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Labour market flexibility, migration and inflexible social protection in the SADC region

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LABOUR MARKET FLEXIBILITY, MIGRATION AND INFLEXIBLE SOCIAL PROTECTION IN THE SADC REGION

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Summary

This paper considers the international and regional framework and the (in)flexibility of labour and social regulation, the lack of coordination and the limited nature of exportability and portability arrangements in the Southern Africa Development Community (SADC). The focus is the social protection available to categories of non-citizens migrant workers in certain countries within the region. The development of a comprehensive social security system in SADC is challenging. Existing social protection measures are limited and unable to address the extreme poverty in the region. High unemployment and ineffective labour laws increase the difficulties in providing adequate protection and decent work to all. Multilateral and bilateral agreements are not commonly utilised. The paper will also attempt to consider the way forward for researchers and policy-makers alike.

1. Introduction

“Throughout human history, migration has been a courageous expression of the individual’s will to overcome adversity and to live a better life.”¹

Migration is not a new occurrence but currently the topic assumes a central position on the global policy agenda.² Migration patterns have changed in recent years, irregular migration has increased and a link between migration and development has highlighted positive aspects to migration. In Europe many migrant workers enjoy adequate labour and social protection but this isn’t the case in our region. Migration has increased, amongst other reasons, as a result of globalisation and millions leave their homes seeking higher wages and better opportunities elsewhere. In some countries of destination these workers are welcomed because of the increase demand for skilled workers and as local workers often do not want to accept low wages, low-skilled or manual jobs.³ Push-pull factors include poverty, famine, natural disasters, wars or a lack of decent works in the home country and higher wages, better opportunities or a demand for skills in the host country.⁴ Therefore migration can be a positive experience for some, but many others face challenges such as discrimination, poor working conditions, harassment and a lack of social and labour protection.

2. Migration

2.1 International migration

The United Nations Population Division (UNPD) estimates that there will be over 214 international million migrants in the world in 2010 and nearly half are women.⁵ The International Labour Organisation (ILO) estimates that 105,4 million persons will be economically active migrants in 2010. Of these migrant workers 39,1 million of them are in Africa and Asia and approximately 60.2 million are in Europe and Asia.⁶ Refugees and asylum seekers represent only 7-8% of migrants.⁷ Migration trends in these continents have displayed an increase in movement from rural areas to urban areas. According to the UNDP international migration from poor developing countries (the South) to

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¹United Nations (2006).

²Avato, Koettl and Sebates-Wheeler “Definitions, good practices, and global estimates on the status of social protection for international migrants” Discussion paper no 0909 Social Protection & Labour The World Bank (2009).

³ILO *International Labour Migration. A Rights Based Approach* (2010) 1.

⁴*ibid.*

⁵ Most of the women travel without families.

⁶ILO *International Labour Migration* 18.

⁷*ibid.*

developed countries⁸ (the North) represents only a third, South–South is similar and North–North⁹ represents less than a third. According to the World Bank nearly half of migrants from developing countries migrate to other developing countries. According to the 2010 ILO report on international migration there is considerable evidence that migrant workers can be found in self-employment, vulnerable jobs, flexible contracts and temporary work and are often over-qualified for their jobs.

2.2 *Migration trends in SADC*

People across southern Africa are constantly engaged in some form of movement across borders. For many workers (for example informal traders) their livelihood is dependent on this form of movement. Nearly 120 million people in SADC live on less than one USD1.00 per day and are unable to access basic services.¹⁰ Migration in SADC has been greatly influenced by the increase in migrant workers employed as contract workers, cross border movement and movement from rural to urban sectors as a result of the HIV/AIDS pandemic.¹¹ An important principle to recognise and appreciate is that in this region people often migrate to improve their situation, thus migration can be seen as a regional social protection tool, used to alleviate poverty in a search for better living conditions.¹²

According to the International Organization for Migration (IOM) the increased commercial border traffic across southern Africa can be ascribed to the growth in cross-border formal and informal trade fuelled by high levels of unemployment and the decrease in formal sector employment. Informal cross border trade refers to trade across borders without the necessary documentation. The majority of the informal cross border traders are female and poverty is often the motivation for engagement in this trade.¹³ These female workers are extremely vulnerable to HIV/AIDS because of lengthy periods spend in high transmission areas such as border posts and informal settlements.¹⁴ Lack of the required documentation at border posts increases their vulnerability to exploitation, abuse, and even rape.¹⁵ In Zambia, a cross border traders association addresses issues such as access to health care. Other countries address the HIV/AIDS problem related to these traders through general programmes. It is submitted that the Zambian specific approach offers a better solution to the problems experienced by this specific group of migrants.

Migration in the SADC region is typically characterised by persons migrating among low and middle income countries, where South Africa is one of the main host countries. Migrant workers in this region often seek to alleviate poverty and migrate to countries with a better economy. Migrants from SADC often enjoy less protection in the host country than in the country of origin and must rely on informal social security measures. Employers (providing housing for undocumented migrant workers), burial societies and churches often form part of these informal measures.¹⁶ Undocumented migrants are largely representative of this group of migrants moving between low and middle income countries, increasing the problem of accessing labour and social protection.

In the agricultural sector in SADC, seasonal migrant workers are a common incidence. The South African mine workers, recruited from rural South Africa and countries like Lesotho and Mozambique are examples of “formalised” migrant labour workers. Historically the emphasis was placed on the migrant workers in the gold mines, however, nowadays migrant workers are employed in many other

⁸ Here the country of destination is mostly Europe and the United States of America.

⁹ This takes place within Europe and across the Atlantic.

¹⁰ Southern Africa Trust “Crossing the threshold of regionalism. Can we meet the social cost of integration in Southern Africa?” (2008).

¹¹ Olivier “Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)” International Institute for Social Law and Policy (World Bank Report 2009) 13.

¹² Avato, Koettl and Sebates-Wheeler (2009).

¹³ IOM International Organisation for Migration “Informal Cross-border Trade” (2010).

¹⁴ *ibid.*

¹⁵ International Organisation for Migration “Informal Cross-border Trade”.

¹⁶ *ibid.*

sectors e.g. domestic workers. The following sectors in SADC rely to a large extent on migrant workers:¹⁷ informal cross border trade,¹⁸ mining,¹⁹ the construction sector,²⁰ the transport sector, and commercial agriculture.²¹ The social and labour protection of these workers due to the nature of their employment (i.e. the nature of their work as well as where they perform their duties) is problematic. The large numbers of migrant workers in the region underline the need for social protection of these vulnerable workers in order to ensure that basic human rights are available to all in the region, despite their status and place of work.

3. *Definitional context*

3.1 *Non-citizens*

In most SADC countries non-citizens are classified according to their immigration status and purpose of entry into another country. This classification of the migrant person will determine his or her right to access to social protection and the application of national labour laws in the country of destination. Residency status, contribution and length of employment are key issues. Non-citizens generally include permanent residents,²² temporary residents (this category includes migrant workers),²³ refugees²⁴ and asylum seekers,²⁵ and irregular or undocumented non-citizens.²⁶ Within these categories more vulnerable groups can be identified. Irregular migrant workers are a vulnerable group. Irregular migration and migrant workers in irregular status are the preferred concepts to illegal and clandestine migrants as they provide comprehensive cover for the variety of irregular movements involved. Undocumented migrants do not provide for the migrant entering the country with the required documentation but who becomes irregular at a later stage. Migrant workers often face stringent immigration laws in the country of destination and as a result of these laws enter the country without compliance with immigration laws. This fact is even more marked in the SADC region where natural migration patterns were evident long before immigration laws became relevant.

Recently South Africa's courts have come to the rescue of irregular or undocumented workers and as a main country of destination in the region this will have an enormous impact on the labour law protection of these migrant workers.

3.2 *Social Protection*

It has been stated²⁷ that social protection embraces the traditional measures of social insurance, social assistance and social services, but goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the state. A broader

¹⁷ ILO *International labour migration* 1.

¹⁸ Workers travel with their goods across borders.

¹⁹ Working conditions in this sector is labour intensive and often dangerous. Workers are mostly young men, living in single sex accommodation.

²⁰ This sector consists of semi-skilled and unskilled workers and is, as is the case with the mining industry, labour intensive. After completion on a specific site, these workers often move to a new area. Apart from being isolated, away from their families and culture, they face dangerous working conditions that can result in physical injuries and even death.

²¹ The sector is mostly seasonal and therefore relies on migrant workers. Migrant workers are often more attractive than local labourers to farm owners due to their frequently undocumented status and the belief that they are therefore not covered by stringent labour laws.

²² A permanent resident is a non citizen who has been granted permission to reside in a country indefinitely.

²³ Unlike permanent residents this group of non-citizens has permission to reside in a country for a fixed period.

²⁴ Article 1(a) of the United Nations Convention Relating to the Status of Refugees provides a definition.

²⁵ This is a person who is seeking recognition as a refugee or whose refugee status has not yet been confirmed. Unfortunately they do not enjoy the same rights as refugees and in most instances assistance is only provided in cases of emergencies.

²⁶ This category is in a country without permission, in other words in contravention of the country's immigration laws, and faces arrest and deportation.

²⁷ The Committee of Inquiry into a Comprehensive Social Security System [in South Africa] *Transforming the Present –Protecting the Future* (Draft Consolidated Report) March 2002.

definition is suitable for developing countries in the SADC region to enhance and develop strategies and programmes and to develop an integrated framework with the assistance of other role players to provide social protection. This approach is also evident from the constitutional court's judgment in the *Grootboom*²⁸ case in South Africa. When considering whether social protection is accessible and flexible for migrant workers in SADC one may have regard of the following factors:²⁹

- (i) access to social protection, including social security and social services;³⁰
- (ii) portability of benefits;
- (iii) informal social security; and
- (iv) recruitment-conditions in the country of origin as well as labour market conditions in the host country.

To this one may add the requirements and impact of immigration laws on the movement and status of people; and the scope and impact of labour laws in the host country.

4. *The precarious position of migrant workers*

The migrant worker when leaving his or her family usually loses his or her access to that country's formal social security schemes and is disconnected from informal social security networks available in the country of origin.³¹ Accordingly an inclusive approach has to be evident if the goal is to provide a safety net to all those in need.³²

“Migrant workers often face difficulties in accessing social protection, in particular social security benefits. Not only do they frequently risk losing social security entitlements in their country of origin, but they regularly also encounter restrictive conditions in the host country's national system of social security. For this reason, the ILO has adopted an inclusive approach to try to improve the position of migrant workers. There are two conventions that are particularly important to migrant workers – the Equality of Treatment (Social Security) Convention [118 of 1962] and the Maintenance of Social Security Rights Convention [157 of 1982].”

Migrant workers are frequently employed in precarious jobs, self-employed, employed in the informal economy or in other atypical forms of employment. In 2004 the ILO identified specific vulnerable groups of migrant workers; women, specifically domestic workers,³³ workers in the informal economy, children and the youth, temporary migrant workers and migrant workers in irregular status.³⁴

5. *International Framework*

5.1 *International Labour Organisation*

Since the ILO's inception in 1919, migration has been one of its focus areas and it has a constitutional mandate to improve the protection of migrant workers. The protection of migrant workers cannot be dealt with in an isolated manner as the issue concerns all major aspects of the ILO's work such as employment and social protection and labour standards.³⁵

5.2 *Equal treatment*

The following conventions and recommendations focus on the equal treatment of nationals and non-nationals and endeavours to establish an international system for the maintenance of acquired rights:

²⁸ *Government of the Republic of South Africa v Grootboom* 2000 BCLR 1169 (CC) par 35.

²⁹ See Avato, Koettl and Sebates-Wheeler (2009) 5.

³⁰ In the country of origin and in the host country.

³¹ Avato, Koettl and Sebates-Wheeler (2009) 3.

³² See Van Niekerk, Christianson, McGregor, Smit and Van Eck *Law@work*(2008) 451.

³³ See Smit and Mpedi “Decent work and domestic workers” 2010 *LDD* forthcoming.

³⁴ ILO *International Labour Migration* 94.

³⁵ ILO *International Labour Migration A rights based approach* (2010) 2.

(a) *Equality of treatment (Accident Compensation) Convention 1925 (No. 19) and Recommendation 1925 (No. 25)*

Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, South Africa, Tanzania, Zambia and Zimbabwe have ratified this convention.³⁶

(b) *Equality of Treatment (Social Security) Convention 1962 (No. 118)*

This convention has only been ratified by the Democratic Republic of Congo and Madagascar.³⁷ This convention deals with the equality of treatment of nationals and non-nationals in social security matters and includes refugees and stateless persons.³⁸

(c) *Maintenance of Social Security Rights Convention 1982 (No. 157) and Recommendation 1983 (No. 167)*

This convention has only been ratified by 4 countries, not one of the SADC member states has ratified this convention.³⁹

(d) *Social Security (Minimum Standards) Convention, 1952 (No 102)*

Forty six countries have ratified this convention providing for minimum standards of social security but the Democratic Republic of the Congo is the only SADC country that has ratified it.

5.3 *Migrant worker specific instruments*

There are some international instruments of the ILO that deals specifically with migrant workers. They are briefly highlighted below.

Migration for Employment Convention (revised) 1949 (No 97) and Recommendation (No 86)

Forty nine countries have ratified this Convention. Malawi, Mauritius, Zambia and Tanzania are the only SADC countries to have done so.⁴⁰ This convention is applicable to a person who migrates from one country to another, and a person regularly admitted as migrant for employment.⁴¹ Self-employed migrant workers are, however, excluded.⁴² In the SADC region undocumented migrant workers often engage in informal trading and other informal activities where it is difficult to identify an employer party and they would therefore be classified as self-employed.

Migrant Workers (Supplementary Provisions) Convention 1975 (No.143) and Recommendation (No. 151)

Twenty three countries have ratified this convention in contrast to the 49 countries that have ratified convention 97. None of the SADC countries are members to this convention. The convention places an obligation on member states to respect the basic human rights of *all* migrant workers and it addresses the problems associated with irregular migration. Though there is no formal definition of irregular migration in migrant worker instruments of the ILO, this convention employs words like “clandestine” and “illegal” to refer to irregular and undocumented.⁴³

The Private Employment Agencies Convention 1997 (No, 181)

The Migrant Workers (Supplementary Provisions) Convention does not provide for the private recruitment agencies and the above convention address issues related to these agencies.

³⁶See Van Niekerk *et al* *Law@work*451 regarding the position in South Africa.

³⁷ ILOLEX www.ilo.org/ilolex (03-06-2010)

³⁸ See art 10(1).

³⁹ ILOLEX www.ilo.org/ilolex (03-06-2010).

⁴⁰ ILOLEX www.ilo.org/ilolex (03-06-2010)

⁴¹ See art 11(1). Excluded from this convention are frontier workers, short-term entry of members of the liberal professions and artistes and seamen. See a 11(2).

⁴² Art 11(1) states migrant for employment means a person who migrates from one country to another with a view to being employed otherwise than for his own account.

⁴³ The term illegal is not used in relation to the workers themselves.

5.4 *The United Nations*

On 18 December 1990 the United Nations General Assembly adopted the International Convention on the Protection of the Rights of All Migrant Workers and their Families. Ratification has been slow and currently only 42 states have ratified it, with another 16 being signatories. Lesotho is the only SADC country that has ratified this convention.⁴⁴ The majority of receiving countries have been reluctant to ratify this convention. Countries fear that undocumented migrants are provided with too many rights and others believe that protection of migrant workers is sufficiently covered by other international instruments.⁴⁵

5.5 *The (SADC) regional framework:*

The SADC was formed in 1980.⁴⁶ At this stage their objective was to coordinate development projects to decrease the economic dependence on an apartheid South-Africa.⁴⁷ In 1992 the organisation was transferred into a Development Community. The SADC vision, based on common values and principles is one of a regional community, improved standards of living, freedom and social justice, peace and security for all the people.⁴⁸

In the preamble of the 1992 founding SADC Treaty⁴⁹ the determination to alleviate poverty through regional integration, sustainable economic growth and development is stated as objectives. Article 3 affords SADC legal personality. Signatories of this treaty undertake to harmonise policies, take initiatives to develop all ties across the region and to join in the implementation of all programmes and projects of the community.⁵⁰ In article 21, member states undertake to cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit and to conclude protocols in the different areas of cooperation. The cooperation areas of social welfare, social and human development and special programmes are specifically crucial for purposes of extending social protection to vulnerable workers.

Possibly the most significant instrument in respect of social and labour protection is the Charter of Fundamental Social Rights adopted in 2003. One of the key objectives of this instrument is the harmonisation of legal, economic and social policies and programmes and the establishment and harmonisation of social security schemes.⁵¹ It is the responsibility of governments to create an enabling environment to ensure the realisation of the objectives.⁵² The charter recognises basic human rights and organisational rights as provided for by international instruments, equality for men and women, protection of children and young people, people with disabilities and elderly persons.

Compliance by member states with article 10 remains problematic. In terms of this article, member states must create an enabling environment so that every worker in the region will have the right to adequate social protection and will, regardless of status and type of employment, enjoy adequate protection. In the analysis of the different country case studies in SADC, it is clear that this is a very ambitious provision and countries must overcome many challenges in their quest to fulfil these obligations. Article 16 contains a key provision in that responsibility for the implementation of the charter is given to national tripartite institutions and regional structures. Article 17 of the Code on Social Security provides that member states must ensure that *lawfully employed* immigrants are protected through upholding of certain core principles. These core principles include the *right to*

⁴⁴In 2005 (ILOLEX www.ilo.org/ilolex (03-06-2010)).

⁴⁵The UN Migrants Workers Convention http://www.Radio1812.net/en/themes/the_un_migrant_workers_convention (15-06-2010).

⁴⁶www.sadc.int/index (28-6-2010).

⁴⁷ Founding member states are Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

⁴⁸www.sadc.int/index (28-6-2010).

⁴⁹ The founding treaty was signed in 1992 in Windhoek, Namibia.

⁵⁰ Art 5 of the SADC Treaty.

⁵¹ Art 1.

⁵² Art 2.

participate and enjoy *equal treatment* in social security schemes of the host country, *aggregation* of insurance *periods* and *maintenance of acquired rights* and *benefits* between *similar schemes* in different member states that must be present and the *facilitation of exportability* of benefits that should be ensured. The article extends protection to self-employed migrants on the same basis. An important aspect of article 17 is the provision that these principles should be contained in national laws and in bi-or multilateral agreements to ensure compliance.

The SADC protocols assist in the achievement of a number of main objectives.⁵³ Two protocols, namely the Draft Protocol on the Facilitation of Movement of Persons⁵⁴ and the Protocol on Gender and Development⁵⁵ are relevant for purposes of social protection.

6. *Inflexible social protection in the SADC region*

6.1 *General*

Migrant workers face many challenges in their quest to obtain adequate social protection when they work in host countries. A major challenge is how to move social security benefits between their host country and country of origin, when they return home. The 2008 Policy Brief of the SA Trust describes “portability” as the migrant worker’s ability to preserve, maintain and transfer social security rights independent of nationality and country of residence.⁵⁶

In the SADC region social security aggregation, maintenance and portability arrangements are limited and it can be attributed to the following:⁵⁷

- (a) the limited number of national/public insurance schemes;
- (b) the diversity of schemes;
- (c) several countries do not have the necessary political will; and
- (d) migrant communities and representatives in SADC not being persistent enough in promoting portability arrangements.

The SADC Code on Social Security provides guidelines for the development, coordination and consolidation of social security. Portability indicates cooperation between the social security institutions and both the country of origin and the host country.⁵⁸

Bilateral agreements exist between South Africa and certain neighbouring countries however no multi-lateral social security portability agreement exists.⁵⁹ Though these agreements govern the supply of migrant labour to South Africa, social security provisions are merely secondary. Countries party to these agreements should endeavour to improve on the scope, effect and reciprocal nature of such agreements. A bilateral agreement was concluded between Lesotho and South Africa to facilitate the movement of their citizens and between South Africa and Mozambique. These agreements should include public social security transfers and consideration must be given to aggregation of insurance periods and maintenance of acquired rights.⁶⁰ A founding principle of these agreements should include equality of treatment between nationals and migrant workers with reference to social security.

⁵³ See art 22(1) of the SADC Treaty.

⁵⁴ This protocol was first drafted in 1995.

⁵⁵ The protocol on Gender and Development was signed in August 2008.

⁵⁶ Southern Africa Trust “Crossing the threshold of regionalism. Can we meet the social cost of integration in Southern Africa?” (2008).

⁵⁷ CICALASS and Southern African Trust (2010) par 4.1.

⁵⁸ As mentioned above portability must be distinguished from exportability – see Avato, Koettl and Sebates-Wheeler (2009) 6.

⁵⁹ Included are Zimbabwe, Swaziland, Botswana, Lesotho, Malawi and Mozambique. CICALASS & Southern African Trust (2010) par 4.1.

⁶⁰ *ibid.*

The SADC can learn from the Philippine experience.⁶¹ There portability through bilateral agreements has received the attention of the Department of Home Affairs and the Social Security System (SSS) for the private sector since the 1980's.⁶² Agreements were signed with countries like Austria, United Kingdom, France and Canada.⁶³ The treaties were in line with the Maintenance of Social Security Rights Convention 1982 (No. 157) and in 1994 Philippines ratified this convention (one of only four countries to do so). For the successful implementation of these bilateral agreements, compatibility of social security systems between signature countries is required. This is a major challenge for the SADC region, as so many diverse systems exist and where public insurance schemes are restricted. The bilateral agreements concluded highlight important aspects in the coverage and portability of benefits for migrant workers. Equality of treatment, export of benefits, reciprocity, and mutual administrative assistance⁶⁴ are commonly addressed in these agreements.

Bilateral agreements in the EU poses one of the most successful examples of portability of social security benefits and are based on one source, the EU Regulation 883/2004. For the SADC region, the advantage of one source regulating these agreements can be the provision of common standards and decreasing the administrative burdens imposed on countries of origin and host countries.

It is submitted that SADC countries should endeavour to establish bilateral and multilateral agreements through negotiation processes. This will be a long and complicated process. These agreements pose administrative challenges to both the host and receiving countries. Pensions,⁶⁵ the current most portable benefit, could form the first subject to be regulated by portability agreements in the region. Except for the EU, few examples of bilateral agreements on the portability of health care benefits exist.⁶⁶ However, it must be acknowledged that even in this instance it will be difficult. For example, South Africa still does not have a public universal pension or health scheme and membership of a pension fund or medical aid scheme is not obligatory, unless so stipulated in terms of a contract of employment.

It is suggested by the authors that multi and bilateral agreements are the best way to regulate the portability of benefits, however other alternatives do exist. Where the country of origin has a well-developed pension (public or private) system, the migrant can continue contributions in the home country. Unfortunately many countries in the SADC region lack a well-developed system to accommodate this option. No multilateral agreement exists in SADC, but during the 1960s and 1970s South Africa concluded "labour agreements" with several countries in SADC, though it is uncertain if they are still operational.⁶⁷ These agreements regulate important issues between countries and their workers such as recruitment, terms and conditions of employment, taxation, remittances and formal requirements to allow border transfers.⁶⁸ An innovative provision of these agreements was that of a labour official appointed by the country of origin, situated in South Africa protecting the interests of

⁶¹ In 2003, 3 247 member workers were availed retirement, death and disability benefits as a result of bilateral agreements. The largest number of workers covered was between the Philippines and Austria.

⁶² See Armando T Cruz "Portability of benefit rights: Portability of benefit rights in response to external and internal labour mobility: The Philippine experience." A paper delivered at ISSA 13th Regional Conference for Asia and the South Pacific (2009).

⁶³ *ibid.*

⁶⁴ State parties undertake to pay the benefits provided in the national legislation regardless of nationality and residence of beneficiaries.

⁶⁵ This includes old-age, disability and survivor benefits.

⁶⁶ See Armando T Cruz "Portability of benefit rights: Portability of benefit rights in response to external and internal labour mobility: The Philippine experience" Paper delivered at ISSA 13th Regional Conference for Asia and the South Pacific (2009).

⁶⁷ With Mozambique, Malawi, Lesotho and Swaziland. Also with Botswana and Zimbabwe in 2007. See Olivier "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)" International Institute for Social Law and Policy (World Bank Report 2009)70.

⁶⁸ Agreements obtained (<http://www.queensu.ca/samp/Treaties/Botswana>) for Malawi, Botswana and Swaziland (25-06-2010).

migrant workers in South Africa and acting as a link between the sick workers and the government on their repatriation.⁶⁹ According to article 3 of the agreement with Botswana and Lesotho the labour representative could consult with authorities on conditions of employment and welfare and housing matters. Though limited in scope, not reciprocal in nature and mostly applicable to employers not governments, relevant SADC countries should consider the revival of such agreements as it can improve working conditions and provide support to migrant workers in certain circumstances. It may be seen as a convenient starting point in a progressive approach to extend and increase the protection of migrant workers.

6.2 *Statutory and other provisions for the portability of social security benefits in SADC*

Only two countries in SADC, South Africa and Swaziland⁷⁰ provide for portability of benefits through legislative measures. In South Africa section 94 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)⁷¹ provides that the minister may issue directions to give effect to the provisions of any agreement between South Africa and any other state where provision is made for reciprocity in respect of compensation payable to employees for employment injuries resulting in death or disablement. Section 60 provides that an employee residing outside South Africa or absent from the country for six months can be awarded a lump sum, instead of a monthly pension.⁷² In South Africa the coverage of social assistance can be extended through legislative provisions to non-citizens if a bilateral agreement exists.⁷³ Section 45(1) of the Swaziland Provident Fund Act allows for a reciprocal agreement with another government with a similar fund or scheme.

Examples of legislative provision for bilateral agreements exist as indicated above, but are isolated and adequate protection for migrant workers depend on more countries initiating negotiations for the conclusion of these agreements and legislative provisions regulating such. In SADC the remittances of migrant workers are often used to alleviate extreme poverty and to cover the family's basic needs such as food and the payment of tuition fees. Migrant workers are often reluctant to use formal institutions due to high fees and cumbersome administration procedures and monies are transferred informally through money brokers and family members.⁷⁴ This practice is problematic due to possible theft and fraud.

Though not regulated by legislation, an agreement exists between Zambia and Malawi for mine workers from Malawi working in Zambia. According to this agreement the Workers Compensation Fund in Zambia should identify a medical practitioner in Malawi to assess workers for occupational diseases.⁷⁵

6.3 *Non-citizens, including migrant workers and social protection in SADC*

6.3.1 *Introduction*

In the Southern African Development Community (SADC) migration is a social protection tool for many. These workers leave their country of searching for decent work and an improved quality of life. Though most migrant workers are still male, there has been a significant increase in female migrant workers in this region. Unfortunately immigration policies in SADC concentrate on deportation and not on freedom of movement and the protection of human rights of migrants.⁷⁶

6.3.2 *Social protection for (migrant) workers in SADC*

⁶⁹ See art 1 of treaty series No3/1986, art 1 of No 3/1973 and art 1 of No. 10/1967 that mentions a Government Labour Representative.

⁷⁰CICLASS & Southern African Trust (2010) par 7.

⁷¹Compensation for Occupational Injuries and Diseases Act 130 of 1993.

⁷² These benefits can be remitted through major recruitment agencies or inter government agreements.

⁷³S 2(1) of the South Africa Social Assistance Act 13 of 2004.

⁷⁴ILO *International Labour Migration* 44.

⁷⁵Avato, Koettl and Sebates-Wheeler (2009). 30.

⁷⁶ Olivier "Regional overview of social protection for non-citizens in the Southern African Development Community (SADC)" Report commissioned by the World Bank (2004) 8.

A characteristic of the Southern Africa Development Community (SADC) region is that most of the social security schemes provide protection only to those in formal employment (in the formal economy) and this despite the continuous growth of the informal economy. Many migrant workers in this region are employed in the informal economy, including informal cross border traders. The Charter of Fundamental Social Rights in SADC contains important provisions relevant to labour and social security protection of workers,⁷⁷ and aims to create an enabling environment so that workers who have reached retirement age can maintain a decent standard of living. The right to adequate social protection and adequate social security benefits are provided for in article 10. These rights apply to every worker regardless of status and type of employment. It must however be noted that this charter is not as such directly enforceable. See below a short summary of existing social security in the region.

Malawi:

Malawi is one of the smallest countries in SADC.⁷⁸ In Malawi a distinction is drawn between legal and illegal immigrants. Legal immigrants consist of permanent residence permit holders, business resident permit holder, temporary permit holders and student permit holders.⁷⁹ The Social Welfare Department provides social assistance but social assistance even for citizens is limited. A social grant system as in South Africa does not exist in Malawi. Seasonal workers often migrate from rural areas to urban areas, seeking temporary employment. If they are unable to find employment they are left without money to return to their homes and the Social Welfare Department will assist in the return of these workers.⁸⁰ According to the World Bank report,⁸¹ temporary residents have access to emergency health care, a universal/ bottom line benefit and access to public schools but any other social services are linked to their contract of employment. Social insurance benefits for migrant workers are often linked to formal employment, excluding workers in the informal economy and other atypical migrant workers. Clearly undocumented migrant workers will not benefit.

There is no universal old age benefit. People who have never entered the formal labour market are dependent on their families and communities for care and support. Unemployment benefits are not provided for by the government. Section 5 of the Employment Act 6 of 2000 contains an anti-discriminatory clause, prohibiting discrimination against another person on the basis of amongst others nationality, race or political origin. Section 6 provides for equal pay for work of equal value without discrimination based on a number of listed grounds including nationality. The above protection of fundamental rights provided in labour laws can be an important tool to ensure equal treatment in the workplace to categories of non-citizens. Refugees are not able to enter the formal labour market and are thus denied employment benefits and related social security benefits. As in many SADC countries undocumented or irregular migrant workers are denied access to social services because of their status.

Limited portability arrangements exist. Portability of occupational pension is available to permanent residents for a period of 12 months after the return to the country of origin.⁸² A large number of Malawian citizens are employed in the mining industry in South Africa and Zimbabwe. On their return they have access to their pension through the Ministry of Labour. Regrettably many workers

⁷⁷Olivier and Mpedi “The Extension of Labour Law and Social Security Protection to Non-Formal Sector Workers - Experiences from SADC and the Caribbean” Paper presented at the 5th Asian Regional Congress of the International Industrial Relations Association (IIRA) (Korea 2004).

⁷⁸Covering 94 276 sq km. See Institute of Policy Research and Social Empowerment (IPRSE) “Access to Social Services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC) Malawi country report” World Bank Report (2007) 1.

⁷⁹*ibid* par 2.

⁸⁰*ibid* par 2.3.

⁸¹*ibid* 18.

⁸²Institute of Policy Research and Social Empowerment (IPRSE) “Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC) Malawi country report” World Bank Report (2007) par 4.2.

have to wait years before they have access to these funds, and survivors face even more challenges due to administrative problems and incapacity on the side of the Ministry and the occupational funds.⁸³

South Africa:

In 2004, 5 million people visited South Africa from neighbouring countries. This is 4 million more than in 1990.⁸⁴ Large numbers of migrants entering any host country places pressure on public funds, employment opportunities and social security provisions. Many migrant workers in the region come to South Africa in search for better opportunities and to escape extreme poverty in their mother country.

In South Africa permanent residents, temporary residents, refugees, asylum seekers and undocumented migrants can all be described as non-citizens. A permanent resident in South Africa is granted all rights in chapter 2, the bill of rights, of the Constitution (except for example political rights reserved for citizens). In South Africa citizens and permanent residents (last mentioned since 2004) have access to social assistance, national and occupational old-age and disability pensions, unemployment benefits, public housing and public schooling.⁸⁵ Social assistance in South Africa is regulated by the Social Assistance Act 13 of 2004 and its regulations. The payment of benefits is not universal and the poor are often excluded because they do not meet the required conditions. The constitutional court in the *Khosa* case⁸⁶ found the provisions of the Social Assistance Act that excluded permanent residents from social assistance, unconstitutional. According to the constitutional court temporary workers, and “illegal residents” have only a tenuous link with the country and it may therefore be reasonable to exclude them from certain legislative provisions concerning social assistance.

Similar to Swaziland, temporary residents do not have access to social assistance grants. Public health care is not available to temporary residents though they can enjoy private coverage in terms of the Medical Schemes Act 131 of 1998. Temporary residents will have access to benefits from the Road Accident Fund, however section 3(1)(d) of the Unemployment Insurance Act 63 of 2001 excludes temporary residents who enter the country in terms of a fixed contract and must return to the country of origin on termination of the contract. The Compensation for Occupational Injuries and Diseases Act 130 of 1993 does provide that if an employee or dependant of an employee to whom a pension is payable is resident outside the Republic the Director-General may award a lump sum as determined by him in *lieu* of such pension. Temporary residents are unable to access free primary education or monetary assistance provided by government in the form of a loan for tertiary studies.

The constitutional protection of social security rights in SADC varies from country to country. In Botswana and Zimbabwe there is no constitutional protection. South Africa, like Tanzania, has a constitutional obligation to give priority to the welfare of the people and a rights-based approach to social security flows from this constitutional inclusion. The protection of equality and prohibition of discrimination provision⁸⁷ has proved an important tool for courts to extend access to social security to non-citizens⁸⁸ in South Africa. The *Larbi-Odam* case⁸⁹ dealt with foreign teachers temporarily employed in South Africa. The Constitutional Court held that a provincial regulation which prevented all non-citizens from being appointed into permanent teaching posts amounted to unfair discrimination. Though citizenship is not a listed ground in the Constitution, the court held that it is a

⁸³ *ibid.*

⁸⁴ Southern Africa Trust (2008) 5.

⁸⁵ CICLASS and Southern African Trust (2010).

⁸⁶ *Khosacase* 2004 (6) BCLR 569 (CC).

⁸⁷ S 9.

⁸⁸ See the *Khosacase*.

⁸⁹ *Larbi-Odam v MEC for Education (North-West Province)* 1998 1 SA 745 (CC).

suspect ground because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens as human beings.

In South Africa, unlike in Malawi, refugees are not required to stay in camps. In terms of section 27 of the Refugees Act a refugee in South Africa enjoys full legal protection including the human rights in the Constitution. Refugees are also entitled to seek employment.⁹⁰ In *Union of Refugee Womens v Director: Private Security Industry Regulatory Authority*⁹¹ the court emphasised the special vulnerability of refugees as they are, per definition vulnerable due to the flight from a threat of serious human rights abuse.⁹² The applicants in this case challenged the constitutionality of section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2000, averring that it discriminates against them on the basis of their refugee status and thus infringes their right to equality. In terms of the said provision social security service providers are required to register with a regulatory authority - citizenship or permanent residence is however required for such registration. The court held that while this section limits their rights to work in the private security industry, it does not prevent them from seeking employment in other industries and therefore section 23(1)(a) was not a unjustifiable violation of their right to equality.

In *Discovery Health Ltd v CCMA & others*⁹³ an Argentinean national was lawfully resident in South Africa but not legally permitted to work at the time in question. The labour court commented on the effect of globalisation on international labour migration, noting that many people migrate to escape poverty, unemployment and other social, economic and political pressures.⁹⁴ The court took note of the ILO's international instruments, in particular addressing the tension between the right of states to protect their labour markets and the protection of fundamental rights of migrant workers. The court found that though the worker did not have a valid work permit at the time, he was an "employee" in terms of South African labour legislation⁹⁵ and enjoyed protection as such. In a recent case concerning a prostitute it was held that a person who performs an illegal activity could still be regarded as an "employee" as the right to fair labour practices in the bill of rights extends to everyone.⁹⁶

These cases indicate the willingness of the South African courts to give a wide interpretation to the definition of employee and to have regard of the vulnerability of undocumented workers in order to extend the fundamental right to fair labour practices to "everyone" working within the South African borders.

In *Lawyers for Human Rights v The Minister of Home Affairs*⁹⁷ the court stated that the very fabric of our society and the values embodied in our Constitution could be detracted from if we violate the freedom and dignity of "illegal" foreigners, arriving poor and desolate without any protection. To preserve our own national integrity South Africa cannot deny vulnerable groups basic human rights just because they have not entered the country formally and correctly. Before 2004, legislation prohibited asylum seekers to study or work until they received refugee status.⁹⁸ This left them without any form of income or support, whilst they awaited refugee status. Unfortunately great delays are experienced in the processing of such applications. In *Watchenuka and another v The Minister of*

⁹⁰ See s 27(a) and (f).

⁹¹ 2007 4 SA 395 (CC).

⁹² See par 28 and 29.

⁹³ 2008 7 BLLR 633 (LC).

⁹⁴ *Ibid* 45.

⁹⁵ S 213 of the Labour Relations Act 66 of 1995.

⁹⁶ *Kylie v CCMA & others* Case No CA10/08 (LAC judgment of May 2010).S 23 of the Constitution of the RSA, 1996.

⁹⁷ 2004 4 SA 125 (CC) par 20. In this case the constitutional court had to consider two provisions of the Immigration Act 13 of 2000 regulating the treatment of illegal foreigners at ports of entry pending their removal.

⁹⁸ Reg 7(1)(a) of the Regulations to the Refugees Act.

*Home Affairs and others*⁹⁹ the Supreme Court of Appeal found these provisions unconstitutional and although they are now allowed to work, the lack of documentation often force them into low paid and low skilled jobs.

By adopting a purposive and international law friendly approach within our constitutional context, the South African courts have played a major role in the extension of labour and social protection to vulnerable groups.

Since April 2009, Zimbabweans who want to enter South Africa seeking asylum and employment can apply for a free 90-day visitor's permit at the border and can then apply for casual work in South Africa.¹⁰⁰ A special dispensation permit will ensure that asylum seekers and job applicants have the right to work, access to education and basic health care for a six month period and will prevent deportation. This special regulation will minimise the numbers requesting political asylum as most Zimbabweans are entering South Africa as economic migrants. The Home Affairs Deputy Minister said that this important decision acknowledges that the migration patterns between South Africa and Zimbabwe have changed permanently. This arrangement is unlikely, however, to be a permanent one.

In South Africa social insurance is mostly available to people in formal employment (including documented migrant workers). Permanent residents employed in the formal economy will have access to certain social security schemes such as benefits under the Road Accident Fund,¹⁰¹ compensation for an occupational injury or disease¹⁰² and unemployment insurance benefits in terms of the Unemployment Insurance Act.¹⁰³ The atypical employed, including the self-employed and workers in the informal economy are excluded from unemployment insurance and compensation for occupational injuries and diseases. Domestic workers in South Africa are also excluded from compensation for occupational injuries and diseases coverage.¹⁰⁴

As social insurance is mostly available to migrant workers in formal employment and benefits under these schemes are often only payable to workers who fit the "employee" label, it is very important to consider who qualifies as an employee in South African laws. During 2006 the ILO adopted the Employment Relations Recommendation (No 197) and this was closely followed in South Africa with a rebuttable presumption being introduced during 2002. The presumption is applicable when a person claiming to be an employee establishes one of the factors listed in section 200A.

Mauritius:¹⁰⁵

In Mauritius there is no distinction made between temporary and permanent residents, both groups are classified as residents. This means that migrant workers, non-citizen students and permanent resident permit holders are known as residents, though their rights and obligations are linked to the length of residence and status as an immigrant.¹⁰⁶ The National Pensions Act No. 44 of 1976 defines an employee as: "a person who works under a contract of service or apprenticeship, whether written or oral, express or implied, for another person". An independent contractor is excluded, and similar to the position in South Africa the Minister can prescribe any other category of person as employees.¹⁰⁷ There are no refugees or asylum seekers as this status is not granted. Undocumented non-citizens are deported when discovered. Social assistance is only available to citizens. In respect of public, occupational and private provision of old age pension, disability pension and unemployment benefits,

⁹⁹2004 4 SA 326 (SCA).

¹⁰⁰<http://www.news24.com> (15-06-2010).

¹⁰¹ See Road Accident Fund Act 56 of 1996.

¹⁰²COIDA 130 of 1993.

¹⁰³63 of 2001.

¹⁰⁴ See Smit and Mpedi "Decent work and domestic workers" 2010 *LDD* forthcoming.

¹⁰⁵CICLASS and Southern African Trust (2010) ch 3.

¹⁰⁶*ibid.*

¹⁰⁷ See s 2(c).

citizens, permanent- and temporary residents (conditions apply) do have access to these systems. Citizens and “residents” have access to free health care, and to sickness benefits according to applicable labour laws. Public housing is only available to citizens, however free public schooling is available to citizens and “residents”. There is a Migrant Workers Unit, which is part of the Ministry of Labour that ensures that migrant workers receive equal treatment with nationals in respect of housing, food and employment conditions. Section 3 of the Nationals Pension (Non-Citizens and Absent Persons) Order¹⁰⁸ provides membership to foreign nationals after a two year residence period. Foreign nationals who do not meet the residency requirement enjoy coverage under the Workmen Compensation Act, but the level of protection for industrial injuries varies from those national receive under the National Pensions Act and thus does not provide equal treatment.¹⁰⁹ Mauritius does not comply with the obligations imposed by the above convention and must report to the Committee of Experts during 2010. The Committee’s comments will be considered during the revision of the National Pensions Act.

Regulation 3(1) of the Social Aid Regulation 1984 provides that social aid is payable to a citizen or resident residing in the country, however section 4 of the Deportation Act provides for the Minister of Defence and internal security to deport a person who is or is likely to become a charge on public funds.

In contrast to South Africa, Mauritius does have an agreement with the UK in respect of portability of benefits.

Botswana:

Social assistance is generally only available to citizens,¹¹⁰ however the programme for Destitute Persons, similar to social relief in South Africa, provides short term relief to all destitute persons.¹¹¹ Destitute persons are classified as an individual who is unable to engage in sustainable economic activities because of a disability or chronic health condition, or as a result of old age, mental or physical or emotional disability or a terminally ill destitute person and children in need of care are included.¹¹² As beneficiaries must produce registration cards this programme is limited to citizens.¹¹³ Temporary assistance¹¹⁴ is available to non-citizens under this programme. A universal old age pension scheme is available to citizens, 65 years and older, and this is not subjected to a means test as is the case in South Africa. Arrangements for the portability of this benefit are not currently available. Disability pension and unemployment benefits are not available in Botswana.

Swaziland:

Only citizens of Swaziland have access to social assistance.¹¹⁵ All categories of non-citizens do have access to health care in public institutions.¹¹⁶ Significantly, membership to the Swaziland National Provident Fund is mandatory for all employees, despite their nationality.¹¹⁷ Domestic workers, casual

¹⁰⁸ of 1978.

¹⁰⁹ ILO *Report of the Committee of Experts on the Application of Conventions and Recommendations (Report III (Part IA))* (2009) 619.

¹¹⁰ Citizens 65 years and older qualify for the old age pension.

¹¹¹ CICLASS & Southern African Trust (2010) par 3.3.

¹¹² See par 2.2 of the Botswana Revised National Policy 2005.

¹¹³ Ntseane & Solo “Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC): Botswana country report.” A report to the World Bank (2007) 9.

¹¹⁴ A maximum of 6 months.

¹¹⁵ Social assistance consists of an old age grant when 60 years old, subjected to a means test.

¹¹⁶ Public Health care is provided in terms of the Public Health Act of 1969. Poor people cannot be refused medical care. Non-citizens can obtain private medical coverage.

¹¹⁷ The Industrial Relations Act, 2000 s 2 defines an “employee” as a person, whether or not the person is an employee at common law, who works for pay or other remuneration under a contract of service or under any

workers and the self-employed are, however, excluded from this Fund. Permanent and temporary residents can access sickness benefits if they are in formal employment. The Workmen's Compensation Act provides for the workers' compensation and occupational injury scheme that extends coverage to employees in the private and public sector. Similarly to South Africa domestic workers and the self-employed are excluded. A proposed unemployment insurance scheme will provide benefits to all categories of non-citizens in formal employment. Though social assistance is only available to citizens, many categories of non-citizens qualify for benefits through social insurance schemes in operation within formal employment. Unfortunately non-citizens engaged in the informal economy are vulnerable and without protection. All people have access to compensation for bodily injuries and or death arising from a motor vehicle accident. As in South Africa the fund is financed through fuel levies.

*Lesotho*¹¹⁸

Lesotho faces many challenges - poverty, food insecurity and a high occurrence of HIV/AIDS.¹¹⁹ These challenges increase the problems associated with inadequate social protection in developing countries for nationals and even more so for non-citizens migrant workers. In contrast with South Africa, undocumented non-citizens in Lesotho represent the minority of migrants. Undocumented non-citizens in Lesotho only have access to public health care. Sickness benefits, including maternity leave benefits are limited to occupation. Since these workers are often afraid of discovery by authorities and consequent deportation, they will probably not access such occupational schemes.

Social assistance in Lesotho is available to citizens, refugees¹²⁰ and asylum seekers¹²¹ that comply with prescribed requirements. Legislation does not explicitly provide for access to social assistance for permanent residents. Unlike South Africa¹²² permanent residents have not challenged this in court. Undocumented non-citizens have no access. Significantly, a public old age pension scheme is available to all citizens subject to qualifying conditions. Unlike in South Africa pension schemes are limited in occupational and private sectors. Permanent and temporary residents¹²³ can only rely on private arrangements though indigent refugees and asylum seekers have access to public pension schemes. Permanent and temporary residents, refugees and asylum seekers enjoy access for injury on duty coverage and private arrangements are available. Unemployment benefits are available to citizens, though limited in the private sector. Permanent and temporary residents, refugees and asylum seekers have to rely on private arrangements. All persons, except undocumented non-citizens enjoy access to free primary education in public and church schools.

Zambia:¹²⁴

Social security coverage is limited to formal sector workers, reflecting a social insurance model.¹²⁵ This is problematic as around 10% of workers are employed in the formal sector, leaving the majority of workers in the informal economy in a precarious position.¹²⁶ Informal economy workers are reliant on informal social security arrangements. The Minister of Community Development and Social Services do provide assistance in kind or cash to vulnerable groups, including permanent residents,

other arrangement involving control by, or sustained dependence for the provision of work upon, another person.

¹¹⁸Bitso "Access to social services for non-citizens and the portability of social benefits in Lesotho" in CICLASS & Southern African Trust (2010).

¹¹⁹*ibid.*

¹²⁰ Many refugees are employed and can sustain themselves.

¹²¹ Processing applications from asylum seekers is not a lengthy process in Lesotho due to the limited number of applications received.

¹²² See again the *Khosa* judgment in the South African context.

¹²³Including contract migrants.

¹²⁴ A World Bank Report Muyembe "Access to social services for non-citizens and the portability of social benefits within the Southern African Development Community (SADC): Zambia Country report" (2007).

¹²⁵ Retirement, disability survivor and retrenchment protection is provided.

¹²⁶ Labour Force Survey 2005.

temporary residents and contract migrant workers.¹²⁷ Permanent and temporary residents and refugees employed in the formal sector enjoy benefits available through their employment.¹²⁸ All categories of non-citizens, except asylum seekers and undocumented non-citizens, can contribute to retirement provisions available to those in formal employment. Unemployment benefits are not available in Zambia. Health care services are private and occupational based, thus employed permanent residents and temporary residents can enjoy access.

7. Concluding remarks

The right to work and decent employment conditions are important factors when considering labour and social protection of migrant workers. Decent jobs ensure that workers are self-sufficient. Regrettably migrant workers are often employed in low-skill and low-pay jobs, and this increases their vulnerability and need for social protection. Labour and social policies and legislation must not be fragmented but rather complement each other to provide effective protection to migrant workers. For example, where labour courts recognise illegal immigrants as “employees” qualifying for labour law protection this approach should be consistently applied.

Governments must ensure the proper administration of migration, including effective admission policies. It is important for both the country of origin and the host country to ensure the effective regulation of migration including adequate labour and social protection of migrant workers. This can enhance positive factors attributed to migration such as growth and development. To ensure effective regulation countries need to discourage irregular migration, prohibit discrimination, combat xenophobia and promote coordination and negotiations between countries to conclude bilateral agreements.¹²⁹ This can prove challenging as irregular migrations increases and existing laws and policies do not offer adequate protection. Policymakers must have regard of traditional and contemporary migration patterns and should try to provide for freedom of movement subject only to non-arbitrary limitations. Governments should avoid a top-down approach in the regulation of migration and should rather engage in social dialogue with civil society, trade unions, and employer and employee organisations. Trade unions can play an important part in protection of rights of migrant workers. They can offer support and legal advice and ensure the adherence to international standards and universal human rights. It is clear that migrant workers constitute a vulnerable group. For example, in 2007, Indian workers in the United Arab Emirates took part in a strike to protest against low wages and poor working conditions. The government reacted by threatening these workers with deportation, a similar experience in Kuwait led to the deportation of workers.¹³⁰ Clearly, migrant workers engaging in collective action often face severe punishment. The fact that migrant workers are covered by laws does not necessarily mean that they can easily exercise their rights. Countries should ensure that national laws underpin migration policies and comply with international standards. Enactment of laws must be supported by labour inspectors and enforcement measures, apart from immigration inspections and enforcement. Employers should know that migrant workers will have equal access to dispute resolution and remedies against contraventions of relevant laws.

Through the unique supervisory mechanisms of the ILO, assistance and guidance can be provided to countries for the implementation of policies and national legislation in line with international standards. Unfortunately the low ratification of many migrant related conventions and the reluctance of countries to submit reports hinder the success of this mechanism achieving its objective. It is always acknowledged that in SADC governments cannot be solely responsible for adequate protection - other role players like civil society, employer and employee organisations and trade unions must actively promote the labour and social protection of these workers.

¹²⁷ Vulnerable groups include women, street kids, orphans and the disabled. Assistance is provided through the National Trust for the Disabled, Micro Bankers Trust, The Food Security Pack, the Child Care Upgrading Programme and the Public Welfare Assistance Scheme.

¹²⁸ This includes disability coverage through a workers' compensation fund.

¹²⁹ 1994 International Conference on Population and Development.

¹³⁰ ILO *International Labour Migration* 175.

Bilateral agreements do not only have to provide for portability and/or exportability of social security benefits but can also regulate the provision of minimum labour rights in line with international instruments, for a country's citizens working abroad. For example, a bilateral agreement between Spain and Ecuador provides vast protection to workers by regulating not only social security matters but also providing for matters relating to educational programmes, equality provisions and work and residence permits.¹³¹ Though the protection of migrant workers in their host country is vital, reintegration must also be considered when these workers return to their own countries. Workers should thus be encouraged to gain and utilise new skills to the benefit of themselves and their dependants.

¹³¹ILO *Protecting the Rights of Migrant Workers: A Shared Responsibility* (2009) 11.