

**Political and regulatory dimensions of access, portability and
exclusion: Social security for migrants, with an emphasis on migrants
in Southern Africa**

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Political and regulatory dimensions of access, portability and exclusion: Social security for migrants, with an emphasis on migrants in Southern Africa¹

by Marius Olivier* and Ockert Dupper•

1. Introduction

This chapter focuses on rights, regulation and a normative understanding of migrants' entitlements, in particular in relation to social protection, and with specific reference to migrants in Southern Africa, i.e. intra-SADC (Southern African Development Community) migrants. It explores the importance of adopting a rights-based and regulatory approach. In order to ensure access to social protection and portability of social security entitlements, there is need for the alignment of appropriate international standards, regional instruments, constitutional frameworks and statutory contexts.

The reality is often different. Limitations in social security law effectively inhibit enjoyment by migrants of social security entitlements. In addition, immigration law regulation and status of migrant categories is often used to effectively restrict access to and portability of social security entitlements, impacting in particular on specific vulnerable categories of migrants, such as asylum-seekers and undocumented migrants.

2. Contextual framework: Migration data, nature and trends

World-wide, there are 175 million people – about three per cent of the world's population – who are currently not residing in their countries of origin. Of these, 90 million are migrant workers. For a range of reasons reliable data on the extent and volume of migration within and to SADC is hard to obtain – this also applies to the major migrant-receiving country in the Southern African region, namely South Africa. In Southern Africa, 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 majority of SADC 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. These countries, therefore, offer migrants better prospects for improving their quality of life."² South Africa in particular attracts by far the majority of intra-SADC migrants.

From the available evidence, subject to some exception, 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. In fact,

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² Kaseke *The social security context of migration* 2.

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 concerned. Apart from informal cross-border trade-related migration, work on the mines, in particular in South Africa, served as a magnet for both internal and external migrants. From the historical perspective, as is supported by data on modern-day migration movements within SADC, 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.³

While a large number of cross-border migrants in Southern Africa remain *circular* migrants – their visits to the host country are generally seen as temporary – contrary to the increasing temporary nature of international labour migration, migration patterns within SADC have largely been characterised by their permanent or ongoing nature. Once immigration linkages are established, they are very difficult to break, and migration flows are almost impossible to reverse. 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 migrating⁴ – despite the fact that they maintain strong links with the home country. This also flows from the fact that more migrants from the respective countries are older, married and, in most cases, heads of households. In addition, 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.

In addition to labour contract migration, SADC-related migration is characterised by several other dimensions:⁵ (i) declining levels of legal migration to and within the region and the increase in clandestine and undocumented (i.e. irregular) migration;⁶ (ii) substantial brain drain migration;⁷ (iii) increased feminisation of cross-border

³ Kanyenze *African Migrant Labour situation in Southern Africa* 2-10 (at 2).

⁴ Pendleton *et al Migration, Remittances and Development in Southern Africa* 2-3, 15.

⁵ The following section draws in part from Marius Olivier, 'Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)' (Report commissioned by the World Bank, 2009) 13-14. Also see Olivier and Dupper, 'Migration patterns and social protection responses: Perspectives from South and Southern Africa', paper delivered at the International Social Security Association 6th International Policy and Research Conference on Social Security, Luxembourg 2010 (available at <http://www.issa.int/Resources/Conference-Reports/Migration-patterns-and-social-protection-responses-Perspectives-from-South-and-Southern-Africa>).

⁶ Irregular migration 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. See Crush, Williams, Peberdy 12-13. The growth in irregular migration is characteristic of South-South migration in general and migration within Africa in particular. As Bakewell points out, many of the cross-border movements within the South - where many borders may be crossed with little or no formalities – are undocumented. This is particularly acute in Africa 'with its numerous long borders cutting across kinship and language groups with few formal border crossings.' Bakewell 18.

⁷ While there is significant intra-regional brain drain, especially from countries such as Zimbabwe, Mozambique and Angola to South Africa and Botswana in particular, this is counterbalanced by significant emigration of SADC professionals to countries *outside* SADC. This has led one team of researchers to conclude that, for the region as a whole, "within-SADC brain drain means no net loss". See Crush, Williams & Peberdy 19. The health sector in SADC is most severely impacted by the brain drain, with nearly 30% of SADC-born physicians and 10% of SADC-born nurses resident outside their countries of birth. Major destinations for SADC health care professions include the UK, USA, Portugal, Australia and Canada. See

migration;⁸ (iv) growth in intra-regional informal cross-border trade;⁹ (v) the significance of remittances as a primary source of household income in migrant-sending SADC countries;¹⁰ (vi) the inter-generational¹¹ and permanent¹² nature of migration; (vii) an increase in human trafficking¹³ and internal and external refugee movements;¹⁴

Jonathan Crush & Vincent Williams 'Labour Migration Trends and Policies in Southern Africa', *SAMP Policy Brief 23*, March 2010, 27-29 and the studies referred to there.

⁸ However, most intra-SADC migrants continue to be male. A recent five country study in SADC revealed that in Botswana, Mozambique and Swaziland over 80% of migrants are male: Pendleton *et al* 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). Growing feminization of migration is a global phenomenon. See Crush & Williams 'Labour Migration Trends and Policies in Southern Africa', *SAMP Policy Brief 23*, March 2010, 21. Within SADC, men and women migrate for different reasons: "Men go primarily in search of employment, whereas women's migration is driven by a wide range of social and reproductive factors in addition to economic incentives. Even the economic motives for migration are gender-specific, with women going largely to trade and men to work, most in formal employment. Thus migration is closely tied to socio-economic roles and responsibilities allocated on the basis of gender." Dodson, B *Women on the move: Gender and cross-border migration to South Africa* 141,

⁹ This is linked to the growing feminization of migration. Significantly more women than men cross intra-SADC borders for purposes of informal trading. See the studies referred to by S Peberdy, *Hurdles to trade? South Africa's immigration policy and informal sector cross-border traders in the SADC* (paper presented at SAMP/LHR/HSRC workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria, 23 April 2002) 39-40 and Crush & Williams 'Labour Migration Trends and Policies in Southern Africa', *SAMP Policy Brief 23*, March 2010, 22. Peberdy points out that the term "informal trade" may be a misnomer because "it obscures the multiple linkages between the formal and informal sectors in buying and selling". See Peberdy 36. Cross-border traders represent a significant part of regional migrants to South Africa. According to a recent study of the Southern African Migration Project conducted at major border posts with all South African neighbours except Namibia and Botswana, "of the 6 millions border crossings in a year, 30-50% are by small-scale traders" (reported in the Financial Mail, 'Immigration: what it's doing to South Africa', 16 February 2007, p36). Further studies indicate that volumes of informal sector trade may even exceed formal sector cross-border trade between certain countries within SADC, See Peberdy 37.

¹⁰ Remittances remain a primary source of household income in migrant-sending SADC countries – for example, in 2006 in Lesotho, remittances were estimated to contribute as much as one quarter of GDP. See Jonathan Crush, Belinda Dodson, John Gay, Thuso Green & Clement Leduka, *Migration, Remittances and 'Development' in Lesotho*, Southern African Migration Programme (SAMP) (2010), 4. However, while remittances relieve some of the sending countries' balance of payments difficulties, and contribute to capital formation and *per capita* national income, their role in promoting development is less clear. See Maxine Reitzes, 'Regionalizing International Migration: Lessons for SADC' (Southern African Migration Project (SAMP) Migration Policy Brief No. 11) 15.

¹¹ Many migrant sending households in migrant sending countries (such as Lesotho, Mozambique, Swaziland and Zimbabwe) have a migration "tradition" which is passed on from one generation to the next – parents and even grandparents worked outside the home country. For example, a recent study found that 76% of migrants from Lesotho had parents and at least 25% had grandparents who had worked in South Africa. This compared to a regional average of 57% and 23%: Crush et al *Migration, Remittances and 'Development' in Lesotho* 8 (referring to 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).

¹² 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 – despite the fact that they maintain strong links with the home country. Pendleton, Crush, Campbell, Green, Simelane, Tevera & de Vletter 2-4,15.

¹³ 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: Crush, Williams, Peberdy 21-23, 25-26.

¹⁴ 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: Brookings Institution -

and, generally (viii) the growth in the volume¹⁵ and complexity¹⁶ of cross-border movements.

3. Precarious position of intra-SADC migrants and prevailing policy approaches

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. 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, inadequate. Cross-border migrants are mostly unskilled or semi-skilled, and are typically found at the lower end of the labour market in receiving countries. Irregular migrants in particular suffer exploitation of their workers' and human rights. 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, the mining industry in South Africa shed a large 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.¹⁷ Also, it has been noted that the mining sector in particular has a stubbornly high rate of disablement and deaths.¹⁸ 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 and the wide-spread prevalence of xenophobia, in particular in South Africa.

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 6. And yet the position is that a coordinated response to the challenge of internal and external refugee movements is lacking in SADC: "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." (Crush, Williams & Peberdy 13-14. See also IOM 5.

¹⁵ The numbers of people legally crossing borders throughout the Southern African region has exploded in the last decade. In South Africa, for example, the annual number of legal visitors from other SADC countries has increased from around South Africa increased from 1 million in 1990 to 5.1 million in 1996 and over 9 million in 2008. See Richard Black et al *Migration and Development in Africa: An Overview* (SAMP African Migration and Development Series No. 1) (IDASA 2006) 85 and Jonathan Crush & Vincent Williams 'Labour Migration Trends and Policies in Southern Africa', SAMP Policy Brief 23, March 2010, 6.

¹⁶ Besides the decline in the number of those migrating on fixed-term labour contracts (primarily due to a policy of 'South Africans first' adopted by the South African mining industry as well as a general decline of the mining sector in SADC), as well as a growing feminization and irregularisation already alluded to, irregular migration has also been characterized by growing informalisation. As Crush and Williams point out, since 1990, more labour migrants have begun to work in the unregulated informal sector (either as owner-operators or as employees of micro-enterprises and SMME's). While the numbers of informal sector labour migrants in the region are unknown, it is clear that they are increasing as the informal sector expands throughout the region. See Crush & Vincent Williams 'Labour Migration Trends and Policies in Southern Africa', SAMP Policy Brief 23, March 2010, 21. In addition, HIV/AIDS has also impacted considerably on migration. Not only is the rapid diffusion of the epidemic itself inexplicable without reference to the mobility of people but new forms of migration are emerging in response. See Richard Black et al *Migration and Development in Africa: An Overview* (SAMP African Migration and Development Series No. 1) (IDASA 2006) 83. Finally, growing poverty has displaced many people from rural areas to urban centres, either internally or across borders. Rapid urbanization in the area has therefore largely been a function of rural poverty. See Black et al 89-90.

¹⁷ Kanyenze 16.

¹⁸ *Ibid* 17.

From a policy perspective, the picture is that SADC Member States have no clear common approach towards immigration. Few, if any, countries have pro-active immigration policies. In fact, security concerns, in the form of control and deportation appear to characterise their migration laws and policies. Migration of people within the region is viewed as a "problem", rather than an opportunity. 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.

3. Restrictive legal regimes and policy constraints

3.1 General

The position of migrants 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 and social security laws is crucial to the understanding of the status of non-citizen workers. And yet, it is evident that these laws often espouse conflicting policy objectives.

3.2 Social security law limitations

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

Non-citizens in SADC are in many of the systems wholly or partially excluded from the sphere of social protection (excluding those countries, notably Mauritius, 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). 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 and social insurance. However, other categories of non-citizens do not necessarily qualify for equal treatment with South African citizens and permanent residents – for example, in the area of unemployment insurance. Workers compensation legislation 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. However, little use has been made of it.

In accordance with the provisions of refugee legislation, refugees in principle enjoy full legal protection which includes the rights set out in the bill of rights chapter of the South African Constitution. Persons who have obtained refugee status therefore qualify for the constitutionally entrenched right to access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. However, the social assistance legislation does not extend protection to refugees. An apparent conflict therefore exists between the two laws.

3.3 Immigration law restrictions

On the other hand, entitlement to benefits is sometimes linked to the immigration status of the worker. Typically, 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.

In South Africa, for example, the *Immigration Act* of 2002 regulates non-citizens' entry into and residence in South Africa. Given the specific legal requirements that have to be met, the majority of SADC migrants to South Africa are employed in low-skilled jobs and do not qualify for a general work permit under the available categories.

The Act distinguishes between permanent and temporary residence. Permanent residents are not regarded as 'foreigners' as 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). As such they are the "elite" of non-South Africans.

The second category consists of temporary residents. The crucial provision in this regard is that, in accordance with section 10 of the Act, a temporary residence permit is issued on condition that the non-citizen is not, or does not become a 'prohibited or undesirable person'. 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.¹⁹

In SADC countries, the employment of illegal/irregular/undocumented foreign workers²⁰ is also prohibited and may imply that such a worker is not entitled to the protection of the various labour and social security laws. However, a recent Labour Court judgment in South Africa, *Discovery Health Limited v CCMA & others*, held that a foreigner whose work permit has expired, still has a valid employment contract and is entitled to the unfair dismissal protection provided for in South African labour laws. It is submitted that this judgment has important consequences not only for labour law purposes, but also for (employment-based) social insurance arrangements.

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. They are allowed to work, but are sometimes by law excluded from working in particular industries. Attempts to prevent asylum-seekers awaiting procession of their

¹⁹ Klaaren & Rutinwa *Towards the harmonisation of immigration and refugee law in SADC* 55.

²⁰ Some convergence seems to be emerging on the use of "irregular migration" as the most appropriate term to refer to migrants whose status does not conform to the legal norms of the country in which they reside. See the discussion in Dupper "Migrant Workers and the Right to Social Security: An International Perspective" 2007 *Stellenbosch Law Review* 219 at 221ff.

applications from working or studying were not upheld: these provisions were held to be *ultra vires* the Constitution.²¹

3.4 Marginalising impact

The prevailing evidence is clear: through available legislative mechanisms SADC governments are able to give precedence to immigration laws over labour and social security laws. Secondly, the legislative policy in both South Africa and the other SADC Members States is geared towards restricting access, controlling movement and regulating presence in the host country, and not towards honouring a human rights approach and towards encouraging and supporting migration. Immigration laws and policy in SADC countries generally focus on the effects, rather than the underlying causes of migration. A recent study remarked that "[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books."²²

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 and other Cruel, Inhuman or Degrading Treatment of 1984, in relation to migrants:²³

"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 non-citizens 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)."

4. Regulatory responses

4.1 International standards

4.1.1 General

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.

Some Constitutions in the region, such as the constitutions of Malawi, Namibia and South Africa, make provision for the role of international law, potentially impacting on

²¹ *Minister of Home Affairs v Watchenuka*.

²² Crush, Williams & Peberdy 10, 24.

²³ 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* (37th Session, 6-24 November 2006, CAT/C/ZAF/CO/1).

the terrain of social security for migrants – in particular as far as the application of international standards contained in ratified agreements and the contents of bi- and multilateral agreements concerning social security are concerned.

4.1.2 *The impact of international standards on migrants and their social security status*²⁴

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.²⁵

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, ratified by most Southern African countries, provides in article 9 for the right to social security for everyone. In essence this implies that countries may not draw distinctions between citizens and non-citizens as to social rights, including the right to social security. Developing countries, including those SADC member states that ratified the Covenant, are bound by this provision.

The recently adopted UN General Comment No 19 (2008) 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. Some of the salient principles which appear from the General Comment in this regard can be summarised as follows:

- With reference to the prohibition on grounds of nationality, care should be taken to ensure that migrants should have access to social security in law and practice/implementation. Special attention should be paid to specific vulnerable individuals and groups who traditionally face difficulties in exercising the right to social security, including refugees, asylum-seekers, returnees and non-nationals generally.
- Non-nationals should be able to access non-contributory schemes for income support, and should have affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable.
- Also, all persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care. It would appear that this is an unqualified entitlement, given the vulnerable status of those in need of, in particular, emergency medical care.
- 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, consistent with international standards. For these groups, the bar of entitlement is significantly lowered – they are not only entitled to

²⁴ See also Olivier *The end of labour law in the global workplace context? A South and Southern African response* 13-52 at 31-35, on which this part is based.

²⁵ Weissbrodt *Final report on the rights of non-citizens* 4.

access non-contributory schemes, but also enjoy this entitlement on the basis of equal access.

- 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.
- Also, a migrant worker's entitlement should not be affected by a change in workplace.
- Where persons work temporarily in another country, they should be covered by the social security scheme of their home country.
- Finally, the General Comment notes the importance of establishing bi- and multilateral agreements or other instruments for coordinating or harmonising contributory social security schemes for migrant workers, 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.

The International Convention on the Protection of All Migrant Workers and Members of Their Families (the UN Migrant Workers Convention) of 1990 protects all migrant workers and their families, save particular categories of workers, most of whom are protected in terms of other specific international instruments. This Convention amongst others provides for non-discrimination, equality of treatment between nationals and migrant workers as to work conditions and pay, equal access to social security, and the right to repatriate earnings, savings and belongings. The Convention confers specific rights on documented workers, and sets out core rights 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.

Targeted international human rights instruments, widely ratified by SADC countries, deal with the position of refugees and asylum-seekers. For example, the Convention and Protocol 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. Asylum seekers should also be granted the right to work, while employment and social assistance, amongst others, should not be denied to recognised refugees.

Relevant ILO Conventions and Recommendations protect the rights of all workers irrespective of citizenship. 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."²⁶ Specific ILO instruments protect migrant workers and their families, although only a few SADC countries have ratified these instruments. Usually certain rights, including the right to social security, are extended only to those *lawfully* within a territory.

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, such as the European Court of Human Rights and the Inter-American Court of Human Rights 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.

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. 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, and regional and supra-national instruments. These principles are incrementally applied to workers engaged in a self-employed capacity as well as to stateless persons and refugees.

Special although protection is at times extended in an attempt to deal with irregular migration, as is evident from the provisions of the United Nations Migrant Workers Convention of 1990. One of the relevant ILO Conventions also extends protection, both indirectly and indirectly. ILO Convention 143 of 1975 provides in article 8 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." It further stipulates (in article 9) that irregular migrant workers shall have the same rights as regular migrant workers concerning social security benefits arising out of past employment.

Many of the important UN instruments that impact on social security rights of migrants, including the specialised UN refugee Conventions, have been ratified relatively widely by SADC countries. However, only two SADC countries (i.e. Lesotho and Seychelles) have ratified the UN Migrant Workers Convention of 1990.²⁷ As far as the ILO is concerned, the position 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. However, certain pre-World War II social security Conventions have been ratified by some SADC countries. These Conventions require equal treatment of citizens and non-citizens, who are citizens of other countries that

²⁶ Baruah & Cholewinski *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* 154-155.

²⁷ It is important to note that the countries that have signed and/or ratified the Convention consist only of so-called "sending States". None of the major "labour-receiving" countries, that is States which primarily attract migrant labour, have to date either signed or ratified the Convention. See Dupper "Migrant Workers and the Right to Social Security" 227.

ratified these Conventions. A few SADC countries have also ratified ILO migration-related Conventions, which affect the area of social security as well. The poor ratification of ILO and to some extent UN Conventions within SADC has been deplored, in view of the seriousness of migration issues.²⁸

4.2 Regional normative framework

4.2.1 Regional standards

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 objectives of the SADC Treaty contained in article 5 of the Treaty, including regional integration, poverty alleviation and the support of the socially disadvantaged, the Charter of Fundamental Social Rights in SADC ("Social Charter") of 2003 in article 10 imposes on SADC Member States the obligation to create an enabling environment so that every worker in the region shall have a right to adequate social protection. 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. No distinction is drawn between citizens and non-citizens. Such a distinction is also not contemplated, given the Treaty emphasis on regional integration and Charter focus on harmonisation of social security schemes.

Even more explicit are the provisions of article 17 of the Code on Social Security in SADC of 2007, which do not allow disparate treatment of foreigners, and encourage Member States to ensure that all lawfully employed immigrants are protected through the promotion of certain core principles. In terms of two of these principles migrant workers should, firstly, be able to participate in the social security schemes of the host country and, secondly, enjoy equal treatment alongside citizens within the social security system of the host country. 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.

The Code further suggests 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 regards refugees, it stipulates that social protection extended to them should be in accordance with the provisions of international and regional instruments.

It could, therefore, be said that there is a clear tendency in both the Charter and the Code to create a regime within SADC which ensures minimum levels of social protection on the basis of equality, regardless of, amongst others, citizenship.

In addition, the provisions of the adopted (in 2006) but not yet implemented SADC Draft Protocol on the Facilitation of Movement of Persons are important, also in view of the absence of a right to freedom of movement 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

²⁸ 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 Kanyenze19.

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 the Draft Protocol on the Facilitation of Movement of Persons does not guarantee 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*.

As the SADC region is moving closer towards free trade — the free movement of capital and goods — and ultimately economic integration, there has been considerable reluctance to develop a SADC-wide policy on the free movement of people.²⁹ It has aptly been remarked that '(f)reeing up flows of goods and capital while simultaneously trying to shut down the movement of people makes limited economic sense.'³⁰ In SADC, therefore, the free movement of persons continues to be balanced against the political and economic interests of individual member states. National policies, legislative instruments and institutions and mechanisms designed to manage cross-border migration are inevitably couched in protectionist language, which the Protocol is unlikely to change.³¹

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) of the Treaty does not include the prohibition of discrimination based on nationality/citizenship.³²

4.2.2 Social security cross-border agreements

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. The scope of these agreements is limited and, with some exception, does not cover public social security schemes, but merely employer-based occupational arrangements. However, the obligations contained in the labour agreements between South Africa and several SADC countries are primarily imposed upon the relevant employers, and not the South African government. 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 are not reciprocal in nature, as they stand to only regulate the position of citizens of one of the respective countries – i.e. the citizens of the

²⁹ Crush, Williams & Peberdy, 'Migration in Southern Africa' (paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration, September 2005) 24.

³⁰ Crush, Williams and Peberdy, 27.

³¹ Williams and Carr, 'The Draft Protocol on the Facilitation of Movement of Persons in SADC: Implications for State Parties' (Southern African Migration Programme Policy Brief No. 18, 2006) 3.

³² It reads as follows: 'SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability'.

country that entered into the agreement with South Africa, and not South African citizens.

- (b) Repatriation regulation is accorded specific emphasis, alongside labour migration.
- (c) 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.
- (d) Institutional capacity appears to be weak. For example, the agreement between South African and Mozambique that allows for payments in respect of employment injuries and diseases to be made in Mozambique has been widely criticised in view of the fact that payments seldom reach beneficiaries.³³

In fact, these agreements have the effect of excluding most citizens of the sending country who are migrant workers in South Africa 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, this may leave returning migrants in a precarious position upon return to their home country.

However, 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 immigration legislation, particularly in South Africa.

Finally, it is important to recognise that the scope for entering into bi- and multilateral social security agreements does exist in SADC. 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. In South Africa, similar provisions relating to entering into of reciprocal bilateral agreements are contained in the workers compensation and social assistance legislation. As mentioned above, constitutions of countries such as Malawi, Namibia and South Africa recognise both incorporation and transformation as legitimate methods of deriving domestic effects from the state's international obligations – including obligations flowing from multi- and bilateral arrangements.

It must be noted that while targeted country-specific cross-border bilateral agreements between states have the advantage of incorporating regulations and standards that pertain specifically to the unique migratory patterns that may exist between the two

³³ Fultz & Pieris *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* 19-20.

states as well as the specifics of their respective national social security laws, the danger inherent in such agreements is the fact that they may result in portability arrangements that not only highly complex but also difficult to administer. In addition, such agreements may end up granting differing rights and entitlements to migrants, which could undermine regional integration. One way to counteract this is to establish common standards in a regional – or multilateral framework against which all bilateral agreements can be measured. This is the case in the EU. Despite the multitude of bilateral agreements that exist in the EU, the fact that they are all based on a single legal source, namely EU regulation 883/2004 ensures some degree of convergence. Similarly, bilateral agreements between countries belonging to the Caribbean Community, MERCOSUR as well as the Ibero-American Summit are all based on a single multilateral agreement that establishes a standardised framework. There is thus a need for a similar standardised multilateral framework in SADC. In respect of such a framework, Olivier suggests the following:

‘Such a multilateral instrument, which draws its principled framework from international and regional standards, should from an overall perspective and in framework fashion stipulate the overarching and generally applicable principles, standards, institutional mechanisms and channels to guarantee entitlements, rights and obligations, and facilitate and streamline portability of benefits and the implementation of other common arrangements. A multilateral agreement therefore effectively undergirds bilateral agreements, which should contain specific and appropriate cross-country arrangements.’³⁴

Besides establishing a standardised framework for bilateral agreements, another important advantage of such a multilateral framework agreement is that it can provide for a phased and incremental approach in relation to (i) the types of schemes covered; (ii) the benefits provided for; (iii) the categories of persons covered by such an agreement; and (iv) the countries included in the agreement.³⁵

4.3 Constitutional rights and jurisprudential perspectives

4.3.1 Constitutional frameworks

There are two reasons why SADC constitutional frameworks extend little social security protection to non-citizens. The first reason is that some SADC country constitutions refer to social security in general terms, and does not create directly enforceable social security or broader social protection rights. The second reason is that anti-discrimination provisions in these constitutions are rarely made applicable to non-citizens.

The notable exception to the above-mentioned picture is the South African constitution. In the chapter dealing with the Bill of Rights the Constitution in section 27 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". 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". Furthermore, section 9 of the Constitution prohibits

³⁴ Olivier, 189.

³⁵ Olivier, 189.

unfair discrimination, whether directly or indirectly. Discrimination against non-citizens is included in this framework, although nationality is a so-called unlisted discrimination ground.

4.3.2 Progressive judicial pronouncements

In particular as far as social security for non-citizens is concerned, the Constitutional Court in South Africa remarked, when considering the purpose of providing access to social security to those in need, that:³⁶

"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."

It has to be noted that there is a specific constitutional focus in South Africa on addressing the plight of the most vulnerable and desperate in society. In fact, in the South African constitutional context it has been accepted that non-citizens constitute a vulnerable group in society. For example, the Constitutional Court held that excluding permanent residents from access to employment in the public education sector,³⁷ and excluding permanent residents from the social assistance system would amount to *unfair* discrimination. 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 children³⁸ and unaccompanied foreign children³⁹ respectively.

Several of the court cases dealing with the protection of non-citizens relate to the constitutional protection, including social security protection, available to irregular/undocumented non-citizens and refugees. For example, these cases included instances where the release of unlawfully detained refugees, the processing of applications for refugee status within reasonable time and in accordance with national and international refugee law, the removal of unlawful conditions from the asylum-seeking process, and the incorporation of refugees who are disabled within the framework of the social assistance grants, were ordered.⁴⁰

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 and the right of refugees and asylum-seekers to work,⁴¹ effectively implies access to unemployment insurance (at least for permanent residents not employed in

³⁶ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development* 573A (case headnote summary).

³⁷ *Larbi-Odam v Member of the Executive Council for Education (North-West Province) v The Minister of Education*.

³⁸ *Khosa* judgment.

³⁹ *Centre for Child Law (Lawyers for Human Rights) v Minister of Home Affairs*.

⁴⁰ *Centre for Child Law* judgment; *South African Human Rights Commission & Forty Others v Minister of Home Affairs and Dyambu (Pty) Ltd*; *Kiliko and Others v Minister of Home Affairs*; *Somali Refugee Forum v The Minister of Home Affairs*.

⁴¹ See the *Larbi-Odam* and *Watchenuka* judgments.

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.⁴²

From these judgments it is clear that in South African jurisprudence 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, 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 in principle available to non-citizens migrating to South Africa.

5. Conclusion: the rationale for regulation

The legal position of non-citizens in social security is generally a weak one. Compliance with standards set at the international and regional level, even if in some respects incomplete, could go a far way to ensure that migrants and their families are extended essential human rights protection in the area of social security. Integrating these standards in SADC domestic legal systems, in particular via the adoption of a fundamental rights framework in country constitutions, would further help to cement the protective framework. With such a constellation in place, as experience in several jurisdictions around the world, including in SADC the South African jurisdiction has shown, courts and other adjudicating institutions through their jurisprudential activity are quick to give legal effect to the embedded rights. In addition, there is need to adopt targeted statutory provisions to which immigration law provisions are appropriately aligned. In addition, coherence is required, not only between the legal and policy frameworks, but also between law and practice: too often the protective rights framework pertaining to migrating non-citizens, also in SADC countries such as South Africa, has been undermined by inconsistent policy regimes and oppressive treatment of non-citizens, also in relation to social security. Finally, the value of meaningful bilateral social security arrangements between affected countries, supported by a framework-setting multilateral edifice at the regional or supra-national level, has proved to be indispensable, as it clarifies the legal position of the migrants concerned and expresses the joint commitment of the countries concerned.

It is evident that the picture in Southern Africa reveals major shortcomings. Ratification of and compliance with relevant international standards are unsatisfactory; underlying and supportive measures, such as the principle of freedom of movement of workers and other categories of persons, are weakly developed; while regional standards in relation to among others the co-ordination of social security are still being concretised. With the exception of the South African Constitution, and possibly the constitutions of a few other SADC countries, fundamental rights frameworks are not in place. Furthermore, across the Southern African region, immigration law and policy regimes emphasise selection and control, undergirded by hostile treatment and immigration-unfriendly perceptions. There is no multilateral social security framework agreement in place, while bilateral arrangements are few and weak in content, and hardly cover public social security schemes.

⁴² *Discovery Health Limited v CCMA*.

The reality 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 in this chapter 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.

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