



An analysis of SADC migration instruments in light of ILO and UN principles on labour migration

Second Draft Report

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Contents

1	INTRODUCTION	3
1.1	Objectives of this report.....	4
2.2	Outline of the report.....	5
2	INTERNATIONAL PRINCIPLES ON LABOUR MIGRATION.....	6
2.1	Integrating labour migration in the developmental process.....	6
2.2	Enabling, facilitating and managing the entire migration process	7
2.3	Promoting and protecting the rights of migrant workers and their families at all stages of the migration process.....	8
2.4	Ratification of key migration Conventions by SADC States.....	13
3	SOUTH AFRICA'S BILATERAL AGREEMENTS WITH SADC STATES	15
3.1	Early agreements with Botswana, Lesotho and Swaziland	15
3.1.1	Analysis of the early BLS Treaties in light of the international principles on migration.....	16
3.2	The South Africa-Portugal (Mozambique) Bilateral Agreement.....	20
3.3	South Africa's recent agreements with SADC States	24
4	THE SADC PROTOCOL ON THE FACILITATION OF MOVEMENT OF PERSONS.....	29
4.1	The regulation of migration in SADC: A historical overview.....	29
4.2	Analysis of the SADC Protocol in light of ILO and UN principles.....	32
4.2.1	Failure to recognize and foster migration-development linkages	32
4.2.2	Shortcomings in enabling, facilitating and managing migration.....	33
4.2.3	The lack of a rights-based approach to the regulation of migration.....	37
4.3	Conclusion	39
5	KEY FINDINGS AND RECOMMENDATIONS.....	41
5.1	Forward in time, backward in scope and protection	41
5.2	International principles on migration: A bridge too far for SADC?.....	49
5.2.1	Migration and development	50
5.2.2	Enabling, facilitating and managing migration.....	51
5.2.3	Promoting and protecting the rights of migrant workers and members of their families.....	52
5.3	The costs and burden of implementing international principles on migration in the SADC region	53

BIBLIOGRAPHY	56
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1 INTRODUCTION

International migration has reached unprecedented levels and has become an important global phenomenon. A complex web of inter-related factors underlies the process of cross-border migration. The push-pull framework conceptualizes migration in terms of the factors driving migrants to leave their home countries and the factors attracting them to settle in destination countries.¹ Economic factors such as unemployment, low wages, poverty and lack of opportunity; and social and political factors including 'poor governance, patronage and corruption, political instability, conflict and civil strife' drive out-migration.² Migrants are attracted to particular destination countries by the existence or perception of opportunities for a better life, higher income, better social services and greater security there.³

Migration has assumed greater socio-economic, political and legal significance in the Southern African Development Community (SADC), which is the focus of this report. This report focuses on the regulation of migration by citizens of SADC States *within* the region. Although there are a number of deficiencies in the data on intra-regional migration,⁴ there is broad consensus that there has been an increase in both documented and undocumented migration in SADC. There is also broad consensus that South Africa remains the major recipient of migrants within the region.⁵

As with other regions in the world, SADC confronts a number of challenges related to migration.⁶ One of the key challenges is the greater incidence of undocumented or irregular migration through human smuggling, forced migration and human trafficking. This highlights significant shortcomings in border control and the administration of migration procedures, including corruption by officials in origin, transit and destination countries. Another significant issue is the non-recognition and violation of the rights of migrants and the greater vulnerability of migrant workers as a result of factors such as age, gender and legal status. Another developmental challenge is the loss of scarce and critical skills, as key personnel leave their home countries in search of better opportunities elsewhere.

¹ The Migration Policy Framework for Africa (MPFA) adopted by the Executive Council of the African Union at its Ninth Ordinary Session, 25-29 June 2006 p 1.

² Ibid.

³ Ibid.

⁴ See J Crush and V William *Labour Migration Trends and Policies in Southern Africa* (Southern African Migration Project Policy Brief No. 23, 2010) p 4-9 and 33-35.

⁵ Ibid.

⁶ Ibid at p 33-45.

1.1 Objectives of this report

The aim of this report is to assess SADC instruments governing labour migration in light of the ILO and UN principles on labour migration. This report focuses on two sets of instruments governing labour migration.

The first set of instruments comprises SADC instruments on labour migration, namely:

- South Africa's bilateral labour agreements with neighbouring countries, that is, Mozambique (1974 and 2003), Botswana (1973) Swaziland (1975), Lesotho (1973 and 2006), the Democratic Republic of Congo (2004), Tanzania (2007), Namibia(2008), and Zimbabwe (2009);
- the SADC Draft Protocol on Facilitation of Movement of Persons (2005)

The second set of instruments comprises the international standards on labour migration, namely:

- the Migration for Employment Convention (Revised), 1949 (No. 97) and its accompanying Migration for Employment Recommendation (Revised), 1949 (No. 86);
- the Equality of Treatment (Social Security) Convention, 1962 (No. 118)
- the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and its accompanying Migrant Workers (Supplementary Provisions) Recommendation, 1975 (No. 151);
- the Maintenance of Social Security Rights Convention, 1982 (No. 157);
- the ILO core conventions on freedom of association and collective bargaining, discrimination, protection from forced labour and child labour, namely the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); the Right to Organise and Collective Bargaining Convention, 1949 (No. 98); the Forced Labour Convention, 1930 (No. 29); the Abolition of Forced Labour Convention, 1957 (No. 105); the Equal Remuneration Convention, 1951 (No. 100); the Discrimination (Employment and Occupation) Convention, 1958 (No. 111); the Minimum Age Convention, 1973 (No. 138); and the Worst Forms of Child Labour Convention, 1999 (No. 182).
- the ILO Multilateral Framework on Labour Migration (2006);
- the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 45/118 (1990).

The report will analyse SADC's key labour migration instruments with a view to assessing their congruence with international standards on migration. Ultimately, it will make recommendations on how to improve the SADC instruments to increase their convergence with international standards.

2.2 Outline of the report

The remainder of the report is structured as follows:

Part 2 of the report outlines the key international principles that must guide the regulation of migration within SADC.

Part 3 analyses South Africa's bilateral agreements with seven SADC countries in light of the international principles.

Part 4 analyses the SADC Protocol on the Facilitation of Movement of Persons in light of the international principles.

Part 5 is the conclusion, which summarizes the key findings and makes recommendations on how to align SADC migration policy with key international principles, considers some of the obstacles to their implementation and identifies possible ways to overcome them.

2 INTERNATIONAL PRINCIPLES ON LABOUR MIGRATION

This part outlines the key principles that should guide the regulation of labour migration in SADC. These principles are drawn from ILO migration Conventions and Recommendations, ILO core conventions, the ILO Multinational Framework on Labour Migration, the UN Convention on the Protection of the Rights of Migrant Workers and Members of their Families, as well as principles enshrined in other instruments, and recommendations made in various declarations, resolutions and reports.

The principles contained in these instruments have been divided into three inter-related categories, namely:

1. Integrating labour migration in the developmental process;
2. Enabling, facilitating and managing the entire migration process, from the pre-departure stage, through arrival and stay, the employment relationship, loss of employment and return to the country of origin; and
3. Promoting and protecting the rights of migrant workers and their families at all stages of the migration process.

These are outlined in greater detail in sections 2.1, 2.2 and 2.3 below. This is followed by an overview of SADC Member States' ratification of the international Conventions on labour migration.

2.1 Integrating labour migration in the developmental process

This involves the recognition of labour migration's contribution to employment, economic growth, development and poverty alleviation. In addition, it includes measures to ensure that both sending and receiving states obtain the maximum benefits from labour migration.

The following are the applicable principles and guidelines in relation to migration and development:

- Mainstreaming labour migration in national policies on employment, labour market and development policy;⁷
- Supporting and expanding on research to generate evidence on labour migration and migrant workers' contribution to the economies of destination countries⁸
- Incentivising the promotion of productive investment of remittances in countries of origin⁹
- Mitigating the cost of the loss of workers with scarce and critical skills¹⁰

⁷ Paragraph 32 of Recommendation No.122; Article 10 of Convention No.143; Guideline 4.2 of the MFLM.

⁸ Guideline 3.3 of the IMFLM.

⁹ Guideline 15.5 of the IMFLM.

¹⁰ Guideline 15.7 of the IMFLM.

- Promoting and incentivizing the transfer of capital, skills and technology by migrant workers¹¹

2.2 Enabling, facilitating and managing the entire migration process

Laws and policies governing labour migration have traditionally aimed to set the parameters in terms of labour migration will take place and regulate the flow of migrant workers into and out of countries. A more pragmatic approach goes beyond merely envisaging law and policy as playing a policing role, but emphasizes the enabling and facilitating role of legal and policy instruments governing labour migration. Laws and policies are not only relevant to the period of the migrant's stay in the destination country, but also encompass all stages prior to the migrant's departure from the country of origin and after their return to their country of origin.

The principles and guidelines for enabling, facilitating and managing migration include:

- The identification of the categories of migrant workers and skills and qualifications required in receiving countries and the identification of exportable skills, qualifications and competencies in sending countries;¹²
- The harmonization of education and training standards and the recognition of educational and training qualifications obtained in foreign countries;¹³
- Exchange of information, cooperation and coordination between sending, receiving and transit states;¹⁴
- The collection and recording of data on labour migration i.e. number of persons migrating from and to the countries, destination and origin countries, gender of migrants, skills and qualifications of migrants, information on the families of migrant workers, duration of stay in destination countries;¹⁵
- Measures to promote regular migration and to curb irregular migration, the trafficking of migrant workers and the employment of irregular migrant workers;¹⁶
- Provision of migrant workers and their families with relevant information related to their admission as migrant workers, living conditions and conditions of employment prior to their departure from their country of origin;¹⁷
- Providing the necessary information and support to assist migrants' integration in the destination country upon arrival and for the duration of their stay in the destination country;¹⁸

¹¹ Paragraph 35 of Recommendation No.122; Guideline 15.9 of the IMFLM.

¹² Annex to Convention No.202; Article 1 to Annex of Recommendation No.86; Guideline 5.1 of the IMFLM.

¹³ Article 4 to Annex of Recommendation No. 86.

¹⁴ Article 1 of Convention No.97; Article 65 of the ICMW; Principle 2 of the MFLM.

¹⁵ Principle 3 of the MFLM.

¹⁶ Article 13 of Annex 2 of Convention No.097; Article 2 of Convention No.143; Article 68 of the ICMW.

¹⁷ Article 65 of the ICMW; Paragraph 5(2) of Recommendation No.86; Guideline 12.1 of the IMFLM.

¹⁸ Article 8 of the ICMW.

- Facilitating and minimizing the costs and risks of sending remittances to families in migrants' countries of origin;¹⁹
- Promoting social dialogue between states, employers' associations, trade unions and civil society organisations on migration-related matters;²⁰
- Facilitating the exportation and importation of migrant workers' personal possessions and tools between the country of origin and the destination country;²¹
- Harmonization of social security schemes and provision for portability of social security benefits through the maintenance of rights in the course of acquisition and maintenance and acquired rights.²²

2.3 Promoting and protecting the rights of migrant workers and their families at all stages of the migration process

In addition to enabling, facilitating and managing the process of migration, it is necessary to promote and protect the rights of migrant workers and their families at all stages of the migration process. The rights include negative rights, which require states and employers to refrain from certain conduct in relation to migrant workers (e.g. non-discrimination) and positive rights, which oblige states and employers to take positive action in relation to migrant workers.

- i) The rights-based approach encompasses the basic human rights to which all migrant workers should be entitled, regardless of their migration status.*

The fundamental human rights to which all migrant workers and members of their families are entitled are the following:

- The right to life²³
- The right not to be subjected to torture, or to cruel, inhuman and degrading treatment²⁴
- Freedom of thought, conscience and religion²⁵
- Freedom of opinion and expression²⁶
- The right to privacy²⁷
- The right not to be unlawfully deprived of their property²⁸
- Liberty and security of the person, including upon arrest and rights during detention²⁹

¹⁹ Article 13 of Annex to Recommendation No.86.

²⁰ Article 4 of Convention No.143; Principle 6 of the MFLM.

²¹ Article 1 of Annex 3 of Convention No. 97.

²² Article 21 of Annex to Recommendation No. 86.

²³ Article 9 of the ICMW.

²⁴ Article 10 of the ICMW.

²⁵ Article 12 of the ICMW.

²⁶ Article 13 of the ICMW.

²⁷ Article 14 of the ICMW.

²⁸ Article 15 of the ICMW.

- Rights before courts and tribunals in criminal matters;³⁰
- The right to medical care, including treatment during a medical emergency;³¹
- Children of migrant workers are entitled to a name, birth registration and a nationality as well as to access to basic education, regardless of their or their parents' migration status.³²

ii) *The ILO has identified fundamental workers' rights in its Declaration on Fundamental Principles and Rights at Work*, which exhorts the ILO through its Member States to pay special attention to the needs of migrant workers and embark on national, regional and international efforts to resolve their problems.³³

The Fundamental Principles and Rights at Work are enshrined in the ILO's eight core Conventions, but are binding on ILO Member States regardless of their ratification of the core Conventions, are as follows :³⁴

1. freedom of association and the effective recognition of the right to collective bargaining: Article 2 of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) makes sacrosanct the right of workers and employers "without distinction whatsoever" to establish and join organisations of their own choosing without previous organisation. In addition, workers are entitled to protection against anti-union discrimination in respect of their employment and their organisations are entitled to organise without interference.³⁵
2. the elimination of all forms of forced or compulsory labour: State Parties to Conventions No. 29 and 105 are obliged to suppress forced or compulsory labour in the context of labour migration.³⁶
3. the effective abolition of child labour: States are obliged to prohibit the recruitment and employment of migrant workers below school-leaving age, which must be at least 15 years in terms of the Minimum Age Convention, 1973 (No. 138).³⁷ State Parties to Convention No. 182 are required to prohibit the engagement of children below the age of 18 in worst forms of child labour, that is, slavery, trafficking and forced labour; involvement in prostitution or the production of pornography; involvement in illicit activities

²⁹ Article 16 of the ICMW.

³⁰ Article 16.6 of the ICMW.

³¹ Article 28 of the ICMW; Article 2 of Convention No.118.

³² Article 30 of the ICMW.

³³ The ILO Declaration on Fundamental Principles and Rights at Work, Adopted by the International Labour Conference at its Eighty-Sixth Session, 18 June 1998.

³⁴ Paragraph 2 of the ILO Declaration on Fundamental Principles and Rights at Work.

³⁵ Article 1, 2 and 3 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

³⁶ See the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105).

³⁷ Articles 2(1) and (3) of the Minimum Age Convention, 1973 (No. 138).

4. including drug trafficking; and performing any work that is likely to jeopardise their health, safety or morals.³⁸
- the elimination of discrimination in respect of employment and occupation: This principle places an obligation on State Parties to prohibit discrimination amongst migrant workers on the basis of attributes such as “race, colour, sex, religion, political opinion, national extraction or social origin”, with the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation”.³⁹ The elimination of discrimination also entails the promotion of equal remuneration for men and women workers for work of equal value.⁴⁰

iii) *The basic rights for all migrant workers relate specifically to the process of migration or the circumstances of migrant workers.* These rights are extended to all migrant workers regardless of their status in the destination country.

The basic migration rights for documented and undocumented rights are as follows:

- The right to leave the country of origin and the destination country;⁴¹
- The right not to have their identification or travel documents unlawfully retained or destroyed;⁴²
- The right to transfer earnings and savings on return to the country of origin;⁴³
- Right to access and communicate with consular and diplomatic authorities present in destination countries;⁴⁴
- The right to be informed of their rights under the Convention, of the terms and conditions of their admission, living conditions and employment;⁴⁵
- The right to maintain their cultural identity;⁴⁶
- The right to equal treatment with nationals in respect of past employment; particularly in relation to remuneration, social security, benefits and working conditions;⁴⁷
- The right to equal treatment with nationals in relation to social security and social services, provided they meet the prerequisites for entitlement thereto;⁴⁸
- The right to have their case of expulsion examined and determined individually, not to be subjected to measures of collective expulsion and indemnification

³⁸ Article 3 of the Worst Forms of Child Labour Convention, 1999 (No. 182) read with Article 3(1) of the Minimum Age Convention (No. 138).

³⁹ Article 1(1) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁴⁰ Equal Remuneration Convention, 1951 (No. 100).

⁴¹ Article 8 of the ICMW.

⁴² Article 21 of the ICMW; Guideline 11.6 of the MFLM.

⁴³ Article 31 of the ICMW.

⁴⁴ Article 16.7 of the ICMW.

⁴⁵ Article 33 of the ICMW.

⁴⁶ Article 12 (f) of Convention No.143; Article 31 of the ICMW.

⁴⁷ Article 6 of Convention No.97; Article 4 of Convention No.118; Article 25 of the ICMW.

⁴⁸ Article 6 of Convention No.097; Article 27 of the IMCW.

from the costs of expulsion.⁴⁹

iii) Some rights provide additional protection to documented migrants only

The additional rights extended to documented migrants are as follows:

- Information on the migrant worker's admission, their stay in the destination country, living conditions and conditions of employment, including the contract of employment;⁵⁰
- Freedom of movement in the host country and freedom to choose their remunerated activity;⁵¹
- The right to form and join associations and trade unions;⁵²
- The right to participate in the public affairs of their country of origin;⁵³
- The right to be consulted and to have their interests and aspirations considered by States in the formulation of policies and legislation affecting them;⁵⁴
- Equal treatment with nationals in relation to access to education, vocational guidance, placement, training, housing, health and social services, memberships in co-operatives, participation in cultural life;⁵⁵
- The right to have the unity of their family protected and to measures to promote the reunification of the family;⁵⁶
- Migrants' family members are entitled to equal access with nationals with regard to education, vocational guidance and training, social and health services, cultural life, and the promotion of social integration and the maintenance of their cultural identity;⁵⁷
- The right to exemption from customs duty for personal goods and tools of their trade when departing from their country of origin and when returning to their country of origin;⁵⁸
- The right to transfer earnings and savings to their country of origin;⁵⁹
- The right to protection from double taxation, and to equality with nationals with regard to tax rates and deductions;⁶⁰
- States may consider granting migrants' family members leave to stay in the destination on the migrant workers' death or on dissolution of the migrant

⁴⁹ Article 22 of the ICMW.

⁵⁰ Article 5 of Annex 1 of Convention No. 97.

⁵¹ Article 39 of the ICMW.

⁵² Article 40 of the ICMW.

⁵³ Article 41 of the ICMW.

⁵⁴ Article 3 of Convention 122; Paragraph 3 of Recommendation 122; Article 12(e) of Convention No.143; Article 42 of the ICMW.

⁵⁵ Article 3 of Convention No.118; Paragraph 2 of Recommendation No.151.

⁵⁶ Article 44 of the ICMW; Paragraph 15.1 of Recommendation No.086; Paragraph 13 of Recommendation No.151; Guideline 14.10 of the MFLM.

⁵⁷ Article 45 of the ICMW.

⁵⁸ Article 1 of Annex 3 of Convention No. 97.

⁵⁹ Article 9 of Convention No.097; Article 47 of the ICMW.

⁶⁰ Article 48 of the ICMW.

- workers' marriage;⁶¹
- Equality of treatment with nationals in respect of security of employment, the provision of alternative employment, relief work, and retraining;⁶²
- The right to equality of treatment with nationals in relation to dismissal, unemployment benefits, public work schemes and access to alternative employment;⁶³
- The right not to be regarded as an undocumented migrant or to lose their authorization of residence withdrawn upon the termination of their employment or the expiration of their work permit.⁶⁴

iv) In order to ensure the effectiveness of migrant workers' substantive rights, there must be adequate provision for institutions to enable migrant workers to vindicate their rights and to ensure that employers and recruitment agencies comply with their obligations

The institutional and procedural arrangements to protect migrant workers' substantive rights are as follows:

- Extending labour inspection to workplaces where migrant workers are employed and ensuring that the labour inspectorate is adequately equipped and trained to address migrant workers' rights;⁶⁵
- Promoting the conclusion of written contracts to document the rights and obligations of the parties thereto;⁶⁶
- Providing effective remedies to and the provision of effective and accessible channels for migrant workers to enforce their rights without discrimination, intimidation or retaliation;⁶⁷
- Providing for remedies against all persons and entities involved in the recruitment and employment of migrant workers for violation of the rights of migrants and members of their families;⁶⁸
- Providing effective sanctions and penalties for those who violate migrant workers' rights;⁶⁹
- Providing migrant workers with information about their rights and assisting them with defending their rights⁷⁰
- Conscientising employers' and workers organisations about the rights of

⁶¹ Article 50 of the ICMW.

⁶² Article 8 of Convention No.143; Article 43 of the ICMW; Paragraph 2 of Recommendation No.151.

⁶³ Article 68.1 of Convention No.102; Article 54 of the ICMW.

⁶⁴ Article 8 of Convention No.143; Article 49 of the ICMW.

⁶⁵ Article 15.4 of Annex to Recommendation N0.086; Guideline 10.1 of the MFLM.

⁶⁶ Article 5 of Annex 1 of Convention No.097; Guideline 10.3 of the MFLM.

⁶⁷ Guideline 10.5 of the MFLM.

⁶⁸ Article 54 of the ICMW; Guideline 10.6 of the MFLM.

⁶⁹ Article 6 of Convention No.143; Guideline 11.4 of the MFLM.

⁷⁰ Guideline 8 of the IMFLM; Guideline 10.8 of the MFLM.

- migrant workers;⁷¹
- Providing interpretation and translation services for migrant workers during administrative and judicial proceedings;⁷²
- Offering legal services to migrant workers during legal proceedings related to employment and migration.⁷³

2.4 Ratification of key migration Conventions by SADC States

Having outlined the key principles enshrined in the international instruments on labour migration, this section looks at the extent to which SADC Member States have ratified the five international Conventions on labour migration. Table 1 below tabulates the 15 SADC States' ratification of Conventions 97, 188, 143, 157 and the ICMW.

Table 1: SADC States' ratification of migration Conventions

Country	Migration Convention				
	C097	C118	C143	C157	ICMW
<i>Angola</i>	--	--	--	--	--
<i>Botswana</i>	--	--	--	--	--
<i>Democratic Republic Of The Congo</i>	--	01 Nov 1967	--	--	--
<i>Lesotho</i>	--	--	--	--	16 Sep 2005
<i>Madagascar</i>	14 Jun 2001	22 Jun 1964	--	--	--
<i>Malawi</i>	--	--	--	--	--
<i>Mauritius</i>	02 Dec 1969	--	--	--	--
<i>Mozambique</i>	--	--	--	--	19 Aug 2013
<i>Namibia</i>	--	--	--	--	--
<i>Seychelles</i>	--	--	--	--	15 Dec 1994
<i>South Africa</i>	--	--	--	--	--
<i>Swaziland</i>	--	--	--	--	--
<i>Tanzania</i>	22 Jun 1964	--	--	--	--
<i>Zambia</i>	02 Dec 1964	--	--	--	--
<i>Zimbabwe</i>	--	--	--	--	--

Source: Compiled by the author using data from the ILOLEX database

Key

-- denotes a Convention that the relevant country has not ratified

⁷¹ Article 12(c) of Convention No.143; Guideline 10.10 of the MFLM.

⁷² Article 6 of Annex 1 of Convention No.097; Article 18 of the ICMW; Guideline 10.10 of the MFLM.

⁷³ Article 18 of the ICMW; Guideline 10.11 of the MFLM.

Table 1 shows that SADC Member States fare poorly in terms of the ratification of international Conventions on migration. Seven SADC States including South Africa have not ratified any of the migration Conventions. Only one country, Madagascar has ratified two migration Conventions, namely Conventions No. 97 and No. 118. The seven remaining Member States have only ratified one migration Convention, with a concentration on Convention No. 97 and the ICMW.

It is worth noting that the major migrant-receiving States, namely South Africa, Namibia and Botswana are amongst those have not ratified a single international Convention on migration. Convention No. 97, which provides for the basic rights of migrant workers, has received the highest number (that is, four) of ratifications by SADC States. The ICMW, which is the most comprehensive Convention on labour migration, has been ratified by only three SADC States, with the majority of these being migrant-sending States. Only one SADC Member State has ratified a Convention dealing specifically with social security in the context of migration.

SADC's poor ratification record on labour migration signals the limited incorporation of international principles on labour migration. This position does not bode well for the mainstreaming of migration and development; the enabling, facilitation and management of migration; or protection of migrant workers within Member States' territories.

3 SOUTH AFRICA'S BILATERAL AGREEMENTS WITH SADC STATES

South Africa has a long history of bilateral labour and migration agreements with neighbouring states. Its early agreements with Botswana, Lesotho and Swaziland (the BLS States) were concluded in July 1963 and were updated in 1973 and 1975. The provisions of South Africa's agreements with these States were identical and are discussed under section 4.1. In 1964, South Africa concluded a labour agreement with Portugal to regulate the migration of workers from Mozambique (then a Portuguese colony) to South Africa. The provisions of the South Africa-Mozambique Agreement differ markedly from those of the South Africa-BLS Agreements, thus warranting separate discussion under section 4.2.

Following its transition to democracy, South Africa has concluded several bilateral labour and/or migration agreements and memoranda of understanding with several SADC countries. These countries are Lesotho, Mozambique, the Democratic Republic of Congo, Tanzania and Zimbabwe. The recent Agreements and MOUs with Lesotho, the Democratic Republic of Congo and Zimbabwe have been concluded within the framework of broader joint commissions or bilateral cooperation agreements between the respective countries.⁷⁴ Section 4.3 considers South Africa's recent agreements and MOUs on labour and migration in light of the international principles.

3.1 Early agreements with Botswana, Lesotho and Swaziland

South Africa concluded arrangements with Botswana, Lesotho and Swaziland in July 1963.⁷⁵ These arrangements governed passport control posts between South Africa and the BLS states and the documentation of South African and BLS citizens for purposes of crossing common borders. The arrangements provided for the employment of migrants from the BLS States in South Africa.

⁷⁴ See the Preamble of the Memorandum of Understanding between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe in the Fields of Cooperation and Labour (2004), which was superseded by an MOU concluded between the two countries in 2009; Preamble of the Memorandum of Understanding between the Government of the Democratic Republic of the Congo and the Government of the Republic of South Africa on Cooperation in Immigration and Population Matters (2004) and the Agreement between the United Republic of Tanzania and the Government of the Republic of South Africa in Cooperation in Areas of Migration Matters (2007).

⁷⁵ Arrangements Regarding Passport Control Posts, the Employment and Documentation of the Kingdom of Swaziland and the Movement of Certain Citizens of the Republic of South Africa and Swaziland across the Common Border between South Africa and the Kingdom of Swaziland (1 July 1963); Arrangements Regarding Passport Control Posts, the Employment and Documentation of the Kingdom of Lesotho and the Movement of Certain Citizens of the Republic of South Africa and Lesotho across the Common Border between South Africa and the Kingdom of Lesotho (1 July 1963); Arrangements Regarding Passport Control Posts, the Employment and Documentation of Citizens of the Republic of Botswana and the Movement of Certain Citizens of the Republic of South Africa and Botswana across the Common Border between South Africa and the Republic of Botswana (1 July 1963). These shall collectively be referred to as the South Africa BLS Arrangements.

The Arrangements provided for South African employers seeking to employ migrant workers from BLS States to obtain authorization from the South African government to employ a specified number of workers.⁷⁶ These employers were also required to seek the sending government's permission to employ its citizens and pay the prescribed fees. In order to be admitted into South Africa for employment, migrant workers from the BLS States were required to have a valid passport or travel document and prior authorization from the South African government. They were also required to have a written contract of employment duly attested in their country of origin⁷⁷ and valid for up to two years.⁷⁸

In 1973 and 1975, South Africa concluded migration Agreements with the BLS States.⁷⁹ The Agreements superseded the provisions of the 1963 Arrangements and incorporated the latter as Annexures. The discussion below will therefore make reference to the 1973 and 1975 Agreements and where necessary, refer to the 1963 Agreements as Annexures. The 1973 and 1975 Agreements introduced five key provisions to the regime governing the employment of migrant workers from the BLS States. These relate to the approval of recruitment arrangements, the establishment of interview and selection facilities in sending countries, the establishment of Labour Offices in South Africa, protection against double-taxation and obligations in respect of remittances and related matters. These provisions are discussed in the analysis below.

3.1.1 Analysis of the early BLS Treaties in light of the international principles on migration

This section will analyse the South Africa-BLS treaties in light of the international principles on migration, as contained in the ILO and UN instruments, the MLFM and the MPFA. Importantly, reference will be made to the Model Agreement on Temporary and Permanent Migration for Employment Including Migration of Refugees and Displaced Persons, which is annexed to Recommendation No. 86 (the Model Treaty). As with the analysis of the SADC Protocol, it divides the discussion into three categories of principles, namely those relating to migration and development; those pertaining to the facilitation,

⁷⁶ Articles 3 of the Botswana, Lesotho and Swaziland Arrangements.

⁷⁷ Article 2 of the Botswana, Lesotho and Swaziland Arrangements.

⁷⁸ Articles 2 of the Botswana, Lesotho and Swaziland Arrangements.

⁷⁹ Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Lesotho relating to the Establishment of an Office for a Lesotho government Labour Representative in the Republic of South Africa, Lesotho Citizens in the Republic of South Africa and the Movement of such persons across the international border' (24 August 1973: Republic of South Africa Treaty Series No. 1/1973); Agreement between the Government of the Republic of South Africa and the Government of the Republic of Botswana relating to the Establishment of an Office for a Botswana government Labour Representative in the Republic of South Africa, Botswana Citizens in the Republic of South Africa and the Movement of such Persons across the International Border (24 December 1973: Republic of South Africa Treaty Series No. 3/1973) and Agreement between the Government of the Republic of South Africa and the Government of the Kingdom of Swaziland relating to the establishment of an office for a Swaziland government Labour Representative in the Republic of South Africa, certain Swaziland citizens in the Republic of South Africa and the movement of such persons across the common border and the movement of certain South African citizens across the common border, and addendum thereto (22 August 1975: Government of South Africa Treaty Series No. 3/1986).

promotion and management of migration; and those relating to the rights of migrants and their family members.

Migration and development

The South Africa-BLS Agreements make little reference to issues concerning migration and development. There is a brief reference to contractual provisions allowing employers to deduct agreed amounts for remittance to migrant workers' families in their countries of origin.⁸⁰ However, there are no provisions requiring States to promote the productive investment of remittances or the transfer of skills and technology by migrants to the BLS States.

The Agreements make no mention of the need for State Parties to investigate, measure and raise awareness about the developmental impacts of migration on sending and receiving countries. There is no provision encouraging State Parties to minimize the negative impacts of labour migration on sending countries, for example brain drain and the loss of scarce skills.

The enabling, facilitation and management of migration

The South Africa-BLS Agreements do not contain provisions for mutual agreement and cooperation on three matters that are indispensable for the facilitation of migration. The first is the exchange of information by State Parties on a number of matters including the legislative and administrative provisions governing migration, the number and categories of migrants required and of intending migrants, the environment and living conditions prevailing in the respective countries and the social security system.⁸¹ Second, the Agreements do not oblige State Parties to take measures to accelerate and simplify the administrative formalities relating to migration.⁸² Third, there are no provisions governing the criteria for a receiving state's recognition of documents issued by a sending state concerning a migrant worker or their family member's civil or legal status, educational and occupational qualifications and participation in social security schemes.⁸³

The Agreements govern the interview and selection of migrant workers by employment agencies to a limited extent. They require that the governments of the sending and receiving states approve recruitment arrangements between recruiting organisations and the respective BLS governments.⁸⁴ Articles IV of the Agreements require the BLS States to establish facilities in their territories where prospective employers interview, select and engage migrant workers.⁸⁵ However, the Agreements do not outline the technical,

⁸⁰ Articles IV of the (1973 and 1975) South Africa-BLS Agreements.

⁸¹ Article 1 of the Model Treaty.

⁸² Article 3 of the Model Treaty.

⁸³ Article 4 of the Model Treaty.

⁸⁴ Articles VII of the (1973 and 1975) South-Africa - BLS Migration Agreements.

⁸⁵ Articles VI of the (1973 and 1975) South Africa-BLS Migration Agreements.

vocational and medical selection criteria and processes to ensure transparency and consistency in selection.⁸⁶

The South Africa-BLS Agreements do not oblige State Parties to ensure that migrants are adequately informed about their future working and living conditions in the destination country. In terms of the Model Treaty, this information must be provided prior to departure and upon arrival in the destination country.⁸⁷ Moreover, the Agreements are silent on the transportation of migrant workers and their families. In terms of the Model Treaty, States must ensure that workers are transported under humane conditions and provide assistance and safeguard their health and welfare during their journey and upon arrival in the destination country.⁸⁸ In terms of the Model Treaty, States must agree on the allocation of costs of travel, maintenance and medical emergencies while traveling, and the cost of transport of their personal belongings.⁸⁹

The South Africa-BLS agreements address double-taxation by limiting migrants' liability to taxation in their countries of origin only.⁹⁰ However, they do not go further in mitigating some of the financial costs of migration through exemptions from customs duty when exporting and importing their personal belongings and trade tools;⁹¹ relieving them of the administrative costs of recruitment, introduction and placing,⁹² and relieving them of the costs of transport and maintenance for their return journey.⁹³ Related to this is the failure to require State Parties to facilitate the simplification and acceleration of money transfers between the destination country and the migrant's country of origin.⁹⁴

Save for the possibility of welfare funds for disabled ex-migrant workers, the Agreements do not regulate procedures and rights of migrant workers during the return and upon arrival in their home countries.⁹⁵

Rights of migrant workers and their family members

The South Africa- BLS Treaties does not expressly refer to the rights of migrant workers from BLS States in South Africa. There is no mention of their entitlement to basic human rights covered in the ICMW, including the right to life, freedom of thought and expression, freedom of thought conscience and religion and privacy. The Agreements make no mention of fundamental workers' rights in terms of the eight core Conventions, namely

⁸⁶ Articles 5 and 7 of the Model Treaty.

⁸⁷ Article 8 of the Model Treaty.

⁸⁸ Article 11 of the Model Treaty.

⁸⁹ Article 12 of the Model Treaty.

⁹⁰ Articles IV of the (1973 and 1975) South Africa-BLS Migration Agreements

⁹¹ Article 26(3) of the Model Treaty.

⁹² Article 6(4) of the Model Treaty.

⁹³ Article 26(1) of the Model Treaty.

⁹⁴ Article 12 of the Model Treaty.

⁹⁵ See Article 26 of the Model Treaty.

freedom of association and the right to collective bargaining, the elimination of employment- and occupation- related discrimination, the elimination of forced or compulsory labour, and the effective abolition of child labour.

Exacerbating these shortcomings is the absence of certain rights-related provisions covering both documented and undocumented migrant workers. Thus, there is no provision for migrants' protection against the unlawful retention or destruction of their identity and travel documents. The BLS Agreements make no reference migrant workers' rights to equal treatment with South African nationals in respect of past employment and in respect of social security schemes, food and social services. Migrant workers' rights to maintain their cultural identity are not included in the South Africa-BLS Agreements. There is no protection of migrants' rights during the process of expulsion.

Moreover, the Agreements do not include most rights of the rights that the international instruments confer on documented migrants. These include associational and participation rights in both the country of origin and the destination country. There is no provision for migrant workers' equal treatment with South African nationals with regard to education, vocational guidance, placement, training and housing, health and social services. Importantly, there are no provisions for equal treatment of migrant workers in relation to dismissal, provision of unemployment benefits, public work schemes and access to alternative employment. There is no mention of the principle of the reunification of migrant workers' families, or the rights of family members of migrant workers.

The South Africa-BLS Agreements include some provisions that potentially protect migrant workers. These include the requirement that employment agencies obtain authorisation to recruit migrant workers from the sending and receiving governments.⁹⁶ The Agreements also require that workers be provided with a written contract, which must be attested in the country of origin prior to departure.⁹⁷ Importantly, the Agreements establish dedicated consular authorities of the BLS States to function as Labour Offices responsible for assisting and supporting migrant workers in South Africa.⁹⁸ Labour Offices are tasked with ensuring migrant workers' compliance with South African migration requirements and formalities. In addition, they may consult with the South African government and assist migrant workers with respect to housing, repatriation, remittances, compensation funds and tax collections.

Several shortcomings in the formulation of these provisions limit their potential to effectively protect migrant workers. In the first place, the Agreements do not provide for

⁹⁶ Articles IV of the 1963 South Africa-BLS Migration Arrangements.

⁹⁷ Articles III of the 1963 South Africa-BLS Migration Arrangements.

⁹⁸ Articles I of the (1973 and 1975) South Africa-BLS Migration Agreements. In terms of Articles II of the Agreements, the Labour Offices would be staffed by citizens of the respective BLS States, who would enjoy diplomatic privileges and immunities.

the translation of employment contracts into migrant workers' languages. In the second place, there are no rules governing the conduct of neither recruitment agencies, nor penalties for their non-compliance and the exploitation of workers. Third, the requirement that South African government and employers cooperate with the Labour Office⁹⁹ does not include a clear remedy for lack of cooperation or interference with the performance of consular authorities' duties.

Fourth, there are no clear provisions prohibiting and stipulating penalties for the dissemination of misleading information about migration.¹⁰⁰ Fifth, the Agreements do not provide aggrieved migrants with access to the courts for the redress of their grievances in accordance with the laws of the destination country.¹⁰¹ Finally, the Agreements do not require the South African authorities to directly supervise and inspect the living and working conditions of migrant workers.¹⁰²

3.2 The South Africa-Portugal (Mozambique) Bilateral Agreement

The 1964 Agreement between the South African and Portuguese governments was concluded to regulate the migration of Mozambican workers recruited to work on South African mines.¹⁰³ It is analysed below in light of international principles on migration and development; enabling, facilitating and managing migration and the rights of migrant workers and members of their families. The analysis will show that the Treaty's provisions in relation to the facilitation and management of migration and the rights of migrant workers are more extensive than the South Africa-BLS Agreements.

Migration and development

The South Africa-Mozambique Agreement does little to foster or strengthen linkages between migration and development. While Articles VI, XVIII and XIX provide for facilities for money savings and remittances, there are no provisions to encourage the productive investment of savings and remittances. The Agreement does not encourage the transfer of skills and technology by migrant workers. There is nothing in the Agreement exhorting the State Parties to investigate and determine the positive developmental impacts or minimize the potential negative consequences of migration between the two countries.

⁹⁹ See various provisions of Articles III of the South Africa-BLS Agreements, which provide for the concurrence of the South African authorities and provide for the Labour Representative's access to the employers and the workplaces of migrant workers based in South Africa.

¹⁰⁰ Article 2 of the Model Treaty.

¹⁰¹ See Article 16 of the Model Treaty.

¹⁰² Article 15 of the Model Treaty.

¹⁰³ Agreement between the Government of the Republic of South Africa and the Republic of Portugal regulating the employment of Portuguese workers from the Province of Mozambique on certain mines in the Republic of South Africa. 13th October, 1964 (Republic of South Africa Treaty Series No. 11/1964).

Enabling, facilitating and managing migration

The South Africa-Mozambique Agreement does not provide for mutual agreement and cooperation on three matters that are indispensable for the facilitation of migration. The first is the exchange of information by State Parties on a number of matters including the legislative and administrative provisions governing migration, the number and categories of migrants required and of intending migrants, the environment and living conditions and social security systems prevailing in the respective countries.¹⁰⁴ Second, it does not oblige State Parties to accelerate and simplify the migration formalities.¹⁰⁵ Third, there are no provisions governing the criteria for a receiving state's recognition of documents issued by the sending state concerning a migrant worker or their family member's civil or legal status, educational and occupational qualifications and participation in social security schemes.¹⁰⁶

The Agreements govern the interview and selection of migrant workers by employment agencies to a limited extent. They require that recruitment agencies be duly registered by the Mozambican government and allow for them to establish recruitment centres in Mozambique.¹⁰⁷ However, the Agreement does not outline the technical, vocational and medical selection criteria and processes to ensure transparency and consistency in selection.¹⁰⁸

The South Africa-Mozambique Agreement requires that prospective migrants conclude written employment contracts detailing the terms and conditions of employment prior to departure. While this goes some way towards ensuring that migrants are adequately informed about their future working conditions in the destination country, it does not go far enough in informing them about their future living conditions as required by the Model Treaty.¹⁰⁹ Moreover, the Agreement does not require that States ensure that workers are transported under humane conditions and provide assistance and safeguard their health and welfare during their journey and upon arrival in the destination country.¹¹⁰

The Agreement makes several provisions to minimize the financial costs of migration on migrant workers. Amongst them are the exemption of Mozambican migrant workers from paying South African taxes and their exemption from levies and taxes related to the signing of contracts, medical examinations and departure from or entry into Mozambique.¹¹¹ It also

¹⁰⁴ Article 1 of the Model Treaty.

¹⁰⁵ Article 3 of the Model Treaty.

¹⁰⁶ Article 4 of the Model Treaty.

¹⁰⁷ Article IV of the South Africa-Mozambique Agreement.

¹⁰⁸ Articles 5 and 7 of the Model Treaty.

¹⁰⁹ Article 8 of the Model Treaty.

¹¹⁰ Article 11 of the Model Treaty.

¹¹¹ Article XXVI of the South Africa-Mozambique Treaty (1964).

relieves migrant workers from the costs of recruitment, registration of contracts, transportation and repatriation.¹¹²

The Agreement further outlines the rules for the provision of advances to migrant workers prior to their commencement of employment and sets out rules for the recovery of such advances.¹¹³ In terms of the Agreement, migrant workers are exempted from the costs of sending remittances to their families through the Institute of Labour.¹¹⁴ The Agreement does not, however, provide for customs exemption for the importation and exportation of migrant workers' personal possessions and tools of trade between South Africa and Mozambique.¹¹⁵

Despite commendable provisions aimed at minimizing the financial costs of migration, the South Africa – Mozambique Agreement does not address the social costs associated with migration. There is no mention of the principle of family reunification or of migrant worker's entitlement to periodically visit their families in Mozambique. With the exception of compensation funds for occupational injuries and diseases, the Agreement does not draw migrant workers into the South African social security framework. State Parties are not required to promote integration of Mozambican workers in South Africa.

The South Africa-Mozambique Agreement provides little protection to migrant workers upon termination of their employment. It provides that workers found to be unfit for work on the mines or made redundant shall be returned to their places of recruitment at the expense of the recruitment agency or the mine.¹¹⁶ The Agreement does not allow workers in these predicaments to seek alternative employment or to have recourse to contractual remedies for premature termination of employment as required by the Model Treaty.¹¹⁷ It does not protect workers from forced expulsion should they be unable to continue their occupation due to illness or injury.¹¹⁸ Save for the possibility of compensation for occupational injuries and diseases after migrants' return,¹¹⁹ the Agreement does not provide for migrants' rights or reintegration upon their return to Mozambique.¹²⁰

Protecting the rights of migrant workers and members of their families

The South Africa-Mozambique Agreement contains several provisions for the protection of Mozambican migrant workers in South Africa. The Agreement expressly prohibits the

¹¹² Articles III and XVI of the South Africa-Mozambique Treaty (1964).

¹¹³ Articles XX of the South Africa-Mozambique Treaty (1964).

¹¹⁴ Article XIX of the South Africa-Mozambique Treaty (1964)

¹¹⁵ Article 26(3) of the Model Treaty

¹¹⁶ Article XV of the South Africa-Mozambique Treaty (1964).

¹¹⁷ Articles 23 and 24 of the Model Treaty.

¹¹⁸ See Article 25 of the Model Treaty.

¹¹⁹ Articles XXII and XXV of the South Africa-Mozambique Treaty (1964).

¹²⁰ See Article 26 of the Model Treaty.

employment of Mozambican workers below the age of 18 on South African mines,¹²¹ a measure that would contribute to preventing child labour in the context of migration. Article XIII provides for equality of treatment between Mozambican workers and South African workers performing the same kind of work, especially in relation to remuneration, food, accommodation, clothing, working time, occupational injuries and diseases and apprenticeship and occupational grading. The Agreement also provides that the laws governing compensation, benefits and medical examinations for pneumoconiosis continue to apply to Mozambican workers after their return to Mozambique.¹²² A significant drawback of the latter provision is the fact that compensation awards for Mozambican workers is significantly less than that paid to South African workers.¹²³

There are several shortcomings in the rights-related provisions in the South Africa-Mozambique Agreement. There is no mention of their entitlement to basic human rights covered in the ICMW, including the right to life, freedom of thought and expression, freedom of thought conscience and religion and privacy. The Agreements fail to provide for some of the fundamental workers' rights identified by the ILO, namely freedom of association and the right to collective bargaining and the elimination of forced or compulsory labour.

The South Africa-Mozambique Agreement also fails to provide for certain rights intended for both documented and undocumented migrant workers. These include protection against the unlawful retention or destruction of their identity and travel documents. Migrant workers' rights to maintain their cultural identity are not included in the South Africa-Mozambique Agreement. There is no protection of migrants' rights during the process of expulsion. Moreover, the Agreements do not include most rights of the rights intended for documented migrants, for example, the associational and participation rights in the country of origin and the destination country.

In addition to providing for the substantive rights of migrant workers, the Agreement provides for two important mechanisms for the protection of their rights. The first is Article VIII, which requires that a recruitment agency and a Mozambican worker conclude an employment contract prior to the worker's departure from Mozambique. The contract must be written in Portuguese and Mozambican dialects and must contain all information pertaining to the migrant worker's employment including the nature of the work, the duration of the contract, the worker's salary, and provision for food, clothes and lodging.¹²⁴

¹²¹ Article XII of the South Africa-Mozambique Treaty (1964).

¹²² Article XXV of the South Africa-Mozambique Treaty (1964).

¹²³ Article XXII of the South Africa- Mozambique Treaty (1964) This would be i) the total amount awarded, where the worker was awarded R 20 or less, ii) R 20, where the worker was awarded an amount between R 20 and R 200 and iii) ten per cent of the total amount awarded, where the worker was awarded more than R 200.

¹²⁴ Article X of the South Africa-Mozambique Treaty (1964).

Each employment contract must be approved and registered by the Mozambican Institute of Labour.¹²⁵ The Agreement expressly prohibits the employment of migrant workers in terms of contracts whose provisions are contrary to the Agreement.¹²⁶

The second mechanism is the provision empowerment of the Mozambican consular authorities and the Institute of Labour to assist and protect Mozambican workers in South Africa and ensure the fulfillment of their contractual rights.¹²⁷ The South African government is obliged to facilitate the Institute of Labour's performance of its functions and investigations into the working and living conditions of the Mozambican workers.¹²⁸ Mozambican migrants, their heirs or dependants may also request the Delegate of the Institute of Labour to act as their advisor in any civil cases to which they may be party.¹²⁹

The Agreement provides for sanctions and penalties for recalcitrant employers and recruitment agencies. In terms of Article XII, the Institute of Labour may withhold the approval of contracts signed on behalf of any mine that fails to fulfill its contractual obligations, or deliberately obstructs the action of the Delegate of the Institute of Labour, or obstructs Mozambican workers' access to the Institute.¹³⁰ In the second place, it makes recruitment agencies' licenses subject to annual renewal and entitles the Government of Mozambique to withdraw an agency's license if it fails to fulfill the provisions of the Agreement or to comply with Mozambican laws.¹³¹ These provisions go some way towards buttressing migrants' rights and the protection mechanisms described above. However, they do not provide aggrieved migrant with access to the courts for the redress of their grievances in accordance with the laws of the destination country.¹³²

3.3 South Africa's recent agreements with SADC States

Since its transition to democracy, South Africa has concluded Agreements and Memoranda of Understanding (MOUs) with Mozambique, Lesotho, the Democratic Republic of Congo, Tanzania, Zimbabwe and Namibia. These Agreements and MOUs establish broad frameworks for the parties' cooperation in labour and migration matters. The agreements follow a similar format and contain provisions on the following:

- i) Identification of the competent authorities responsible for the implementation of the agreements;
- ii) Objectives and areas of cooperation;

¹²⁵ Article VIII of the South Africa-Mozambique Treaty (1964).

¹²⁶ Article XII of the South Africa-Mozambique Treaty (1964).

¹²⁷ Article VI of the South Africa-Mozambique Treaty (1964).

¹²⁸ Article VI of the South Africa-Mozambique Treaty (1964).

¹²⁹ Article XXI of the South Africa-Mozambique Treaty (1964).

¹³⁰ Article XII of the South Africa-Mozambique Treaty (1964).

¹³¹ Articles IV and V of the South Africa-Mozambique Treaty (1964).

¹³² Article 16 of the Model Treaty.

- iii) Forms of cooperation, that is, the nature of activities to be undertaken by the parties;
- iv) The coordination of programmes and financial arrangements relating to cooperation;
- v) Rules governing amendment, dispute resolution, entry into force, duration and termination.

The second theme is of particular interest for the purposes of this analysis. The objectives and areas of cooperation in the recent Agreements and MOUs cover a range of issues. A key objective is the combatting of illegal migration and cross-border trafficking.¹³³ Parties to some of the MOUs aim to streamline and harmonize laws and policies relating to visa procedures, information technology and record-keeping.¹³⁴ In some agreements, parties commit to support the capacity-building of immigration officials.¹³⁵ Importantly, South Africa's MOUs with Zimbabwe provide for the establishment of One-Stop Border Posts and a Beitbridge labour migration centre to facilitate cross-border movement and provide assistance to migrant workers at borders.¹³⁶

Two of the recent agreements require State Parties to address matters arising in the context of historic migration of workers for employment on South African mines. The Zimbabwe-South Africa MOU exhorts the State Parties to facilitate an interface between the ex-Zimbabwean migrant mine workers and their previous South African employers or ex-employment agencies.¹³⁷ South Africa's MOU with Lesotho places the finalization of outstanding workers' compensation claims of Basotho ex-mine workers¹³⁸ and the review of the Labour Agreement concluded between the two countries in 1973 on the bilateral agenda. The latter MOU extends its scope to cover compensation in respect of occupational and injuries to citizens of both countries presently working in either of the two countries.¹³⁹

South Africa's recent MOUs and Agreements with SADC states outline the broad frameworks for cooperation on labour and migration matters. They identify various forms of cooperation between the State Parties. These include exchange visits, study tours, exchange of materials and information, consultation, training, joint task teams of experts, training, and the provision of logistical support. There is very little literature on the

¹³³ See Article 2(b) of the South Africa-Zimbabwe MOU (2009) and the Preamble to the Tanzania-South Africa MOU (2004).

¹³⁴ See Article 2(a) of the Democratic Republic of Congo-South Africa MOU (2004); Article 1 of the Tanzania-South Africa MOU (2007) and Article 2 of the South Africa-Zimbabwe MOU on Migration Matters (2009).

¹³⁵ Article 2 of the South Africa-Zimbabwe MOU on Migration Matters (2009) and Article 2(a) of the Democratic Republic of the Congo-South Africa MOU (2004).

¹³⁶ Article 3(b) (v) of the Zimbabwe-South Africa MOU on Employment and Labour (2009) and Articles 2(a) and (e) of the South Africa-Zimbabwe MOU on Migration (2009).

¹³⁷ Article 3(b) (vii) of the Zimbabwe-South Africa MOU on Employment and Labour (2009).

¹³⁸ Articles 1(c) and 3(5) of the South Africa-Lesotho MOU (2006).

¹³⁹ Articles 1(e) of the South Africa-Lesotho MOU (2006).

development and implementation of programmes on employment and migration matters between South Africa and the SADC states.

One of the better known examples of concrete action with regard to migration is South Africa's special amnesty for Zimbabwean migrants in South Africa, which was announced in 2009. Zimbabweans who were undocumented or had acquired fraudulent documents were invited to present themselves to apply for amnesty from the South African government. They were subsequently allowed to apply for work, study and business permits on the basis of relaxed requirements. In addition, Zimbabwean citizens visiting South Africa have been granted a free 90-day visa since May 2009. This special dispensation took place during the same year that South Africa and Zimbabwe concluded two MOUs on labour and migration matters¹⁴⁰ and were preceded by bilateral discussions between the Ministers of the respective countries. .¹⁴¹

Assessment in light of international principles on labour migration

One of the most significant findings from a reading of the provisions of the MOUs and Agreements is the failure to acknowledge or refer to the international instruments governing labour migration. It therefore comes as no surprise that the recent bilateral instruments do not draw significantly on the international principles and guidelines on labour migration.

The recent bilateral instruments do very little to acknowledge the socio-economic significance of labour migration or recognize the links between labour migration and development. Consequently, none of the provisions of the bilateral instruments are directed at investigating and determining the developmental impact of labour migration between the State Parties. The provisions do not exhort State Parties to maximize the developmental impact of labour migration through the facilitation or channeling of remittances or the transfer of skills, technology and capital. Furthermore, they do not acknowledge brain drain and loss of scarce skills as potentially negative impacts of labour migration and thus exclude them from the State Parties' joint agenda.

The recent bilateral instruments contain some provisions that could contribute towards enabling, facilitating and managing migration. For the most part, these relate to technical and administrative matters including visa procedures and information technology. The references to combatting illegal migration and trafficking and the capacity building of

¹⁴⁰ The MOU on Migration was concluded on the 4th of May 2009 and the MOU on Employment and Labour was concluded on the 27th of August 2009.

¹⁴¹ It is worth noting that the MOU on Labour and Employment Matters superseded a previous MOU that the two countries entered into in 2004. Article 2(b)(i) of the latter MOU provided for the state parties to cooperate on measures to regularize the status of Zimbabwean migrant workers in South Africa, "especially on issues such as work permits and conditions of employment". Ironically, this provision was absent from both MOUs concluded between the two countries in 2009.

migration officials highlight the emphasis on policing and controlling migration through the use of force and sanctions.

The Zimbabwe-South Africa MOUs make the most significant attempts to enable and facilitate migration by providing for the regularization of undocumented Zimbabwean migrants and the establishment of one-stop border posts and the labour migration centre. All of the MOUs and Agreements refer to modes of cooperation, which in various ways facilitate the exchange of information, knowledge and experiences between the State Parties. Undoubtedly, the implementation of these measures, with a vision informed by the international principles of migration, could be used to further enable and facilitate migration between SADC States.

The recent bilateral instruments pay little attention to the protection of the rights of migrant workers and members of their families. The only references to rights of migrant workers relate to the finalization of outstanding claims for compensation for occupational injuries and diseases for former Basotho and Zimbabwean migrants. The only attempt to acknowledge existing rights or to create new rights is the reference to compensation for occupational injuries and diseases for South African and Basotho migrants living in either of these countries.

Save for these provisions, there are no references to the rights of migrants in the recent bilateral instruments. Thus, migrant workers cannot rely on these instruments to claim their basic human rights or their entitlement to fundamental rights and principles at work. Migrant workers cannot look to these instruments as a source of the basic rights of undocumented or documented migrants. Moreover, the plight of vulnerable groups of migrant workers such as women, children and the aged is neither acknowledged nor given priority.

In the absence of substantive rights-based provisions, there can be little expectation of provisions for procedural and institutional arrangements aimed at protecting migrant workers. Access to diplomatic and consular authorities, extension of labour inspection to migrant workers, contracts of employment and penalties for violations of the rights of migrant workers are not included in the provisions of the recent bilateral instruments. The standard provision that disputes arising out of the interpretation or implementation of the MOUs and Agreements 'shall be settled amicably through consultation or negotiation between the Parties' refers only to the resolution of disputes at State level. It provides cold comfort to migrant workers who should be entitled to effective remedies to effective and accessible channels to enforce their rights without discrimination, intimidation or retaliation.

The post-1994 bilateral instruments differ markedly from the earlier bilateral agreements that South Africa concluded with the BLS States and Mozambique. Unlike the detailed

substantive provisions of the earlier agreements, the provisions of the recent bilateral instruments outline broad framework and envisage that ongoing engagement between the State Parties will lead to the identification of solutions and drive their implementation. South Africa and its counterparts have made greater use of Memoranda of Understanding to record their intentions with regard to labour and migration matters. MOUs tend to be less formal and more flexible than agreements, which tend to be more complex, legally binding, specific and action-oriented instruments.¹⁴²

According to Wickramasekara, the use of such MOUs (or bilateral agreements of a similar nature) is better than having nothing at all.¹⁴³ He argues that despite their shortcomings, the existence of such instruments is a positive development as they have political significance and signal growing cooperation between source and destination countries.¹⁴⁴ They provide a firm foundation for the parties to build on and can be valuable if supported by concrete initiatives.¹⁴⁵ This is evident in the case of the South Africa-Zimbabwe MOUs, which undoubtedly served as a catalyst for the establishment of the Zimbabwean Special Dispensation Programme, which benefited thousands of undocumented Zimbabweans in South Africa. The potential for MOUs to have tangible consequences for migrants and for the State Parties points to the need to ensure that the MOUs provide for adequate institutional arrangements to facilitate their implementation

¹⁴² S Wickramasekara Something is better than nothing: Enhancing the protection of Indian migrant workers through Bilateral Agreements and Memoranda of Understanding (Migration Forum Asia, 2012) p 34.

¹⁴³ Wickramasekara p 31.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

4 THE SADC PROTOCOL ON THE FACILITATION OF MOVEMENT OF PERSONS

This Part analyses the provisions of the SADC Protocol on the Facilitation of Movement of Persons of 2005. It is divided into three sections. Section 4.1 outlines the historical development of the Protocol. Section 4.2 considers the extent to which the Protocol is aligned with the principles on labour migration found in the ILO and UN instruments. Section 4.3 summarizes the key findings on the SADC Protocol.

4.1 The regulation of migration in SADC: A historical overview

Treaty of the Southern African Development Community (SADC Treaty) identifies the progressive elimination of obstacles to the free movement of inter alia labour and the peoples of the Region generally, among Member States as one of the measures to promote the realization of the Region's objectives.¹⁴⁶ A workshop to consider the modalities of free movement was held in Harare a year after SADC was established. This culminated in the preparation of a Draft Protocol on Free Movement of Persons in SADC (the Draft Protocol) two years later.¹⁴⁷

The main objective of the Draft Protocol was to confer and protect SADC citizens' rights to visa-free entry into other Member States for short visits, to reside in the territory of other Member States and to establish themselves and work in other Member States.¹⁴⁸ The Draft Protocol's ultimate objective was to progressively abolish controls on the movements of the citizens of SADC Member States at internal borders with other SADC States.¹⁴⁹

The Draft Protocol envisaged the realization of these ambitious objectives within a time-frame of ten years.¹⁵⁰ It would be implemented in four phases: namely, the elimination of visas for short visits, to the right of residence, the right to establishment and the elimination of internal border controls between the borders of Member States.¹⁵¹ These phases were to be implemented through a range of measures including legislative and administrative reform, mutual cooperation by Member States and the harmonization of laws and administrative procedures and immigration practices.¹⁵²

¹⁴⁶ Article 5(2) (d) of the SADC Treaty.

¹⁴⁷ C C Nshimbi and L Fioramonte *A Region without Borders?: Policy Frameworks for Labour Migrations towards South Africa* MiWorc Report No. 1 (Johannesburg: African Centre for Migration and Society, 2013) p 54.

¹⁴⁸ Clause 2 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁴⁹ Clause 3 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵⁰ Clause 4 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵¹ Clauses 15-25, 35-44 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵² See for example Clause 14 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

The Draft Protocol provided for several additional principles enshrined in the international instruments migration. These included measures for the portability of rights and benefits acquired by virtue of employment.¹⁵³ In addition, the Draft Protocol provided for migrant citizens of Member States to acquire rights of residence and establishment to enjoy equal rights and freedoms as citizens of the destination Member State.¹⁵⁴ The Draft Protocol further reaffirmed Member States' commitment to their obligations in relation to refugees and made provision for regional cooperation on the issues relating to refugees. Finally, the Draft Protocol outlined the substantive and procedural principles governing repatriation and expulsion of migrants.¹⁵⁵

The adoption of the Draft Protocol on Free Movement was thwarted by South Africa with the support of Botswana and Namibia. They were concerned that the potential influx of migrants to the more prosperous SADC countries would compromise national immigration policies, burden the socio-economic infrastructure and have political consequences.¹⁵⁶ Following the intervention of these Member States, the Draft Protocol was amended and ultimately the Protocol on Facilitation of Movement of Persons was adopted in 2005. The Protocol is yet to come into force as it is yet to be ratified by two-thirds of SADC Member States, as required by Article 35.¹⁵⁷

The Protocol's overall objective is the progressive elimination of obstacles to the movement of persons.¹⁵⁸ It requires State Parties to take measures to facilitate entry, temporary and permanent residence, and establishment of citizens of other State Parties.¹⁵⁹ These include the adoption of administrative and procedural measures including the provision of travel facilities, the standardization of passports, the simplification of administrative forms and the streamlining of procedures.¹⁶⁰

Despite its ostensible commitment to the progressive elimination of obstacles to free movement,¹⁶¹ the Protocol does not give full effect to the principle of free movement as envisaged in the SADC Treaty and in the Draft Protocol of 1996. The Protocol requires State Parties to provide visa-free entry for up to 90 days per year to visitors from other State

¹⁵³ Clause 23 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵⁴ Clause 29 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵⁵ Clause 31-35 of the Draft Protocol on Free Movement of Persons in SADC (15 March 1996).

¹⁵⁶ Nshimbi and Fioramonte p 55.

¹⁵⁷ Thus far, 13 SADC Member States have signed the Protocol and six Member States, namely Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zambia have ratified it.

¹⁵⁸ Article 2 of the Protocol on the Facilitation of Movement of Persons in SADC (2005).

¹⁵⁹ Article 3 of the Protocol on the Facilitation of Movement of Persons in SADC (2005).

¹⁶⁰ Articles 12 and 13 of the Protocol on the Facilitation of Movement of Persons in SADC (2005).

¹⁶¹ Article 2 of the Protocol on the Facilitation of Movement of Persons in SADC (2005).

Parties.¹⁶² However, residence and establishment are subject to the prerogative of State Parties, which may determine the application procedures, qualification criteria and the rights, privileges and obligations of those who acquire residence or establishment.¹⁶³ With the exception of the provisions on refugees and the expulsion of migrants, the Protocol neither restrict nor impose any obligations on State Parties in relation to migrants. The Protocol does not commit States to make legislative amendments to give effect to its provisions, nor does it clearly provide for remedies for the enforcement of its provisions at a domestic level.¹⁶⁴

The Protocol does not confer citizens of SADC States with rights to residence and establishment as was envisaged by the Draft Protocol of Free Movement of Persons¹⁶⁵ and provided for in other regional instruments including the East African Community Protocol on the Establishment of the East African Community Common Market of 2009 (the EAC Common Market Protocol).¹⁶⁶ The right to residence has been defined to include the right to enter the territory of a State Party to seek employment, the right to apply for and accept employment in the territory of State Party, to reside in the territory of State Party to take up employment and to reside in a State Party's territory as a student or trainee.¹⁶⁷

The rights also encompass migrant workers' entitlement to convert their status in a host State to establishment on completion of their employment therein.¹⁶⁸ In addition, some regional instruments entitle migrant salaried workers and self-employed persons to be accompanied by a spouse, child and dependent.¹⁶⁹ Importantly, regional instruments typically require State Parties to abolish legal and administrative restrictions on the right to residence and freedom of establishment and refrain from introducing further restrictions on these rights.¹⁷⁰

¹⁶² Articles 13 and 16 of the Protocol on Freedom of Movement of Persons in SADC. This is also required by Articles 2(9) and 5 (1) of the Protocol on the Development of Tourism within SADC (1998), which aims to promote intra-regional tourism by citizens of SADC Member States.

¹⁶³ Articles 17 to 20 of the SADC Protocol on the Facilitation of Movement of Persons (2005).

¹⁶⁴ Nshimbi and Fioramonti p 56.

¹⁶⁵ See Clauses 19 and 25 of the Draft Protocol on Free Movement of Persons (1996).

¹⁶⁶ See for example Article 43 of the Treaty Establishing the African Economic Community (1991), (The Abuja Treaty) and Article 14 read with Articles 10 and 13 of the EAC Common Market Protocol.

¹⁶⁷ Clause 20 of the Draft Protocol on Free Movement of Persons (1996) and Article 10(3) of the EAC Common Market Protocol.

¹⁶⁸ Clause 27 of the Draft SADC Protocol and Article 13(11)(c) of the EAC Common Market Protocol.

¹⁶⁹ Articles 10(5) and (6) and 13(4) of the EAC Common Market Protocol.

¹⁷⁰ Clause 26(b) and 28 of the Draft SADC Protocol on Free Movement. See for example, Articles 13(5), (6) and (11) of the EAC Common Market Protocol. Article 10(9) of the EAC Common Market Protocol suspends the application of a State Party's laws and administrative procedures whose principal aim or effect is to deny citizens of other State Parties the employment that has been offered to them. Articles 10(11) and (12) read with Articles 13(8) and (9) of the EAC Common Market Protocol further promote transparency by requiring State Parties notify other State Parties of any limitations that they place on free movement of workers and the right to establishment based on public policy, public security or public health.

This section considered SADC's regulation of migration in historical prospective. It briefly analysed the provisions of the Protocol on Facilitation of Movement of Persons to determine the extent to the principle of free movement of persons and labour and freedom of establishment. The analysis shows that the SADC Protocol gives priority to national sovereignty over the establishment of substantive regional norms on migration and to a large extent endorses at regional level the position under Member States' domestic legislation.¹⁷¹ Consequently, it has limited potential to give effect to the principles of free movement of labour and the right to establishment when it becomes operational.

4.2 Analysis of the SADC Protocol in light of ILO and UN principles

In this section, it is argued that the Protocol on Facilitation of Movement falls short of ILO and UN migration principles in several respects. The discussion is structured according to the three categories of international principles on migration. The first relates to the Protocol's failure to promote linkages between migration and development. The second relates shortcomings in the management of migration in SADC. The third relates to the lack of a rights-based approach to the regulation of migration. It is important to note that the organisation of this analysis according to these categories is not intended to deny the complex interaction between certain issues, which appear under two or more of the three categories identified.

4.2.1 Failure to recognize and foster migration-development linkages

The Protocol's Preamble recognizes that freedom of movement (namely, visa-free entry, residence and establishment) facilitate full popular participation in building SADC into a community. However, the main provisions of the Protocol fail to recognize and foster meaningful linkages between migration and development, a principle espoused by the ILO Conventions, the MFLM and the African Union's Migration Policy Framework for Africa.¹⁷² It does not recognize the contribution that labour migration makes to employment, economic growth, development and poverty-alleviation¹⁷³ within Member States and in the region more generally.

Significantly, the Protocol does not require State Parties to take measures to maximize the developmental benefits and mitigate the detrimental effects of migration on countries of origin and destination countries.¹⁷⁴ It does not require State Parties to take regional and national measures to promote research and understanding of the contribution of labour migration and migrant workers to the economies of countries of origin and destination countries and to promote the positive role of labour migration in promoting regional

¹⁷¹ Nshimbi and Fioramonti p 56.

¹⁷² See Principle 15 of the MFLM and Para 4 of the Migration Policy Framework for Africa adopted by the Executive Council, at the Ninth Ordinary Session (25-29 June 2006) (the MPFA).

¹⁷³ Ibid.

¹⁷⁴ See Principle 15 of the MFLM.

integration.¹⁷⁵ There are no provisions requiring or exhorting State Parties to integrate labour migration into national policies on the labour market, employment and development.¹⁷⁶ It contains no provisions encouraging State Parties to harness the potential contribution of migrant workers in the diaspora through capital investment and the transfer of skills and technology to home countries.

Importantly, there are no provisions in the SADC Protocol exhorting State Parties to adopt measures to mitigate the loss of workers with critical skills from countries of origin through short and long-term return migration and measures to replace qualified persons and policies to retention policies.¹⁷⁷ Also absent is the recognition of the need for measures to promote migrant workers' transfer of capital, skills, knowledge and technology to their home countries.¹⁷⁸

4.2.2 Shortcomings in enabling, facilitating and managing migration

The SADC Protocol on the Facilitation of Movement of Persons contains a number of provisions aimed at enabling, facilitating and managing the movement of persons. These include provisions on the standardization of travel documents, the harmonization and standardization of immigration forms and procedures and the establishment of sufficient and adequately equipped 24-hour border posts between State Parties.¹⁷⁹ These provisions are in keeping with the international instruments, which advocate the simplification of administrative formalities.¹⁸⁰ In addition, it provides for cooperation and mutual assistance on awareness programmes on the implementation of the Protocol. Finally, it calls on State Parties to take measures to enhance cooperation in safeguarding national and regional security and to prevent illegal movement of persons into and within the region.¹⁸¹

The Protocol fails to meet ILO and UN standards on labour migration in several respects. Firstly, while it refers to State Parties laws and policies on migration, it does not encourage them to draft and implement coherent migration policies. The ILO recommends that Member States should develop migration policies based on the economic, social and labour market needs of countries of origin and destination countries, as well as the long-term socio-economic consequences of migration for migrants and communities concerned.¹⁸²

Given the absence of provisions for State Parties to develop migration policies, it is unsurprising that the SADC Protocol does not require State Parties to adopt measures

¹⁷⁵ See Guidelines 3,3, 15.2 and 15.3 of the MFLM.

¹⁷⁶ See Guideline 15.1 of the MFLM.

¹⁷⁷ See Guideline 15.7 of the MFLM and Para 4.2 of the MPFA.

¹⁷⁸ See Paragraph 10(d) of Recommendation 86; Guideline 15.9 of the MFLM and Para 4.1 of the MPFA.

¹⁷⁹ Articles 11(2) (d), 12 and 13 of the SADC Protocol on the Facilitation of Movement of Persons.

¹⁸⁰ See Article 6(a) of Annex 1 to Convention No. 97.

¹⁸¹ Articles 11(2) (b) and (e) of the SADC Protocol on the Facilitation of Movement of Persons.

¹⁸² See Paragraph 1 of Recommendation No. 151 and Principle 4 of the MFLM. See also Paragraph 1.1 of the MPFA.

aimed at creating an enabling environment for regular migration.¹⁸³ Such measures include the identification of categories of workers and skills and qualifications required in destination countries and sending countries' exportable skills, qualifications and competencies.¹⁸⁴ Other potential measures to enable migration are the harmonization and recognition of educational and training standards and qualifications to facilitate labour mobility¹⁸⁵ and the adoption of quotas for unskilled migrants.¹⁸⁶

In addition to these shortcomings is the failure to provide for Member States to collect, analyse and share data on labour migration. This would include the number of migrants migrating to and from Member States, destination and origin countries, the gender and ages of migrants, their skills profiles, information on migrants' families and the duration of their stay in destination countries.¹⁸⁷ Accurate migration data is essential to enable States to make informed decisions about the development and application of policies and legislation and the allocation of resources.¹⁸⁸ In addition, there is a need to expand the scope of the provision for the exchange of information amongst State Parties beyond national and regional security matters.¹⁸⁹ These include information on national migration laws and policies, special provisions on labour migration, migrant workers' conditions of employment and livelihoods, and treaties concluded by State Parties.¹⁹⁰

While the SADC Protocol provides for State Parties to take measures to prevent the illegal movement of persons into and within the region,¹⁹¹ it does not require States to prevent, detect and eliminate the employment of undocumented migrants, as stated in Convention No. 143 and the ICMW.¹⁹² Importantly, the Protocol does not encourage State Parties to define the parameters within which the status of undocumented workers may be regularized, as is provided in the ICMW, Convention No. 143 and Recommendation No. 151.¹⁹³

Furthermore, the Protocol does not clearly identify the need to combat the trafficking of persons, which is an issue of grave concern within SADC. In addition, the provision does not elaborate on the nature of measures that State Parties may take to combat the illegal smuggling and trafficking of persons within the region. In this regard, reference could be made to Conventions No. 97 and 143, which provide for the prohibition of misleading

¹⁸³ See also Paragraph 7.3 of the MPFA.

¹⁸⁴ Principle 5 of the MFLM.

¹⁸⁵ Guideline 12.6 of the MFLM.

¹⁸⁶ See Paragraph 1.1 of the MFLM.

¹⁸⁷ See Guidelines 3.1 to 3.5 of the MFLM.

¹⁸⁸ See Guideline 3.1 of the MFLM.

¹⁸⁹ This is provided for in Article 12(2)(b) of the Protocol.

¹⁹⁰ Article 1 of Convention No. 97 and Paragraph 7 of Recommendation No. 86.

¹⁹¹ Article 11(2)(e) of the SADC Protocol.

¹⁹² Article 6 of Convention No. 97 and Article 68(2) of the ICMW.

¹⁹³ See Article 69(2) of the ICMW, Article 9 of Convention No. 143 and Para 8 of Recommendation No. 151.

information, the exchange of information between States, the application of sanctions and social dialogue to prevent address irregular migration.¹⁹⁴

The SADC Protocol requires State Parties to formulate awareness programmes regarding its implementation.¹⁹⁵ The extent of this obligation is unclear as the nature of the information to be shared in the awareness programmes and the target audiences are not specified. The provisions of the ILO migration instruments and the ICMW provide clarity about the role of States in the provision of information. The ICMW requires State Parties to provide employers, workers, their organisations and governments of other States with appropriate information on migration policies, laws, regulations and relevant agreements with other States.¹⁹⁶ In addition, States must provide prospective migrants with information and assistance regarding the migration formalities, arrangements for departure and travel, their rights, general conditions of work and life, and information on customs, currency, tax, and relevant laws and regulations.¹⁹⁷

The SADC Protocol does not provide for migrant workers to receive the necessary information and assistance to facilitate their integration into destination countries.¹⁹⁸ The international instruments on migration require States to facilitate migrants' understanding of local languages; provide interpretation and translation services; combat discrimination, racism and xenophobia and raising awareness amongst nationals of destination countries.¹⁹⁹ They further require States to promote equality of opportunity and treatment in respect of the advantages, social services in the destination country.²⁰⁰

The requirement for integration of migrants does not, however, imply total assimilation into the social and cultural fabric of the destination country. In terms of the international instruments, States must also enable migrant workers to maintain their national and cultural identities, maintain family and social ties and participation in the public affairs of their home country.²⁰¹ This would entail measures such as the facilitation of migrants'

¹⁹⁴ Article 3 of Convention No. 97 read with Articles 3, 4, 6 and 7 of Convention No. 143. Guidance could also be sought from Article 20(5) of the SADC Gender and Development Protocol, which identifies the enactment of legislation, the establishment of harmonized data collection mechanisms, the operation of joint operations amongst countries of origin, transit and destination countries and building the capacity of law enforcement officials through awareness-raising campaigns. SADC Gender and Development Protocol (2008). This instrument is not yet in force as it is yet to be ratified by the requisite number of Member States.

¹⁹⁵ Article 11(2)(a) of the SADC Protocol.

¹⁹⁶ Article 65(1)(c) of the ICMW. See also Paragraph 6 of Recommendation No. 86.

¹⁹⁷ Article 2 of Convention No. 97, read with Article 65(1)(d) of the ICMW, Paragraph 5 of Recommendation No. 86 and Guideline 12.1 of the MFLM.

¹⁹⁸ Article 6(c) of Annex I to Convention No. 97; Paragraphs 7(1)(c), 7(2) and 24 of Recommendation No. 151 and Principle 14 of the MLFM. See also Para 3.6 of the MPFA.

¹⁹⁹ Paragraphs 7(1)(b) and 23(b) of Recommendation No. 151; Guidelines 12.7, 14.2 and 14.9 of the MFLM.

²⁰⁰ Paragraph 11 of Recommendation No. 86 read with Paragraphs 9 and 23 of Recommendation No. 151.

²⁰¹ Article 12(f) of Convention No. 143; Paragraph 2 of Recommendation No. 151 read with Articles 31 and 41 of the ICMW.

travel between the destination and their home countries, provision for protecting family unity, the establishment of effective consular services and the provision of language and cultural orientation courses.²⁰² There is a further requirement for States to take measures to facilitate the resettlement and reintegration of migrant workers on their return to their home countries through inter alia promoting their employment and granting them social security benefits.²⁰³ As is the case with integration, the SADC Protocol makes no provision for the maintenance of migrants' identities and ties or their reintegration into their home countries.

The SADC Protocol falls short of international principles aimed at minimizing the financial and social costs on migrant workers. One of these is the provision for the duty-free import and export (as the case may be) of migrant workers' and their families' personal possessions trade tools between the country of origin and the destination countries.²⁰⁴ Others relate to the facilitation and minimization of the costs and risks of sending remittances to migrants' countries of origin²⁰⁵ and the avoidance of double –taxation.²⁰⁶ Moreover, the Protocol does not require State Parties to provide for the harmonization of social security schemes, equal treatment in social security and for portability of social security benefits.²⁰⁷

Finally, the Protocol narrows the scope of the actors involved in the migration process to State governments, and, in matters involving refugees, the United Nations High Commission for Refugees (UNHCR) and the International Organization for Migration (IOM).²⁰⁸ There are no provisions in the SADC Protocol requiring State Parties to engage and consult with trade unions, employers' organisations or migrant workers' associations organisations as required by international instruments governing migration.²⁰⁹ The Protocol also limits the role of consular authorities to assistance in the case of impending expulsion.²¹⁰ This falls short of international instruments such as the ICMW, which require

²⁰² Articles 38, 44 and 45(4) of the ICMW read with Paragraphs 15 and 16 of Recommendation No. 86; Paragraphs 13 to 18 of Recommendation No. 151; Guidelines 12.8, 12.9 and 14.7 of the MFLM.

²⁰³ Article 67 of the ICMW; read with Paragraph 20 of Recommendation No. 86 and Guideline 12.2 of the ICMW. See also Paragraph 3.6 of the MPFA.

²⁰⁴ Annex III to Convention No. 97; Article 46 of the ICMW.

²⁰⁵ See Article 9 of Convention No. 97; Paragraph 10 (c) of Recommendation No. 86 and Guideline 15.6 of the MFLM.

²⁰⁶ Article 48 of the ICMW.

²⁰⁷ Article 6(1)(b) of Convention No. 97; Article 27 of the ICMW; Articles 4 to 8 of Convention No. 118; Parts III to V of Convention No. 157; Paragraph 20 of Recommendation No. 86; Principle 9 especially Guideline 9.9 of the MFLM. See also Para 1.1 of the MPFA.

²⁰⁸ This is in term of Article 28 of the Protocol on the Facilitation of Movement of Persons in SADC (2005).

²⁰⁹ Article 7 of Convention No. 143; Paragraph 4(2) of Recommendation No. 151; Paragraphs 7 and 9 of Recommendation No. 151; Principle 6 of the MFLM. See also Para 1.1 of the MPFA.

²¹⁰ Article 23 of the SADC Protocol.

State Parties to provide migrants and their families with services necessary to meet their social, cultural and other needs.²¹¹

4.2.3 The lack of a rights-based approach to the regulation of migration

It is significant that despite the important socio-economic contribution that migration makes and the vulnerability of most migrant workers to various forms of exploitation and abuse, the SADC Protocol makes very limited provision for the rights of migrants within the region. This section considers the lack of a rights-based approach to regulating migration in the region. It considers the extent of the Protocol's alignment with the five categories of rights-based principles that were discussed in Part 2.3 above.

The SADC Protocol does not include the first category of rights, that is, the basic human rights afforded to documented and undocumented migrants in terms of the ICMW. These rights include the right to life, to emergency health care, the right not to be subjected to slavery and servitude and not to be subjected to cruel, inhuman and degrading punishment.²¹² Second, the SADC Protocol makes no mention of the Fundamental Principles and Rights at Work enshrined in the ILO's eight core Conventions. These are freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced and compulsory labour, the elimination of discrimination in employment and occupation and the effective abolition of child labour. The ICMW and the MFLM provide that the four principles should be respected in relation to all migrant workers, regardless of their legal status.²¹³ It is significant that although all 15 SADC Member States have ratified the eight core Conventions, the SADC Protocol makes no mention of the fundamental rights and principles in its provisions.

The third category of rights-related provisions comprises rights relating specifically to the situation of migrant workers and the process of migration. These rights apply to both documented and undocumented migrant workers. The SADC Protocol provides only for the protection of migrant workers in cases of expulsion.²¹⁴ To this end, the Protocol endorses several principles found in international instruments on migration, including the migrant's right to present their case prior to expulsion, the right to protection from collective expulsion, the right to consult with diplomatic and consular authorities about impending expulsion.²¹⁵

²¹¹ Article 65(2) of the ICMW.

²¹² Articles 9-11 and 28 of the ICMW.

²¹³ See Articles 7, 11, 25(1)(b) and 26 of the ICMW, which provide for the protection of the fundamental principles and rights at work under Part III of the Convention, which covers the rights of all migrant workers and members of their families regardless of their legal status. See also Principle 9 of the MFLM.

²¹⁴ Articles 22 to 25 of the SADC Protocol on Facilitation of Movement of Persons.

²¹⁵ Ibid.

The SADC Protocol does not provide for the protection of any of the other rights falling under the third category. Thus it excludes the right to leave any State and the right to enter and remain in the country of origin, protection against imprisonment for failing to fulfil a contractual obligation and the right not to have one's identity and immigration documents confiscated or destroyed.²¹⁶ There is no provision for migrants' equal treatment with host country nationals in respect of minimum age of employment, remuneration, working hours, safety and health, social security and termination of employment.²¹⁷ Moreover, the Protocol does not provide for migrants' rights to transfer their earnings and personal belongings upon the termination of their employment.²¹⁸

The SADC Protocol makes no provision for the rights falling under the fourth category of rights-related provisions contained in the international instruments. This category exclusively covers documented migrants and members of their families. These include freedom of movement in the destination country and retention of their residency during temporary absences.²¹⁹ Documented migrant workers and members of their families should be entitled to freely choose their remunerated activity within the destination country, subject to certain limitations.²²⁰ The international instruments provide for documented migrants' equal treatment in respect of the exercise of their authorized remunerated activity,²²¹ including protection against dismissal, unemployment benefits, access to public works schemes and access to alternative employment.²²² They must be protected from the loss of their work authorization by mere virtue of termination of employment prior to the expiry of their work permit.²²³ In addition to these provisions are a host of rights that enable migrants to be represented and to participate in the affairs of the home and destination countries. None of these rights are mentioned in the SADC Protocol.

The fifth category of rights-related provisions in the international instruments relates to the establishment of measures and institutions to implement and enforce the rights of migrant workers and their families. The measures include the provision of effective and accessible channels for migrant workers to enforce their rights without discrimination,

²¹⁶ Articles 8, 20 and 21 of the ICMW.

²¹⁷ Articles 25 and 27 of the ICMW.

²¹⁸ Article 32 of the ICMW.

²¹⁹ Articles 39 and 38 of the ICMW.

²²⁰ Articles 52 and 53 of the ICMW. Migrants' rights may be limited inter alia, in the interests of the State or as a result of legislation concerning the recognition of qualifications obtained outside the destination country. The rights of migrant workers' families may be limited in cases where their authorization to reside in the destination is for a limited duration.

²²¹ Article 55 of the ICMW.

²²² Article 54 of the ICMW.

²²³ Articles 49 and 51 of the ICMW. Article 51, however provides for an exception where residence authorization is expressly dependent on the specific economic activity for which they were admitted.

intimidation or retaliation.²²⁴ In terms of the international instruments on labour migration, States must also provide remedies – including sanctions and penalties – against all persons and entities involved in the recruitment and employment of migrant workers for the violation of the rights of migrants and their families.²²⁵ The international principles require States to support migrant workers and their families in the exercise and enforce their rights through the conclusion of written contracts between migrant workers and their employers,²²⁶ the provision of adequate pre-departure information, diplomatic and consular support, and language support and legal services during administrative and judicial proceedings.²²⁷ Given the SADC Protocols omission of substantive rights of migrant workers, it is unsurprising that it does not provide for institutional and procedural arrangements for the protection of migrants' rights.

4.3 Summary of the short-comings of the SADC Protocol

The provisions of the SADC Protocol on Facilitation of Movement of Persons make no significant commitment to meaningfully recognize or promote the free movement of workers and the rights to residence and establishment. To a large extent, the Protocol reduces the role of State Parties in the regulation of migration to the bare administrative and technical matters that fall under States' exclusive domain such as the issuing of passports and border control. The provisions indicate that in addition to these aspects of migration, the region is mainly preoccupied with national and regional security issues. Given the overall tenor of the Protocol, one could hardly expect it to stand up to scrutiny in light of the international principles on migration and development; the enabling, facilitation and management of migration and the protection of the rights of migrant workers.

The overall tenor of the Protocol indicates that it does not fully recognize the potential developmental benefits of migration for countries of origin and destination countries within the region. The failure to provide for the maximization of the positive economic effects of migration and mitigate its detrimental effects represents the loss of an opportunity to meaningfully contribute to the development of SADC States and the region as a whole.

The Protocol's provisions on 90-day visa-free entry facilitate the free movement of persons intending to visit a SADC State on a short-term basis. The Protocol does nothing to enable *migrants* and prospective migrants to enter a SADC State to seek work, to work or to establish themselves within its territory. The Protocol's failure to make clear provisions regarding inter alia, the exportation and importation of migrants' personal goods and tools

²²⁴ Guideline 10.5 of the MFLM.

²²⁵ Article 54 of the ICMW read with Article 6 of Convention No.143 and Guidelines 10.6 and 11.4 of the MFLM.

²²⁶ Article 5 of Annex 1 of Convention No. 97; Guideline 10.3 of the MFLM.

²²⁷ Article 6 of Annex 1 of Convention No.097; Article 18 of the ICMW; Guidelines 10.10 and 10.11 of the MFLM.

of trade, social security, integration and reintegration, places the social and administrative costs of migration squarely on the shoulders of migrants and their families. This runs contrary to Recommendation No. 151, which calls on States to “take account of the need to spread the social cost of migration as widely and equitably as possible over the entire collectivity of the country of employment, and in particular over those who profit most from the work of migrants”.²²⁸

It is significant that the SADC Protocol makes little mention of the five categories of rights of migrant workers discussed in section 2.3 above. The only substantive right of migrant workers included in the Protocol relates to their protection in cases of impending expulsion. Moreover, there is no recognition of the need to take special measures to protect the rights of vulnerable groups of migrants, including women, children, the aged and trafficked persons.

The Protocol’s provisions are myopic in a number of additional respects. Their scope is essentially limited to border procedures and the expulsion of migrants, thus failing to embrace the full spectrum of migration, which the MFLM envisages to span several stages, including “planning and preparing for labour migration, transit, arrival and reception, return and integration”.²²⁹ The provisions limit the Protocol’s scope to migrant workers to the exclusion of their families. It also ignores the role played by stakeholders including workers’ and employers’ organisations, migrants’ associations and diplomatic and consular authorities in the supporting efforts to facilitate and manage migration.

²²⁸ Paragraph 11 of Recommendation No. 11.

²²⁹ Principle 12 of the MFLM.

5 KEY FINDINGS AND RECOMMENDATIONS

Part 2 of this report outlined the international principles on labour migration as espoused in various international instruments on the subject, principally Conventions No. 97, 118, 143 and 157; Recommendations No. 86 and 151 the MFLM and the ICMW. Consideration was also given to the eight ILO core Conventions, namely Conventions No. 87 and 98 (freedom of association); No. 29 and 105 (forced labour), No. 100 and 111 (discrimination) No. 138 and 182 (child labour). Parts 3 and 4 considered the extent to which South Africa's bilateral instruments and the Protocol on Facilitation of Movement of Persons respectively give effect to the principles on migration and development; enabling, facilitating and managing migration; and protecting the rights of migrant workers and members of their family.

This Part begins by summarizing the key lessons learned from the analysis and highlighting the areas where the bilateral instruments and the SADC Protocol could be better aligned with the international principles. This is followed by a discussion of key issues to be taken into consideration in charting the way forward in section 5.2.

5.1 Forward in time, backward in scope and protection

The analysis of the regulation of migration in SADC in Parts 3 and 4 was structured according to the nature of legal instruments adopted to govern labour migration. This section will begin by considering SADC's migration instruments in light of two eras which reflect differing levels of confluence with international principles on labour migration. The first is the pre-1975 period during which South Africa concluded Agreements with the BLS States and with Mozambique. The second is the post-1975 period during which the SADC Protocol has been developed and South Africa has concluded several MOUs and Agreements with SADC states. A comparison of pre- and post-1975 migration instruments reveals an overall regression in the level of migrant worker protection and compatibility with international migration principles over time.

The majority of international instruments governing labour migration came into force after 1975. One would have expected that the principles espoused in these instruments would have informed the post-1975 SADC and bilateral instruments. One would have hoped that the SADC instruments would include substantive provisions aimed at promoting migration-development linkages; enabling, facilitating and managing migration; and protecting the rights of migrant workers and members of their families.

Instead, the post- 1975 SADC instruments demonstrate a preoccupation with simplifying and harmonizing migration formalities and administrative procedures. The instruments

also prioritize the improvement of States' capacities to facilitate the movement of people by ensuring the adequacy of border infrastructure and the training of border personnel. The references to security concerns, illegal migration and human trafficking demonstrate that the control and policing of migration is higher on the agenda than the promotion and facilitation of legal migration. This is hardly surprising if one considers the region's poor ratification of the key international instruments on labour migration. Table 2 below summarises the analysis of the post-1975 instruments in light of the international principles on labour migration.

Table 2: Compatibility of post- 1975 instruments with international principles on migration

Principle	SADC (2005)	SA-DRC (2004)	SA-LES (2006)	SA-MOZ (2006)	SA-TAN (2007)	SA- NAM (2008)	SA-ZIM (2004, 2009)
Migration and development							
Mainstreaming migration in national policies	--	--	--	--	--	--	--
Generating evidence on economic contribution of labour migration	--	--	--	--	--	--	--
Incentivising productive investment of remittances in source countries	--	--	--	--	--	--	--
Mitigating cost of loss of scarce and critical skills	--	--	--	--	--	--	--
Promoting transfer of skills, capital and technology by migrant workers	--	--	--	--	--	--	--
Enabling, facilitating and managing the migration process							
Identification of workers and skills required and available	--	--	--	--	--	--	--
Harmonisation and recognition of educational and training qualifications	--	--	--	-	--	--	--
Exchange of information, cooperation and coordination between states	+	+	+	+	+	--	--
Collection and recording of migration data	--	+	--	--	--	--	--
Promoting regular migration and curb irregular migration	-	-	--	--	+	--	+
Providing migrants with adequate pre-departure information	--	--	--	--	--	--	--
Information and support to assist migrants' integration in destination country	--	--	--	--	--	--	-
Facilitating and minimizing risks and costs of sending remittances	--	--	--	--	--	--	--
Promoting social dialogue on migration-related matters	--	--	--	--	--	--	--
Facilitating export and import of migrants' personal possessions and tools	--	--	--	--	--	--	--
Harmonisation of social security schemes and portability of benefits	--	--	-	--	--	--	-
Promoting and protecting the rights of migrant workers and their families							
<i>Basic human rights</i>	--	--	--	--	--	--	--
Rights to life; privacy; opinion and expression; medical care; liberty and security; property; thought, conscience and religion; freedom from torture, cruel, inhuman and degrading treatment; children's rights							
<i>ILO Fundamental principles and rights</i>							
freedom of association and	--	--	--	--	--	--	--

	collective bargaining							
	elimination of discrimination	--	--	--	--	--	--	--
	abolition of forced/compulsory labour	--	--	--	--	--	--	--
	effective abolition of child labour	--	--	--	--	--	--	--
<i>Basic rights of all migrant workers</i>								
To leave country of origin and destination country		-	--	--	--	--	--	--
Not to have identification and travel documents retained or destroyed		--	--	--	--	--	--	--
To transfer earnings and savings on return to country of origin		--	--	--	--	--	--	--
To access and communicate with consular and diplomatic authorities		-	--	--	--	--	--	--
To be informed of rights under Conv., conditions of entry, living and employment		--	--	--	--	--	--	--
To maintain their cultural identity		--	--	--	--	--	--	--
To equal treatment with nationals in respect of past employment		--	--	--	--	--	--	--
To equal treatment with nationals in relation to social security and social services		--	--	--	--	--	--	--
To have their case of expulsion dealt with lawfully		+	--	--	--	--	--	--
<i>Rights of documented migrant workers</i>								
Information on admission, stay, living and working conditions, emp. contract		--	--	--	--	--	--	--
Freedom of movement and choice of remunerated activity		--	--	--	--	--	--	--
To form and join associations and trade unions		--	--	--	--	--	--	--
To participate in public affairs in country of origin		--	--	--	--	--	--	--
To be consulted and to have their interests and aspirations considered		--	--	--	--	--	--	--
Equality with nationals: education, training, housing, health, social services etc.		--	--	--	--	--	--	--
Protection of family unity and promotion of reunification of family		--	--	--	--	--	--	--
Family members' equal access with national: education, training, social and health services, cultural life etc.		--	--	--	--	--	--	--
Exemption from customs for personal goods and tools of trade		--	--	--	--	--	--	--
To transfer earnings and savings to country of origin		--	--	--	--	--	--	
Family members' leave to stay on migrants' death or dissolution of marriage		--	--	--	--	--	--	--
Equality with nationals: job security, alt. employment, relief work, retraining		--	--	--	--	--	--	--
Not to be regarded as undocumented on termination of employment before expiry		--	--	--	--	--	--	--

of work permit							
<i>Institutions and procedures for the protection of migrant workers' rights</i>							
Extending labour inspection to migrant' workplaces	--	--	--	--	--	--	--
Promoting conclusion of written employment contracts	--	--	--	--	--	--	--
Effective remedies and effective and accessible channels for enforcement	--	--	--	--	--	--	--
Remedies for violation of rights of migrants and their families	--	--	--	--	--	--	--
Sanctions and penalties for those who violate migrant workers' rights	--	--	--	--	--	--	--
Conscientising employers and workers' organisations about rights of migrant workers	--	--	--	--	--	--	--
Interpretation and translation services during admin. and judicial proceedings	--	--	--	--	--	--	--
Offering legal services to migrant workers during legal proceedings	--	--	--	--	--	--	--

Source: Compiled by the author

Key:

- Relevant instrument does not comply with the principle**
- Relevant instrument partially complies with the principle**
- + Relevant instrument complies with the principle**

Ironically, the pre-1975 Agreements, which were concluded before most international instruments on labour migration came into force, have greater potential to protect migrant workers than the more recent instruments. The South Africa-BLS Agreements provide for recruitment facilities in destination countries and the approval of recruitment arrangements by the respective governments. They require the parties to conclude written employment contracts before departure and provide for migrant workers' access to dedicated diplomatic authorities in South Africa. They also provide for remittances and prohibit double-taxation of migrant workers.

The Treaty governing the migration of Mozambican workers makes more expansive provision for migrant workers' rights than the South Africa-BLS Agreements and provides for more effective enforcement of the provisions. The gaps between the South Africa-Mozambique Agreement on the one hand and the South Africa- BLS States Agreements on the other are quite significant. The differences are even more striking given the fact that the latter Agreements were concluded about 10 years after the former Agreement.

The South Africa-Mozambique provides for the licensing and regulation of recruitment agencies and outlines the key provisions of employment contracts and provides for their translation into languages understood by migrant workers. It also expressly prohibits the employment of children below the age of 18 as migrant workers. Moreover, it provides for the equal treatment between Mozambican and South African workers in relation to their employment conditions. The Agreement further protects migrant workers from unlawful taxation and deductions. Finally, it provides for measures to be taken against employers and recruitment agencies that fail to comply with the provisions of the Agreement. Despite its generous provisions, the scope of the South Africa-Mozambique Agreement is limited to mine workers and to migration flows from Mozambique to South Africa.

Table 3 below summarises the extent to which the South Africa-BLS Agreements and the South Africa-Mozambique Agreements comply with the international principles on labour migration.

Table 3: Compatibility of the pre-1975 Agreements with the international principles on migration

Principle	SA-BLS Agreements	SA-MOZ Agreement
Migration and development		
Mainstreaming migration in national policies	--	--
Generating evidence on economic contribution of labour migration	--	--
Incentivising productive investment of remittances in source countries	--	--
Mitigating cost of loss of scarce and critical skills	--	--
Promoting transfer of skills, capital and technology by migrant workers	--	--

Enabling, facilitating and managing the migration process			
Identification of workers and skills required and available		--	--
Harmonisation and recognition of educational and training qualifications		--	--
Exchange of information, cooperation and coordination between states		--	--
Collection and recording of migration data		--	--
Promoting regular migration and curb irregular migration		-	-
Providing migrants with adequate pre-departure information		-	-
Information and support to assist migrants' integration in destination country		-	-
Facilitating and minimizing risks and costs of sending remittances		-	+
Promoting social dialogue on migration-related matters		--	--
Facilitating export and import of migrants' personal possessions and tools		--	--
Harmonisation of social security schemes and portability of benefits		-	-
Promoting and protecting the rights of migrant workers and their families			
<i>Basic human rights</i>		--	--
Rights to life; privacy; opinion and expression; medical care; liberty and security; property; thought, conscience and religion; freedom from torture, cruel, inhuman and degrading treatment; children's rights			
<i>ILO Fundamental principles and rights</i>	freedom of association and collective bargaining	--	--
	elimination of discrimination	--	--
	abolition of forced/compulsory labour	--	--
	effective abolition of child labour	--	-
<i>Basic rights of all migrant workers</i>			
To leave country of origin and destination country		--	--
Not to have identification and travel documents retained or destroyed		--	--
To transfer earnings and savings on return to country of origin		-	-
To access and communicate with consular and diplomatic authorities		+	+
To be informed of rights under Conv., conditions of entry, living and employment		-	-
To maintain their cultural identity		--	--
To equal treatment with nationals in respect of past employment		--	+
To equal treatment with nationals in relation to social security and social services		--	-
To have their case of expulsion dealt with lawfully		--	--
<i>Rights of documented migrant workers</i>			
Information on admission, stay, living and working conditions, emp.		-	-

contract		
Freedom of movement and choice of remunerated activity	+	+
To form and join associations and trade unions	--	--
To participate in public affairs in country of origin	--	--
To consultation and to have their interests and aspirations considered	--	--
Equality with nationals: education, training, housing, health, social services etc.	--	-
Protection of family unity and promotion of reunification of family	--	--
Family members' equal access with national: education, training, social and health services, cultural life etc.	--	-
Exemption from customs for personal goods and tools of trade	--	--
To transfer earnings and savings to country of origin	+	+
Family members' leave to stay on migrants' death or dissolution of marriage	--	--
Equality with nationals: job security, alt. employment, relief work, retraining	--	--
Not to be regarded as undocumented on termination of employment before expiry of work permit	+	+
<i>Institutions and procedures for the protection of migrant workers</i>		
Extending labour inspection to migrant' workplaces	-	-
Promoting conclusion of written employment contracts	+	+
Effective remedies and effective and accessible channels for enforcement	-	-
Remedies for violation of rights of migrants and their families	-	-
Sanctions and penalties for those who violate migrant workers' rights	--	+
Conscientising employers and workers' organisations about rights of migrant workers	--	--
Interpretation and translation services during admin. and judicial proceedings	--	--
Offering legal services to migrant workers during legal proceedings	--	--

Source: Compiled by the author

Key:

- Relevant instrument does not comply with the principle**
- Relevant instrument partially complies with the principle**
- + Relevant instrument complies with the principle**

The analysis in Parts 2 and 3 of this report as summarized in Tables 2 and 3 above demonstrates that the SADC Protocol and South Africa's bilateral instruments fall short of the international principles on labour migration to varying degrees. Overall, there is a need to incorporate the principles falling under the three main categories of integrating labour migration in the developmental process; enabling, facilitating and managing the entire

process of migration and promoting and protecting the rights of migrant workers and members of their families during the entire migration process.

The discrepancies between the provisions of the bilateral instruments and the Protocol point towards the urgent need for a comprehensive process of alignment with the international principles. Given the pressing need for regional standards on labour migration, priority should be given to the amendment of the Protocol on the Facilitation of Movement of Persons. This would incorporate the international minimum standards for promoting linkages between migration and development; enabling, facilitating and managing migration; and protecting the rights of migrant workers and their families. The amended Protocol could then be supplemented by bilateral treaties that could include more favourable provisions or outline the modalities for the implementation of the regional instruments provisions in light of the historic ties and particular characteristics of migration flows between the relevant countries.

The following constitute over-arching guidelines to be taken into consideration and implemented in any attempts to re-align the SADC Protocol and bilateral instruments with the international principles on migration:

1. The need to ensure extensive and broad-based consultation with all interested stakeholders in SADC States, including representatives of labour and employers, migrant workers' associations, civic society organisations, and international organisations;
2. The need to envisage migration as extending beyond the mere crossing of another country's borders. This would involve a more holistic perspective covering the pre-departure stage and including the period after arrival to the departure from the destination country to return and re-integration into the home country;
3. The need to mainstream gender and the interests of vulnerable groups of migrants such as children, the aged, refugees and stateless persons; and
4. The need to ensure that re-alignment is informed by grounded evidence-based research on relevant trends on labour migration within the region, and best practices in Member States as well as States and regions outside of SADC.

5.2 International principles on migration: A bridge too far for SADC?

The international principles on migration establish a number of detailed rights and obligations for all parties that may be daunting for a developing region such as SADC. This section considers the extent to which the international principles on labour migration are truly novel or could be regarded as lofty and far-fetched ideals from a SADC perspective. It is argued that despite their exclusion from the Protocol on Facilitation of Movement of Persons, many of the international principles are already directly recognized by SADC

through its regional instruments on various issues, or indirectly recognized through the African Union, of which SADC is an integral part. It also shows that, while seemingly challenging for a developing region with a poor ratification record of labour migration Conventions, many of the rights and obligations that the international principles allude to have been embedded in the realities of migrant workers, employers, recruitment agencies and governments of some Member States through bilateral Agreements between South Africa and its neighbours.

In order to align it with the structure of previous parts of this report, the discussion below is structured according to the recognition of linkages between migration and development; the enabling, facilitation and management of migration; and the protection of migrant workers and members of their families.

5.2.1 Migration and development

The Treaty of the SADC includes amongst its objectives the promotion of the productive employment and sustainable use of the region's resources²³⁰ and the strengthening of "the long-standing historical, social and cultural affinities and links among the peoples of the Region".²³¹ One of the measures to further the realisation of SADC's objectives is the development of policies aimed at progressively eliminating the obstacles to "the free movement of ...labour... and the peoples of the Region generally, among Member States".²³²

The Charter on Fundamental Social Rights in SADC (2003) provides that one of its key objectives is the "promotion of labour market legislation, policies and practices that facilitate labour mobility, remove distortions in labour markets... in Member States".²³³

Article 3(g) of the Protocol on Education and Training in SADC (1997) identifies the following as one of its objectives "to work towards the relaxation and eventual elimination of immigration formalities in order to facilitate freer movement of students and staff within the Region for the specific purposes of study, teaching and research and any other pursuits relating to education and training".

At the AU level, the Treaty Establishing the African Economic Community recognizes the significance of freedom of movement of persons and the rights of residence and establishment in the establishment of the Community and the development of the continent.²³⁴ The AU also calls for efforts to bring migration into the developmental process through specific instruments on labour migration, namely the MPFA and the African Common Position on Migration and Development. These instruments call for the

²³⁰ Article 5(1) of the SADC Treaty of 1992.

²³¹ Article 5(1) (h) of the SADC Treaty.

²³² Article 5(2) (d) of the SADC Treaty.

²³³ Article 2(1) (c) of the SADC Charter of Fundamental Social Rights.

²³⁴ Chapter VI of the Treaty Establishing the African Economic Community (Abuja, 1991).

engagement of the diaspora to play a role in the development of their home countries and the mitigation of brain drain and other negative consequences of migration.

5.2.2 Enabling, facilitating and managing migration

As was seen in Part 3 and in Tables 2 and 3 above, the bilateral agreements recognize some of the principles pertaining to the enabling, facilitation and management of labour migration. An important principle in the pre-1975 Agreements is the promotion and facilitation of regular migration, which has been implemented through provisions for recruitment facilities and the authorization of recruitment agencies. The early bilateral agreements also provide for the provision of pre-departure information, facilitation of migrant remittances and, to a limited extent, the portability of social security benefits. On the other hand, South Africa's recent bilateral agreements and MOUs have emphasized the need for exchange of knowledge and information and cooperation between State Parties. The recognition and application of these principles at a bilateral level could form the basis for their recognition and application at regional level.

There are limited provisions for the enabling, facilitation and management of labour migration at SADC level. Article 1(e) of the SADC Charter on Fundamental Social Rights provides for the establishment and harmonization of social security schemes. Article 3(k) of the Protocol on Education and Training in SADC (1997) provides that the Protocol's ultimate objective is to "progressively achieve the equivalence, harmonisation and standardization of the education and training systems in the Region". While the provisions make no specific mention of labour migration, there can be no doubt that they could play a role in the facilitation of labour migration.

Although it is not yet in force, the Gender and Development Protocol in SADC signifies growing regional convergence on measures to combat human trafficking.²³⁵ Amongst these are the enactment of legislation, the development and implementation of enforcement mechanisms, the establishment of harmonized data collection mechanisms. It also calls for the operation of joint actions among countries of origin, transit and destination countries, and capacity building, awareness-raising and sensitization campaigns to equip law enforcement officials.

The MPFA calls for African States and regional economic communities (RECs) to embark on actions to effectively facilitate and manage migration. These include regional cooperation and the harmonization of labour migration policies and measures to curb migrant smuggling and human trafficking. It exhorts States and RECs to collect and analyse migration data and to develop a regional migration data exchange to record migration trends on the continent. States and RECs are also encouraged to promote the integration of

²³⁵ Article 20(5) of the Protocol on Gender and Development in SADC (2008).

migrants into destination countries and their re-integration upon their return to their home countries.

5.2.3 Promoting and protecting the rights of migrant workers and members of their families

Prior to its incorporation into regional instruments, the principle of respect for migrants' rights had been incorporated into some of South Africa's bilateral agreements with SADC States, albeit to a limited extent. The bilateral agreements make no mention of basic human rights or fundamental principles and rights at work for migrant workers. They principally include the migration-specific rights that cover both documented and undocumented workers. Amongst the rights are the right to transfer earnings and savings to home countries, to freedom of movement and free choice of remunerated activity, the right to communicate with and have access to diplomatic authorities, and the right to equal treatment with nationals with regard to employment conditions.

The bilateral agreements have also provided for institutional and procedural arrangements to ensure the protection of the rights of workers. These include the promotion of the conclusion of written contracts, the imposition of sanctions and penalties for the violation of the rights of migrant workers. The recognition and application of these principles at a bilateral level could be used as a basis for their extension (both in scope of rights and scope of beneficiaries of rights) to ensure the protection of workers at a regional level.

At regional level, SADC has recognized the protection of social and labour rights through its Charter of Fundamental Rights and Principles in SADC (2003). Importantly, SADC States have undertaken to ratify the ILO's eight core Conventions, which give effect to the fundamental rights and principles of freedom of association and the right to collective bargaining, the abolition of child labour, the elimination of forced and compulsory labour and the elimination of all forms of discrimination in employment and occupation.²³⁶ By the end of 2003, all 15 SADC States had ratified these core Conventions.

In addition to the four fundamental principles and rights at work, the SADC Charter also provides for the following rights for every worker in the region:²³⁷

- elderly persons' rights at retirement;
- professional and social integration of persons with disabilities;
- right to adequate social protection;
- the improvement of working and living conditions and harmonization of minimum standards;
- protection of health, safety and environment;

²³⁶ Article 5 of the SADC Charter of Fundamental Social Rights.

²³⁷ Articles 8 to 15 of the SADC Charter of Fundamental Social Rights.

- information, consultation and participation of workers;
- freedom to engage in occupation of choice and to equitable remuneration; and
- an enabling environment that supports the education and training of workers.

The recognition of the universality and indivisibility of these rights and the unqualified reference to ‘every worker’ as a holder of these rights implies that their reach is wide enough to embrace even migrant workers in SADC. One can find support for this wide interpretation in other key instruments that the SADC Charter refers to, including the UDHR, the African Charter on Human and People’s Rights and the ILO Constitution.²³⁸

The African Charter for example, extends the rights to inter alia, life and integrity of the person, dignity, freedom and security of the person, freedom of association and assembly, equality before the law, equal protection of the law and to work under equitable conditions, and to equal pay for equal work. These rights are granted to *every individual* regardless of their national or social origin, birth or other status,²³⁹ and would therefore cover migrant workers. Support for this interpretation is found in the MPFA, which recommends that African States take measures to extend fundamental human rights to migrants.²⁴⁰ The MPFA also encourages African States to incorporate the provisions of international instruments aimed at protecting migrant workers, including the ICMW and Conventions No. 97 and 143.

SADC’s endorsement of the ILO’s Constitution calls to mind its Preamble, which emphasizes the ‘protection of the interests of workers when employed in countries other than their own’. This principle is reiterated in the ILO Declaration on Fundamental Rights and Principles at Work, which encourages the ILO to ‘pay special attention to the problems of workers with special social needs, particularly ...migrant workers’.²⁴¹

5.3 The costs and burden of implementing international principles on migration in the SADC region

The above has shown that despite their limited incorporation in the SADC Protocol on the Facilitation of Movement of Persons, the international principles on migration are not novel and foreign to SADC, but are (to a large extent) recognized in the region through South Africa’s bilateral Agreements, through other SADC instruments and indirectly through certain AU and ILO instruments. Despite their relative familiarity, one may question the feasibility of implementing these principles in a region plagued by poverty and high rates of unemployment and under-employment, and where millions are affected

²³⁸ Article 3(1) of the SADC Charter of Fundamental Social Rights.

²³⁹ Article 2 read with Articles 3-15 of the African [Banjul] Charter of Human and People’s Rights adopted on 27 June, 1981.

²⁴⁰ See Para 2.1 of the MPFA.

²⁴¹ Preamble to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up adopted by the International Labour Conference at its Eighty-Sixth Session, 18th June 1998.

by natural disasters and civil strife and continue to contend with their devastating after-effects.

To what extent can SADC support the realization of these principles, given that inequalities in natural endowments, per capita and national income, and levels of development provide an impetus for the flow of migrants to the few States that represent islands of prosperity in one of the poorest regions on the continent? Can the expenditure of resources on non-nationals be justified where even the wealthiest States are incapable of adequately providing for their own? These are complex questions that cannot be fully ventilated in this report. What follows are some recommendations to shed some light on how SADC and its Member States may justify and mitigate the costs that may be involved in the application and implementation of the international principles on migration.

It is necessary for the SADC region and SADC Member States to consider the costs of compliance with international principles on migration in light of the benefits of migration to both sending and receiving countries. This would require a comprehensive assessment of the economic contribution of migrant workers to these countries through the transfer of skills and expertise, technology, remittances, capital and their overall contribution to economic activity and GDP within the region. Given the fact that these contributions ultimately benefit States, it would be fair to require them to absorb the costs associated with the implementation of international principles on migration.

Migrant workers from the Philippines receive assistance in the form of pre-departure training on social and working conditions abroad, life insurance and pension plans, medical insurance and tuition for themselves and members of their families, loans and low-cost remittance transfers. In addition, there are incentives for migrants to return to the country, including loans for business capital at preferential rates and subsidized scholarships. The Philippines Overseas Employment Administration is a specialized agency under the Department of Labor and Employment and is responsible for the administration of out-migration. India has established a specialized Ministry of Overseas Indian Affairs and has established the Indian Workers' Resource Centre in Dubai and the Overseas Workers' Resource Centre in Delhi to provide assistance and support to Indian migrant workers. The adoption of pro-active measures to facilitate migration and to assist and protect migrant workers by countries such as the Philippines and India can at least in part be attributed to the respective governments' recognition of the economic significance of migration.

There is also a need for States to recognize that governments need not shoulder the entire costs and burden of implementing the international principles on migration. Other stakeholders that benefit from labour migration include employers in destination countries and recruitment agencies and would therefore be liable to assume some of the costs associated with the implementation of the international principles. In addition, migrant

associations and NGOs could also play a role in the application, implementation and enforcement of the international principles. The MPFA encourages States to create an enabling environment for these institutions by allowing for their formation and facilitating their establishment.²⁴² SADC and its Member States may also seek technical assistance from relevant international organisations such as the ILO and the International Organisation of Migration who can provide the necessary expertise and advice on the implementation of the international principles.²⁴³

Finally, SADC Region and Member States should take measures to address the root causes of migration.²⁴⁴ These include poverty, unemployment, conflict and natural disasters which are amongst the factors pushing migration. In addition, the region should pursue the more equitable development of its Member States to minimize the disparities in levels of development, which attract migrants to States with better opportunity and more resources. The focus on the root causes of migration would not only reduce the incidence of migration and the unevenness of migration flows, but would also contribute towards greater prosperity and development in the region.

²⁴² Paragraph 2.1 of the MPFA.

²⁴³ Wickramasekara *Something is Better than Nothing* p 35.

²⁴⁴ See Paragraphs 3.4 and 6.1 of the MPFA.

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