to essential support, aimed in particular at survival, is therefore confirmed. This appears to be in line with policy pronouncements, although not policy implementation and treatment of irregular workers, in the main migrant-receiving country in SADC, namely South Africa.<sup>864</sup> It is also in line with the developing constitutional jurisprudence in the same country, in terms of which irregular migrants are entitled to enjoy essential support in human rights terms.<sup>865</sup>

### 9.3.2.5 Overall conclusions

Several conclusions flow from the discussion above. Some of these are the following:

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<sup>859</sup> *Ibid* par 5C(g).

<sup>860</sup> Par 9.1 above.

<sup>861</sup> *Ibid*.

<sup>862</sup> See article 5 of the SADC Treaty.

<sup>863</sup> Article 21.

<sup>864</sup> See par 3.2 above.

<sup>865</sup> See par 3.2 and par 5.2 above. See now in particular, as far as the labour law and antecedent social security protection of irregular migrant workers in South Africa is concerned, the recent Labour Court matter in *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

- (a) The need for the development of an appropriate migration policy in SADC covering the position of irregular migrants, also in relation to social security, is evident and critical. The detailed provisions of the UN Migration Convention and the policy framework provided by the relevant AU documents appear to be of major importance in this regard, as these documents reflect the current thinking and discourse at both the international and continental level.
- (b) The imperative for the adoption of suitable arrangements and an appropriate policy framework also appears from the SADC Treaty emphasis on regional integration, also in relation to the socially advantaged, and the need to adopt harmonised approaches in these areas in SADC.
- (c) Respect for the human rights of irregular migrants requires a careful and sensitive formulation of the core protection they should be entitled to in the host country, and the demarcation of their position vis-à-vis that of nationals and regular migrants.
- (d) There is a clear need for the adoption of improved and more nuanced definitional frameworks with regard to different categories of irregular migrants. A more flexible approach should be considered as regards the position of certain specific categories of (in particular short-term) migrants who are currently regarded as irregular migrants – in order to avoid their classification as irregular migrants in circumstances where more appropriate policy and legal responses are available.
- (e) From the available best practices and international standards it is evident that there should be some entitlement to social security coverage, benefits and portability of benefits in the event that an irregular migrant has contributed to a social security scheme.
- (f) National legislation and bi- and multi-lateral agreements need to be adopted to give expression to the principles outlined above.

## ***9.4 Developing integrated labour market policy responses in the SADC region: Extending social security coverage to migrant workers in the informal economy***

### **9.4.1 Understanding the context**

It is clear that there are several elements common to the different country labour markets in SADC. Two of these elements relate to the fact, firstly, that in most SADC countries the overwhelming majority of those who work fall outside the labour law and social security regimes, in particular as a result of the informal and atypical nature of their work. Secondly, labour migration is an ever-increasing reality. The mechanisms, however, to deal with these phenomena from a labour rights and social security perspective are wholly inadequate. It is therefore necessary not only to introduce and invoke appropriate standards to provide benchmarks, but also to develop regional approaches and solutions, given the cross-border spill-over effect of these phenomena.

## 9.4.2 Extending social security coverage: Definitional approaches<sup>866</sup>

Definitional or conceptual widening of coverage to include at least certain categories of informal economy workers is an important step to extend social security protection to intra-SADC migrants, given the fact that the preponderance of migrant workers are to be found in the informal economy. This is in particular true for those informal work relationships where an identifiable employment relationship is present, i.e. where an employer can be identified in circumstances of wage employment. Extending protection to these categories, such as domestic and seasonal workers, may prove to be less difficult than initially thought.<sup>867</sup> In *work relationships of dependence* it may not be easy to determine who the real employer(s) or provider(s) of work is/are, as a worker could be rendering services in a wide variety of dependent contexts and for different providers of work and/or suppliers. In this regard it may be of help to consider the wider notions of "employee" and "employer" adopted in labour law systems. In many countries, including a number of developing countries, labour law systems have recognised the complexity of modern day work relationships and have therefore extended the conceptual scope of the employee notion to include workers who work in other forms of dependent or assistive relationships (e.g. as dependant contractors).<sup>868</sup> And yet, the experience is that many social security systems, also in SADC, have not yet adopted this wider frame of reference, and have by and large retained the historical notion of an employment relationship as the basis of liability and entitlement.<sup>869</sup>

Innovative recent attempts aimed at extending protection and including informal workers within the statutory framework of social security could also be of benefit.<sup>870</sup> As discussed above,<sup>871</sup> at the international level, the Employment Relationship Recommendation of

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<sup>866</sup> See Olivier, M "The end of labour law in the global workplace context? A South and Southern African response" in Blanpain, R & Tiraboschi, M *Global Labor Market: From Globalization to Flexicurity* (Kluwer 2008) 13-52 at 50-52, from where this part is to some extent based.

<sup>867</sup> The extension of unemployment insurance protection to domestic and seasonal workers in South Africa, as discussed above, may prove the point. These categories were brought within the net of unemployment insurance through flexible arrangements, including flexible contribution payment options. Despite predictions to the contrary, the registration of employers and employees in the industry went remarkably well, with a high rate of compliance on the part of employers.

<sup>868</sup> For example, in the case of some Caribbean countries, labour dependant contractors have been included in the protective framework of labour legislation: see Taylor, O "The Jamaican Labour Relations and Industrial Disputes Act (LRIDA): A Critical Assessment" in Cowell, N and Branche, C (eds) *Human Resource Development and Workplace Governance in the Caribbean* (Kingston, Ian Randle Publishers, 2003) 426-450. See also Barrientos, A & Barrientos, S *Extending social protection to informal workers in the horticulture global value chain* (World Bank, 2002) 29-30.

<sup>869</sup> In South Africa, for example, most of the social security laws retained the notions of employee (or a similar notion) and employer for purposes of establishing social security coverage, entitlement and liability – see, among others, the Unemployment Insurance Act 63 of 2001 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>870</sup> See, among others, Barrientos, A & Barrientos, S *Extending social protection to informal workers in the horticulture global value chain* (World Bank, 2002) 37 (in respect of Chile). See also Horn, P *Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment* (Paper presented at the EGDI and UNU-WIDER Conference on "Unlocking Human Potential: Linking the Informal and Formal Sectors", 17-18 September 2004) 1.

<sup>871</sup> See par 4.1.3.1 above.

2006 of the ILO provides useful standards and guidelines to extend labour law protection to different categories of non-standard workers. It is suggested that this may be helpful for the extension of social security coverage as well to these workers.

Developed countries with their well-developed social security systems clearly set the trend as is evident from, for example, the position in some of the Australian state jurisdictions – with regard to among others both occupational health and safety<sup>872</sup> and workers compensation.<sup>873</sup>

However, innovative approaches are also discernable in the developing country context, also in the comparable area of extension of labour law protection – even in some of the SADC countries.<sup>874</sup> In fact, it might help to build bridges between the protection of

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<sup>872</sup> See, for example, sections 22 and 23 of the Occupational Safety and Health Act 101 of 1984 (Western Australia). According to section 22 of the Act an employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the "employees") are not exposed to hazards. Section 23 extends this duty, by providing that a person that has, to any extent, control of: (a) a workplace where persons who are *not* employees of that person work or are likely to be in the course of their work; or (b) the means of access to and egress from a workplace, shall take such measures as are practicable to ensure that the workplace, or the means of access to or egress from the workplace, as the case may be, are such that *persons who are at the workplace or use the means of access to and egress from the workplace* are not exposed to hazards (own emphasis). For provisions similar to section 22 in other Australian jurisdictions see, for example, section 10 of the Occupational Health and Safety Act 2000 (NSW) and section 23 of the Occupational Health and Safety Act 1985 (Vic); sections 24 and 30 of the Workplace Health and Safety Act 1995 (Qld) and section 23 of the Occupational Health, Safety and Welfare Act 1986 (SA).

<sup>873</sup> Section 5 of the Workers' Compensation and Injury Management Act 86 of 1981 (Western Australia) contains an extended definition of "worker", which includes "any person engaged by another person to work for the purpose of the other person's trade or business under a contract with him for service, the remuneration by whatever means of the person so working being in substance for his personal manual labour or services". While casual workers are specifically excluded from the main provision, this extended definition goes much further than the contract of service notion, as it effectively comprehends a person who would otherwise be classified as an independent contractor or sub-contractor, as long as the remuneration received is in substance for the personal manual labour or services. See *Summit Homes v Lucev* (1996) 16 WAR 566; BC9601264 and Guthrie *LexisNexis Workers' Compensation Western Australia* 1319. For similar provisions in the legislation of New South Wales, see the definition of "worker" contained in section 3 of the Workers Compensation Act 70 of 1987 and section 4 of the Workplace Injury Management Act 86 of 1998. See also section 8 of the Victorian legislation, the Accident Compensation Act 10191 of 1985. Section 175 of the Western Australia Workers' Compensation and Injury Management Act 86 of 1981 contains yet a further example of extended liability. In terms hereof, where a person (i.e. the principal) contracts with another person (i.e. the contractor) for the execution of any work by or under the contractor, *both* the principal and the contractor are, for purposes of the Act, deemed to be employers of the worker so employed and are jointly and severally liable to pay any compensation which the contractor if he were the sole employer would be liable to pay under the Act. However, the work on which the worker is employed at the time of the occurrence of the injury must be directly a part or process in the trade or business of the principal. See *Hewitt v Benale Pty Ltd* (2002) 27 WAR 91; [2002] WASCA 163; BC200203416; *Marsden v Unimin Australia Ltd* BC200404087; [2004] WASCA 143 and Guthrie *LexisNexis Workers' Compensation Western Australia* 5367. See also s 10A of the applicable legislation in the state of Victoria, the Accident Compensation Act 10191 of 1985.

<sup>874</sup> See Benjamin, P *Changing employment patterns and labour law in South Africa and SADC countries* Paper presented at the IIRA 5<sup>th</sup> Africa Regional Congress, Cape Town, 26-28 March 2008, who discusses the implications of the new ILO Employment Recommendation of 2006 and developments in some SADC countries, such as Swaziland.

formal and informal work relationships, in particular when workers move across the divide, to adopt a redesigned notion of security that ensures the continuity of employment – and, one could add, social security – status during transition periods.<sup>875</sup> As noted by Benjamin: "This approach argues that certain aspects of labour law should be extended to workers who are neither employers nor employees: such an approach requires the adoption of new definitions of the categories of workers that are protected."<sup>876</sup> Which social security rights should in this way be extended, based upon the introduction of statutorily redefined formulations, should be carefully considered.

As far as social security coverage or informal workers is concerned, in India, for example, the recently approved Unorganised Workers' Social Security Act, 2008<sup>877</sup> has adopted a deliberately wide notion, firstly, of what is comprehended by the term "unorganised sector"<sup>878</sup> and, secondly, of who is intended to be an employer and a worker for purposes of covering those embedded in a relationship of work in the informal economy. It defines "employer" as "a person or an association of persons, who has engaged or employed an unorganised sector worker either directly or otherwise for remuneration."<sup>879</sup> It attaches a specific meaning to unorganised sector workers,<sup>880</sup> and defines this term with reference to a distinction to be drawn between a home-based worker,<sup>881</sup> self-employed worker<sup>882</sup> and a wage worker. Of particular importance is the definition of "wage worker", which evidently aims at including workers with little income who render services in subcontracted capacity, who may work for more than one employer, and who may fall within a range of atypical work relationships.<sup>883</sup>

*"Wage worker means a person employed for remuneration in the unorganised sector, directly by an employer or through any contractor, irrespective of the place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home-based worker, or, workers employed by households including domestic workers, with a monthly wage of*

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<sup>875</sup> See Benjamin, P. *Informal work and labour rights in South Africa* (Paper presented at the IIRA 5<sup>th</sup> African Regional Congress, Cape Town, March 2008) 9.

<sup>876</sup> *Ibid.*

<sup>877</sup> Act 33 of 2008. This law recently passed through both houses of Parliament in India.

<sup>878</sup> "Unorganised sector" means "an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten" (article 2(k)).

<sup>879</sup> Article 2(a).

<sup>880</sup> "Unorganised sector worker" means "a home-based worker, self-employed worker or a wage worker in the unorganised sector (article 2(l)). However, the 2008 version of the Act has widened the scope of this provision, by stipulating that an unorganised worker means "an unorganized sector worker and also includes workers in the organized sector not covered by the existing laws relating to social security." (new article 2(n)).

<sup>881</sup> "Home-based worker" means "a person engaged in the production of goods or services for an employer in his or her home or other premises of his or her choice other than the workplace of the employer, for remuneration, irrespective of whether or not the employer provides the equipment, materials or other inputs" (article 2(b)).

<sup>882</sup> "Self-employed worker" means "any person who is not employed by an employer, but engages himself or herself in any occupation in the unorganised sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government" (article 2(j)).

<sup>883</sup> Article 2(m). Emphasis added.

*an amount as may be notified by the Central Government and State Government, as the case may be."*

In similar but perhaps less elaborated fashion the Social Security Bill, 2005 of Tanzania defined the "informal sector" as the sector which includes workers who work informally and who do not work in terms of an employment contract or another contract contemplated in the definition of employee. A "self-employed person" is defined as a person who works for gain for him/herself. "Worker" includes a self-employed person and a worker in the informal sector.<sup>884</sup>

In dependency scenarios, it might be necessary to embark on a contractual tracking exercise to determine who the real employer is (or combination of employers).<sup>885</sup> It has been suggested that the "real" employer or provider of work down (or perhaps up) the chain – i.e. the unit that has responsibility for the rights and protection of all workers in the chain – is the lead firm that outsources production, even it is only a retail firm.<sup>886</sup> As regards micro-entrepreneurs producing independently, a pragmatic approach to the application of labour/social security legislation has been proposed – one that seeks to balance the concerns for the health, safety and security of the worker, and the broader community, with concerns for the financial viability of informal enterprises.<sup>887</sup>

In fact, introducing regulatory approaches that centre on the regulation of supply chains could go a long way to extend not only labour law, but also social security protection to informal workers. To quote Benjamin:

*"These approaches are a response to the outsourcing of aspects of the work process in sectors such as the clothing industry to categories of workers who fall outside of the conventional definition of employment such as outworkers and home-workers as well as to the increasing use of unprotected "owner-drivers" to transport goods. This approach has been used in state level legislation within Australia. It has the potential to apply to any situations in which businesses utilise supply chains that include "non-employee" workers. Aspects of this approach include applying minimum employment standards to all workers in a supply chain and placing obligations on entities such as retailers, manufacturers and primary contactors to disclose information on their supply chains to interested groupings such as trade unions and inspectorates."*

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<sup>884</sup> Clause 3 of the Social Security Bill, 2005 (Tanzania).

<sup>885</sup> Quinlan, M *The Global Expansion of Precarious Employment: Meeting The Regulatory Challenge* (paper) (Australian Council of Trade Unions, 2003) 2-3 (accessed at [http://www.actu.asn.au/public/ohs/reactivatecampaign/1064473735\\_24238.html](http://www.actu.asn.au/public/ohs/reactivatecampaign/1064473735_24238.html)) 22.

<sup>886</sup> Chen, M, Jhabvala, R and Lund, F *Supporting Workers in the Informal Economy: A Policy Framework* (ILO Working Paper on the Informal Economy, ILO, Geneva, 2002) 34.

<sup>887</sup> *Ibid.*

### 9.4.3 Extending social security coverage: Alternative institutional arrangements and appropriate regulatory responses<sup>888</sup>

Innovative reform approaches in the form of alternative institutional arrangements, linked to appropriate regulatory responses, have also in recent years been adopted. It is evident that the exclusion of many of those who work non-traditionally and informally from in particular social security coverage requires alternative institutional responses and a tightening of the regulatory framework. Concentrating attention on institutionally reforming that part of the social security system which covers only a small part of the labour force active in the formal labour market at the expense of those involved in non-traditional work and in the informal economy is inherently unequal, as it directs the attention of government and other stakeholders away from a huge segment of the population with no or little social security coverage.<sup>889</sup> There is, therefore, a need to investigate ways, means and modalities of extending coverage to these excluded categories, from an institutional and structural point of view.

Historically public measures have been seen as the preferred method to ensure social security coverage, with specific reference to the dual framework of social insurance and social assistance. This simple classification and limited framework of measures are no longer sustainable in a developing country context, where the importance of the

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<sup>888</sup> See Olivier, M "Access to justice in welfare law and litigation: judicial reform in South Africa" *Obiter* Vol 27(3) (2006) 470-501 at 431-436, on which this part is to a large extent based. See generally Kannan, K *Social Security, Poverty Reduction and Development: Arguments for enlarging the concept and coverage of social security in a globalizing world* (ESS Extension of Social Security Paper no 21) (ILO, Geneva, 2004); ILO *World Labour Report 2000* (ILO 2000); Gillion, C *et al* (eds) *Social Security Pensions: Development and Reform* (ILO, Geneva 2000); Help Age International *Non-contributory pensions and poverty prevention: A comparative study of Brazil and South Africa* (December 2003); Van Ginneken, W *Extending social security: Policies for developing countries* ESS Paper No 13 (ILO 2003); Van Ginneken, W (ed) *Social security for the excluded majority: Case studies of developing countries* (ILO 1999); Van Ginneken, W *Social security for the informal sector: Issues, options and tasks ahead* (ILO 1996); Bailey, C *Extending social security coverage in Africa* (ILO 2004); Dau, R K *Social security coverage through micro-insurance schemes in Tanzania* (ILO 2003); Ghai, D *Social security priorities and patterns: A global perspective* (IILS, 2002); Stenwachs, L *Extending health protection in Tanzania: Networking between health financing mechanisms* ESS Paper No 7 (ILO 2002); Chaabane, M *Towards the universalization of social security: The experience of Tunisia* ESS Paper No 4 (ILO); ILO *Extending social security and fighting poverty: A complex challenge: Experiences from Africa* (ILO); Holzmann, R "Risks and vulnerability: The forward looking role of social protection in a globalizing world" in Dowler, E & Mosely, P (eds) *Poverty and social exclusion in North and South* (Routledge 2002); Olivier, M & Kaseke, E "Informal social security and formal social security: Developing an integrative approach" (Paper presented at a SADC Social Security Conference, held in Gaborone, Botswana November 2004); Rao, P M *Social security for the unorganised in India – An approach paper* (accessed at <http://www.globalaging.org/health/world/socindia.pdf>); "We, the self-employed" – SEWA'S electronic newsletter (January 2005); Unorganised sector in India *Social security and welfare funds* (accessed at <http://www.labour.nic.in/ss/UNORGANISEDSECTORINDIA>); Employees' Provident Fund Organisation, India (accessed at <http://www.epfindia.com/epfbrief/htm>); Social Security Division *A general overview* (accessed at <http://www.labour.nic.in/ss/overview.html>).

<sup>889</sup> Barbone, L and Sanchez, L "Pensions and social security in sub-Saharan Africa – Issues and options", in *Social Security in Africa: New realities* (Thirteenth African Regional Conference, Accra, 6-9 July 1999, Social security documentation, African Series No. 21 International Social Security Association, Abidjan, 2000) 20-21.

complementarity of a range of measures to effect more comprehensive coverage is recognised:

- (a) Hybrid models have increasingly been developed – such as insurance-based schemes topped up by government co-contribution (e.g. the Tanzanian community-health insurance framework).
- (b) Sector-specific modalities of coverage have been developed – such as the informal economy scheme framework provided for in the Indian and Tanzanian context (with reference to the unorganised sector).
- (c) Special coverage arrangements are being introduced on an industry basis – such as the welfare funds in India, in terms of which a cess or levy is imposed on a particular industry to provide for social security cover for workers in that industry.
- (d) Recognition of bottom-up approaches – with particular reference to mutuality-based informal social security arrangements.
- (e) In many developing countries attempts are made to rely on micro-insurance to provide coverage. In some cases this has been successful; in many cases this appears not to be a viable option, due to limited numbers of scheme members, small contributions, the profit motive of insurance providers, etc.

In particular as far as those in non-traditional work and in the informal economy are concerned, several options are available and need to be considered.<sup>890</sup> Experience from other countries suggests that it is possible to extend social security coverage to non-traditional and informal workers. Two broad approaches have been used in India, a country with 423 million informal workers, of whom 393 million are to be found in the unorganised sector,<sup>891</sup> namely bottom-up and top-down approaches.<sup>892</sup> A good example of top-down approaches, apart from the centrally-funded social assistance schemes, is the introduction of welfare funds by the Government of India – at both the national<sup>893</sup> and provincial (state) level. Central funds are administered through the Ministry of Labour for workers in certain occupations for whom no direct employer-employee relationship exists, such as *beedi* workers. These funds, which cover around 10 million workers in the unorganised sector, are funded from levies on employers and manufacturers. In the latter case, a tax (levy/*cess*) is imposed by state governments on the aggregate output of selected industries (e.g., the Bidi Welfare Fund is financed by a tax on *bidis* (hand-rolled cigarettes)). In the case of building and construction work, a small levy/*cess* is collected on the basis of the construction project. The benefits provided by welfare funds include

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<sup>890</sup> See generally Olivier, M *Acceptance of social security in Africa* (Main Report presented at the Fifteenth ISSA Africa Regional Conference, held in Lusaka, Zambia, 9-12 August 2005) 18-20, on which this part of the contribution is partially based.

<sup>891</sup> The percentage of workers employed on regular salaried employment (16%) is small. The majority of the workforce is either self-employed (53%) or employed in casual wage employment (31%): "Unorganised sector in India" – accessed at <http://www.labour.nic.in/ss/UNORGANISEDSECTORINDIA-SocialSecurityandWelfareFunds.pdf> (June 2006) 1.

<sup>892</sup> See Sankaran, K *Legislating for the informal economy: The challenges of labour law* Paper presented at the IIRA 5<sup>th</sup> Africa Regional Congress, Cape Town, 26-28 March 2008.

<sup>893</sup> Five such funds have been set up by the government of India.

medical care, maternity benefits and assistance with children's education, housing and water supply. A legislative framework for the welfare funds has also been developed.<sup>894</sup>

Another example of a top-down approach is the introduction of social insurance schemes by central and state governments in India. These include schemes launched for the benefit of weaker sections of the working population through the Life Insurance Corporation and the General Insurance Corporation of India. Some of these schemes may cover accidental death and partial or total permanent disability due to accident. Contributions are paid by beneficiaries and by the government of India.<sup>895</sup>

More recently, in terms of the provisions of the Unorganised Workers' Social Security Act, 2008<sup>896</sup> a particular arrangement in the form of dedicated schemes is foreseen for unorganised sector workers. The arrangement is envisaged to provide as a minimum pension ("old age protection"), health benefits, maternity benefits, life and disability cover, and any other benefit as may be determined by the Central Government.<sup>897</sup> Some provision is made for in-built flexibility in this regard: the Central Government may "... formulate, from time to time, *suitable welfare schemes for different sections of the unorganised sector workers*".<sup>898</sup> In addition, state governments may develop, from time to time, suitable welfare schemes for different sections of organised sector workers, relating to the following benefits and services: provident fund, employment injury benefit, housing, educational schemes for children, skill upgradation of workers, funeral assistance, and old age homes.<sup>899</sup> Contributions for the Central Government schemes come from beneficiaries (the workers), employers (where identifiable) and government (either the Central government alone, or partly the Central and partly the State Governments).<sup>900</sup> Contributions for the State Government schemes follow the same pattern, except that in this case the State Government may seek financial assistance from the Central Government.<sup>901</sup> Delivery of social security to these workers will apparently be done either through workers' organisations or through other organisations, like panchayat bodies, self-help groups and trade unions.

The interesting and exemplary experience of the Self-Employed Women's Association (SEWA) in India, is a good example of a bottom-up approach. SEWA became a registered union in 1972 in order to improve the welfare of women in the informal sector. The informal sector workers are divided into four categories, namely vendors, hawkers, home-based workers and labourers. SEWA provides a number of services for its members such as a credit, training, child care, health care, pension and insurance. In order to provide these services SEWA has links with private insurance companies. The

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<sup>894</sup> See generally "Unorganised sector in India" 3-7.

<sup>895</sup> "Unorganised sector in India" 2-3.

<sup>896</sup> Act 33 of 2008. This law recently passed through both houses of Parliament in India.

<sup>897</sup> Section 3(1) of the Unorganised Workers' Social Security Act, 2008.

<sup>898</sup> *Ibid.* Own emphasis.

<sup>899</sup> Section 3(4) of the Unorganised Workers' Social Security Act, 2008.

<sup>900</sup> Section 4(1).

<sup>901</sup> Section 7(1)-(3).

strength of SEWA is that it responds to the specific needs and priorities of the members and also responds to both immediate and future needs.<sup>902</sup>

As noted in a recent ILO publication,<sup>903</sup> there is no one solution to the fundamental problem of extending social security coverage to non-traditional and informal economy workers. The first (theoretical) option would be to extend the social assistance system to as many as possible of those who are poor and vulnerable, including those who work informally.

As a second option, the pursuit of social justice ideals demands that coverage of existing social insurance schemes be extended to non-traditional and informal economy workers. However, as noted by the ILO, most of the existing social security schemes, at least in Africa, cannot easily be extended to the self-employed and the informal economy, because the threshold of entry in terms of their contribution and benefit structure is too high for most of those excluded and because the benefits provided are not consistent with the priorities of people living in poor circumstances whose social protection requirements are essentially short-term. Also, it needs to be determined whether the administrative capacity of the existing (public) social insurance schemes, if in existence, is adequate to take on the task of extending coverage.<sup>904</sup> Furthermore, problems are experienced with extension of coverage, also in SADC countries,<sup>905</sup> where informal workers are required to pay a double contribution in the absence of an employer contribution. Tunisia, however, provides an example of how this option can be successfully implemented in the area of workers' compensation. In this country, on an experimental basis, contributions to their employment injury and diseases scheme were determined for small farmers, fishermen, the employers of domestic workers and private individuals using labourers for a short period. The contribution was in the form of a lump sum and determined according to the size of the farm, the type of crop, type of fishing or the provisional duration of the work.<sup>906</sup> This is a result of the need to develop innovative ways to extend protection to non-traditional workers.<sup>907</sup>

As a third option, the importance and potential use of existing informal social security arrangements have to be acknowledged. While the family- or kinship-based forms of

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<sup>902</sup> "Unorganised sector in India" 3.

<sup>903</sup> Gillion, C *et al* (eds) *Social security pensions: Development and reform* (2000) 530.

<sup>904</sup> Gillion, C *et al* (eds) *Social security pensions: Development and reform* 530; see also Barbone, L and Sanchez, L "Pensions and social security in sub-Saharan Africa – Issues and options", in *Social Security in Africa: New realities* 32. Ghana provides an illustration of a less than successful attempt to use an existing public fund to extend social security coverage to the informally employed. The Social Security and National Insurance Trust Fund (SSNIT) of Ghana covers the self-employed on a voluntary basis. Of its 942,000 active members (10 per cent of the working population) a few years ago, there were only 5,400 voluntary members in spite of the fact that those in the informal sector represent 70 per cent of the working population.

<sup>905</sup> E.g. in Namibia – while the Social Security Act of 1994 (Namibia) provides for self-employed workers to voluntarily join the social security framework established in terms of the Act, uptake has been extremely low, in particular due to the inability of informal workers to pay a double contribution.

<sup>906</sup> Chaabane, M *Towards the universalization of social security: The experience of Tunisia* (Extension of Social Security ESS Paper No 4, ILO 2002) 17.

<sup>907</sup> The Social Security Bill, 2005 (Tanzania) also makes provision for this possibility.

support may be decreasing due to the disintegration of family-based structures, there is ample evidence that mutuality- or self-organised group-based arrangements offer real solutions to the dilemma of limited formal social security coverage.<sup>908</sup> This does, however, require that these institutions and the role played by them be recognised and supported by governments. Economies of scale can be achieved if proper links are developed between these informal arrangements and the formal social security system. There should therefore be a proper model aimed at developing an integrated approach towards formal and informal social security coverage.<sup>909</sup> This may require a limited measure of formalisation, in particular if government support were to be extended to these informal schemes.

However, it is doubtful whether the existing informal social security arrangements are able to extend social security coverage to the bulk of the excluded non-traditional and informal economy workers. As a matter of general experience, these institutions reach only a fraction of the essentially unorganised informal economy.<sup>910</sup> Also, the effectiveness, reach and sustainability of informal social security arrangements are limited. These arrangements on their own rarely provide a sufficient and all-encompassing solution to the risks which poor people are confronted with.<sup>911</sup> More importantly though for present purposes, is the fact that these community-based social protection schemes usually do not include certain social security risk categories, such as occupational health and safety and workers' compensation arrangements,<sup>912</sup> presumably because these are not viewed by scheme participants as the most pressing needs to be covered. However, it might be possible to use these institutions as part of the delivery mechanisms for social security benefits.<sup>913</sup>

Governments could consider, as a fourth option, the establishment and support (by way of, for example, a subsidy) of a public low cost social security scheme as a strategy for enhancing coverage and social protection. The scheme should be set up for non-traditional and informal economy workers and for low-income formal economy workers who are not members of one of the existing social insurance schemes. In this way responsibility can be taken on a national basis for ensuring that as many of the non-traditional and informal economy workers and lowly paid formal sector workers as possible enjoy social security protection. The recently adopted unorganised sector

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<sup>908</sup> See, amongst others, Mouton, P *Social security in Africa: Trends, problems and prospects* (ILO 1975) 143.

<sup>909</sup> See, for more details on such an approach, Olivier, M and Kaseke, E "Informal social security and formal social security: Developing an integrative approach" (Paper presented at a SADC Social Security Conference, held in Gaborone, Botswana, November 2004). See also Tostensen, A *Towards feasible social security systems in sub-Saharan Africa* (CMI Working Paper 5) (Chr. Michelsen Institute 2004) 1.

<sup>910</sup> However, see the example of SEWA discussed above.

<sup>911</sup> Holzmann, R "Risks and vulnerability: The forward-looking role of social protection in a globalizing world" in Dowler, E. and Mosely, P. (eds) *Poverty and social exclusion in North and South* (Routledge 2002), para II.

<sup>912</sup> Barrientos, A and Barrientos, S *Extending social protection to informal workers in the horticulture global value chain* 34.

<sup>913</sup> This is the approach adopted by both the Social Security Bill, 2005 (Tanzania) and the Indian Unorganised Sector Workers Social Security Bill, 2007.

workers social security arrangement in India, referred to above, would be an example of such an approach.

The discussion above effectively also highlights a related area of innovative approaches, namely an increased role for governments and innovative funding options. As is evident from the preceding discussion, the welfare fund system in India provides an example of an arrangement where the resources are raised by the government on a non-contributory basis: the delivery of welfare services is effected without linkage to the individual worker's contribution.<sup>914</sup> Likewise, in terms of the structure foreseen in the Unorganised Workers' Social Security Act, 2008, the position is that contributions are forthcoming from the workers, employers (where identifiable) and Central and/or State government (in particular where employers are not identifiable).

Also, those for whom an employer is not forthcoming may not be able to sufficiently contribute on their own, let alone pay a double contribution, as is sometimes required by formal social insurance-based schemes when extending coverage. In this regard, additional funding mechanisms, such as government subsidies and/or a levy on the industry concerned, may be viable alternatives to explore.

## ***9.5 Adopting an appropriate human rights and principled framework***

### **9.5.1 Introduction**

In this report the importance of an appropriate human rights framework for the proper treatment of intra-SADC migrants as far as social security is concerned, has been highlighted. It has also been indicated that international standards, comparative best practices, the regional and inter-country response framework and constitutional dispensations are important for the advancement of human rights in this area.

It is suggested that in so doing, the social security position of migrants, in particular that of vulnerable workers and other persons in need could be significantly enhanced. For example, much more could be done to actively ratify international norms in both labour and social security, and to constitutionally cement and safeguard the rights of those who are disadvantaged by the current exclusionary regimes. This is true even of South Africa, despite its extensive and liberal constitutional and international law-friendly framework.<sup>915</sup>

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<sup>914</sup> "Unorganised sector in India" 3-4.

<sup>915</sup> It is significant to note that South Africa's ratification record of ILO Conventions is generally weak. In total only 20 current Conventions have been ratified, and many of these belong to an era which has long passed – in particular in the social security area. In fact, on several occasions, also in the recent past, one of the main supervisory bodies of the ILO, the Committee of Experts on the Application of Conventions and Recommendations, has indicated to South Africa that there are more recent and advanced Conventions on a particular matter that South Africa should consider ratifying.

## 9.5.2 International standards and comparative best practices

The improvement of the social security status of intra-SADC migrants cannot be seen in isolation from developments in international law and practice. International instruments provide for a range of human rights standards pertaining to non-citizens, also in the area of social security. These instruments invariably draw no distinction between citizens and non-citizens, as they apply to all migrants, irrespective of status. This is, for example, true of the range of UN instruments.<sup>916</sup> These instruments invariably provide for the right to equal treatment, also in relation to the right to social security, for specific contingency-based social security entitlements, as well as (in the case of ILO instruments) for a set of guidelines for the proper co-ordination of cross-border social security schemes.<sup>917</sup> They effectively encourage the entering into of appropriate multilateral and bilateral agreements, realising that regional and inter-country agreements provide the ideal environment for the regulation of social security entitlements in cross-border situations. In addition, more recent instruments afford special protection to specific marginalised groups, such as migrating women<sup>918</sup> and irregular migrants.<sup>919</sup>

The ILO instruments are of general application – all workers are covered, regardless of citizenship.<sup>920</sup> This is also true of the migration instruments of the ILO impacting on social security. Of course, this also has an influence on the interpretation of the migrant-based and social security-specific ILO Conventions and Recommendations. This follows from the position adopted by the Committee of Experts of the ILO that the social security provisions in the migrant workers Conventions and Recommendations should be read in the context of the other ILO standards concerned with social security.<sup>921</sup>

As mentioned above, the position in terms of the above-mentioned human rights instruments in general terms is clear. Human rights protection is in principle extended to everyone, regardless of nationality.<sup>922</sup> In social security terms, discrimination against lawfully residing non-nationals workers and their families is not tolerated.

The low level of ratification of social security-related international instruments by SADC countries, in particular of relevant ILO Conventions and the UN Migration Convention,

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<sup>916</sup> See, among others, articles 22 and 25(1) of the UN Declaration of Human Rights of 1948, article 9 (read with article 2) of the UN International Covenant on Economic, Social and Cultural Rights of 1966, article 5(e) of the International Convention on the Elimination of All Forms of Discrimination against Women of 1981, and (in the European context) article 12 of the (regional) European Social Charter.

<sup>917</sup> See par 8.1 above.

<sup>918</sup> See the International Convention on the Elimination of All Forms of Discrimination against Women of 1981, discussed in par 9.3.1.3 above.

<sup>919</sup> See the UN Migrant Workers Convention of 1990, discussed in par 8.1 and par 9.3.2.3 above.

<sup>920</sup> Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS), 2008) 14-56 at 22.

<sup>921</sup> *Ibid* 24.

<sup>922</sup> See par 8.1 and par 8.2 above; FIDH (International Federation of Human Rights) *Surplus People? Undocumented and other vulnerable migrants in South Africa* (2008) 21.

can be criticised.<sup>923</sup> However, it is true that these instruments have generally, despite similar but perhaps less severe forms of non-ratification in large parts of the developed world, served as the basis for reforming national laws, policies and practices.<sup>924</sup> There is no reason why SADC countries could not in similar fashion rely on the international instrumental framework to adjust national laws and policies. In addition, SADC Member States should be ratifying the relevant instruments and incorporate the standards contained in these instruments, in national legislation, as is required by the instruments themselves.<sup>925</sup>

Finally, from the perspective of comparative best practices a more nuanced approach to the treatment of non-citizens in social security is evident. As appears from the position generally subscribed to by international law,<sup>926</sup> comparative experiences in countries with developed systems of social security indicate that social security protection, in particular in the event of social insurance, should in principle be available to lawfully residing non-citizens, on the basis of equality with citizens.<sup>927</sup> It would further appear that the position of irregular non-citizens also requires a nuanced approach, in the sense of definitional adjustments and the recognition that even irregular migrants should be entitled to some measure of protection and benefit entitlement, in particular where they did in fact contribute (or contributions were paid by the employer or otherwise on their behalf).<sup>928</sup>

### **9.5.3 Regional and intra-regional response framework and constitutional dispensations**

It is suggested that the availability of certain relevant social security norms to migrating non-citizens at the SADC regional level is of crucial importance. These norms set a benchmark, and provide guidelines to SADC Member States in the reform of their immigration and social security policies. This flows from the important AU policy framework pertaining to migration, and the provisions in particular of the SADC Social Charter and the Code on Social Security. Policy and legislation at the country level should especially take into account the essential principles of co-ordination stipulated in the Code, such as equality of treatment, maintenance of acquired rights, the aggregation of insurance periods, portability of benefits, and the provision of at least essential forms of protection to irregular migrants.

Multilateral and bilateral agreements constitute the best intra-regional modalities for regulating the social security position of intra-SADC migrants. While multilateral

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<sup>923</sup> See par 8.3 above.

<sup>924</sup> Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS) 2008) 14-56 at 37, 39.

<sup>925</sup> *Ibid* 47.

<sup>926</sup> See par 8.2 above.

<sup>927</sup> See par 8.4 above.

<sup>928</sup> See par 9.3.2.2 above.

agreements usually create the principled and standards framework for social security cross-border entitlements,<sup>929</sup> bilateral agreements provide the opportunity to enter into specific arrangements which suit both contracting parties. As such, bilateral agreements regulate specific matters and give expression to the framework created by the standards framework contained in both multilateral agreements<sup>930</sup> and in relevant international instruments. As remarked,<sup>931</sup>

*"Although international standard-setting activities provide a framework which may be regarded as indispensable for the elaboration of bilateral agreements between the countries of origin of migrant workers and the host countries, such bilateral agreements are still necessary in order to give precise application to international principles and settle specific problems."*

The value of these agreements is that they could contain co-ordinating measures which are needed to ensure the maintenance of acquired rights and the exportability of benefits of migrating workers. On the other hand, on their own these agreements may not provide sufficient protection. This follows from the fact that they are usually based on the principle of reciprocity.<sup>932</sup> And yet, given the applicable human rights framework, there is a need to protect non-citizens *irrespective* of whether the country of origin extends protection. This may require an appropriate response at the country level, especially in the area of unilateral action required to extend the necessary protection.

Constitutional protection of social security in SADC, and the protection of non-citizens in social security, is generally weak. And yet, where this is available, this form of protection could contribute significantly to enhance the precarious position of intra-SADC migrants. This much is evident from the South African data on the implications of the constitutional embodiment of the right to social security, and the protection extended by the developing jurisprudence.<sup>933</sup>

#### **9.5.4 The need for a principled approach**

From the evidence provided in this report, it follows that there is a dire need to deal with the social security plight of intra-SADC migrants in accordance with the applicable human rights framework. Three contexts in particular need to be addressed from the perspective of human rights. The first is the migration context, and its impact on the social security status of intra-SADC migrants. The overemphasis on access, residence and occupational control, and on deportation, linked to the disadvantaged treatment to which non-citizens are generally exposed in SADC Member States,<sup>934</sup> requires appropriate human rights-based responses. A reorientation in this regard of the applicable legal and policy framework pertaining to immigration, sojourn and exit will assist in

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<sup>929</sup> See par 9.2.1 above.

<sup>930</sup> See par 9.2.1 and par 9.2.2 above.

<sup>931</sup> 26 UN ESCOR Commission for Social Development *Welfare of Migrant Workers and Their Families. Principles Concerning Migrant Workers and Their Families Already Embodied in International Instruments Adopted by United Nations Organizations: Report of the Secretary-General* 11 (UN doc. E/CN.5/564 (1978)).

<sup>932</sup> See par 9.2.1 above.

<sup>933</sup> See par 5.2 above.

<sup>934</sup> See paras 3.2, 4.2.3 and 4.2.4 above.

improving the position of non-citizens, also as regards the related field of social security. In addition, it will give expression to relevant continental and regional values and principles, such as freedom of movement and regional integration.

The second context relates to the terrain of social security. It should be clear that there is little justification for the continued discrimination in social security law and policy of non-citizens who lawfully reside in the host country. Lawful residence is an important criterion which underlies the social security protection available to non-citizens in terms of international standards,<sup>935</sup> and multilateral arrangements, such as the EU and Caricom.<sup>936</sup> Furthermore, it is possible to adopt instruments in this regard that draw a distinction between nationals of particular countries bound together in a regional framework, such as SADC (as is done in the European Union) – on the basis, for example, that Member States of SADC form a special legal order.<sup>937</sup> The social security framework of this special legal order is *inter alia* embedded in SADC regional instruments, such as relevant provisions of the SADC Treaty, the Social Charter and the Code on Social Security in the SADC.

It is furthermore suggested that the applicable human rights framework contains important implications for the very definition of lawfully residing non-citizens and for the extent, nature and level of protection available to lawfully residing non-citizens in SADC. Firstly, the very limited (personal) sphere of application as regards those who are covered by social security is in need of serious reconsideration and revision. Urgent steps are required to extend social security protection to several excluded categories of persons, including excluded categories of lawfully residing non-citizens. There may be a need to adopt specialised measures and interventions in this regard, as has been proposed for the informal sector in this report.<sup>938</sup> Secondly, the material sphere of coverage equally deserves the attention of policy-makers, the legislature and the jurisprudence. This relates not only to the often wholly unsatisfactory low levels of benefits and protection made available to social security beneficiaries, but also and most importantly the need to guarantee an essential level of protection. For example, the exclusion of large numbers and categories of lawfully residing non-citizens, who have completed a reasonable period of residence in the host country, from the social assistance system of the host country need to be interrogated. This follows from the fact that migrants invariably contribute to the tax base of the country concerned.<sup>939</sup>

*"... [t]he effective participation of migrant workers in the financing of national social security programmes is not limited to those contributions which may be deducted from wages."*

It has been remarked that,<sup>940</sup>

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<sup>935</sup> See par 8.2 above.

<sup>936</sup> See par 9.2.2 above.

<sup>937</sup> See par 8.2 above.

<sup>938</sup> See paras 9.4.2 and 9.4.3 above.

<sup>939</sup> Cf ILO *Introduction to Social Security* (ILO 1989) 159.

<sup>940</sup> Dupper, O "Migrant workers and the right to social security: An international perspective" in Becker, U & Olivier, M (eds) *Promoting access to social security for non-citizens and informal sector workers: An international, South African and German perspective* (Max Planck Institute for Foreign and International

*"Excluding migrant workers entirely from all tax-funded benefits is a refutation of this contribution, and violates principles of social justice and fairness. Many countries acknowledge this contribution by extending some social assistance benefits to both regular and irregular migrants. However, this is done haphazardly, and, being dependent on national law, inevitably differs from country to country. In the absence of international guidelines, this will continue to be the case. The time may be ripe to consider including the guarantee of some form of minimal social assistance to migrant workers in the relevant international instruments."*

The third context relates to the position of particularly vulnerable groups of non-citizen migrants, such as refugees, children, women and irregular migrants. The applicable human rights standards require that special forms of regulation and protection should be extended to these categories, as has been indicated in this report with reference to the position of women<sup>941</sup> and irregular migrants.<sup>942</sup>

## **9.6 The need to prioritise appropriate country reforms**

The comprehensive task of rolling out appropriate forms of social security protection to intra-SADC migrating non-citizens requires a careful and sensitive consideration of options, priorities and sequencing. The primary starting point, so it would seem, is to revamp and reform the legal and policy frameworks at the national or country level, with reference to the deficiencies and shortcomings in the system. Entering into appropriate bilateral arrangements would make little sense if the in-country legal and policy dispensation does not allow giving effect to protective provisions contained in the relevant agreement. The ambit and content of the suggested country-level reform relate to the issues discussed in this report, and other issues that might appear to be relevant too, given the specific country context. In essence, it requires as a minimum the re-orientation of migration and social security laws and policies as well as the implementation thereof, as far as they pertain to intra-SADC migrating non-citizens. In particular, this translates into the need to:

- Adopt a migration policy framework which balances the demand for national security and the orderly flow of migration;
- Develop an orientation towards intra-SADC migration which is mindful of the strong historical context of such migration, the role that it plays in the economic development of both the host and sending countries, as well as in poverty alleviation at the household and individual levels, and the imperatives of regional integration;
- Appropriately extend, streamline and simplify the ambit of the range of intra-SADC migrants who are allowed to lawfully enter, reside and work in the country concerned, bearing in mind the need to allow and regulate particular shorter term informal cross-border trade-related movements;

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Social Law & Centre for International and Comparative Labour and Social Security Law (CICLASS), 2008) 14-56 at 53.

<sup>941</sup> See par 9.3.1 above.

<sup>942</sup> See par 9.3.2 above.

- Ensure that a proper human rights-based approach informs the treatment of all categories of migrants, in accordance with applicable international, continental and regional standards; and
- Extend appropriate protection to particular vulnerable categories of migrants, such as women, children and, to the extent necessary, undocumented non-citizens.

While the approach suggested above essentially translates into a need to adopt unilateral reforms, it is clear that there is a rich comparative framework available to inform and help steer the content and process of the reform. This is to be found in the wide range of applicable international norms, continental and regional policy frameworks and regional standards contained in important SADC instruments, as well as in relevant comparative best practices. It should also be evident that a human rights orientation should drive the suggested reform, as the improvement of the position of non-citizens in SADC social security systems is the critical focus of the reform.

Secondly, presumably also in sequence, there is a need to enter into appropriate bilateral arrangements. Once again, the comparative framework available in this regard is of utmost importance. Nevertheless, it should be added that the limitations contained in the current restricted framework related to existing agreements should not be repeated – such as the limited focus on serving the interests of the host country only, and the lack of universally acceptable standards, including equality of treatment and portability of benefits.<sup>943</sup>

Thirdly, the adoption of a tailor-made multilateral instrument for the SADC region could be an important tool to provide the framework for suitable bilateral agreements at inter-country level, in accordance with agreed principles and the human rights standards contained in relevant international and regional instruments.

Finally, there is a need to improve and extend the range of existing regional instruments. An appropriate instrument which gives effect to the migration policy framework suggested by the Africa Union, and which is mindful of the realities of intra-SADC migration, could go a long way towards ensuring the appropriate social security protection of intra-SADC migrants.

Following a sequential, multi-dimensional and complementary approach is critical for developing a sound and logical framework for addressing the social security plight of intra-SADC migrants. This is a task which requires bold and innovative steps, yet sensitive and considered policy formulation, backed by research-based evidence and solutions.

The precarious position of migrant workers and their families demands an appropriate response in the form of special protection embedded in or foreseen by a proper policy framework. Such a migration policy framework in SADC needs to be informed by applicable AU policy and SADC standards instruments, by human rights imperatives, and

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<sup>943</sup> See the discussion in par 6 above.

by the need to integrate immigration and social security policies, and should be developed and implemented at both the country and regional level.

Furthermore, the conclusion of bilateral agreements with suitable content could go a long way towards extending social security protection to intra-SADC migrants on the basis of equality of treatment, totalisation or aggregation of insurance periods, maintenance of acquired rights, and portability of benefits. This should ideally be undergirded by a multilateral instrument which draws its principled framework from international and regional standards.

Also, there is a clear need to prioritise addressing the precarious social security position of certain particularly marginalised migrant groups – especially female and irregular migrants – in accordance with relevant international law and human rights imperatives. The conceptual widening of social security coverage to include at least certain categories of informal economy workers is an important step to extend social security protection to intra-SADC migrants, given the fact that the preponderance of migrant workers are to be found in the informal economy. Extension of coverage to the informal sector would further require alternative institutional arrangements, linked to appropriate regulatory responses.

Finally, there is need for an appropriate human rights framework for the proper treatment of intra-SADC migrants as far as social security is concerned. International standards, comparative best practices, the regional and inter-country response framework and constitutional dispensations are important for the advancement of human rights in this area. Simultaneously this requires a principled approach. In particular, there is from a human rights perspective little justification for the continued discrimination in social security law and policy of non-citizens who lawfully reside in the host country.

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### Summary Findings

This report gives an overview of the social security status of non-citizens in the Southern African Development Community (SADC), describes measures and efforts to support labour mobility through enhanced social security protection of non-citizens in SADC, and makes recommendations as to how to improve the social security status of the said non-citizens, including through the portability of acquired benefits and other cross-country co-ordination arrangements. After dealing with the relevant conceptual framework, the report commences with a section highlighting the current diversity of social security systems in SADC countries and the problems this diversity creates for the mobility of people in SADC and their social security status. Restrictions contained in the legal system are in particular emphasised.

**HUMAN DEVELOPMENT NETWORK**

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