SOCIAL PROTECTION AFFORDED TO IRREGULAR MIGRANT WORKERS: THOUGHTS ON INTERNATIONAL NORMS, THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, BOTSWANA AND SOUTH AFRICA

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Social Protection Afforded to Irregular Migrant Workers: Thoughts on International Norms, the Southern African Development Community, Botswana and South Africa

By

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Abstract

The majority of migrant workers target those countries in southern Africa that have stronger economies. Irregular migrants are in a particularly vulnerable position, and this article discusses the protection that this category of persons may expect to experience in the southern African region. The authors recommend that the broad notion of “social protection”, rather than the narrower concept “social security” should be emphasized. International, continental and regional instruments providing protection to irregular migrants are traversed and the constitutional and legislative frameworks in relation to social protection in Botswana and South Africa are compared. The article concludes that there are significant differences relating to the countries’ constitutional underpinnings and the level of influence that the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families has had on the countries. In in South Africa constitutional principles have served as a useful tool to extend labor security to

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migrant workers. This has not occurred in Botswana. It is suggested that the advantages of the free movement of people in the region should be explored and encouraged. The authors also support the notion that a regional policy which seeks to balance the flow of migrants in the Southern African Development Community should be adopted.

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INTRODUCTION

Within the Southern African Development Community (SADC), the majority of migrant workers target countries with stronger economies. These include countries like Botswana,
Namibia and South Africa. Of these countries, South Africa is by far the most significant “receiving country” for people who are looking for a better way of life in the region.

The term “migrant workers” is a wide concept. It refers to those persons who are engaged in a remunerated activity in a country of which they are not nationals. The one common feature is that the term covers non-citizen migrants. As pointed out by George Mpedi and Nicola Smit, there are a number of distinct categories within the broader group of non-citizen migrants. The categories include permanent residents, temporary residents, refugees, asylum-seekers and “irregular” or “undocumented” migrants. This last category is also referred to as “illegal migrants”. However, this term is susceptible to criticism for connoting something criminal and reprehensible about the persons covered by it. The term “irregular migrants” will be used for purposes of this contribution. Of the categories mentioned, irregular migrants are undoubtedly

2 See Wade Pendleton, Jonathan Crush, Eugene Campbell, Thuso Green, Hamilton Simelane, Daniel Tevera & Fion de Vletter, Migration, Remittances and Development in Southern Africa, MIGR. POL. SERV., No. 44, 3 (2006) (according to this five-country study on southern African countries, 86% of migrants of these countries work in South Africa - the countries covered by the study are Botswana, Lesotho, Southern Mozambique, Swaziland, South Africa and Zimbabwe).
3 United Nations’ INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES No. 45 of 158 art. 2(1) (defines a migrant worker as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national”).
5 See e.g. Ockert Dupper, Migrant Workers and the Right to Social Security: An International Perspective, 18 STELL. L. R. 219, 223 (2007). Patrick A. Taran, Human Rights of Migrants: Challenges of the New Decade, 38 INT’L MIGR. 23, (2000) (the term “illegal migrants” associate migrants with “criminality, unemployment, disease and other social ills”). United Nation’s INTERNATIONAL CONVENTION ON THE PROTECTION OF THE RIGHTS OF ALL MIGRANT WORKERS AND MEMBERS OF THEIR FAMILIES, art. 5 (“For the purposes of the present Convention, migrant workers and members of their families: (a) Are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment …; (b) Are considered as non-documented or in an irregular
the most vulnerable group. Members of this group are often subjected to substandard living and working conditions, they are always fearful of being deported and they are in most instances excluded from the varying degrees of coverage of social protection that governments provide.\textsuperscript{6}

It is problematic to obtain accurate estimates about how many migrants live and work in SADC: such migrants do not want to be detected, and government and private agencies are not effective in determining reasonably accurate numbers. Media estimates of the number of irregular migrants in Botswana now range from 60 000 to 800000 in total.\textsuperscript{7} According to one of the South African government’s official web pages under the heading “State of South Africa’s Population Report 2000” it is stated that estimates range between 2 million and 4 million irregular immigrants. However, according to Crush, Williams and Peberdy, even though South Africans believe that 25\% of the population is foreign, the more accurate figure of irregular migrants is probably closer to around 500 000.\textsuperscript{8}

Despite the uncertainty regarding the exact number of irregular migrants in southern Africa, the one aspect that is clear is that the problem is not insignificant. Citizens and migrants compete for scarce resources in developing countries, while in many instances they struggle for

\textsuperscript{6} Id., Dupper, \textit{supra} note 5, 220 (confirming that many migrants are at the bottom of the employment ladder, doing jobs that are “dirty, dangerous and difficult”). \textit{See also} International Labour Office, \textit{Towards a Fair Deal for Migrant Workers in the Global Economy} 7 (2004) (confirming that this is especially true in respect of irregular migrants, who most often fall into a pool of flexible labor outside most forms of social protection).


survival.\textsuperscript{9} In addition to scarce resources, the countries are faced with phenomena such as high HIV-infection\textsuperscript{10} and unemployment rates.\textsuperscript{11} These socio-economic problems are all contributing factors which increase the competition for available resources in the SADC region.

The overarching theme of this contribution concerns the question to what extent irregular migrants can rely on “social protection”\textsuperscript{12} in the SADC region and in Botswana and South Africa in particular. International, continental and regional norms relating to social protection and migrant workers have been adopted. In addition to this, a number of constitutions of African countries contain the right to some form of social protection as a human right.\textsuperscript{13} The following sequence will be followed in the contribution: the term “social protection” will be conceptualized as it is used in the rest of the discussion; a number of significant international, continental and regional instruments pertaining to migration and social protection will be traversed; a snapshot of the social protection measures that have been introduced in two neighboring SADC countries, namely Botswana and South Africa, will be provided; and comparisons will be drawn and

\begin{itemize}
  \item \textsuperscript{9} See Adriette H. Dekker, \textit{The Social Protection of Non-citizen Migrants in South Africa} 22 S.A. MERC. L.J. 388 (2010).
  \item \textsuperscript{10} Ann Strode, Brenda Grant and Suhayafa Bhamjee, \textit{Are There Laws and Policies Protecting People Infected and Affected by HIV/AIDS in Southern Africa? An Update of a Review of the Extent to which Countries within the South African Development Communi}y have Implemented the HIV/AIDS and Human Rights International Guidelines, 16 OBITER 460 (2010) (mentioning that seven of the SADC countries have HIV/AIDS rates of 15\% and higher).
  \item \textsuperscript{11} See Statistics South Africa, \textit{QUARTERLY LABOUR FORCE SURVEY, QUARTER 1, vi} (2012) (an unemployment rate of 25.2\% was surveyed in South Africa during the first quarter of 2012). At xxi of the \textit{SURVEY} the term “unemployed persons” is defined as those (aged 15–64 years) who: a) Were not employed in the reference week and; b) Actively looked for work or tried to start a business in the four weeks preceding the survey interview and; c) Were available for work, i.e. would have been able to start work or a business in the reference week or; d) Had not actively looked for work in the past four weeks but had a job or business to start at a definite date in the future and were available.
  \item \textsuperscript{12} See the discussion about the terms “social protection”, “social security” and “labor security” below.
\end{itemize}
conclusions and suggestions will be made regarding the plight of irregular migrants in southern Africa.

I. SOCIAL PROTECTION AND SOCIAL SECURITY

The concepts “social protection” and “social security” are fairly flexible and the terms often overlap. Social protection is a wider concept than social security and it includes, but is not limited to, the traditional sub-divisions of social security. Social security is often described as consisting of two main pillars, namely “social insurance” and “social assistance”.14 Social insurance relates to formalized schemes which rely on contributions to an insurance scheme, such as unemployment insurance and disability insurance. Such schemes are employment-based and the contributions to such schemes are collected from the salaries of the contributors (or their employers) and only the contributors to such schemes are eligible to claim benefits from the insurance fund. Social assistance, on the other hand, includes formal programmes financed by taxes and which provide a safety-net for those who are not engaged in regular employment. State-funded health care, old-age pensions and child care for means-tested parents are examples of such schemes.15

The term “social protection” is not limited to the protection for persons who have contributed to social security insurance schemes or groups of people such as the elderly or indigent who receive basic social assistance benefits. The term also incorporates schemes and

14 See e.g., Adriette H. Dekker, Linda Janse van Rensburg, Rene Liffman, Mark Thompson and Adrian van der Walt, Social Security: A Conceptual Overview, 4 LAW, DEM. & DEV. 1, 3 (2000); Dupper supra note 5, 224; Fombad, supra note 13, 2.
15 Wouter Van Ginneken, Extending Social Security: Policies for Developing Countries, 142 INT’L LAB. REV. 277, 279 (2003) (arguing that “a broad perception of social security is required to respond to the realities faced by informal-economy workers”). A discussion of informal social security in the SADC region falls beyond the scope of this discussion.
policies that promote employment, job creation and the improvement of economies.\textsuperscript{16} As stated by the Asian Development Bank, social protection is a combination of guiding principles and plans developed to lessen poverty and vulnerability by promoting competent labor markets, limiting individuals’ exposure to risk and ensuring that they can protect themselves against loss of income by promoting their capability to fend for themselves.\textsuperscript{17}

The International Labour Organization’s (ILO) introduced the concept and goals of the “decent work” agenda in 1999. This strategy adopts a broad approach, which reaffirms the primary goals of the ILO “to promote opportunities for woman and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity”.\textsuperscript{18} As will be argued more comprehensively later in the contribution, it is submitted that the goals of social protection should be closely linked to the concept of decent work as espoused by the ILO.

In 2004 the World Commission on the Social Dimension on Globalization proposed a “social protection floor”, and this concept has been further developed by the ILO as a means of

\textsuperscript{16} The South African Department of Social Development uses the term “comprehensive social protection”. See Department of Social Development, \textit{Strategic Plan Update 2009–2012}, available at www.info.gov.za/view. This concept includes social assistance, social insurance, social services and development initiatives which promote labor security. See Adriette H. Dekker, \textit{Where Have All the Young Men Gone? The Impact of HIV/AIDS on Informal Social Security Systems and Care for the Elderly}, 19 S.A. PUBL. L. 152, 158 (2004) (“[c]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life”).


extending the scope of coverage of social protection. In 2009 the United Nations (UN) System Chief Executives Board adopted a Global Initiative for a Universal Social Protection Floor. This initiative does not establish a new international human rights instrument. It establishes a floor of social protection policies parallel to existing international instruments and obligations at international, regional and national levels. This initiative also places the emphasis on social protection, rather than the more limited notion of social security, and this is also where the emphasis falls in this contribution.

III. INTERNATIONAL, CONTINENTAL AND REGIONAL INSTRUMENTS

A. The UN and the ILO

The ILO has adopted conventions which provide for minimum standards of social security in general. Of particular significance is the ILO Social Security (Minimum Standards) Convention No 102 of 1952, which establishes minimum world-wide standards for nine

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22 Ibid.
23 See also, the Equality of Treatment (Accident Compensation) Convention No 25 of 1925; the Equality of Treatment (Social Security) Convention No 118 of 1962; and the Maintenance of Social Security Rights Convention No 157 of 1982 (guarding equal treatment between nationals and non-nationals and protecting acquired social security rights when workers transfer their work from one country to another).
branches of social security, namely: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit; and survivors’ benefit.

The UN and the ILO have recognized the need to protect migrants and their families and have also adopted conventions dealing directly with protective measures for migrants.\footnote{24} In 1990 the UN adopted the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families\footnote{25} (the International Convention on Migrant Workers). This is the most significant overarching convention providing protection to migrants and their families and will be the subject of further discussion below.

However, long before the adoption of this instrument, the ILO has been concerned with the protection of migrant workers. Ockert Dupper points out that since the foundation of the ILO in 1919,\footnote{26} the preamble to the ILO Constitution among other things highlighted the need for the “protection of the interests of workers when employed in countries other than their own”.\footnote{27} The ILO has adopted the following two significant conventions aimed specifically at addressing the

\footnote{24} Apart from this, the ILO has adopted numerous conventions that provide for social security and labor protection in general that also indirectly relate to migrants. The ILO has identified eight conventions as being the fundamental conventions of the ILO: the Freedom of Association and the Right to Organise Convention No 87 of 1948; the Right to Organise and Collective Bargaining Convention No 90 of 1949; the Forced Labour Convention No 29 of 1930; the Abolition of Forced Labour Convention No 105 of 1957; the Minimum Age Convention No 138 of 1973; the Worst Forms of Child Labour Convention No 184 of 1999; the Equal Remuneration Convention No 100 of 1951; and the Discrimination (Employment and Occupation) Convention No 100 of 1951. See Andre Van Niekerk, Marilyn A. Christianson, Marie McGregor, Nicila Smit and Stefan van Eck, LAW@WORK, 22 (2012).

\footnote{25} Adopted by General Assembly resolution No 45 of 158, December 18, 1990.

\footnote{26} See Dupper, supra note 5, 219 (pointing out that “[a]t the First Session of the International Labour Conference in 1919, a recommendation [The Reciprocity of Treatment Recommendation, 1919 (No 2)] was adopted which already reflected the two main aims of the ILO in this area, namely equality of treatment between nationals and migrant workers, and coordination of migration policies between States").”

plight of migrant workers, namely the Migration for Employment Convention (Revised) No. 97 of 1949 (Convention No. 97 of 1949) and the Migrant Workers (Supplementary Provisions) Convention No. 143 of 1975 Convention No 143 of 1975). Neither of these conventions makes a direct reference to the protection of irregular migrants in particular. Convention No. 97 of 1949 provides for equal treatment of both migrant workers and other workers within member states, including in the areas of employment rights, social security rights and accommodation rights. However, article 6 specifically provides that this protection applies in respect of nationals and “immigrants lawfully within its territory”. By implication, this provision excludes irregular migrants.

Article 10 of Convention No. 143 of 1975 mirrors article 6 of the older convention in this regard. It provides that states that have ratified the Convention undertake to guarantee “[e]qual opportunity and treatment in respect of employment and occupation”. However, it goes further and limits this right to “migrant workers or … their families [who] are lawfully within its territory”.28

Convention No. 143 of 1975 further encourages member states to conclude bilateral (and multilateral) agreements with other countries which could ensure portability29 of social security benefits and reciprocity of treatment.30 So, for example, a person who has worked in a foreign country and has contributed to the receiving country’s social security programmes should be able

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28 Emphasis added.
29 “Portability” refers to a migrant worker’s right to maintain social security benefits which were gained in the country where they were employed and to transfer this to their country of origin after their return.
30 “Reciprocity”, in the context of migration, would mean that both the country of employment and the migrants’ country of origin would have to be signatories to a convention before social security rights can be transferred. It is significant to note that the principle of non-reciprocity is enshrined in both of the ILO conventions dealing with migration. This entails that the migrant’s social security rights should be respected by the country of employment irrespective of whether the country of origin has ratified the convention. See Dupper, supra note 5, 231 note 80.
to return to the person’s country of origin and continue to receive benefits from the receiving
country’s programmes.\textsuperscript{31} Convention No. 143 of 1975 is susceptible to criticism in so far as
irregular migrants are not protected. Irregular migrants are generally in a more precarious
position than regular migrants and this category is arguably in greater need for protection than
regular migrants.\textsuperscript{32}

Roger Böhning avers that among the UN organizations, the ILO has the constitutional
responsibility of protecting the “interests of workers when employed in countries other than their
own”.\textsuperscript{33} However, for a number of political reasons, the ILO was sidestepped when the UN
adopted the International Convention on Migrant Workers in 1990. It took almost 13 years for a
sufficient number of countries to ratify the Convention before it could enter into force.\textsuperscript{34} The fact
that this took so long is indicative of the fact that there is a broad reluctance to adopt conventions
that protect the human rights of migrants in general and irregular migrants in particular.\textsuperscript{35}

It is submitted that important human rights gains pertaining to the protection of irregular
migrant workers were made with the adoption of the International Convention on Migrant

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\textsuperscript{31} As example, the Southern Africa Trust \textit{Crossing the Threshold of Regionalism, Policy Brief} 10
(2008) makes reference to Morocco as an example of a country that has concluded bilateral
agreements with a number of European countries to ensure the transfer of pension and health
benefits. The effect of these agreements has been that the return rate of Moroccan migrant
workers to Europe, who retained their social insurance benefits, has increased by 50 per cent.
\textsuperscript{32} \textit{See e.g.}, Sandhesh Sivakumaran, \textit{The Rights of Migrant Workers One Year On: Transformation or Consolidation?} 36 GEORGETOWN. J. INT’L L. 113, 120 (2004); Dupper, \textit{supra} note 5, 220.
\textsuperscript{33} Roger Böhning, \textit{The ILO and the New UN Convention on Migrant Workers: the Past and the
\textsuperscript{34} Ockert Dupper, \textit{Migrant Workers and the Right to Social Security: An International
Perspective, Access to Social Security for Non-Citizens and Informal Sector
Workers: An International, South African and German Perspective} (Ulrich Becker
and Marius P. Olivier (eds)), 35-36 (2008) (confirming that 20 ratifications were needed for the
Convention to come into force).
\textsuperscript{35} \textit{See e.g.}, Taran, \textit{supra} note 5, 18; Dekker, \textit{supra} note 9, 392 (pointing out that there is a “fear
that irregular migration may increase” if human rights protection is extended to irregular
migrants).
Workers.\textsuperscript{36} It does not include only the families of migrant workers, but most of the International Convention on Migrant Workers also applies to all migrant workers irrespective of their status. In the preamble to the Convention it is stated that it should be borne in mind that “the human problems involved in migration are even more serious in the case of irregular migration” and it further directs that “action should be encouraged in order to prevent and eliminate clandestine … trafficking in migrant workers”.\textsuperscript{37}

The International Convention on Migrant Workers is divided into four parts. Part I provides for the scope of application and definitions. Part II provides that state parties shall adhere to international human rights instruments and it directs that states should not discriminate against migrants on grounds such as sex, race, religion or nationality.\textsuperscript{38} Part III forms the centerpiece of the instrument and establishes a set of human rights that apply to all migrant workers (both regular and irregular), while Part IV establishes an additional set of “other [human] rights” that apply only to regular migrant workers and their families. Part III is of particular relevance, as it relates to the social and labor security of migrant workers. In relation to social security, article 27(1) states that “[m]igrant workers and their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfill the requirements provided for by the applicable legislation of that State”. Article 27(2) adds that: “[w]here the applicable legislation does not allow migrant workers … a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them”.\textsuperscript{39}

\textsuperscript{36} Böhning, supra note 33, 740.
\textsuperscript{37} Available at http://www2.ohchr.org/english/law/cmw.htm.
\textsuperscript{38} International Convention on Migrant Workers, art. 7.
\textsuperscript{39} Emphasis added.
A number of salient aspects stand out when the social security article is interpreted. Firstly, states are not compelled to provide migrants (regular or irregular) with the same social security benefits as their citizens. States remain at liberty to set their own requirements in their social security legislation which need to be met before a person becomes entitled to benefits. This could include being a national or that only regular migrants may apply.40 Secondly, the article sets a relative weak directive in respect of contributions made by migrant workers. There is no compulsion contained in the provision, as it directs that states “shall examine the possibility [of] reimbursing” contributors the amount of contributions they made to social security schemes.41

The International Convention on Migrant Workers provides much stronger protection in respect of labor security than in the case of social security. Article 25 protects individual employment rights and directs that all migrant workers “shall enjoy treatment not less favourable than that which applies to nationals of the State” in respect of, among other things, remuneration and other conditions of work (such as overtime, paid holidays and the termination of the employment of work).42 The article goes further and states that “it shall not be lawful to derogate in private contracts of employment” from the equality of treatment compared to nationals.43 Finally, article 25 protects irregular migrants directly in so far as “employers shall not be relieved of any legal or contractual obligations … in any manner by reason of such irregularity [in their stay or employment]”.44

40 Dupper, supra note 5, 392 (state parties “can adopt provisions that would, for example, differentiate between regular and irregular migrants, thereby negating the protection of that this article is meant to confer on all migrants, irrespective of their status”).
41 Ibid.
42 International Convention on Migrant Workers, art 25.1.
43 Id. art. 25.2.
44 Id. art. 25.3.
The provisions relating to labor protection are the most meaningful. The word “shall” is used, and no discretion is provided in relation to the setting of additional requirements in legislation as is the case with the social security clause. Furthermore, irregular migrants have been specified in so far as employers may not be relieved of any of their individual labor law rights which may be relevant to nationals in a particular jurisdiction.

Article 28 of the International Convention on Migrant Workers protects the rights of migrant workers pertaining to emergency medical care. It provides that all migrant workers and their families “shall have the right to any medical care that is urgently required”. It further directs that such care “shall not be refused them by reason of any irregularity with regard to stay and employment”. The right to emergency medical care has been called the “bottom line” pertaining to social protection.45

To summarize: the ILO Conventions do not protect irregular migrants, and the most influential stride towards the protection of the human rights of irregular migrants has been made with the adoption by the UN of the International Convention on Migrant Workers. It is submitted that two policy considerations might have played a significant role when the International Convention on Migrant Workers was formulated. Firstly, once irregular migrants have entered a country, they should not be subjected to a situation where unscrupulous employers could exploit them by providing them with less favorable working conditions than those provided to regular migrants and nationals. If this were to be permitted, it could provide fertile ground for practices such as human trafficking. Secondly, it places financial burdens on any state to provide social security services, and, apart from medical care, states are not as a minimum compelled to provide social security services to irregular migrants. They are, however, at liberty to do so. Therefore, it

45 Dupper, supra note 5, 234. The author does, however, point out that there is uncertainty pertaining to the definition of “emergency care”.
has been accepted on an international level that states are entitled to include requirements pertaining to nationality in social security legislation.

B. The African Union (AU)

The AU recognizes the importance of implementing a coherent and integrated strategy regarding the social protection of migrants at continental and regional (such as SADC) levels. As far back as 2001 the AU has expressed the need for member countries to develop and implement co-ordinated migration policies. In its Resolution on the Establishment of a Strategic Framework for a Policy of Migration in Africa, the AU Executive Council recommended that member countries should work towards the free movement of people and stressed the need to strengthen “inter-regional co-operation in matters concerning migration on the basis of the established processes of migration dialogue at regional and sub-regional levels”.

More recently, in 2006, the AU adopted the AU Migration Policy Framework for Africa, which expresses the need for a comprehensive migration policy in Africa. It calls on member countries to adopt principles from ILO Conventions No 97 of 1949 and No 143 of 1997 and the UN’s International Convention on Migrant Workers. The AU Migration Policy Framework for Africa contains a number of guidelines relating to how policies can be developed to promote the free movement of people and to strengthen regional cooperation in matters concerning migration. It also recommends that member countries should: seek collective solutions through dialogue and regional agreements; establish transparent labor migration

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46 Par. 4 and 5 of the African Union, Resolution on the Establishment of a Strategic Framework for a Policy of Migration in Africa (CM/Dec 34 (LXXIV) 2001).
policies; strengthen measures to prevent trafficking; and resolve conflicts relating to migration by balancing national security and migrants’ rights.\textsuperscript{48} Apart from pointing out that strategies should be implemented to protect irregular migrants against trafficking, the AU Migration Policy Framework for Africa does not provide specific protection to this vulnerable group within the broader group of migrants. It is our argument that this is a shortcoming and that the AU has not responded appropriately in respect of the principles contained in the International Convention on Migrant Workers by providing protection labor protection to irregular migrants.

Marius Olivier succinctly confirms that, despite the existence of AU instruments relating to the regulation and protection of migrants in general, “the adoption, implementation and monitoring of international and regional standards … appear to be problematic”.\textsuperscript{49} The author further makes convincing points relating to the fact that the social security regimes still operate under circumstances where free movement is not encouraged and where there is a glaring absence of the implementation of overarching and integrated migration policies.\textsuperscript{50}

C. Southern African Development Community (SADC)

On August, 17, 1992, in Windhoek, Namibia, the SADC Treaty that transformed the Southern African Development Coordination Conference (SADCC) into the SADC was signed.\textsuperscript{51} The motto, contained in the SADC coat of arms, reads “Towards a Common Future. The SADC Treaty states that member states shall establish a priority list of relevant conventions (including

\textsuperscript{48} Id. par. 7.1.


\textsuperscript{50} Ibid.

\textsuperscript{51} On 14 August 2001, Heads of State and government signed an agreement amending the SADC Treaty.
the ILO’s eight core conventions)\(^{52}\) and take appropriate action to ratify and implement these instruments. Article 5 spells out one of the main objectives of SADC, namely “to promote sustainable and equitable economic growth and socio-economic development through deeper cooperation and integration”. As mentioned by Mathias Nyenti and George Mpedi, the objectives of the SADC Treaty “envisage a regional collaborative approach, as they can be achieved only through the development of regional social security mechanisms”.\(^{53}\)

In August 2003, the SADC Heads of State signed the Charter of Fundamental Social Rights in SADC (the SADC Charter). Adapting the objectives of the SADC Treaty, the SADC Charter among other things places the emphasis on the harmonization of social protection of those who have work and those who are striving to enter the job market. Article 10 provides that “every worker … shall have a right to adequate social protection … and enjoy adequate social security benefits.” To this it is added that persons “who have been unable to enter or re-enter the labour market … shall be able to receive sufficient resources and social assistance.”

Other goals include the alignment of policies regarding freedom of association and collective bargaining,\(^{54}\) equal treatment for men and woman,\(^{55}\) protection of children and young people,\(^{56}\) protection of elderly persons\(^{57}\) and protection of people with disabilities.\(^{58}\) It is notable that the SADC Charter does not extend these protective measures to irregular migrants.

Whereas the SADC Charter contains general overarching goals, the Code on Social Security (the SADC Social Security Code) focuses on the implementation of social security in

\(^{52}\) SADC Charter, art 3. See also note 24 supra.

\(^{53}\) See Nyenti and Mpedi supra note 21, 252.

\(^{54}\) SADC Charter, art. 4.

\(^{55}\) Id. art. 6.

\(^{56}\) Id. art. 7.

\(^{57}\) Id. art. 8.

\(^{58}\) Id. art. 9.
the SADC region.\textsuperscript{59} It is a non-binding document, and encourages states to work towards the free movement of persons. It also suggests that immigration controls should be progressively reduced.\textsuperscript{60} The SADC Social Security Code specifically promotes social protection for migrants, foreign workers and refugees. It encourages member states to protect regular migrants in so far as they should be entitled to participate in the social security schemes of host countries and they ought further to enjoy equal treatment regarding social security alongside nationals of the host country.\textsuperscript{61} However, the instrument is narrowly construed in so far as it provides that social protection should be extended to “all lawfully employed immigrants” by means of bi- or multilateral arrangements between member states and national legislation.\textsuperscript{62} In what we deem to be a glaring omission, the SADC Social Security Code has not included any protection in respect of labor rights of irregular migrants.

On the positive side, the SADC Social Security Code encourages member states to facilitate the exportability of benefits, which includes the payment of benefits by the host country.\textsuperscript{63} In respect of irregular migrants the SADC Social Security Code provides that such persons “should be provided with basic minimum protection … and should enjoy coverage according to the laws of the host country”.\textsuperscript{64}

Compared to the UN International Convention on Migrant Workers the SADC Social Security Code (and for that matter all of the SADC instruments) does not provide any meaningful social protection to irregular migrants or their families. This is especially relevant in respect of the protection relating to labor security of irregular migrants. It must be remembered

\textsuperscript{59} The SADC Social Security Code refers to the position of migrant workers in particular.
\textsuperscript{60} Id. art. 17(1).
\textsuperscript{61} Id. art. 17(2)(a) and (b).
\textsuperscript{62} Ibid.
\textsuperscript{63} Id. art. 17(2)(c) and (d).
\textsuperscript{64} Id. art. 17(3).
that the International Convention on Migrant Workers specifically protects irregular migrant workers against exploitation in that irregular migrants may not be subjected to employment practices that do not comply with individual labor law protection.

The SADC Treaty makes provision for member states to conclude protocols that will give effect to the aims and objectives of the SADC Treaty. Along with protocols covering aspects like trade and economic cooperation, the SADC Protocol on Health has been adopted. The aims of this protocol include the formulation and implementation of regional health policies to attain an acceptable standard of health for the people in the SADC. The SADC Health Protocol contains broad and vague statements, and it cannot be foreseen that this instrument will have much of an impact on the regulation of health and social protection in the region.

III. SOCIAL PROTECTION IN BOTSWANA AND SOUTH AFRICA

A. Background

How have migrant-receiving countries in southern Africa responded to the instruments relating to the social protection of, among others, irregular migrant workers adopted by the UN, the ILO, the AU and the SADC? More pertinently, to what extent have Botswana and South Africa included in their constitutions and their legislative frameworks protection for migrant workers, and has any impact been made on the human rights protection of irregular migrant workers?

66 See Nyenti and Mpedi, supra note 21, 256-257.
In a study which covers the constitutional right to social security of 30 African countries, Charles Fombad concludes that since the 1990s constitutional reforms have resulted in significant improvement of the recognition of human rights in Africa. The author mentions that many of the modernized constitutions “now contain provisions aimed at promoting democratic governance, constitutionalism, respect for the rule of law and human rights”. The study mentions that 14 out of the 30 African constitutions have “social security as a distinct right” specified in their constitutions. However, only in two of those countries, namely South Africa and Kenya, have this right and other related constitutional social security protection been specified in depth. In numerous African countries socio-economic rights and those rights associated with social protection are contained in unproductive sections that categorize it as “state policy” or “fundamental objectives and directive principles” which are specified not to be enforceable by the judiciary.

The majority of migrants to SADC countries come from other SADC countries. It is widely accepted that the SADC region is a deprived and poor region in the world. Poverty, unemployment, low levels of education, HIV/AIDS and irregular migration pose significant socio-economic challenges to the governments of these developing countries. To illustrate the point, as per the Botswana Core Welfare Indicators Survey (2009/10), the unemployment rate in

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67 Fombad, supra note 13, 1.
68 See the discussion infra.
69 Fombad, supra note 13, 12-16 (mentioning that this is especially the case in, among other countries, Lesotho, Nigeria, Sierra Leone and Tanzania).
70 See Olivier, supra note 1, 123 (“subject to some exceptions, it appears that most of the migration from SADC is actually to other SADC countries. Thus intra-SADC movement is the prevailing characteristic of migration from SADC countries”).
Botswana is 17.8 percent.\textsuperscript{72} In South Africa, which serves as a magnet for migrant workers in the region, nearly half of the country’s roughly 50 million population earn below an extremely low poverty median of R524 (approximately 56.28 US Dollar) per month. During the financial crisis of 2008-2010 South Africa lost 1 million jobs, and the official unemployment rate of just over 25\% does not include the discouraged who have given up seeking employment, which brings the rate up to 37.4 percent.\textsuperscript{73} The two receiving countries discussed below are neighbours. They are both members of SADC, are signatories to the SADC Charter and each country has a constitution. However, what needs to be determined is whether or not the respective countries provide any social protection to irregular migrant workers.

\textbf{B. Botswana}

Compared to South Africa, Botswana has the older constitution. The Botswana Constitution of 1966 hardly makes any mention of the protection of social security or labor security rights, let alone the rights of migrant workers.\textsuperscript{74} According to the eminent scholars Dolly Ntseane and Kholisani Solo the constitution of Botswana contains a bill of fundamental rights, which contains first generation political and social rights. They confirm that since it was


\textsuperscript{74} See Fombad, \textit{supra} at note 13, 13.
implemented as far back as 1966 “it does not have socio-economic rights or second generation rights, as do recent constitutions.”\(^7^5\)

Despite this lack of constitutional protection, a number of \textit{ad hoc} and fragmented social security schemes have been put into place in Botswana. According to a 2007 World Bank Country Report on Botswana covering access to social services for non-citizens in SADC, the social security services that have been implemented in Botswana include a Programme for Destitute Persons, an Orphan Care Programme, and a Universal Old Age Pension.\(^7^6\) However, the protection of social security in Botswana is not rights-based and this means that those who are in need of assistance have no legal basis upon which to insist on the provision of social security benefits.\(^7^7\)

The National Policy on Destitute Persons was implemented in 1980, and its aims are to ensure that the Botswana government provides minimum assistance to needy people and to improve their welfare conditions and alleviate poverty. The 2005 Revised National Policy on Destitute Persons defines a destitute person as an individual who: due to disability or chronic health condition, has insufficient income or assets; is incapable of engaging in sustainable


\(^7^6\) Dolly Ntseane and Kholisani 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 7 (2007) (other services referred to in the report are: the School-Based Food Programme; World War II Veteran’s Allowance; Labour Based Relief Programme; Programme for Remote Area Dwellers; Education; and Health Care Provision).

\(^7^7\) Ntseane and Solo, \textit{supra} at note 75 at 89 and 92. (“most social security programs in Botswana are offered as a matter of social policy only. There is no right to social security and social assistance”).
economic activity due to old age disability, or is terminally ill; and a child under 18 who is in need and may not be assisted under the orphan care programme.

The National Policy on Destitute Persons was designed to protect citizens. An individual who wants to apply must prove citizenship, and in the absence of such proof assistance is provided only on a temporary basis. Irregular migrants are reported to the Botswana Department of Immigration and according to the World Bank Report “[n]on-citizens who have illegal status are eventually repatriated to their country of origin”.78 This exclusionary trend in respect of the provision of social services is also present in both the Orphan Care79 and the Universal Old Age Pension Programmes,80 which are dependent on citizenship.

The 2007 World Bank Country Report on Botswana concludes that the Botswana government has “adopted an exclusive approach with respect to social services for non-citizens and portability of these services in SADC”.81 The Report sums the situation up by stating that “[g]iven the inadequacy of financial revenues, there is an understanding that neighbouring governments should provide for their own citizens.”82 The Report continues and mentions that there are other challenges with the existing schemes – like financial sustainability of schemes, shortage of human resources, and adequacy of services. In 2004 the eminen Dolly Ntseane and Kholisani argued that the country should ideally conduct a comprehensive review of all social security programmes and that they should be brought under one umbrella ministry. They also

78 See Ntseane and Solo, supra at note 76, 8-9.
79 Id. at 11 (“[i]ke the destitute allowance, the scheme is accessible to citizens only. In an effort to check citizenship, social workers who conduct assessment demand that beneficiaries produce the death certificates of their parents or their national registration card”).
80 Id. at 13 (“[i]dentification to confirm eligibility is through the National Registration Card and therefore the scheme is very exclusive”).
81 Id. at 21.
82 Ibid.
suggested that social security programmes should be provided with a legal base.\textsuperscript{83} Unfortunately, there is no indication or available evidence which indicates that there is any progress being made toward the protection of either social security rights or any other broader social rights of irregular migrants in Botswana.

It is our argument that neither the UN International Convention on Migrant Workers, nor the any of the AU continental norms in respect of irregular migrant workers have had any positive influence on the protection of irregular migrant workers in Botswana. This leaves irregular migrant workers in the position that employers could very well be tempted to exploit their already precarious position and provide them with less favourable conditions of service compared to nationals. There is no likelihood that any progression pertaining to human rights protection for this precarious group will originate under the auspices of the Botswana constitution either.

\textit{C. South Africa}

Commentators are in agreement that South Africa has a progressive and modern Constitution\textsuperscript{84} which protects most if not all categories of human rights that are ordinarily included in international human rights instruments.\textsuperscript{85} It contains a Bill of Rights which protects

\textsuperscript{83} See Ntseane and Solo, \textit{supra} at note 75, 94.
civil, political and socio-economic rights. No distinction is drawn between these categories of rights, and all have equal force and function in an integrated fashion. In *Grootboom* the Constitutional Court confirmed that these rights are enforceable through the judiciary and emphasized that the right of access to land, the rights of children and the right to adequate shelter are interrelated to ultimately realize the constitutional right to human dignity. The Constitution, 1996, further directs that the courts “must consider international law”, and “may consider foreign law” when interpreting the Bill of Rights.

Section 27(1) of the Constitution, 1996, enshrines “everyone[’s]” right to have access to “healthcare services”, “sufficient food and water” and “social security”. The word “everyone” is used and no limiting criteria are attached to a person, such as citizenship, migration status or legality of work. However, these social security rights are qualified in so far as the section provides that the “state must take reasonable legislative and other measures, within its available resources” to achieve the realization of these rights. On the face of it, and by virtue of the wide

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86 Olivier and Mpedi, *supra* at note 71, 25 (mentioning that no direct reference is made to the traditional division between first, second and third generation human rights in the Constitution, 1996).

87 In *Government of the Republic of South Africa v. Grootboom*, 2000 11 BCLR 1169 (CC) the respondents were rendered homeless as a result of their eviction from their informal homes situated on private land. They applied to the court for an order requiring government to provide them with adequate basic shelter until they obtained permanent accommodation. They were granted certain relief. The court held that human rights are inter-related and are all equally important. This has significant practical importance in a society founded on these values. At par 1 the court stated that “[t]he people of South Africa are committed to the attainment of social justice and the quality of life for everyone. The Preamble of the Constitution records this commitment”.

88 Sec. 39(1)(b) and 233 of the Constitution, 1996 (when legislation is being interpreted the courts must prefer any reasonable interpretation that is consistent with international law over alternative interpretations).

89 *Id.* sec. 27(1)(a)-(c) (closely related to the notions of social security and social protection, the Constitution, 1996 further protects everyone’s right to human dignity (sec. 10), equality (sec. 9), the right to housing (sec. 26) and the right to education (sec. 29)).

90 *Id.* sec. 27(2). In *Soobramoney v. Minister of Health, KwaZulu-Natal*, 1998 1 SA 765 (CC) free medical treatment was denied to the applicant in an instance where a hospital could, due to
meaning of “everyone”, it could mean that irregular migrants would also be entitled to social 
security protection in terms of the Constitution, 1996, to the extent that the state has sufficient 
resources to realize these rights. Commentators such as Danie Brand, Sandra Liebenberg and 
June Sinclair have strongly criticized decisions of the Constitutional Court where it was not 
willing to extend socio-economic rights to “everyone” on grounds which include insufficient 
resources and based on the excuse of the separation of powers and the judicial role (rather than 
executive role) which the courts fulfil.91

Also included in the Constitution, 1996, under the heading “[l]abour relations”, is a 
 somewhat unusual provision which states that “[e]veryone has the right to fair labour 
relations”.92 It is submitted that links can be drawn between this right and the ILO’s decent work 
agenda. It should be remembered that this initiative promotes opportunities for everyone to 
obtain decent and productive work, in conditions of freedom, equity, security and human dignity.

Before turning to the potential that lies in the Constitution, 1996 in extending social protection to 
irregular migrants, we provide a brief overview of some of the social security and labor security 
protective measures provided for in the South African legal framework.

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92 Sec. 23(1) of the Constitution, 1996.
Viewed from a developing country’s perspective and within a regional context, South Africa has a reasonably well-developed social security framework. As pointed out by George Mpedi and Avinash Govenjee, “imperfect as it is”, the South African social security system caters for all of the ILO’s so-called classical contingencies, namely illness, maternity, employment injury, unemployment, invalidity, old age, death, medical care and family. So, for example, under the category social insurance: the Compensation for Occupational Injuries and Diseases Act and the Occupational Diseases in Mines Act provide for compensation caused by occupational injuries and diseases; the Unemployment Insurance Act regulates temporary unemployment insurance; the Medical Schemes Act regulates the registration of primarily private medical schemes; the Pension Funds Act provides for the registration and dissolution of pension funds; and the road accident fund provides for payments to accident victims. In South

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93 Mpedi and Govindjee supra at note 17, 775. Olivier supra at note 1, 130 (“[h]owever, the system is category-based and means-tested, as benefits are provided only to certain defined categories of persons who are deemed to be in need”).
94 85 of 1993. The Act provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.
95 76 of 1973. Occupational lung diseases are covered by this Act.
96 63 of 2001. Sec. 2 of the Act provides that it establishes “an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment”.
98 24 of 1956. There is no national retirement scheme in South Africa. It is believed that 75% of workers in formal employment are members of private retirement schemes. See Olivier, supra at note 1 at 133.
99 Established in terms of the Road Accident Fund Act 56 of 1996.
Africa public insurance schemes extend to workers in the formal sector, and in most instances irregular migrant workers work in the informal (flexible) sector. This automatically excludes most irregular migrant workers due to the fact that they do not contribute to any of the public social insurance schemes.

The Social Assistance Act (hereafter SAA) is the primary legislation in South Africa which regulates the provision and implementation of social assistance. The SAA makes provision for various forms of social grants, which are mainly funded through taxation. The basic grants are only for a number of limited categories, and the SAA initially unambiguously applied only to South African citizens.

The South African Constitutional Court has played a progressive role in extending the scope of coverage of social assistance legislation to some categories of migrant workers. However, the question remains whether the court has done enough? In the Khosa and Mahlaule cases, Mozambican migrants who had obtained permanent residence in South Africa lodged a constitutional challenge against the SAA which limited the right to social assistance to South African citizens. The court held that the right to social security vests in “everyone” and that

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100 VAN NIEKERK et al, supra at note 24, 459.
101 Olivier, supra at note 1, 131 mentions that “migrant workers do not qualify for unemployment insurance benefits: they are excluded from coverage, since they have to return to their home country, when their contract of service … in South Africa ends”.
102 13 of 2004.
103 Social Assistance Act 13 of 2004, sec. 1 (defining “social assistance” as “a social grant including social relief of distress”).
104 SOCIAL ASSISTANCE ACT 13 of 2004, sec. 1 and 4 (making provision for the following specific categories of social grants: child support (for disadvantaged children); care dependency (for severely disadvantaged children); foster child care; disability; old age; war veterans; and social relief for distress as a temporary measure). See Olivier, supra at note 1, 130 (severely criticizing the limited nature of these grants); and Sinclair, supra at note 72, 201 (arguing that this narrow formulation is unconstitutional).
105 Khosa v. Minister of Social Development; Mahlaule v. The Minister of Social Development 2004 6 BCLR 569 (CC). At par. 40 of the decision the court held that “the socio-economic rights in our Constitution are closely related to the founding values of human dignity, equality and
regular migrants who are permanent residents are bearers of this right. The court read the words “or permanent resident” after the word “citizen” in each of the challenged sections of the SAA. However, the court was not prepared to extend the constitutional right to social security to irregular migrants.

It is our argument that the court has not done enough in the *Khosa* and *Mahlaule* cases and that it missed a golden opportunity to extend the social security protection (in respect of social assistance in particular) to irregular migrants. Even though the scarcity of recourses is a seriously limiting factor, and the extension of social assistance would have budgetary and distributive consequences for government, this ought not to be the end of the enquiry. The information that is critical to the determination of adequacy of resources lies within the realm of government, and the onus must surely be on it to divulge the cost implications of such extension and to provide proof that it lacks sufficient resources to comply with the constitutional imperatives. The constitutional right to social security extends to “everyone” and we argue that it is not justified to impose a blanket ban on any category of excluded persons without such evidence being presented to the courts.

The counter-argument to this, however, may be the fact that even the most progressive of international instruments regulating the position of migrant workers, namely the International Convention on Migrant Workers, does not impose any compulsion on states to extend social security protection to irregular migrants. As mentioned above, states are at liberty to include freedom.” Further at par. 82 the court held that “the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration consideration on which the state relies”. In *Larbi-Odam & Others v. MEC for Education* 1998 1 SA 745 (CC) the Constitutional Court struck down regulations that limited appointments of state school teachers to citizens only. The court held that these limitations discriminated against migrants with permanent residency. However, the court did not extend this principle to irregular migrants. We acknowledge reliance on Liebenberg, *supra* at note 89, 195-197 and Sinclair, *supra* at note 72, 218 in formulating this argument.
requirements pertaining to nationality in social security legislation. However, to this our counter-argument is that this norm does not bar states from extending social security rights to irregular migrants, and this is especially true in instances where a country’s constitution directs that the state should progressively work towards the extension of social security rights.

To what extent does the legislative regime in South Africa provide labor security to irregular migrants? It must be borne in mind that the International Convention on Migrant Workers provides labor protection to irregular migrants in so far as they may not be exposed to exploitation in the workplace, and that the Constitution, 1996, protects everyone’s right to fair labor practices. In a significant positive development, the South African labor courts in *Discovery Health* and “*Kylie*” have in the past 5 years ruled that persons who fall in the category of irregular migrants and those engaged in illegal work, fall within the definition of “employee” and they are consequently entitled to the constitutional promise of fair labor practices. In *Discovery Health* it was held that despite the fact that a person’s right to temporary residence may have expired, that such an individual is still entitled to protection against unfair dismissal and sub-standard employment conditions. The court was influenced by the International Convention on Migrant Workers when it formulated its decision. It confirmed that even though South Africa is not a signatory to the convention it is bound by the South African Constitution, 1996 which provides that “[c]ustomary international law is law in the Republic” and when legislation is being interpreted any “reasonable interpretation … that is consistent with

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107 In *Discovery Health Ltd v. CCMA (2008) ILJ 1480 (LC)* the Labour Court concluded that even though a contravention of the IMMIGRATION ACT 13 of 2002 is deemed a criminal offence, it does not invalidate the underlying contract of employment. Sec. 23 of the Constitution, 1996, provides that “everyone has the right to fair labour practices”, and the irregular migrant worker still remains an “employee” in terms of labor legislation.

108 In “*Kylie*” v. *CCMA* 2010 BLLR 705 (LAC) the Labour Appeal Court held that the definition of “employee” contained in labor legislation was wide enough to include a sex worker whose contract of employment was unenforceable in terms of the common law.
international law” must be adhered to. The court underscored the fact that the International Convention on Migrant Workers seeks to balance the fundamental rights of irregular migrants and at the same time discourages irregular immigration and that irregular migrants at least have the right to fair labor practices.

IV. CONCLUSIONS AND SUGGESTIONS

The promotion and implementation of broad concepts like social protection, decent work and the right to fair labor practices should be encouraged. Emphasis should not solely be placed on the protection of social security rights of migrant workers and irregular migrants in particular. This, it is argued, will be the best point of departure in the quest to provide some human rights protection to irregular migrants who are faced with the real threat of being exploited in countries where they work.

Compared to Botswana, and especially in respect of labor security, South Africa provides better protection to irregular migrants. The South African Constitution and the UN’s International Convention on Migrant Workers have in recent years gradually guided South African courts to extended social protection to migrants and irregular migrants. In Botswana there has been no imperative to modernise their constitutional dispensation in recent times and there is no proof that international, continental and regional norms have had any influence in improving the rights of regular or irregular migrants.

International instruments, such as the UN’s International Convention on Migrant Workers, do not protect irregular migrant workers’ social security rights, but it does provide guidance pertaining to the safeguarding of labor rights. Neither South Africa nor Botswana has
signed the International Convention on Migrant Workers,\textsuperscript{109} but despite this, the instrument has played a positive role in South Africa to extend labour security rights to irregular migrants. There is no indication that Botswana with its old-style Constitution is moving in the same direction.

Against the background of high unemployment rates in the region, there can be no doubt that there are huge imperatives on migrant-receiving countries in SADC to create jobs. We argue that placing the focus on the provision and extension of social security alone will not have the desired effect of improving the lives of citizens and migrant workers alike. A more holistic approach must be followed by governments in the region to improve the chances of success of gaining entry into the labour market. Such plans of action have been introduced and redesigned with seemingly little effect in some SADC countries.\textsuperscript{110} However, hope should not be lost and hard work towards the effective implementation of social protection strategies should receive the continuous and urgent attention of governments in the region. In the interim, while the alleviation of poverty has not yet occurred, a gradual and continued expansion of the provision of social insurance and social assistance schemes in respect of vulnerable groups such as irregular migrants should not be neglected. As succinctly argued by June Sinclair, countries in southern Africa should guard against neglecting the goals of the welfare state by migrating to the ideals of

\textsuperscript{109} UN Report of the Committee on the Protection of the Rights of All Migrant Workers and their Families 1 (2009) (stating that only 41 states were party to the convention on May 1, 2009).

\textsuperscript{110} South Africa, as example, has responded to poverty alleviation with a number of policies over the past two decades. First it was the Reconstruction and Development Plan (RDP), then the Growth, Employment and Distribution plan (GEAR) followed by the Accelerated and Shared Growth initiative for South Africa (ASGISA). These strategies, together with the Millennium Development Goal, aimed to halve unemployment by 2014. The now new National Development Plan aims at eradicating poverty by creating 11 million new jobs by 2030. Even though these goals seem idealistic and difficult to attain, it is imperative that such strategies should be devised and put in place.
a developmental state in totality, which generally places more emphasis on economic growth and job creation rather than catering for the social security needs of vulnerable groups in society.\textsuperscript{111}

Migration has developed into a long-standing feature of the southern African region, particularly in relation to work in the agriculture and mining sectors.\textsuperscript{112} A five-country study conducted in 2005 indicates that migration is regarded as a career rather than a localized event.\textsuperscript{113} From a historical perspective, the research suggests that cross-border trade and migration has made industrial development possible in the region.\textsuperscript{114} However, despite the fact that the African Charter and the SADC Social Security Code encourage states to work towards the free movement of persons, evidence suggests that the countries in the SADC region are much more intent on protecting their own borders and the deportation of irregular migrants than extending human rights protection to irregular migrants.\textsuperscript{115} Marius Olivier points out that “[s]ecurity concerns, in the form of control and deportation, appear to characterise the migration laws and policies of the various SADC countries”. He adds that migration in the region is perceived “as a ‘problem’, rather than an opportunity”.\textsuperscript{116} What is needed is a mind shift and realization by southern African states that cross-border trade, the transfer of skilled and unskilled labor and the establishment of an economically vibrant and entrepreneurial culture in the region will also benefit the economic growth of neighbouring states.

\textsuperscript{111} See Sinclair, supra at note 72, 196-199.
\textsuperscript{113} Crush et al, supra at note 8, 3-5.
\textsuperscript{114} Ibid.
\textsuperscript{115} The 2007 World Bank Country Report on Botswana confirms that in this country it was realised that neighbouring governments should provide for their own citizens and that irregular migrants who apply for social security grants would only be assisted on a temporary basis, before being reported to the Botswana Department of Immigration and being repatriated to their country of origin. See Ntseane and Kholisani, supra at note 74, 8-9 and 21.
\textsuperscript{116} Olivier, supra at note 1, 127.
Practical examples of how cross-border movement can be arranged include developing and implementing a regional policy framework (and appropriate country policy frameworks) that will balance the demands of national security and the orderly flow of migrants in the SADC region. Such an initiative should ideally be developed in line with the AU Migration Policy Framework for Africa and the SADC Social Security Code, which recognize the strategic and economic advantages of the free movement of people in the region. This should be done in conjunction with the overarching principles contained in the International Convention on Migrant Workers which contains details on the regulation of the position of regular and irregular migrants. Added to this, targeted bi- and multilateral social security agreements should be negotiated and entered into, and accompanying amendments of the relevant countries’ legal systems should take place to ensure the enforceability of such agreements.

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117 Olivier supra at note 49, 161, (doing extensive research in this regard and making useful suggestions about how this can be realized).

118 See e.g., Mpedi and Govindjee, supra at note 17, 781; Olivier, supra at note 49, 162. Daleen Millard, Migration and the Portability of Social Security Benefits: The Position of Non-citizens in the Southern African Development Community, 8 AFR. HUM. R. L. J. 37, 55-56 (2008) (suggesting that policies should also be developed in the in the SADC region that will allow for the portability of pension fund and other social insurance contributions and benefits).