ENHANCING ACCESS TO SOUTH AFRICAN SOCIAL SECURITY BENEFITS BY SADC CITIZENS: THE NEED TO IMPROVE BILATERAL ARRANGEMENTS WITHIN A MULTILATERAL FRAMEWORK (PART II)

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Abstract

This contribution, the second of two parts, reflects on the need and availability of mechanisms to improve bilateral arrangements within a multilateral framework in order, amongst other things, to enhance access to South African social security benefits by SADC migrants. It discusses the impeding impact of the operation of the current immigration law and policy framework, as migrant workers whose employment or right to reside in South Africa has terminated may not have sufficient opportunity to finalise social security arrangements before departure. In addition, the widely reported xenophobic conduct vis-à-vis and treatment of non-citizens further hampers access to social security benefits. The current labour agreements between South Africa and certain SADC countries, as is the case with more recent Memoranda of Understanding, are inadequate for various reasons, and do not qualify as true bilateral social security agreements. Despite guidance provided by the AU Migration Policy and Social Protection Frameworks and related documents, SADC regional social security and migration policy frameworks are still absent. The development of an integrated vision and harmonised policy framework at SADC level with regard to migration needs to be supported at the country level by a coherent and relevant migration policy. While some provision is made for the protection, in social security terms, of the position of non-citizens, SADC instruments invariably qualify the protection available; importantly, such protection is not supported by nationality discrimination and freedom of movement provisions. International instruments provide an important framework for a range of applicable principles for the treatment of non-citizens in social security, the protection of their accrued rights and portability of benefits, and the entering into of bilateral agreements. However, while applicable UN instruments have been widely ratified by most SADC countries, this is not so as regards ILO social-security-related Conventions, with particular reference to ILO migration Conventions. There is an evident need for the adoption of suitable bilateral social security agreements to better regulate entitlement to South African social security benefits and related social security coordination provisions. This flows from the weak provision made in this regard in the South African legal system and the legal systems of other SADC countries. Flexible approaches should be adopted by, for example, initially focusing on areas of concern which are common to South Africa and its neighbouring countries, and which are in need of urgent action (such as access to occupational injuries and disease benefits). It is argued that the bilateral regime should be undergirded by a multilateral framework which contains generally applicable standards and displays a phased and incremental approach in relation to (a) benefits provided for; (b) categories of persons covered; (c) the introduction of the principle of aggregation/totalisation of insurance periods/contributions; and (d) countries included in the agreement.

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I Introduction

This contribution, the second of two parts, focuses on the need and availability of suitable mechanisms to enhance access to South African social security benefits by Southern African Development Community (SADC) migrants – with particular emphasis on the need to develop and implement appropriate bi- and multilateral arrangements. This flows from the impeding impact of the current South African immigration law and policy framework, and the xenophobic conduct vis-à-vis and treatment of non-citizens. Current bilateral arrangements, in the form of labour agreements and Memoranda of Understanding (MOUs), are inadequate and may, in the event of labour agreements affecting migrant workers, even have an exclusionary effect. Dedicated social security and migration policy frameworks dealing with the position of non-citizens are largely absent, both in South Africa and other SADC countries. The protection extended by SADC social security and migration instruments is weak and insufficient, also in view of the absence of provisions which prohibit nationality discrimination and guarantee freedom of movement. It is, therefore, clear that appropriate bilateral social security agreements need to be developed to better regulate entitlement to, for example, South African social security benefits by introducing relevant social security coordination provisions. However, this should be supported by a standardised multilateral framework which could adopt a phased and incremental approach in terms of the benefits (to be) provided; the categories of persons covered; the introduction of the principle of aggregation/totalisation of insurance periods/contributions; and the range of countries included in the agreement.

II Impact of South African immigration law and policy and of xenophobic conduct

Several considerations emanating from the current South African law and policy framework and indications of xenophobic conduct in South Africa emphasise the need for the adoption of appropriate unilateral, bilateral and multilateral responses. Firstly, South African immigration law effectively employs a means of subsistence test to guarantee that only those who can maintain themselves or are sufficiently supported are allowed to enter and remain in South Africa. This follows from the provision in the Immigration Act[1] that a foreigner may be declared an undesirable person if s/he is or is likely to become a public charge,[2] read with the requirement that a temporary residence permit is issued on condition that the non-citizen is not, or does not become, an undesirable person.[3]

In addition, temporary residence permits are issued for a particular purpose and for the duration of the purpose. The non-citizen is expected to return to his/her country of origin or country of permanent residence upon completion

1 Act 13 of 2002.
2 Section 30(1)(a).
3 Section 10(4). See also M Olivier 'Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework (Part I)' (2011) 1 *SADC Law Journal* 138 (hereafter Olivier 2011).

of the purpose of stay or expiry of the permit. In such instances, failure to leave the country will make the non-citizen an illegal foreigner. Section 32 of the Immigration Act stipulates that an illegal foreigner is required to 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'.

In this regard, implications flowing from termination of employment – whether it be in the form of retirement, resignation or dismissal for operational or other reasons – impact negatively on the ability of ex-migrant workers to make necessary arrangements to access social security benefits and related services before they leave South Africa. In terms of their contracts of employment, they invariably have to vacate employer-provided accommodation almost immediately, and as a result of the operation of immigration law in South Africa they would have to leave the country in a very short space of time. It has been reported that migrant workers whose employment has terminated are routinely required to leave South Africa within 24 to 48 hours.[4] In the absence of cross-border portability arrangements (either at scheme or national level), a former migrant worker will effectively be denied access to social security benefits as a result of the impact of immigration law.

It is evident that migrant workers returning to SADC countries who wish to access South African social security benefits face daunting challenges as a result of the complex immigration regime obtaining in South Africa read with, as discussed before,[5] the largely fragmented nature of the South African social security system. The confusion is exacerbated by the fact that most returning migrant workers simply have no or have limited knowledge about their social security status in South Africa and the relevant benefits applicable to them. In addition, as indicated in the course of a study undertaken for the International Labour Organization (ILO) among constituents and stakeholders in the countries neighbouring South Africa, many of the returning migrants are illiterate and are consequently unable not only to appreciate documentation informing them about their rights and obligations, but also to procure and fill out the relevant documents needed to lodge a claim or request a benefit-related service.[6]

The prevailing evidence, therefore, is clear: through available legislative mechanisms, supported by a particular policy approach, the South African government is able to give precedence to immigration laws over labour and social security laws.

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4 M Olivier *Reflections on the Feasibility of a Multilateral SADC Social Security Agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe* (2010a) par 160 ((hereafter Olivier 2010a). The text draws on experiences shared by numerous ILO constituents and stakeholders whom the author met in Lesotho, Mozambique, Swaziland and Zimbabwe during the course of an ILO study in this regard.

5 See Olivier (2011) op cit note 4 at 130 – 46; Olivier (2010a) op cit note 5 par 23 – 46.

6 Olivier (2010a) op cit note 5 par 161.

Secondly, the legislative and policy framework in South Africa[7] (as is the case in other SADC members states as well)[8] is aimed at control and deportation, as is also apparent from the scope and orientation of the labour agreements (relating to the provision of migrant labour to South Africa) between South Africa and a range of SADC countries. As indicated before,[9] this framework is geared towards restricting access, controlling movement, and regulating presence in the host country, and not towards honouring a human rights approach or towards encouraging and supporting migration. Immigration laws and policy in South Africa, as in other SADC countries, generally focus on the effects rather than the underlying causes of migration. An increasingly forceful line on enforcement is adopted.[10]

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 (UN) Committee against Torture recently made the following remark with reference to South Africa's non-compliance with the treaty provisions of the UN Convention against Torture,[11] in relation to migrants:[12]

> The Committee is concerned with the difficulties affecting documented and undocumented non-citizens detained under the immigration law and awaiting deportation in repatriation centres, 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 (arts. 2, 13 and 16).

Similarly, the UN Committee on the Elimination of Racial Discrimination in its concluding observations in South Africa's report on its compliance with the UN International Convention on the Elimination of All Forms of Racial Discrimination, submitted during its Sixty-ninth Session,[13] deplored 'the substantial backlog of asylum-seekers' applications'.[14] The Committee encouraged South Africa to accelerate its measures to reduce the backlog of applications for asylum, '[i]n the light of general recommendation 30 (2004) on discrimination against non-citizens'.[15] The Committee was also concerned

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7 FIDH/International Federation of Human Rights *Surplus People? Undocumented and Other Vulnerable Migrants in South Africa* (2008) 6 (hereafter FIDH 2008).

8 A recent study remarked that '[N]o country, with the possible exception of Botswana, has migrant or immigrant-friendly legislation on the books'; in J Crush, V Williams & S Peberdy *Migration in Southern Africa* (A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration) (2005) 10, 24 (hereafter Crush, Williams & Peberdy 2005).

9 Olivier (2011) op cit note 4 at 128.

10 Oliver (2011) op cit 26.

11 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984; the Convention entered into force in 1987.

12 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) (2006); available at *http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/403/24/PDF/G0740324.pdf?OpenElement*, accessed 21 August 2012.

13 United Nations *Report of the Committee on Elimination of Racial Discrimination: Sixty-Ninth Session 31 July – 18 August 2006* (2006).

14 Contrary to Article 5(d) & (e) of the Convention.

15 See Committee on the Elimination of Racial Discrimination *Concluding observations of the Committee on the Elimination of Racial Discrimination: South Africa* CERD/ C/ZAF/CO/3 19 October 2006, par 21 (hereafter CERD 2006).

about 'allegations of ill-treatment, including extortion, of documented and undocumented non-citizens by law enforcement officials, inter alia in the Lindela Repatriation Centre and at the border, and about the lack of investigation of those cases'[16] – contrary to Articles 6 and 7. The Committee urged South Africa to take appropriate measures to eradicate all forms of ill-treatment; ensure prompt, thorough, independent and impartial investigation of all those allegations; and prosecute and punish those responsible for those acts. It further recommended that South Africa provide non-citizens with adequate information about their rights and the legal remedies available against their violation.[17]

The maltreatment of many intra-SADC and African migrants in South Africa, also in the form of xenophobic utterances and actions, has been widely reported.[18] This applies in particular to specific vulnerable groups, including asylum-seekers and refugees, women involved in informal cross-border trade, and irregular migrants. This was specifically reflected on by the UN Committee on the Elimination of Racial Discrimination in its concluding observations in the report on South Africa's compliance with the UN Convention on the Elimination of All Forms of Racial Discrimination referred to above. The Committee, while acknowledging the 'Roll Back Xenophobia' campaign, was concerned about the persistence of xenophobic attitudes in South Africa and negative stereotyping of non-citizens, including by law enforcement officials and in the media, as well as about reports of racist behaviour and prejudices, particularly at schools and on farms, and the inefficiency of the measures to prevent and combat such phenomena.[19]

These phenomena are contrary to Article 7 of the Convention. Therefore, the Committee recommended that South Africa strengthen its existing measures to prevent and combat xenophobia as well as prejudices which lead to racial discrimination, and that it provide information on the measures adopted with regard to promoting tolerance, particularly in the field of education and through awareness-raising campaigns, including in the media.[20] Subsequent developments in South Africa, with particular reference to the widespread xenophobic attacks of May 2008 which left more than 60 people dead, confirmed the concerns expressed by the UN.

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16 CERD 2006 par 23.

17 Ibid.

18 L Landau 'Democracy and discrimination: Black African migrants in South Africa' (2004) *Global Migration Perspectives No. 5*. See also FIDH (2008) op cit note 8 at 6 and 34; Crush, Williams & Peberdy (2005) op cit note 9 at 27; J Klaaren & B Rutinwa 'Towards the harmonisation of immigration and refugee law in SADC' in J Crush (2004) *MIDSA* [Migration Dialogue for Southern Africa] *Report No. 1* 73 (hereafter Klaaren & Rutinwa 2004).

19 CERD 2006 op cit note 16 par 27.

20 Ibid.

III Current bilateral regime

As noted before,[21] South Africa has entered into so-called labour agreements[22] with a range of SADC countries, including Botswana,[23] Lesotho,[24] Malawi,[25] Swaziland,[26] Mozambique[27] and, apparently, more recently, Zimbabwe.[28] It was indicated that it is unclear whether these bilateral agreements are consistently applied and enforced. It might be that they have, at least to some extent, become obsolete.[29]

Nevertheless, an analysis of the agreements reveals that they were entered into to (tightly) regulate the flow of migrant labour from those countries to South Africa.[30] Social security and related arrangements, particularly as regards portability issues, are dealt with purely as a by-product of the agreements. However, with the possible exception of the 1964 labour agreement regulating

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21 Olivier (2011) op cit note 4 at 145 – 7.

22 The agreements specify conditions and obligations on issues such as recruitment, contracts, remittances and deferred pay, taxation, required documentation, unemployment insurance and appointment of labour officials to be stationed in South Africa.

23 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.

24 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.

25 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.

26 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.

27 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 R Plender *International Migration Law* (1988) 339. See also *http://www.queensu.ca/samp/sampresources/policy.html*, accessed on 7 April 2008.

28 According to February 2007 news reports, an agreement between the South African and Zimbabwean governments was recently signed; information available at *http://www.queensu.ca/samp/*, accessed 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 G Kanyenze *African Migrant Labour Situation in Southern Africa* (Paper presented at the ICFTU – AFRO Conference on Migrant Labour, Nairobi, 15 – 17 March 2004) 10.

29 Olivier (2011) op cit note 4 at 146.

30 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 his/her 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.

the employment of Mozambican mineworkers on certain South African mines,[31] it is clear that the obligations outlined in the agreements[32] 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. Furthermore, there are several other reasons why these agreements, to the extent that they may still be operational, need to be seen as limited in scope and effect, and as insufficient from the perspective of constituting true reciprocal agreement and enhancing the portability of (South African) social security benefits:

- The agreements are not reciprocal in nature, as they stand to regulate the position of nationals of one of the respective countries only.
- Repatriation regulation is dealt with together with labour migration. For example, in terms of the agreement between Swaziland and South Africa, the function of government labour offices and representatives established under the agreement is to –[33]

  > … assist the Government of the Republic of South Africa with the repatriation[34] of sick, injured or destitute Swaziland citizens who are or were 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.

- As suggested,[35] as a rule but subject to some limited exception (i.e. the provisions on workers' compensation in the case of Mozambique), they do not cover public social security transfers, but only employer- and occupational-based payments.
- In view of the above, and given the overly controlled and restricted orientation and purpose of the agreements, apart from providing for some measure of portability, the agreements do not provide for other arrangements typical of coordination 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, it also needs to be pointed out that 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

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[31] The agreement with Mozambique provides for the following, amongst other things:
- The payment of workers' compensation benefits partly in South Africa and partly in Mozambique (Article XXII)
- The transfer of assets in the estate of a deceased worker, as well as other 'unclaimed moneys' due to Mozambique workers, to Mozambique (Article XXIII), and
- Application of South Africa's Occupational Diseases in Mines and Works Act 78 of 1973 to Mozambique migrant workers who have returned to Mozambique, as far as mining-related lung diseases are concerned (Article XXV).

[32] Specifically that (a) deferred pay is to be paid to the foreign national in the sending country upon return to that country; (b) allowances are payable to family members; and (c) monies are 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.

[33] Klaaren & Rutinwa (2004) op cit note 19 at 62.

[34] Article 5 requires prior consultation.

[35] Olivier (2011) op cit note 4 at 147.

Insurance Fund.[36] While this may be seen as an arrangement which benefits employers of such migrant workers,[37] this may leave returning migrants in a precarious position upon return to their home country.

It would appear that the labour-ministries-based and employment-related MOUs between South Africa, on the one hand, and other SADC countries respectively, on the other, are potentially of more significance for purposes of access to and portability of South African social security benefits generally and workmen's compensation benefits specifically. While these MOUs do not, as such, constitute binding agreements which contain operational arrangements for cross-border arrangements, they are nevertheless important framework agreements with a focus on promoting cooperation, easing cross-border travel, and resolving outstanding issues – also in the realm of social security benefits. It is possible to envisage that these MOUs can form the basis for proper bilateral agreements containing detailed operational and other provisions which could, to the extent required, be in the form of legally binding rules on access to and portability of social security benefits. These agreements have been entered into with, amongst other countries, Lesotho,[38] Mozambique[39] and Zimbabwe.[40]

South Africa also signed an agreement with Mozambique which allows for payments in respect of employment injuries and diseases to be made in Mozambique. However, this agreement has been criticised because payments had allegedly at times not reached the intended beneficiaries. Commenting on the position in southern Africa in relation to workers' compensation schemes, Fultz and Pieris remark as follows:[41]

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36 See section 3(1)(d) of the Unemployment Insurance Act 63 of 2001.

37 As they would otherwise have been liable to pay contributions to the Fund as well.

38 Memorandum of Understanding between The Government of the Kingdom of Lesotho through its Ministry of Employment and Labour and The Government of the Republic of South Africa through its Department of Labour on Cooperation in the Field of Labour (signed in Maseru on 30 October 2006). The MOU focuses on cooperation in several areas in the field of labour, including 'compensation in respect of occupational diseases and injuries to citizens of both countries working in either of the two countries' and 'social security' (see Article 1(c) and (d), respectively). Forms of cooperation include exchange of visits at ministerial level and by senior officials (Articles 2(a) and (b)). Under 'Coordination of Programs', the MOU specifically provides that 'The South African Compensation Fund and the Office of the Labour Commissioner of Lesotho will also be encouraged to exchange information and cooperate in processing and finalizing outstanding claims for Basotho ex-mineworkers' (Article 3(5)).

39 Co-operation Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa in the fields of migratory labour, job creation, training, studies and research, employment statistics, social dialogue and social security, signed by the labour ministers of the two countries in 2003. The objective of this agreement is to define the basis for institutional relations under which co-operation ties are developed.

40 Memorandum of Understanding between The Government of the Republic of Zimbabwe and The Government of the Republic of South Africa on Cooperation in the Fields of Employment and Labour (signed at Beit Bridge (border post) on 27 August 2009). The MOU states that its objective is 'to define the basis for institutional relations under which cooperation ties can be developed in the fields of labour and employment.' (Article 1) The forms of cooperation are said to include cooperation and discussions on, among other things, social security; a joint technical task force on occupational health and safety and asbestos; and the 'facilitation of the interface between ex Zimbabwe migrant workers in South African gold mines and the previous employers or their ex-employing agencies' (Article 3(b)(iii), (vi) and (vii)).

41 E Fultz & B Pieris 'Employment injury schemes in southern Africa: An overview of proposals for future directions' (1998) *ILO/SAMAT Policy Paper No. 7* at 18 – 9. See also E Fultz 'Social protection of migrant workers in South Africa' (1997) *ILO/SAMAT Policy Paper No. 3*.

> 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.

Also, a few years ago, Mozambique and South Africa entered into a visa waiver agreement. In terms thereof, citizens of each country are allowed to stay in the other country for up to 30 days without a visa. Effectively, the terms of the visa waiver agreement allows thousands of Mozambicans who shop and do business in South Africa to enter without visas. This has resulted in a visible increase in the movement of people at the Ressano Garcia/Lebombo border post. However, according to media reports, several Mozambicans have overstayed the 30-day period, and have been deported as undocumented non-citizens as a result.[42]

More recent bilateral agreements and arrangements between South Africa on the one hand and Lesotho[43] and Zimbabwe[44] on the other 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 these two countries and South Africa. It simultaneously underscores the need for arrangements which qualify the strict provisions of the immigration legislation, particularly in South Africa. However, it is unlikely that major social security implications would flow from these arrangements, as they are focused on short-term visits to South Africa.

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[42] See Olivier (2010a) op cit note 5 par 147.

[43] 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 (June 2007). The objective of the agreement is to facilitate the movement of citizens of South Africa and Lesotho (other than through designated airports) who intend visiting; 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 move freely between these borders without reporting to the migration officers for examination, as long as they have valid passports (Article 3).

[44] In May 2009, a statement was issued by the South African Minister for Home Affairs to the effect that Zimbabweans no longer needed to apply and pay for visas before travelling to South Africa. Instead, they could apply for a free 90-day visitor's permit at the border; available at *http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2510886,00.html*, accessed on 4 May 2009. 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 had entered South Africa seeking political asylum and employment would be given a 'special dispensation' permit. The permit conferred 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; announcement by the Director-General of the Department of Home Affairs and Immigration Services; available at *http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_2495990,00.html*, accessed on 2 April 2009. Apparently, in terms of recent media announcements, this special dispensation was withdrawn by the end of 2010, and Zimbabweans in South Africa were expected to regularise their presence in South Africa; see, among other things, 'Zimbabweans must get their documents in order', available at *http://www.timeslive.co.za/local/article666297.ece/Zimbabweans-must-get-their-documents-in-order*, accessed on 19 September 2010.

IV Inadequate SADC regional social security and migration policy frameworks[45]

Despite the existence of a range of African Union (AU) and SADC instruments relating to social protection and migration, and the widespread social security reforms taking place in the SADC region, for several reasons the adoption, implementation and monitoring of international and regional standards in this area appear to be problematic. Furthermore, SADC social security regimes have to operate within the confines of a wholly inadequate SADC migration policy and regulatory framework – which, among other things, does not provide for the general freedom of movement of workers and for the outlawing of discrimination on the grounds of nationality.

(a) Policy perspectives: Recent UN findings and the AU context

Policy formulation on migration in SADC might benefit from the findings and perspectives expressed in a 2009 report by the United Nations Development Programme (UNDP) on human mobility and development.[46] The report notes that there is a range of evidence about the positive impacts of migration on human development and the empowering effect on traditionally disadvantaged groups, particularly women. However, host country restrictions can raise both the costs and the risks of migration.

At the continental level, several recent AU documents stress the need to develop appropriate migration policies. Already in 2001, the Council of the AU recommended that its member states –[47]

> … work towards free movement of people and … [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 adopting the AU Migration Policy Framework for Africa[48] and of a common position on migration and development.[49] The policy document essentially provides, in broad terms, for a framework which should be employed by member states and

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45 See M Olivier *Project to Evaluate How the Rights of Non-citizens in the Region should be Considered within the South African Social Security System - Report on Conclusions and Recommendations regarding South Africa's Obligations* (Report prepared for the Department of Social Development, South Africa) (2010b) par V, from where the following text has largely been taken.

46 UNDP *Overcoming barriers: Human mobility and development* (2009).

47 See par 4 and par 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).

48 African Union *The Migration Policy Framework for Africa* Executive Council, African Union, Ninth Ordinary Session, 25 – 29 June 2006, Banjul, The Gambia, Document EX.CL/276 (IX) (2006a).

49 African Union *African Common Position on Migration and Development* Executive Council, African Union, Ninth Ordinary Session, 25 – 29 June 2006, Banjul, The Gambia, Document EX.CL/277 (IX) (2006b) (hereafter African Union 2006b).

regional organisations such as SADC to deal with a range of issues, including labour migration, irregular migration, forced displacement, migration and development, and interstate and inter-regional cooperation. Social issues deserving attention are also mentioned, such as poverty and health. 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. In this regard, the policy framework suggests it is necessary to –[50]

> • [i]ncorporate 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]
> • [p]rovide 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 the following:[51]

- 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'.[52]
- Adopting a comprehensive approach to migration management to address the various issues emerging as a result of migration.[53] 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.
- Since migration is a multi-actor process, facilitating the involvement of different stakeholders such as non-governmental organisations (NGOs), community organisations, migrants, government agencies, etc. in policy formulation and designing and implementation of programmes and projects.
- Cooperating on interstate as well as 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
- Resolving the migration-related conflict between national security/integrity and migrants' rights, striking a balance between the two by, inter alia, harmonising national laws and policies with international standards and norms.

It is significant that the AU Migration Policy Framework recommends the incorporation of provisions from ILO Conventions 97 and 143 and the UN

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[50] African Union 2006b at 9.
[51] African Union 2006b par 7, on the way forward.
[52] African Union 2006b par 7.1.
[53] African Union 2006b par 7.2.

International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (*Migration Convention*) into national legislation.[54]

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, also in relation to their social security entitlements.[55] In fact, developing an integrated vision and harmonised policy framework at the SADC level with regard to migration needs to be supported at the country level by a coherent and relevant migration policy.[56]

Note should also be taken of the AU Social Policy Framework, which stresses the importance of the close link between regional integration at the subregional level (e.g. the SADC level) and the portability of social security rights:[57]

> These policies, led by the AU and the Regional Economic Communities, can support the process of socio-economic integration by enhancing the productivity of the African labour force, providing regional social cohesion and peace, and enabling the integration of the regional labour markets through the portability of social security rights and benefits.

(b) SADC: Contextual and policy perspectives

SADC member states have no clear common approach towards immigration[58] – despite the fact that the AU Migration Policy Framework, supported by the AU Social Policy Framework, contains important guiding principles. In fact, security concerns, in the form of control and deportation, appear to characterise the migration laws and policies of the various SADC countries. Migration of people within the region is viewed as a "problem" rather than an opportunity. According to the International Organization for Migration (IOM),[59] member states' immigration polices limit regional economic growth by distorting the labour market, inhibiting cross-border movements, criminalising informal economies, and marginalising migrants.

Migrants in SADC, in particular intra-SADC migrants, invariably find themselves in a precarious position, also in relation to social security.[60] They face seemingly insurmountable difficulties due to the operation of several

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54 African Union 2006b par 1.1.

55 See International Organization for Migration/IOM *Current Migration Themes in Southern Africa: An IOM Perspective* (2005) 7 (hereafter IOM 2005).

56 Ibid at 7; FIDH (2008) op cit note 8 at 7.

57 See African Union *Draft AU Social Policy Framework for Africa* (Document CAMSD/EXP/4(I)) (2008) par 87; see also par 49(j), which recommends the following action: 'Promote the regional integration and collaboration of social security schemes in African countries in order to ensure the portability of social security rights and benefits of labour crossing the borders'.

58 IOM (2005) op cit note 56.

59 Ibid.

60 See M Olivier *Regional Overview of Social Protection for Non-citizens in the Southern African Development Community (SADC)* (Report prepared for the World Bank) (2009) par 9.1 (hereafter Olivier 2009), from where much of what is contained in the following paragraphs has been taken; see also *http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Labor-Market-DP/0908.pdf*, accessed on 21 August 2012.

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 migrants to be excluded from the home country's operation of social security laws, while nationality and residence requirements often exclude foreigners from the sphere of application of the host country's social security laws. 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, intra-SADC migrants are the subjects of discrimination in law and practice.[61] As indicated before, immigration laws and policy in SADC countries – including South Africa – 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.[62]

In southern Africa, including South Africa, there appears to be insufficient comprehension of the fact that migration is a livelihood strategy and, therefore, crucial for the welfare of migrants, in addition to serving the developmental needs of the host country in particular. As remarked by Black, –[63]

> [T]raditional countries of immigration, such as South Africa, Côte d'Ivoire and Gabon have become more intolerant of migrant workers.

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 proactive immigration policies.[64]

(c) SADC instruments and dimensions

Although limited provision is made in current SADC instruments for dealing with the social security position of intra-SADC migrants, it is nevertheless clear that 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.

Despite the lack of concrete provisions on migrants and their social security position, the SADC Treaty provides an important principled and constitutional framework for the development of a SADC social security regime for migrants. In this regard, the SADC Treaty notably emphasises the (development of

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61 N Baruah & R Cholewinski *Handbook on Establishing Effective Labour Migration Policies in Countries of Origin and Destination* (2006) 154 (hereafter Baruah & Cholewinski 2006).

62 Olivier (2011) op cit note 4 at 128; B Maharaj 'Immigration to post-apartheid South Africa' (2004) *Global Migration Perspectives No. 1* 23; M Siddique *South African Migration Policy: A Critical Review* (2004) 32.

63 R Black 'Migration and Pro-poor Policy in Africa' (2004) *Working Paper C6* 14.

64 Crush, Williams & Peberdy (2005) op cit note 9 at 8 – 9.

the) social dimension in SADC, alongside the need for economic growth. In addition, the Treaty and other SADC documents have adopted regional integration as a central theme. In short, 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[65] and regional[66] integration.

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. 'Human resources development' and 'social welfare' are specifically mentioned as areas on which SADC member states agreed to cooperate 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 macroeconomic and sectoral policies and strategies, programmes and projects.[67]

Recalling the objectives of the SADC Treaty,[68] including regional integration, poverty alleviation and the support of the socially disadvantaged, the Charter of Fundamental Social Rights in SADC (*Social Charter*) imposes on SADC member states the obligation[69] to create an enabling environment so that every worker in the region has the right to adequate social protection.[70] Persons who have been unable either to enter or re-enter the labour market and have no means of subsistence is to be entitled to receive sufficient resources and social assistance.[71] No distinction is drawn between citizens and non-citizens. Such a distinction is also not contemplated, given the Treaty emphasis on regional integration[72] and the Social Charter's focus on harmonising social security schemes.[73]

Even more explicit are the provisions of the Code on Social Security in SADC: they do not allow the disparate treatment of foreigners,[74] and they encourage member states to ensure that all lawfully employed immigrants[75] are protected through the promotion of certain core principles.[76] In terms of two of these principles, migrant workers should, firstly, be able to participate

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65 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 this Treaty' (see Article 1).

66 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'.

67 Article 21.

68 Article 5.

69 Article 3.2 requires of member states to observe the basic rights referred to in the Charter.

70 Article 10.1.

71 Article 10.2.

72 See Article 5(1)(a) of the Treaty.

73 Cf Article 2(e) of the Social Charter.

74 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.

75 As well as self-employed migrant workers (Article 17.2(f)).

76 Article 17 of the Code.

in the social security schemes of the host country[77] and, secondly, enjoy equal treatment alongside citizens within the social security system of the host country.[78] Member states are further encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border coordination principles – such as maintenance of acquired rights, aggregation of insurance periods, and exportability of benefits.[79]

The Code also suggests that illegal (i.e. irregular) residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country.[80] As regards refugees, it stipulates that social protection extended to them should be in accordance with the provisions of international and regional instruments.[81]

Furthermore, the Code incorporates the principle of variable geometry,[82] 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. This might have important implications for the development of multilateral arrangements, a regulatory mechanism which is emphasised by Article 17 of the Code. It might be best to adopt a gradual approach towards cross-country coordination of social security and portability of benefits, commencing with a few countries where this could be achieved more easily, and progressively covering all other SADC countries at a later stage.

There is a clear tendency in both the Social 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 other things, citizenship.

In addition, the provisions of the SADC Draft Protocol on the Facilitation of Movement of Persons – adopted in 2006 but not yet implemented – are important, also in view of the absence of a right to freedom of movement in other SADC foundational documents. Yet, the relevance of the Draft Protocol is of limited value for the purposes of the present discussion. Article 5(2)(d) of the SADC Treaty does not regulate the matter conclusively, but nonetheless 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 recognises visa-free travel for up to 90 days, but subjects the right to residence and

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77 Article 17.2(a).
78 Article 17.2(b).
79 Article 17.2(d) and (e). See also Article 10.5 in relation to pension benefits.
80 Article 17.3.
81 Article 17.4.
82 The principle of variable geometry was already adopted in SADC's Regional Indicative Strategic Development Plan (par 6.2.6).

establishment (in the 'occupation' sense of the word) to restrictions contained in national laws.[83]

In the area of social security, unlike in other areas such as trade,[84] education[85] and transportation,[86] there has been considerable reluctance to develop a SADC-wide policy on the free movement of people.[87] As aptly remarked by Crush, Williams and Peberdy, –[88]

> Freeing up flows of goods and capital while simultaneously trying to shut down the movement of people makes limited economic sense.

The SADC Code on Social Security contains some attempt to address this situation. Article 17.1 stipulates that member states should work towards the free movement of persons, and that immigration controls should be progressively reduced.

In conclusion, the SADC Treaty and – with the exception of the Code on Social Security in SADC – other SADC multilateral instruments do not display strong incentives for the development of social security coordination measures.[89] The principle of non-discrimination contained in Article 6(2) of the Code is a closed list, and does not include the prohibition of discrimination based on nationality/citizenship.

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 reflects 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 Angola and Namibia.[90] Simultaneously, it underscores the need for arrangements which qualify the strict provisions of the 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)

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83 See, respectively, 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. See also Article 20.

84 Cf the Free Trade Protocol of 1996, which envisages, among other things, the establishment of a free trade area in SADC; see Article 2.5 of the Protocol; available at *www.sadc.int*, accessed on 21 August 2012.

85 Cf the Protocol on Education and Training of 1997; available at *www.sadc.int*, accessed on 21 August 2012. 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.

86 Cf the Protocol on Transport, Communications and Meteorology of 1996; available at *www.sadc.int*, accessed on 21 August 2012.

87 Crush, Williams & Peberdy (2005) op cit note 9 at 24. On p 28, the authors remark as follows: 'Cross-border migration in the region is, therefore, governed by national migration and refugee legislation'.

88 Crush, Williams & Peberdy op cit 26 – 27.

89 Also, the Regional Indicative Strategic Development Plan of 2003 (available at *www.sadc.int*, accessed on 21 August 2012) 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. See also Crush, Williams & Peberdy (2005) op cit note 9 at 26 – 27.

90 Angola and Namibia have signed an agreement allowing citizens in border communities to travel freely with only a border pass within a range of 60 km in each country; see MIDSA [Migration Dialogue for Southern Africa] *Report and Recommendations of the MIDSA Workshop on Migration, Poverty and Development 24 – 25 April 2006, Windhoek, Namibia* (2006); available at *http://www.iom.int/jahia/webdav/shared/shared/mainsite/microsites/rcps/MIDSA/MIDSA-Workshop-Report-and-Recommendations-2006-Poverty-Development.pdf*, accessed on 9 April 2012.

Act, 2008, provides for the making of regulations in relation to portability of benefit rights and international reciprocal agreements for the transfer of benefits.[91] As will be discussed below, in South Africa and certain neighbouring SADC countries, similar yet limited provisions relating to the entering into of reciprocal bilateral agreements are contained in the respective legal frameworks.

V Ratification of international instruments

(a) International standards

Several UN and ILO instruments regulate the position of migrant workers (and their dependants), also in social security terms. The UN Migration Convention of 1990[92] protects all migrant workers and their families, save some particular categories of workers, most of whom are protected in terms of other specific international instruments.[93] This Convention provides for, amongst other things, non-discrimination,[94] equality of treatment between nationals and migrant workers as to work conditions and pay,[95] equal access to social security,[96] and the right to repatriate earnings, savings and belongings.[97] The Convention confers specific rights on documented workers,[98] and sets out core rights[99] for both documented and undocumented/irregular migrant workers.

Other UN human rights instruments, treaties and conventions confer protection on migrants as well. These include the following:

- The Universal Declaration of Human Rights (1948)
- The International Covenant on Civil and Political Rights (1966)
- The Convention on the Rights of the Child (1989)
- The Convention on the Elimination of all Forms of Racial Discrimination (1965)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and
- The Convention on the Elimination of All Forms of Discrimination against Women (1981).

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91 Section 54(2)(h).

92 GA Res. 45/158, Annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc. A/45/49 (1990). This Convention entered into force on 1 July 2003. According to the last update on 9 April 2012, 45 countries had ratified/acceded to this Convention; information available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en*, accessed on 21 August 2012.

93 Namely international organisation employees, foreign development staff, refugees, stateless persons, students and trainees; see Articles 1 and 3.

94 Article 7.

95 Article 25.

96 Article 27.

97 Article 32.

98 For example, access to social services, unemployment benefits, and the freedom to choose one's occupation.

99 Including the right to life, the right to a fair trial, the right to treatment equal to that of nationals in matters of working conditions, the right to urgent medical care and treatment equal to that of nationals, and children's right of access to education; see Articles 8 – 35.

These instruments are of significance to the debate in southern Africa on the position of non-nationals generally and on social security specifically, as these UN agreements have been ratified by most SADC countries.[100] The same applies to the provisions of the African Charter of Human and Peoples' Rights, ratified by South Africa in 1996.[101]

Targeted international human rights instruments deal with the position of refugees and asylum-seekers. For example, the Convention[102] and Protocol[103] 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 other things, labour legislation and social security,[104] wage-earning employment,[105] self-employment,[106] professions,[107] and freedom of movement.[108] Asylum-seekers should also be granted the right to work,[109] while employment and social assistance,[110] amongst other things, should not be denied to recognised refugees.

Relevant ILO Conventions and Recommendations protect the rights of all workers irrespective of citizenship. As has been remarked, –[111]

> [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.

Specific ILO instruments protect migrant workers and their families,[112] although only a few SADC countries (among which South Africa does not count) have ratified these instruments.[113] 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 ILO 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,

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100 See below.
101 The Convention provides for, among other things, the right to work under equitable and satisfactory conditions (Article 15), the right to enjoy the best attainable state of physical and mental health (Article 16), and the right to family life (Article 18).
102 Of 1951.
103 Of 1966.
104 Article 24.
105 Article 17.
106 Article 18.
107 Article 19.
108 Article 26.
109 D Weissbrodt *Final Report on the Rights of Non-citizens* (2003) E/CN.4/Sub.2/2003/23/Add.2 par 26.
110 Weissbrodt op cit par 48.
111 See Baruah & Cholewinski (2006) op cit note 62 at 155.
112 For example, Convention 118 of 1962 on Equality of Treatment (Social Security) and Article 10 of Convention 143 of 1975 on Migrant Workers (Supplementary Provisions).
113 FIDH (2008) op cit note 8 at 23.

amongst other things, but subject to certain limitations,[114] social security. This also applies to other rights which have a social security application, such as the right to equal opportunities and vocational training.[115]

ILO social security standards can be classified according to their objective with regard to non-citizen workers.[116] One group of labour standards aims to create equality of treatment between citizen and non-citizen workers.[117] Other instruments seek to ensure that a worker's change of residence does not prejudice his or her acquired rights or rights in the course of acquisition.[118] These instruments contain standards and principles aimed at protecting and streamlining the social security (insurance) rights of non-citizens when they move across borders, and also apply to refugees and stateless persons residing in any of the ratifying states without condition of reciprocity.[119] The underlying purpose of the relevant provisions is to prevent the loss of benefit of periods of employment, contribution or residence needed to qualify for benefits or to calculate the amount of benefits.[120] This will obviate the need to start a new qualifying period or the reduction of benefits due to a change of residence by a beneficiary.[121] Bi- and multilateral instruments are indicated as mechanisms to give effect to obligations under the Conventions.[122] In these Conventions, the territorial principle operative in social security is replaced by a personal entitlement to benefits, which follows the beneficiary. The general principles which constitute the content of bi- and multilateral arrangements in this regard usually relate to the following:

- The choice of law principle, i.e. identifying the legal system which is applicable (as a rule, the applicable law is that of the place of employment, the lex loci laboris)
- Equal treatment (in the sense that all discrimination based on nationality is prohibited)
- Aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and

[114] 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 fulfil the contribution conditions prescribed for the award of a normal pension.

[115] ILO Recommendation 151: Migrant Workers Recommendation, par 8(g). See also Article 1(3) of Convention 111 of 1958 on Discrimination (Employment and Occupation).

[116] J Servais *International Labour Law* (2005) 282 (hereafter Servais 2005).

[117] For example, Convention 111 of 1958 (Discrimination in Respect of Employment and Occupation), Article 2, read with Article 1(a); Convention 102 of 1952 (Social Security (Minimum Standards), Article 68(1) and (2); Convention 118 of 1962 (Equality of Treatment (Social Security)), Article 10; Convention 97 of 1949 (Employment Convention (Revised)), Article 97; Convention 143 of 1975 (Migrant Workers (Supplementary Provisions)): Article 10; Convention 2 of 1919 (Unemployment): Article 3; Convention 168 of 1988 (Employment Promotion and Protection against Unemployment), Article 6.1.

[118] See Convention 157 of 1982 (Maintenance of Social Security Rights), Articles 3(1), 6, 7(1), 8 and 9; Convention 118 of 1962 (Equality of Treatment between Citizens and Non-citizens in Social Security), Articles 5, 6 and 7(1).

[119] Article 10(1) of ILO Convention 118 of 1962 (Equality of Treatment between Citizens and Non-citizens in Social Security).

[120] Servais (2005) op cit note 117 at 284.

[121] Ibid.

[122] Article 4(1) of Convention 157, and Article 8 of Convention 118.

maintaining an entitlement to benefits, and of calculating such benefits), and

- Maintenance of acquired benefits and the payment of benefits to SADC residents, irrespective of where in SADC they reside (the "exportability" principle).

Countries may also place conditions on the payment of non-contributory benefits to beneficiaries residing outside the territory of the competent member.[123] In addition to requiring member states to maintain the rights of workers, ILO Conventions 118 and 157 also require states parties to provide each other with administrative assistance to facilitate the application of the Conventions and the legislation.[124] In particular, Convention 157 requires members to allow beneficiaries to present their claims with institutions in their place of residence and for the institutions to forward them to the relevant institutions of the competent states.[125]

(b) Weak ratification record[126]

Most of the important UN and AU instruments which impact on social rights have been widely ratified by SADC countries. This applies, among other instruments, to the African (Banjul) Charter on Human and Peoples' Rights,[127] the UN International Convention on the Elimination of All Forms of Racial Discrimination,[128] the UN Convention on the Rights of the Child of 1993,[129] and the UN Convention on the Elimination of All Forms of Discrimination against Women.[130] Furthermore, the UN International Covenant on Economic, Social and Cultural Rights has been ratified by 12 SADC member countries, but not South Africa.[131] Most SADC countries have also become party to UN treaties in the area of the protection of refugees.[132] Some of the provisions of

[123] Article 10(3) of Convention 157.

[124] Articles 11 and 12, respectively.

[125] Article 13 of Convention 157 of 1982. In order to facilitate access to the rights, members are required to promote the development of social services to assist (particularly) migrant workers in their dealings with the relevant authorities, institutions and jurisdictions. Article 14 makes special mention of the need for assistance to secure 'the award and receipt of benefits to which they are entitled and the exercise of their right of appeal, as well as in order to promote their personal and family welfare'.

[126] M Olivier 'Case study in Southern Africa' in U Becker & F Pennings (eds) *International Standard-setting and Innovation in Social Security* (2012 forthcoming), from where this part has been taken.

[127] Adopted in 1981, and entered into force in 1986. The Charter has been ratified by all 53 AU member states, including all SADC countries; available at *http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf*, accessed on 19 November 2011.

[128] Ratified by all SADC countries except Angola; available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en*, accessed on 19 November 2011.

[129] Ratified by all SADC countries; available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en*, accessed on 31 January 2012.

[130] Ratified by all SADC countries; available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en,* accessed on 19 November 2011.

[131] Botswana and Mozambique have not ratified the ICESCR; South Africa signed the instrument in 1994, but is yet to ratify same; available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en*, accessed on 28 November 2011.

[132] Crush, Williams & Peberdy (2005) op cit note 9 at 13 – 4; IOM (2005) op cit note 56 at 5.

these treaties deal with social security issues.[133] However, only three SADC countries[134] have ratified the UN Migration Convention.

Furthermore, some attempt has been made to ratify ILO Conventions in the area of labour law (in particular the eight so-called core Conventions).[135] However, the clear picture that emerges is that SADC countries, including South Africa, have generally failed to ratify modern ILO social security Conventions, in particular the main social security Convention, namely Convention 102 of 1952 on Minimum Standards in Social Security, and other migration-relevant Conventions, as well as most of the other post-World War II (WWII) social security Conventions. Virtually all the other ratified social-security-specific Conventions date back many years – to the pre-WWII era; and SADC members have not kept pace with most of the modern ILO Conventions on social security.[136] ILO Convention 102 of 1952 on minimum standards in social security has only been ratified (in part) by the DRC, for example.[137] For the rest, SADC member states' ratification of this Convention is conspicuous by its absence. A few SADC countries, not including South Africa, have ratified migration-related Conventions.[138] It is not easy to understand why the SADC ratification record of ILO Conventions is so weak. It may be that domestic systems are not yet in line with the requirements of these Conventions.

VI Bilateral agreements and portability of social security benefits[139]

(a) Regulatory framework

The mandate to enter into bilateral agreements and the portability of social security benefits are to some extent provided for in certain South African social security laws and to a limited extent regulated in the legal systems of the other ("sending") SADC countries. While some of these laws suggest a (restricted) framework for portability, to be supported by appropriate bilateral arrangements, such arrangements are conspicuous by their absence. Portability of South African social security benefits to other countries is essentially a unilateral measure, from the perspective of both the South African legal

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[133] UN Convention Relating to the Status of Refugees, 28 July 1951; UN Protocol Relating to the Status of Refugees, 31 January 1967; and OAU Convention Governing Specific Aspects of Refugee Problems in Africa, 10 September 1969.

[134] That is, Lesotho, Mozambique and the Seychelles; available at *http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en*, accessed on 9 April 2012.

[135] All 15 SADC countries have now ratified all eight core ILO labour Conventions; available at *http://www.ilo.org*, accessed on 31 January 2012.

[136] For example, only one SADC country (the DRC) ratified ILO Convention 121 of 1964 on Employee Injury Benefits; available at *http://www.ilo.org/ilolex/english/newratframeE.htm*, accessed on 31 January 2012.

[137] In 1987 (Parts V, VII, IX and X); information available at *http://www.ilo.org*, accessed on 31 January 2012.

[138] ILO Convention 97 of 1949 has been ratified by only four SADC countries, namely Lesotho, Malawi, Mauritius and Zambia, in addition to Tanzania and Zanzibar; available at *http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en*, accessed on 31 January 2012. However, no SADC country has ratified the more recent ILO Convention 143 of 1975; available at *http://www.ilo.org/ilolex/english/newratframeE.htm*, accessed on 31 January 2012.

[139] See Olivier (2010a) op cit note 5 par 353 – 512.

system and the legal system of the countries to which the ex-migrant workers have returned.

The South African legal provisions are both inchoate and limited in scope and effect. In the absence of a multilateral arrangement including South Africa, there are only a few examples and little use made of bilateral social security agreements and effective portability arrangements in South African law and practice. In addition, the scope of the agreements provided for by law is limited, as they are subject to restrictions, among other things, which hardly let them qualify as true bilateral social security agreements. The relevant legal provisions catering for bilateral social security agreements and portability are mainly to be found in the Compensation for Occupational Injuries and Diseases Act (COIDA),[140] the Occupational Diseases in Mines and Works Act (ODMWA),[141] the Road Accident Fund Act (RAFA),[142] and the Social Assistance Act (SAA).[143] The assumption on which these provisions are premised is clearly that coverage needs to be reciprocal. The requirement of reciprocity of treatment is also embedded in international (specifically ILO) instruments ratified by South Africa. For example, ILO Convention 19 of 1925 on Equality of Treatment (Accident Compensation), ratified by South Africa in 1926, stipulates that a ratifying member state –[144]

> … undertakes to grant to the nationals of any other member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the *same treatment in respect of workmen's compensation as it grants to its own nationals*.

Other social security laws in South Africa do not provide for cross-border social security arrangements. This is true of the Unemployment Insurance Act[145] – despite the fact that ILO Convention 2 of 1919, the Unemployment Convention, which South Africa has ratified, provides for reciprocity, and requires of ratifying member states to ensure that workers "belonging to" one ratifying member state and working in the territory of another –[146]

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[140] Act 130 of 1993, section 94, which 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. See also section 60.

[141] Act 78 of 1973, section 105 (entitled 'Arrangements by commissioner for payment of benefits on his behalf'), which stipulates as follows: 'The commissioner may with the approval of the Minister make arrangements with any other Government Department or any other institution, organization or authority to undertake the payment, on behalf of the commissioner, of benefits or other amounts awarded under the previous Act or this Act'.

[142] Act 56 of 1996, section 9, in terms of which the relevant Minister may, upon the recommendation of the Board of the Fund, cooperate and enter into agreements with any public or private institution in respect of the reciprocal recognition of compulsory motor vehicle insurance or compulsory motor vehicle accident compensation. The Minister is required to sign the agreement on behalf of the Fund.

[143] Act 13 of 2004, section 2(1), which provides that the Act applies to a non-citizen who resides in South Africa, if an agreement between South Africa and the country of which that person is a citizen, makes provision for the Social Assistance Act to apply to that person. See also sections 5(1)(c) and 16, as well as Regulation 31 of the 2008 Regulations in terms of the Act (the beneficiary has to regularly report to a mission abroad or to any other designated office for purposes of identification and verification).

[144] Article 1(1) of the Convention [emphasis added].

[145] No 63 of 2001.

[146] Article 3 of the Convention.

> … shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter.

In conclusion, as far as bilateral arrangements contained in South African social security legislation are concerned, one is left with two clear impressions: first, that such agreements with other countries – with the possible (limited) exception of the much criticised arrangement with Mozambique – allow for the cross-border payment of employment injury benefits. Secondly, while some unilateral statutory attempt is made to regulate portability on the basis of reciprocal treatment, neither the COIDA, ODMWA, RAFA nor the SAA provisions contain any specific direction as to what the bilateral agreements should ideally include. There is no reference to whether the agreements should, in particular, provide for the range of universally applicable portability principles, namely –

(a) (full) equality of treatment in the respective schemes, transcending mere reciprocity
(b) maintenance of acquired rights (and benefits), where relevant
(c) portability of benefits, and
(d) identification of the relevant legal system.

While it is, strictly speaking, not necessary to provide for this in the governing legislation, a clear legislative indication in this regard might support the inference that an agreement entered into in pursuance of such an enhanced legal provision has, in accordance with the constitutional prescript in this regard, become part of South African law and is, therefore, capable of being enforced on that basis.[147]

Limited provision for bilateral social security agreements and the portability of social security benefits is also made in the law and practice of some of South Africa's neighbouring countries, including Mozambique,[148] Swaziland[149] and Zimbabwe.[150] However, while some of the provisions are progressive,[151] in other cases unilateral arrangements for portability are often absent,[152] or may

[147] See section 231 of the South African Constitution, which requires incorporation of the provisions of the relevant international (including regional) agreement in order to be binding within the domestic law sphere.

[148] See Article 14.5 of the Law on Social Protection, 2007 (No. 4 of 2007).

[149] In terms of section 12(1) of the Non-designated Expatriate Pensionable Offices (Retirement Benefits) Act 15 of 1968, provision is made for the extra-territorial payment of retirement benefits to expatriate pensionable officers. See also section 45(1) and (2) of the Swaziland National Provident Fund Order of 1974, which provides for bilateral reciprocal agreements.

[150] See section 47(1) of the National Social Security Act 12 of 1989.

[151] For example, in the case of Swaziland and Zimbabwe, it is stipulated that the reciprocal agreement may effectively modify the provisions of the legislation itself, in order to give effect to the agreement; see section 45(2) of the Swaziland National Provident Fund Order and section 47(2) of the National Social Security Act (Zimbabwe). Also, in the case of Swaziland, portability is provided for as well as the recognition of periods of membership of a foreign country scheme (section 45(1) of the Swaziland National Provident Fund Order and section 47(1) of the National Social Security Act.

[152] According to Article 15.2 of the Law on Social Protection (Mozambique), subject to contrary provisions contained in 'international conventions' (bilateral agreements?), benefits acquired under compulsory social security are not portable. Also, no provision for portability of benefits is made in the case of the Lesotho legal framework.

focus only on one-sided as opposed to reciprocal arrangements.[153] Also, there are clear indications of nationality discrimination in both the law and practice of some of the SADC countries.[154]

In conclusion, as regards the portability of South African social security benefits, from the perspective of both the South African legal system and practice, and the legal systems and treaty practice of Lesotho, Mozambique, Swaziland and Zimbabwe, it appears that –

(i) formal portability arrangements are essentially of a unilateral nature, provided for in a limited but incomplete range of South African legal provisions and reflected in some legal provisions with limited effect obtaining in the legal systems of some of South Africa's neighbours.
(ii) while social security laws in South Africa and in some of the other countries, notably Mozambique and Zimbabwe, allow for reciprocal bilateral arrangements to facilitate benefit payments, no such agreement has yet been entered into between South Africa and any of the other countries to regulate cross-border payment of South African social security benefits – with the possible exception of the much criticised arrangement with Mozambique for the cross-border payment of employment injury benefits, referred to above.
(iii) in addition, no multilateral arrangement has been entered into between South Africa and the other countries to provide a framework for detailed portability arrangements.
(iv) the cumulative effect of the above state of affairs is that only a limited and partly inchoate statutorily provided portability framework exists, which is not supported by proper bi- and/or multilateral arrangements, and
(v) examples of nationality discrimination in the social security laws of some of the countries, in particular Lesotho, Mozambique, South Africa and Swaziland, impede the entering into of truly reciprocal social security agreements.

(b) The need for an improved bilateral and portability regime

From the discussion above, it is evident that the existing unilateral regulatory arrangements and current fragmented structural and institutional set-up in both South Africa and certain SADC "sending" countries, which inform portability of South African social security benefits to ex-migrant workers who have returned to these countries, are wholly insufficient to effectively and

[153] In Lesotho, the Workmen's Compensation Trust Fund Regulations, 1985 (see Legal Notice No. 42 of 1985, issued in terms of section 23(5) of the Finance Act of 1978) provide for the receipt and disbursements of workmen's compensation and occupational pension payments from South Africa. The Deferred Pay Act 19 of 2008 provides for the repatriation of part of the salaries of Basotho mineworkers, earned in South Africa, to Lesotho.

[154] See, in the case of Lesotho, section 3(1) of the Consolidated National Social Security Bill of 2000 and Parts XI and XII of the Labour Code, Order 24 of 1992. Furthermore, it has been reported that, contrary to the position of Swazi members, non-Swazi members of the Swaziland National Provident Fund would only be entitled to the reimbursement of employee contributions – and not the employer's contributions and interest – if they should wish to reside outside Swaziland; see Olivier (2010a) op cit note 5 par 441.

comprehensively deal with the plight of these ex-workers. There is, therefore, a need for formalised arrangements to be contained in bilateral agreements between South Africa and these countries, possibly within the framework of an overarching multilateral agreement.

However, it is also clear that there are several matters that need to be factored in and attended to in order to arrive at contextualised, informed and integrated arrangements (to be) contained in bilateral agreements and possibly also a limited multilateral agreement capable of successful implementation.

The *first* matter to be considered concerns the focus and orientation of the said (bilateral) agreements. From the perspective of this contribution, it is evident that the (lack of) access to South African social security benefits by ex-migrants who have returned to certain SADC countries is a core issue that needs to be addressed. There is, of course, logically a clear link with access by these workers to such benefits while they are still in, and once they have left, South Africa.

Access to South African social security benefits, against the background of the situation and experience of migrant workers and ex-migrant workers from these countries, involves a range of related issues which need to be reflected in the said agreements(s). These include the following:

(a) Confirmation of the social security entitlements of these migrant and ex-migrant workers
(b) The undertaking, desire and resolve, expressed jointly by South Africa and each of the affected countries, to comprehensively and effectively deal with the various issues on the basis of mutual efforts
(c) Agreement on institutional structures, communication channels and operational entities in South Africa and in each of these countries intended to be instrumental in streamlining and facilitating access to South African social security benefits and services
(d) Modalities of cooperation, liaison and interaction with regard to specific thematic areas, such as data exchange and information-sharing; documentary evidence required and forthcoming from institutions from, among others, those in neighbouring countries; medical assessments; lodgement of claims; verification of information and of compliance with conditions for accessing benefits; payment of benefits; and other relevant areas
(e) An operational framework for the range of portability issues, also dealing with issues relating to tax payments and tax directives, transfer costs, and portability mechanisms
(f) Specific arrangements in respect of access to benefits which should have been accessed but were not, due to an inability on the part of the beneficiaries to access same and/or due to administrative or other reasons
(g) The setting up of joint consultative structures to agree on specific interventions and arrangements that may be required subsequent to agreement having been entered into

(h) Reporting to the respective governments and feedback to relevant stakeholders
(i) Possibly, special funding arrangements to deal with historical claims and, to the extent required, payments to surviving ex-migrant workers and their families
(j) Review of the agreement(s) and structures and mechanisms provided for under same, from time to time, and
(k) An appropriate dispute resolution framework.

As a *second* related matter, one has to consider how extensive the scope of the agreement(s) should be, with reference not only to the range of benefits covered, but also the extent to which social security cross-border coordination principles other than mere portability arrangements should be included in the agreement(s).

As regards the range of benefits, it is evident that (lack of) access to South African workmen's compensation benefits (i.e. occupational injuries and disease benefits) is an area of concern which is common to many of these countries and needs to be covered in the agreement(s) in question. There is also another consideration why workmen's compensation benefits should be the ideal core candidate for inclusion in the said agreement(s), at least in the agreements with Lesotho, Swaziland and Zimbabwe, namely relevant international standards in this area applicable to all three countries concerned, as well as South Africa. ILO Convention 19 of 1925 on Equality of Treatment (Accident Compensation), which regulates this area from the perspective of equality of treatment, has been ratified by Lesotho, South Africa, Swaziland and Zimbabwe. Furthermore, while the current absence of a public contributory-based retirement framework in South Africa (as well as in Lesotho) complicates appropriate bilateral portability arrangements, suitable interventions to ensure adequate access to retirement benefits – should a migrant worker return to one of the neighbouring countries – need to be developed and contained in bilateral arrangements in view of reform developments in this area, as discussed below.

Also, since some categories of migrants from SADC countries, in particular those with South African permanent resident status or South African citizenship, would also qualify for other South African social security benefits, notably unemployment insurance and, in principle, also social assistance benefits, these are areas that could be included in or covered by a bilateral and/or multilateral agreement too.

Is there a need to incorporate other social security cross-border coordination principles in these agreements? Purely from the perspective of this contribution, the major problem appears to be (the lack of) access to South African social security benefits. From that vantage point, suitable portability arrangements need to be in place. Furthermore, it would be prudent to include provisions on the applicable legal system that should inform interpretation and dispute resolution, to the extent relevant. Incorporation of the principle of maintenance of acquired rights (and benefits) could be important as well, if only to stress, among other things, that accrued rights and entitlements to benefits are not

lost or reduced purely because the migrant worker does or has to return to his/her home country. An improved bilateral and portability regime will gain considerable importance the moment South Africa has introduced the envisaged national social security scheme.

In addition, it is suggested that formally requiring equality of treatment as a core principle embedded in the agreement(s) (i.e. equality of treatment of nationals and non-nationals in the social security systems of the respective countries) is of paramount importance. There are several reasons why this is so. Firstly, from the perspective of workmen's compensation, the ILO Convention 19 of 1925 on Equality of Treatment (Accident Compensation), ratified by South Africa and several of its neighbours, stipulates that a ratifying member state undertakes to grant to the nationals of any other member to have ratified the Convention, who suffer personal injury or injury to their dependants due to industrial accidents happening in its territory, the *same treatment in respect of workmen's compensation as it grants to its own nationals*.[155] It would, therefore, be prudent to reflect this international obligation imposed on all four countries, in formal agreement(s) to be entered into.

Secondly, as regards the principle of equality of treatment, this is generally regarded as core to any reciprocal arrangement. While it is true that the main practical focus of formalised agreement(s) would be to facilitate, better regulate and streamline migrant and ex-migrant workers' access to South African social security benefits, it would be improper not to make provision for access to similar benefits emanating from the Lesotho, Mozambique, Swaziland and Zimbabwe social security system, by migrant and ex-migrant workers from South Africa – to the extent that these benefits are provided within the framework of a public scheme. This would seem to also flow from, be informed by and simultaneously reinforce SADC's regional integration agenda, as required by its Treaty of 1992.

In fact, reciprocity appears to be statutorily prescribed for entering into bi- or multilateral arrangements by, in particular, several of the South African social security laws. For example, section 94 of COIDA[156] 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. Also, section 9 of RAFA[157] stipulates that the relevant minister may, upon the recommendation of the Board of the Fund, cooperate and enter into agreements with any public or private institution in respect of the reciprocal recognition of compulsory motor vehicle insurance or compulsory motor vehicle accident compensation.

Furthermore, yet another important reason is suggested as to why equality of treatment needs to be specifically embedded in bi- and/or multilateral social

[155] Article 1(1) of the Convention.
[156] Act 130 of 1994.
[157] Act 56 of 1996. Furthermore, as far as social assistance is concerned, section 2(1) of the Social Assistance Act 13 of 2004 provides that the Act applies to a non-citizen who resides in South Africa, if an agreement between South Africa and the country of which that person is a citizen makes provision for the said Act to apply to that person.

security arrangements applicable to South Africa and the relevant SADC countries. This relates to the absence of binding norms in SADC instruments concerning two important principles which are otherwise regarded as fundamental to the successful implementation of cross-country social security agreements, namely freedom of movement and equality of treatment.[158]

Another social security coordination principle which could potentially be relevant concerns the aggregation or totalisation of insurance periods. In terms of this principle, periods of contribution within the framework of a social security scheme in one country could count towards complying with the eligibility criteria for access to benefits flowing from a (similar) social security scheme in another country – as regulated by the detailed terms of an agreement or other legal instrument.

On the one hand, at this stage incorporating the principle of aggregation/totalisation of insurance periods may not be overly relevant for purposes of cross-border bi- and/or multilateral agreements intended to cover the (limited) range of social security benefits likely to be within the ambit of one or more such agreements affecting, in particular, countries neighbouring South Africa. This flows from the fact that, for the purposes of some of the schemes or categories of benefits to be covered by the agreement(s), aggregation or totalisation of insurance periods is not relevant – specifically in respect of workmen's compensation benefits. Also, little congruence currently obtains between public social security schemes in these countries. For example, some of the countries still lack public schemes in the area of retirement insurance – namely Lesotho and South Africa – and, in the In the case of Swaziland, the public retirement scheme is currently of a provident fund nature.

Yet, on the other hand, it is probably prudent to include this principle, particularly in a possible multilateral framework agreement. The main reason for doing so is that it is clear that the social security reform processes obtaining in countries such as Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe are likely to converge in at least one respect: they are likely to have as their outcome the establishment of pension-oriented public retirement fund schemes. Therefore, while it may be unnecessary at this stage to include this principle in operations-focused bilateral agreements, it may facilitate detailed arrangements to be developed in this regard at a later stage, if the principle is already appropriately recognised in a possible multilateral agreement.

A *third* matter to be considered concerns the appropriate mechanism or construct to provide for the above and related arrangements, such as the existing or revised labour agreements with the countries concerned; existing, revised or new MOUs with these countries; targeted social security bilateral agreements; and/or a social security multilateral agreement involving South Africa and these countries.

[158] See Articles 5(2)(iv) and 6(2) of the SADC Treaty, as well as the discussion above.

It is clear from the earlier discussion in this contribution that, for a variety of reasons, the current versions of the existing labour agreements which South Africa has entered into with several SADC countries do not provide a sufficient basis for capturing the social security arrangements required to deal with the range of issues set out above. It also has to be borne in mind that these agreements are essentially labour agreements, regulating a host of other issues not directly relevant to social security coordination and the portability of social security benefits. Furthermore, there is a perception that, at least from the perspective of the South African government, these agreements are outdated and have become obsolete. The agreements are also decisively one-sided, as they are not intended to regulate reciprocity in the social security sense of the word. In addition, the main focus of the said agreements is to regulate labour flows from the various neighbouring countries to South Africa, as well as the implications resulting from these flows. However, social security coordination and the portability of social security benefits transcend the strict employment-based framework, as other categories of persons from the neighbouring countries, such as those who are refugees or who have obtained South African permanent resident status or citizenship, are also affected by cross-border social security arrangements.

Theoretically, revising these labour agreements to address these issues could be considered. However, given the orientation of these agreements, a revision would not effectively address some of the more fundamental issues raised in the previous paragraph. Renegotiating these agreements in a way which would, for example, cause social security arrangements to be contained in an annexure would not resolve all of these issues, and could delay the introduction and implementation of suitable portability arrangements unnecessarily, as a host of other issues need to be negotiated too, over and above cross-border social security arrangements. Therefore, it is doubtful whether the revision of these agreements would constitute the most appropriate channel to deal with the social security matters highlighted in this report.

Another option would be to consider existing, revised or new MOUs between South Africa, on the one hand, and the affected SADC countries, on the other, as the preferred channel for detailed cross-border social security arrangements. While this is a theoretical possibility, it has to be remembered that these MOUs, by their very nature, do not as such constitute binding agreements which contain operational solutions for cross-border arrangements. In a sense, as indicated above, they are nevertheless important framework agreements with a focus on promoting cooperation and resolving outstanding issues, also in the realm of social security benefits. It is possible, therefore, to envisage these MOUs forming the basis of proper bilateral agreements containing detailed operational and other provisions, which could, to the extent required, be in the form of legally binding rules on access to and the portability of social security benefits.

In the end, and flowing from the conclusions drawn above, including dedicated social security arrangements in targeted, country-specific cross-border bilateral agreements, appears unavoidable. Entering into dedicated

agreements focusing on social security portability and coordination also appears to be an almost universal best practice.[159]

(c) A multilateral framework?

Is there then a need for an overarching multilateral agreement in SADC on social security portability and coordination? Much can be gained from the comparative experience in this regard. According to Baruah and Cholewinski, multilateral agreements –[160]

> [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.

A multilateral approach also eases the bureaucratic procedures by setting common standards for administrative rules implementing the agreement.[161]

Furthermore, while entering into bilateral social security agreements is generally seen as the preferred way to guarantee migrants' social security entitlements, this practice, as noted by Holzmann, Koettl and Chernetsky, '[n]ecessarily results in a highly complex and hardly administrable set of provisions on the portability of social security benefits'[162] – 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 883/2004.[163]

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, more recently, South America. In Africa, a now defunct but successful multilateral agreement operated in the Great Lakes area. Most recently, the EAC has commenced with developing a framework for a multilateral agreement, within the context of the EAC Common Market.

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 the portability of benefits and the implementation of other common arrangements. Therefore, a multilateral agreement effectively undergirds bilateral agreements, which should contain specific and appropriate cross-country arrangements.

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[159] See R Holzmann, J Koettl & T Chernetsky 'Portability regimes of pension and health care benefits for international migrants: An analysis of issues and good practices' (2005) *World Bank Social Protection Discussion Paper No. 0519* 32 (hereafter Holzmann, Koettl & Chernetsky 2005), where they remark as follows: 'The administrative approach to achieve the portability for both pension and health care benefits seems to be [reasonably] cost-effective after a bilateral or multilateral agreement has been successfully concluded'.

[160] See Baruah & Cholewinski (2006) op cit note 62 at 156.

[161] Ibid.

[162] Holzmann, Koettl & Chernetsky (2005) op cit note 160 at 8, 12, 25.

[163] EC Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Another notable advantage of a multilateral agreement is that it can provide for a phased and incremental approach in relation to –

(a) benefits provided for
(b) categories of persons covered
(c) the introduction of the principle of aggregation/totalisation of insurance periods/contributions, and
(d) countries included in the agreement.

In this regard, a multilateral agreement which is essentially and initially limited, and which envisages incremental expansion, could be foreseen.

For example, initially, in the SADC context, a multilateral agreement could provide for the payment of those benefits which accrue to migrant workers who work or have worked in South Africa, but who are unable to access same; the transfer of these and further benefits on a reciprocal basis could be achieved in a next phase.

Also, at the beginning, certain categories of persons such as migrant workers and their dependants could be beneficiaries of the cross-border social security arrangements. This could, over time, be extended to include other categories of persons as well, for example, other categories of non-citizens such as self-employed workers – as is the custom in most other regions where a multilateral agreement is in operation.[164]

Furthermore, as explained above, it might be prudent to provide for the principle of aggregation/totalisation of insurance periods/contributions in relation to public social security schemes of the various countries; operationalisation and implementation of this principle could occur once the social security reform processes obtaining in the relevant countries have converged in the establishment of, for example, pension-oriented public retirement fund schemes which are amenable to cross-border coordination.

Finally, in this regard, it might be advisable to initially include within the sphere of operation of a multilateral agreement those countries which at this stage have the most urgent need to enter into appropriate arrangements. From the perspective of this contribution, there is ample reason to believe that countries such as Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe have much in common in terms of (a lack of) access to certain South African social security benefits to justify their inclusion within a multilateral framework. Other countries could be added from time to time, as the need arose.

In essence then, a limited multilateral agreement could provide a basis for the development of dedicated bilateral agreements stipulating specific cross-country arrangements. This would allow countries to provide on a bilateral basis for practical and other arrangements which may to some extent differ from those contained in other bilateral agreements. For example, in the event of some of the bilateral agreements, the payment and transfer of pension benefits could constitute a primary focal point; in the case of some of the other

[164] Such as in the EU and in Caribbean countries.

bilateral agreements workmen's compensation benefits could be the primary emphasis; in other cases both these categories of benefits would need to be addressed.

It is evident that bi- and multilateral 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 bi- and multilateral agreements, fewer than the 30% of migrants worldwide who return to their home country would have done so.[165] This could have important implications not only for South Africa, but also for other SADC countries, whose citizens are affected by the lack of access to South African social security benefits.

(d) Specific considerations

A recent study indicated that stakeholders in a range of SADC countries agree on the need to adopt both a bi- and multilateral approach to the portability of social security benefits and the introduction of related principles.[166] However, from discussions with various stakeholders, it became clear that comprehensive capacity-building in a range of related areas is needed in order to facilitate informed agreement-making. These areas include the following:[167]

- Understanding the normative, legal and institutional framework of, in particular, the South African social security system and the related immigration context
- A practical understanding of the principles and processes informing cross-border social security agreements
- Developing negotiating skills for purposes of entering into suitable cross-border arrangements, and
- Drafting an appropriate agreement at bi- and multilateral level.

Different role players have to be involved in the above capacity-building and consensus-seeking processes. These include government ministries as well as social security institutions in South Africa and other SADC countries. Also, a practical understanding of the principles and processes informing cross-border social security agreements, developing negotiating skills, and imparting the know-how for drafting appropriate agreements requires specialised skills from outside. Such skills could be sourced from the ILO, for example. Furthermore, SADC, as an organisation, should logically be involved in the development of a multilateral framework. In addition, stakeholders emphasised that it was necessary to raise awareness relating to the need for the process concerning, and the outcome of, developing mutually acceptable solutions to be captured in suitable bi- and multilateral agreements. Awareness should be raised not only with formal stakeholders, but also with the public at large, given the

[165] D Paparella 'Social security coverage for migrants: Critical aspects' Unpublished paper presented to the ISSA European Regional Meeting: Migrants and Social Protection, 21 – 24 April 2004' (2004) 3, 6.
[166] Olivier (2010a) op cit note 5 par 503.
[167] Olivier (2010a) op cit par 506.

widespread impact of South African social security benefits on families and communities in neighbouring SADC countries.[168]

Finally, it is necessary to indicate that several matters of a legal nature have to be taken into account when entering into a bi- or multilateral agreement. Entering into such agreements implies the following:

- The respective countries would have to ensure that the said agreements are introduced into their legal systems in such a way that they are capable of being implemented, applied and enforced, both legally and otherwise
- The legal drafting process would have to involve other country-specific role players too, such as (where relevant) departments of foreign affairs and parliamentary drafters, and
- Changes would have to be effected in the national legal systems and policy frameworks. For example, as discussed earlier, true reciprocal arrangements would imply the removal of nationality-based discrimination from the social security system and legal framework.[169]

VII Conclusions

From a regional (SADC) and South African 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 SADC and, to a lesser extent, the Social Charter are important elements in standardising and improving the social security position of migrants, the supporting migration policy framework is clearly lacking. Factors inhibiting the extension of adequate social security protection to intra-SADC migrants include the absence of freedom of movement and the lack of a prohibition on discrimination based on nationality.

Therefore, a clear need exists as regards the development of a regional policy framework, and of appropriate country policy frameworks, for the consistent treatment of categories of intra-SADC migrants. The AU's Migration Policy Framework and Social Policy Framework may be helpful in this regard. It should also be borne in mind that the recently adopted UN Committee on Economic, Social and Cultural Rights' General Comment No. 19 on the right to social security,[170] embedded in Article 9 of the International Covenant on Economic, Social and Cultural Rights, 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.[171] This national strategy and plan of action to realise the right to social security should take into account, among other things, the rights of the most disadvantaged and marginalised groups, i.e. including categories of non-citizens.[172]

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[168] Olivier (2010a) op cit par 507 – 9.
[169] Olivier (2010a) op cit par 510 – 1.
[170] E/C.12/GC/19 of 4 February 2008 (adopted on 23 November 2007).
[171] E/C.12/GC/19 op cit par 41.
[172] E/C.12/GC/19 op cit par 68.

The rationale for adopting migration policies in SADC which integrate social security and related imperatives is compelling. This flows from, among other things, factors such as the following:

- 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
- The family-based tradition of migration, affecting numerous households in the region, and the impact this has had on household survival and poverty reduction
- The 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
- The imperative of aligning immigration policies and laws with international and regional standards and with those of other countries in the SADC region
- The need to remove unnecessary restrictions in and regulation of the social security and labour law frameworks pertaining to migrants
- The need to develop integrated and coordinated strategies, approaches, responses and arrangements (such as bilateral agreements) to deal in a coherent manner with the situation, also in social security terms, of different categories of migrants, and
- The imperative of regional integration and harmonisation.

Despite challenges, significant possibilities for developing an appropriate SADC social security cross-border regime exist. A core issue in this regard has to be the incorporation of the principle of regional integration, and advancing the cause of the socially disadvantaged.

The development of targeted and flexible bilateral social security agreement(s), undergirded by a context-sensitive multilateral arrangement, is crucial for the improved regulation of the social security position of migrating intra-SADC citizens and residents. Of course, entering into such an agreement needs to be accompanied by changes in the South African legal system and the legal systems of the affected SADC countries, to ensure the applicability and enforceability of agreements entered into in this regard.

The success of any social security agreement between South Africa and the other SADC countries concerned will depend on the proper functioning of each of these systems. Therefore, there is also a need to undertake reforms of the various countries' social security systems to ensure they are conducive to the implementation of any such agreement. In relation to the need for such reforms, the following has been noted:[173]

> 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

[173] Olivier (2009) op cit note 61 at 150 – 1.

legal and policy dispensation does not allow giving effect to protective provisions contained in the relevant agreement … 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;
- 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[ly] vulnerable categories of migrants, such as women, children and, to the extent necessary, undocumented non-citizens.