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The Case of SADC

Ockert Dupper

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Abstract

This paper will explore whether and to what extent the (legal) rules of coordination that originated and developed in the EU can be transposed to SADC – a region characterized by high levels of migration, weakly developed social security systems and the absence of suitable portability arrangements. The principle of coordination of social security is primarily aimed at eliminating restrictions that national social security schemes place upon the rights of migrant workers to such social security. One of the fundamental principles of social security coordination is that of portability, which is the ability to preserve, maintain, and transfer vested social security rights or rights in the process of being vested, independent of nationality and country of residence. The best practice around the world to ensure portability of social security entitlements consists of multilateral and bilateral social security agreements. These agreements originated and developed in the EU, and EU coordination arrangements arguably still represent the most sophisticated and developed system of its kind, and one that is worth emulating. In this paper, it is argued that any future attempts at coordinating social security schemes in SADC should start with employment injury schemes, which is the only social security scheme common to all SADC member states. The paper considers some of the issues that should be taken into account in designing social security agreements in SADC along the lines of the EU model.

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1. Introduction¹

An estimated 214 million people, nearly three percent of the world's population, are international migrants (UNDP 2009). This figure includes refugees, displaced persons, stateless persons, and (important for the purposes of this contribution) migrant workers. The numbers are on the rise.² In 1960, the total number of migrants was estimated at 75 million, and in 2004 at 175 million (see Sivakumaran 2004). The increase in migration in the contemporary age of globalization means that nearly all states have become or are becoming "more multi-ethnic, multi-cultural, multi-racial, multi-religious, and multi-lingual" (Taran 2001: 9). Generally, the movement of migrant workers is said to be caused by so-called "push" and "pull" factors. The "push" factors include the desire for a better standard of living, new opportunities and a better future, while the "pull" factors refer to the availability of relatively well-paid work in the receiving country (Sivakumaran 2004). The labor migration process is further aided by ever-improving systems of communication and transportation.

Most migration is between neighboring countries, but the aforementioned greater access to global information and cheaper transport means that geography now poses less of a barrier to movement than it had in the past (International Labour Office 2004: 3). It is clear that the global migrant workforce has increased significantly in recent years, especially within the low and semi-skilled job sectors (Paoletti 2004: 5).

The mobile life cycle of migrants requires special provisions for their social protection³ to ensure that they can adequately manage their risks (Sabates-Wheeler/Taylor 2010: 5). In addition to the fact that newly arrived migrants are removed from their home communities, which deprive them of important informal social networks and social nets, there are often various restrictions placed on their access to formal social protection in their host countries. These restrictions can primarily be traced back to the well-known territoriality principle, which links a social security system to the territory of a particular state (Pennings 2001: 4). This means that a state restricts its responsibility in the area of social security to its own territory.

The principle of coordination of social security is primarily aimed at eliminating restrictions that national social security schemes place upon the rights of migrant workers to such social security. This paper will explore whether and to what extent the (legal) rules of coordination that originated and developed in the EU can be transposed to the Southern African Development Community (SADC)⁴ – a region characterized

1 This paper was written in 2011 while I was a Senior Visiting Fellow at the Kolleg-Forschergruppe "The Transformative Power of Europe".

2 However, even though the total number of migrants has increased, the share of international migrants in the world's population has remained stable at around 3 percent over the last 50 years.

3 The terms "social protection" and "social security" are used interchangeably in this contribution. There is a distinction, however. The latter generally refers to social security programs that are directed at meeting a specific need, are usually financed on the basis of contributions, and are available to beneficiaries on the basis of their participation and entitlements (although benefits are not necessarily proportional to contributions on an individual basis). The former term is intended to encompass both social security programs and other forms of benefits and services (such as family benefits, universal health care services, and minimum-income provisions) that are generally available on a universal basis without regard to participation, contribution or employment status (although they may include a test of means). In any event, the distinction is not a rigorous one. See Gillion (1994), Sabates-Wheeler/Waite (2003).

4 The Southern African Development Community (SADC) consists of 15 member states: Angola, Botswana, Dem-

by high levels of migration, weakly developed social security systems and the absence of suitable portability arrangements.

The paper will be structured as follows: Part 2 will examine what is meant by social protection of international migrants. Two components, namely access to formal social protection in both host and sending countries, and the capacity to move with social security entitlements between host countries and back to the country of origin (portability), will be explored. The best practice around the world to ensure portability of social security entitlements consists of multilateral – and bilateral social security agreements. The origin and development of these agreements will be examined in part 3, suggesting that EU coordination arrangements arguably represent the most sophisticated and developed system of its kind, and one that is worth emulating.

Part 4 will turn to the coordination of social security in SADC. The first part will take stock of the current (inadequate) attempts within SADC to coordinate social security entitlements by means of social security agreements, while the second part will suggest that future coordination attempts could ideally start with employment injury schemes, which is the only social security scheme common to all SADC member states. Part 5 will consider some of the issues that should be taken into account in designing social security agreements in SADC along the lines of the EU model discussed in part 3. This is done in recognition of the fact that legal borrowing – arguably the most important source of transposing legal ideas across geographical boundaries – requires careful implantation and cultivation in the new environment. Part 6 contains some concluding remarks.

2. Social Protection for International Migrants⁵

Social protection for international migrants consists of a number of components, two of which will be addressed in this paper. In the first place, it consists of access to social protection in both host and origin countries. Secondly, and the particular focus of this paper, is the portability of vested social security rights between host and origin countries.⁶ The latter denotes the capacity to move with social security entitlements between host countries and back to the country of origin. Each will be discussed in turn (albeit the latter more comprehensively).

ocratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

5 In the literature, reference is often made to the term “international migrants”, of which “migrants” or “migrant workers” constitute one (albeit sizeable) part. Apart from migrant workers, the term “international migrants” also includes refugees, stateless persons and displaced persons. The focus of this contribution is on how social protection can be extended specifically to migrant workers, although many of the arguments also apply, *mutatis mutandis*, to other categories of international migrants.

6 Other important components (that will not be discussed in this contribution) include labor market conditions for migrants in host countries and the recruitment process for migrants in the origin country, and access to informal networks to support migrants and their family members. See Sabates-Wheeler/ Koettl (2010: 116).

2.1 Access to Formal Social Protection

Access of migrants to social security is essentially a matter of national law and practice.⁷ The host country regulates what benefits migrants have access to and under what conditions. Additionally, it defines what benefits can be received after leaving the country. However, even where national laws dictate that the law must apply equally, protection for migrant workers may be limited by the fact that a high proportion of migrants are located within informal labor markets, which often excludes them from participation in social security schemes. It is therefore necessary to review national legislation to see whether and to what extent migrants are disadvantaged with regard to their eligibility.

Arguably the most favorable regime for international migrants exists in the EU. The EU has since the early 1970s afforded generous economic and social rights to citizens of member states who move to another member state and take up employment there (Cholewinski 2008: 191). EU citizens therefore enjoy full and equal protection in the field of social security and may under no circumstance be treated less favorably than national citizens. They also enjoy portability of most social security benefits. This is a consequence of the right of freedom of movement and the general non-discrimination rule which lie at the heart of the EC treaty (Olivier/Vonk 2004: 52). With respect to third-country nationals, equality of treatment is granted after a certain period of residence (no later than after five years according to EU Directive 109/2003). This means that even third-country nationals enjoy full access to and portability of social benefits within the European Union no later than after five years of residence (Avato et al. 2009: 457). Although not as developed as the regime that exists in the EU, the systems of many other high-income countries such as Canada, Australia and New Zealand include some provisions for international migrants (Avato et al. 2009: 457).

On the other side of the spectrum as far as high-income countries are concerned are the oil-rich countries of the Gulf Cooperation Council (GCC)⁸, which do not grant migrants any access to their social security system.⁹ This makes the migrant reliant on the social security system of the country of origin (which is often non-existent due to the territoriality principle) or on his or her own voluntary contributions to, for example, old age or disability pensions. To address the vulnerability of these migrant workers, some of the countries of origin have taken steps to extend social protection to their own overseas migrant workers and, in the case of Sri Lanka, even to the families left behind.¹⁰

Middle-income countries, in particular in the Caribbean, Eastern Europe, Latin America, and North Africa, all have relatively well-developed social security systems with good coverage of the labor force, including immigrants. Hence, to the degree that these immigrants participate in the formal economy, they are

7 While migrant workers are in principle protected by international legal instruments such as the UN Migrant Workers Convention (1990) as well as various ILO Conventions dealing with the rights of migrant workers (for example the Migration of Employment Convention (1949) and the Migrant Workers (Supplementary Provisions) Convention (1975)), these instruments have been ratified only by a limited number of countries. See van Ginneken (2010: 2).

8 Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates.

9 For a fuller discussion, see Ruhs (2009: 17-21).

10 The Sri Lankan Overseas Workers Welfare Fund covers payments to migrants and their families in the case of death, disability or a need to cover travel expenses. The Philippines Overseas Workers Welfare Administration protects Filipino migrant workers abroad. See van Ginneken (2010: 2).

subject to similar provisions of access to contribution-based social security and exportability of acquired rights as in high-income countries (Avato et al. 2009: 457).

The social security systems of low-income countries, on the other hand – in particular in Central Asia, South Asia, South-East Asia, and Sub-Sahara Africa – are often rudimentary (covering only one or two contingencies and a small portion of the labor force)¹¹ or non-existent. In these countries, a significant part of the labor force works informally and does not contribute to social security, even if available. In low-income countries (but less so in sub-Saharan Africa), most formal social protection is provided through tax-financed social assistance and migrants seem to be by and large excluded from these benefits (Avato et al. 2009: 457). Where social insurance exists, it is usually limited to those working in the formal economy, thereby excluding large categories of migrant workers who would invariably find themselves constrained to working in the informal economy.

The state and development of social security systems in SADC generally reflects the situation in African and, in particular, in sub-Saharan African countries (Fultz/Pieris 1999: 7-12). Systems range from the fairly well developed (for example, Mauritius) to the developing or transitional (for example, South Africa and Namibia) to the underdeveloped (for example, Malawi) when measured against general international and comparative standards (Olivier 2009: 39). Besides the huge diversity characterizing the various systems, coverage is often very low and benefits inadequate. Most social security schemes in the region are insurance-oriented, and only cater for the whole or part of the formally employed, so marginalizing those out of work, the self-employed and those in the informal sector (see Kalula et al. 2008). In addition, in the case of non-contributory schemes, a heavy reliance on general tax revenues strains government financing, keeping benefits at low levels in most countries (Olivier 2009: 40).

Despite recent reforms aimed at enhancing social protection in the various countries in the region (Kalula et al. 2008: 4),¹² the situation of non-citizens or migrants in Southern Africa remains precarious. The legal principle of territorial application of national laws generally prevalent in SADC countries results in the exclusion of migrants from the operation of social security laws of the home country, while nationality and residence requirements often exclude foreigners from the sphere of application of social security laws in the host country (Olivier/Dupper 2010: 8). It is therefore imperative to improve the access of migrant workers to social security *both* in their home countries (or countries of origin) as well as in their host countries (or countries of employment) (van Ginneken 2010: 2).

11 For example, in Tanzania the existing social insurance schemes are said to cover only 5.4 percent of the labor force of 16 million people. See Olivier (2005: 5).

12 See Olivier (2009: 46) for examples of recent reform initiatives in Tanzania, Malawi, Mozambique and South Africa.

2.2 Portability

From a comparative perspective, there are several social security coordination principles,¹³ but in this contribution we will only concentrate on the issue of portability, which has been defined as “the ability to preserve, maintain, and transfer vested social security rights or rights in the process of being vested, independent of nationality and country of residence” (Avato et al. 2009: 456).

Improving the portability of workers’ occupational social security benefits, such as workers’ compensation benefits, severance payments and payments from pension and provident funds has become an important challenge in extending and improving social security coverage for international migrant workers and their families (van Ginneken 2010: 4). Portability is important for two reasons: (i) to prevent financial losses on part of migrant workers (e.g. contributing in host country to pension and losing part of contributions and benefits when returning to country of origin); (ii) actuarial fairness (returning migrant benefits from social security or health care system in country of origin after returning despite having lived most of his or her productive life in host country and contributing to system of host country) (van Ginneken 2010: 4).

In order to achieve full portability, some cooperation between the social security institutions of the origin and the host country is required. Cooperation is required to ensure a joint determination of benefit levels for a particular migrant. Portability must be distinguished from exportability, however. Exportability requires no such cooperation as the social security institution of one country alone determines eligibility and the level of benefit. Nevertheless, benefits could in principle be payable – hence exportable – also in other countries.

3. Coordination

The principle of coordination of social security is primarily aimed at eliminating restrictions that national social security schemes place upon the rights of migrant workers to such social security. The best practice around the world on how to coordinate access to and portability / exportability of social security benefits are multilateral and bilateral agreements. This contribution will focus on EU (multilateral) coordination regulations, which arguably constitute the most comprehensive and sophisticated regulations for our purposes, and its relevance for SADC.

The first *multilateral* social security agreements were entered into soon after the end of the Second World War (Roberts 2009: 15). In November 1949, the five members of the Brussels Pact (Belgium, France, Luxembourg, the Netherlands and the UK) signed two multilateral social security agreements in Paris.¹⁴ Belgium, France and Italy, and France, Italy and the Saar concluded similar agreements in 1951 and 1952 respectively. The first (multilateral) measures to coordinate social security within the EU (then nascent

¹³ See the discussion in part 5.2 below.

¹⁴ The first was concerned with social and medical assistance, while the second aimed to link the various agreements that till then had existed bilaterally between the member countries (Roberts 2009: 15).

EEC) were Regulation No 3 in 1958 (67)¹⁵ and its implementing regulation, Regulation No 4 (68)¹⁶, which became effective on 1 January 1959. While the details of these regulations should not concern us here, the motivation for its passage should. In essence, the concern was economic, namely that lack of coordination of social security would inhibit freedom of movement of persons – one of the four pillars¹⁷ of the EU.¹⁸ Since its inception, coordination of social security in the EU has therefore been closely related to the free movement of persons among the Member States.¹⁹ In fact, the former (coordination) is generally considered to be a necessary condition for the latter: in order to have genuine freedom of movement, labor migration within the common market should not lead to a loss of social security entitlements. As a result, Article 48 of the Treaty of Lisbon assigns the Council with the task of unanimously adopting such measures in the field of social security as are necessary to provide freedom of movement for workers.²⁰

Currently, a number of multilateral social security agreements exist, the most significant of which are the agreements of the European Union (1958), CARICOM (1996),²¹ MERCOSUR (2005) and, most recently, the Ibero-American Social Security Convention (2011)²². Multilateral regimes in the African context are developing, as is evident from the (not yet in force) coordination arrangement covering certain West and Central African states,²³ and similar interventions foreseen within the West²⁴ and East African²⁵ context. EU regulations related to the portability of social security benefits are the most advanced examples of multilateral arrangements. EU regulation 883/2004 is an extensive legal provision that ensures far-reaching portability of social security entitlements within the European Union. When moving within the European Union, even third-country migrant workers enjoy the same rights as EU nationals with respect to the portability of social security and benefit entitlements after five years of residence within the European Union. The European Union is also leading efforts to enhance social security cooperation within the Eu-

15 See Regulation No 3 (OJ 30, 16.12.1958).

16 See Regulation No 4 (OJ 30, 16.12.1958).

17 The other three being free movement of goods, services and capital.

18 This is because social security rights are usually related to periods of employment or contributions or residency. See van Ginneken (2010: 2).

19 This is an important point to remember when considering the introduction of coordination rules in SADC, where free movement of persons is inadequately provided for. See part 4.1, *infra*.

20 We will return to the close connection between coordination and free movement in the last part of this contribution.

21 The agreement is reported to have had limited impact. One of the reasons is the fact that the number of intra-regional migrants remains quite low. See Forteza (2008).

22 The Convention was signed during the 17th Ibero-American Summit of Heads of State and Government held in Chile in November 2007. The countries subscribing to the Convention are Andorra, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, Portugal, Spain, Uruguay, and Venezuela. Article 31 requires the ratification of seven countries before it can enter into force. This occurred in February 2011, when Bolivia became the seventh country to do so (the others being Brazil, Chile, Ecuador, El Salvador, Spain and Portugal). The Convention entered into force in May 2011.

23 See the CIPRES Inter-African Convention on Social Security of 2006; Dioh (2011).

24 That is the ECOWAS General convention on social security.

25 Discussions on the introduction of a multilateral arrangement for the East African Community (EAC), within the context of the EAC Common Market Protocol, are ongoing.

ro-Mediterranean Partnership (EMP). Social security agreements with Morocco, Tunisia and Algeria have been concluded under this initiative. Outside this multilateral framework, many EU member states have also concluded bilateral social security agreements with non-EU countries and have created an extensive global network of portability arrangements.

4. Coordination of Social Protection in SADC

4.1 *Introduction: Lack of Multilateral Agreements and Inadequate Bilateral Arrangements*

There is currently no multilateral arrangement that regulates coordination and portability of social security in SADC. However, some form of harmonization of social security schemes as well as multilateral coordination thereof is certainly envisaged by its foundational instruments. For example, Article 2(e) of the 2003 Charter of Fundamental Social Rights in SADC (“Social Charter”) lists “the establishment and harmonisation of social security schemes” as one of the objectives of the Charter.²⁶ In addition, Article 10 imposes an obligation on member states to create an enabling environment so that every worker in the region shall have a right to adequate social protection. In addition, the Article further provides that persons who have been unable to either enter or re-enter the labor market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance. No distinction is drawn between citizens and non-citizens. Even more explicit are the provisions of the Code on Social Security in SADC. According to Article 3, one of the purposes of the Code is to provide “SADC and Member States with an effective instrument for the *coordination, convergence and harmonisation of social security systems in the region*”²⁷.

In the absence of a multilateral arrangement regulating coordination and portability issues in SADC, countries have had to rely on bilateral arrangements (Olivier 2009: 69). However, only a few such agreements are in existence, and only one of these can properly be described as a social security bilateral agreement, the rest being labor agreements between South Africa and its neighbors, which contain only scant references to social security.²⁸

²⁶ Given the current diversity of social protection schemes in the region, one assumes that the Charter envisages “weak” rather than “strong” harmonization; i.e. the establishment of minimum standards in the region. See 3.1 above.

²⁷ See Article 3.3 (own emphasis).

²⁸ It must be noted that the degree to which countries coordinate the portability of social security benefits via bilateral agreements varies greatly across regions. For example, the European Union and other Western European countries have concluded 1,628 bilateral social security arrangements – through either bilateral or multilateral agreements – of which 1,034 are intra-EU arrangements. East Asian and Pacific (EAP) countries, on the other hand, have concluded only 181 such arrangements, South Asian countries only concluded three arrangements, and even though sub-Saharan African countries have concluded 177 arrangements, it must be pointed out that a large number (75) have been created by Reunion, which is counted as part of France in all French agreements. If Reunion is excluded, only 102 such agreements have been concluded by sub-Saharan African countries. See Sabates-Wheeler/Koettl (2010: 127).

The primary aim of the 2003 agreement between Zambia and Malawi is to address problems experienced by Malawian nationals who had worked in Zambia. Much of the agreement is couched in aspirational terms, and it is uncertain whether and to what extent its provisions have been implemented. For example, in terms of the agreement, the Workers Compensation Fund in Zambia *undertakes* to identify a medical practitioner in Malawi to administer medical examinations or assessment for pneumoconiosis / silicosis for Malawian miners who worked in Zambia.²⁹ The agreement also *foresees* the establishment of a mechanism to facilitate the remittance of monthly pensions through the Malawi High Commission in Lusaka.³⁰

South Africa has entered into bilateral agreements with a number of SADC countries, including Botswana, Lesotho, Malawi, Swaziland, and Mozambique.³¹ None of these agreements, with the exception of the agreement with Mozambique, cover public social security schemes.³² These “so-called labour agreements” (Olivier 2009: 71) were mainly entered into to regulate the flow of migrant labor from these countries to South Africa and primarily cover employer-based occupational arrangements such as recruitment, contracts, remittances and deferred pay, and taxation. It is uncertain whether these agreements, originally designed for the mining industry, are still being applied and enforced today. Olivier speculates that they may have become obsolete (Olivier 2009: 71). In addition, the agreement that allows for payments in respect of employment injuries and diseases to be made in Mozambique has been the subject of trenchant criticism (see Fultz/Pieris 1998: 18-19). A study (albeit somewhat dated and with a relatively small sample size) indicated that, primarily due to corruption in the receiving country, 70 percent of compensation payments had not reached the beneficiaries (Fultz/Pieris 1998: 18).

For a variety of reasons, these agreements cannot be regarded as bilateral social security agreements, especially from the perspective of coordination and portability. The most obvious reason relates to the material scope of the agreements. As pointed out above, they generally do not cover public social security schemes. Secondly, the agreements are not reciprocal. They only regulate the position of nationals of the migrant-sending country. Finally, apart from providing for some measure of portability, the agreements do not provide for other arrangements typical of co-ordination regimes, such as equality of treatment with the nationals of the receiving country, maintenance of acquired rights, and aggregation of insurance periods (Olivier 2012).

29 The relevant paragraph reads as follows: “The workers compensation Fund in Zambia *intends to identify* a medical center practitioner in Malawi to administer medical examinations / assessment for pneumoconiosis/ silicosis for examiners who worked in Zambia” (emphasis added). See par C(g) of the social security bilateral Malawi/Zambia agreement (2003).

30 Par D(c) of the agreement provides as follows: “A mechanism *should also be established* to facilitate, where applicable the remittance of monthly pension through the Malawi High Commission in Lusaka” (emphasis added).

31 For details of all the agreements, see Olivier (2009: 70-71). Olivier points out that a similar agreement may recently have been reached with Zimbabwe, but this cannot be confirmed with any degree of certainty. See Olivier (2009: 71).

32 The agreement between South Africa and Mozambique regulates payment of workers compensation benefits. See Articles XXII; XXIII and XXV of the Agreement between the Government of the Republic of South Africa and the Government of the Republic of Portugal regulating the employment of Portuguese workers from the Province of Mozambique on certain mines in the Republic of South Africa – SA Treaty Series 11/1964.

More recently, South Africa concluded Memoranda of Understanding (MOUs) with Lesotho³³, Mozambique³⁴ and Zimbabwe³⁵. The purpose of the memoranda is to finalize outstanding issues in relation to ex-mineworkers from the three countries who had worked in South Africa (Olivier 2010a: 28). For example, the Lesotho MOU refers explicitly to the exchange of information and cooperation between the South African Compensation Fund and the Office of the Labour Commissioner in Lesotho in processing and finalizing outstanding claims for Basotho ex-mineworkers,³⁶ while the Zimbabwe MOU refers to social security generally, occupational health and safety, and the “facilitation of the interface between ex Zimbabwe migrant workers in South African gold mines and the previous employers or their ex-employing agencies” (Olivier 2010a: 28). While these employment-related MOUs do not impose binding obligations upon the parties, they nevertheless constitute an important basis for binding bilateral agreements in future (Olivier 2010a: 159).

In an encouraging recent development in SADC, Mozambique has been finalizing a bilateral social security agreement with Portugal (Olivier 2010a: 160). The agreement provides for continued coverage under the social security scheme of the host country, should a worker from Mozambique move to Portugal or vice versa. Portability of benefits is foreseen. According to Olivier, the agreement has been signed by the Mozambican and Portuguese national social security schemes, but still has to be ratified by the two governments (Olivier 2010a: 160). Similar bilateral arrangements with Angola and Brazil are foreseen.

4.2 *Tentative First Steps: The Case of Employment Injury Schemes*

It has been argued that the diversity of social security schemes in the SADC region makes it difficult to even develop baseline standards for the region (Olivier 2009 : 40). Nonetheless, despite such diversity, at least one area of commonality exists, namely in the area of employment injury schemes. Employment injury schemes are the only social security scheme that exists throughout SADC, and may therefore be the ideal starting point on the road towards the introduction of coordination rules in the region (Fultz/Pieris 1998: 1; Committee of Inquiry into a Comprehensive System of Social Security for South Africa 2002: 565).

Employment injury schemes provide compensation for work-connected injuries and occupational diseases. The programs normally provide both short and long-terms benefits, depending on both the duration and the incapacity and age of the survivors (Social Security Administration/International Social Security

33 Memorandum of Understanding between The Government of the Kingdom of Lesotho through its Ministry of Employment and Labour and The Government of the Republic of South Africa through its Department of Labour on Cooperation in the Field of Labour (signed in Maseru on 30 October 2006).

34 Co-operation Agreement between the Government of the Republic of Mozambique and the Government of the Republic of South Africa in the fields of migratory labour, job creation, training, studies and research, employment statistics, social dialogue and social security, signed by the labor ministers of the two countries in 2003.

35 Memorandum of Understanding between The Government of the Republic of Zimbabwe and The Government of the Republic of South Africa on Cooperation in the Fields of Employment and Labour (signed at Beit Bridge border post) on 27 August 2009.

36 See Article 3(5).

Association 2009: 11). The benefits nearly always include cash benefits and medical care to workers who are injured at work or who develop occupational diseases, as well as survivors' benefits for families of victims of employment-related fatalities.³⁷ In contrast with other forms of social protection (e.g., retirement pensions or unemployment compensation), insured status is usually extended to newly-hired workers immediately or with only a minimal waiting period (Fultz/Pieris 1998: 5).

Employment injury schemes are present in one form or another in most countries in the world. This is perhaps not surprising in light of the fact that employment injury schemes lie at the root of social security schemes worldwide – often constituting the first contingency covered by social security (International Labour Office 2010: 65). The recent *World Social Security Report* highlights a number of characteristics of employment injury schemes around the world:

- Social insurance schemes predominate around the world;³⁸
- Globally, legal coverage of employment injury schemes is low (with less than 40 percent of the economically active population [EAP] covered), but significant regional differences exist;³⁹
- The group most concerned by work injuries and diseases are migrants, who mainly work in the informal economy,⁴⁰ which is often excluded from social security coverage;⁴¹ and

37 According to the ILO Minimum Standards of Social Security Convention (Convention No. 102 (Article 32)), the contingencies covered under such schemes include the following accident-at-work or employment-related diseases: (a) sickness (“morbid condition”); (b) temporary incapacity for work resulting from such a condition; (c) total or partial loss of earning capacity, likely to be permanent; and (d) the loss of support suffered by dependents as the result of the death of the breadwinner (section 32). The range of benefits required by the Convention includes necessary medical care, sickness benefit for the period of incapacity for work, disability pension in case of loss of earning capacity, and survivors' pension in case of death of a breadwinner.

38 Generally, two types of employment injury schemes exist, namely individual employer liability and social insurance. Under the first, the government mandates that individual employers assume responsibility for compensating their workers for industrial accidents and diseases. Usually, but not always, employers may be required to cover this liability by purchasing an insurance policy or, less commonly, by placing a deposit with the government. The second option, social insurance, involves the establishment of a national employment injury fund. This fund may or may not be part of the general social insurance system. All employers subject to the program must pay contributions to the public carrier, which in turn pays the benefits. Because of the link between workplace risk and prevention, employment injury schemes in many countries are financed from employer contributions only, which are assessed according to the specific risks in the workplace. This intended to provide an incentive to enterprises to invest in reducing the probability of accidents and in other preventive measures. See Fultz/Pieris (1998: 2); International Labour Office (2010: 65).

39 This ranges from around 20 percent in Africa and Asia to 75 percent or more of the EAP in Central, Eastern and Western Europe as well as the CIS region and North America. See International Labour Office (2010: 66).

40 The informal economy is globally the most important source of jobs for migrants (International Labour Office 2010: 66).

41 As the ILO report notes, “[n]o access to social security coverage is usually part of the definition of informal employment.” (See International Labour Office 2010: 27). Of course, the size of the informal economy in developing economies (such as those of sub-Saharan Africa) are much larger than in developed economies, meaning that far fewer workers in developing economies have access to social security protection. This is an issue to which we will return when discussing employment injury-schemes in SADC in part 4.2, *infra*.

- Particularly vulnerable are irregular migrants, who often work in sectors with significant impacts on health (such as mining, construction, heavy manufacturing and agriculture) as well as women working in private households.

In an area in which social security schemes are generally underdeveloped, the presence of employment injury schemes in all member states of SADC is significant. In the first place, it denotes the fact that, as pointed out earlier, schemes to compensate for injuries often constitute the genesis of social security schemes worldwide. Secondly, it is also a reflection of the fact that many SADC countries share common British (legal) routes, and that a significant amount of legal borrowing has taken place in the area of worker's compensation (Fultz/Pieris 1998: 1). For example, the first legislation in South Africa to regulate compensation for injuries suffered and diseases contracted at work, namely the Workmen's Compensation Act of 1914, was mainly borrowed from the British Workmen's Compensation Act of 1906 (Coetzee 1981: 23).

Despite the fact that employment injury schemes are present in all SADC member states, there are nevertheless some differences between the schemes that have to be taken into account when considering the establishment of some type of multilateral coordination arrangement. These differences relate to the type of scheme (social insurance or individual employer liability), coverage, benefits, financing, and administration. In addition to this diversity, there are different governing laws, operational rules and procedures applicable to each of the fifteen schemes in the region. However, the fact that occupational injury schemes exist in all member states coupled with the fact that there is still significant convergence despite the differences certainly make it the ideal first candidate for coordination (Olivier 2010b: 153).

This is not a universally accepted view. Some argue that any concerns about the lack of portability of social security benefits in SADC are premature, and that the focus should instead be on other concerns, such as the development of a proper migration framework for the region and the development of standards on how to coordinate social security systems in the future (Avato et al. 2009: 463). While these are valid concerns that need to be addressed, it should not detract from efforts to introduce a coordination arrangement where that is currently possible, namely in the area of occupational injury schemes. If a problem requires multiple solutions, then a multiple strategy is required and it makes no sense to postpone one prong of it in the interest of first optimizing the conditions for the introduction of such a scheme. As it stands, the occupational health consequences, particularly long-term illnesses and progressions of disabling injuries, continue to be a major cost to labor-sending countries in the SADC region. Often ill-health emerges only after labor contracts have ended and the migrants have returned home. In the absence of proper coordination arrangements, this means that the costs associated with such ill-health have shifted to rural households as well as the public health systems of the sending countries, deepening and further entrenching poverty in the region. This makes the development of coordination arrangements in respect of workers compensation particularly urgent. If done properly, this agreement can serve as a model for the extension of such arrangements to other contingencies such as old age (pensions) and ill-health (health care) as systems in the region progressively expand their reach.

In that spirit, the next section will be devoted to several matters that need to be factored in and attended to in order to arrive at contextualized, informed and integrated arrangements to be contained in future multilateral and / or bilateral agreements – agreements that are capable of effective implementation.

5. Analysis

5.1 Coordination, Harmonization and Convergence

Pennings (2001: 6) defines coordination as follows:

“Coordination rules are rules intended to adjust social security schemes in relation to each other (as well as to those of other international regulations), for the purpose of regulating transnational questions, with the objective of protecting the social security position of migrant workers, the members of their families and similar groups of persons.”

An important point to note is that the definition refers to “adjustment” of national social security schemes in the pursuit of coordination. This means that, in essence, coordination rules leave national schemes intact and only supersede such rules where they are disadvantageous for migrant workers (Pennings 2001: 7). The European Court of Justice has confirmed this on numerous occasions, emphasizing that EU regulations coordinating Member States’ social security systems do not in any way affect the freedom of Member States to determine the content of their own social security schemes “as long as cross border-elements do not play a role”.⁴² This is confirmed by the latest regulation, namely Regulation (EC) No 883/2004.

This should be distinguished from the principle of “harmonization” of social security. In essence, two types of harmonization can be distinguished. One, sometimes referred to as “approximation”, seeks to introduce a common legal system in a certain field and, as a result, constrains future legal developments of the national system. The other type of harmonization is achieved through the setting of minimum standards. Parties to a coordination regime may develop their national system as they choose as long as they do not fall below the minimum standard (Roberts 2009: 16). While harmonization of the stronger kind (“approximation”) in the field of social security was initially favored by the European Commission as a means to avoid potential distortion of competition, and to encourage the free movement of workers, the discussion that influenced the drafting of the Treaty of Rome “were fairly explicit in excluding harmonisation of social security from the remit of the EEC” (Rogowski/Kajtár 2004: 6).

One of the purposes of the SADC Code on Social Security is to provide “SADC and Member States with an effective instrument for the *coordination, convergence and harmonisation* of social security systems in the region”⁴³. It envisages at least “weak harmonization” by obliging each member state to maintain its social security system at a level at least equal to that required for ratification of the ILO Minimum Standards of Social Security Convention (102 of 1952), and urging member states to “progressively raise its system of social security to a higher level” in order to achieve “meaningful coverage”.⁴⁴ Apart from stressing some harmonization and convergence of social protection systems throughout the region, the Code also addresses the issue of coordination. In Article 17, which deals with the rights of migrants, foreign workers and refugees, the Code emphasizes that member states should ensure that all lawfully employed

⁴² See Cornelissen (2009: 17) and the cases referred to there.

⁴³ Article 3.3 (own emphasis).

⁴⁴ See Article 4.4.

immigrants are protected through the promotion of the core principles of coordination.⁴⁵ These principles (which will be discussed in more detail in the next section), the Code emphasizes, should be contained in both the national laws of Member States and in bi- or multilateral arrangements between Member States.

What the EU experience in the area of coordination illustrates is that neither harmonization nor convergence is required in order for the effective implementation of coordination rules. To be sure, an important element of multilateral or bilateral agreements between countries is the principle of reciprocity, which holds that the parties involved will share the costs and benefits on a reasonably equal basis. That assumes that the benefit schemes in the respective countries must be reasonably compatible. While this may be the case with the social security schemes of developed countries (even when some schemes are contributory Bismarckian schemes and the others tax-financed, residence-based schemes), the schemes found in developing countries are often too different to allow for reciprocity (Roberts 2002: 220-221).

Nevertheless, while this argument may hold true for the SADC social security systems in general, it loses its force when it is applied to workers compensation schemes specifically. Apart from the fact that these schemes exist in all the countries in the region, they also display a number of important common elements. For example, in two-thirds of the countries, workers compensation schemes operate as public compensation funds, and many more are in the process of converting their individual employer liability schemes into such public schemes (Olivier 2010b: 11). In addition, the types of benefits provided across the region exhibit broad similarity. All countries pay for permanent incapacity (partial and total), temporary incapacity, medical care, and death (both funeral grants and survivors benefits). Finally, all countries provide some compensation for employment-related diseases and all schemes are financed exclusively by employer contributions. While differences in respect of modes of payment and the administration of the schemes exist, these represent practical difficulties, which, while not inconsiderable, can be addressed in carefully drafted bilateral agreements.

5.2 The Core Principles of Coordination

Although there is no such thing as a fixed and exhaustive list of principles of social security coordination, most authors agree that the following principles characterize coordination: *equal treatment*, *the aggregation of periods* (or “totalization of periods”), *the exportability of benefits* (“waiving of residence clauses”) and *the determination of the legislation applicable* (Van Overmeiren 2009: 4-5). To this a fifth principle is often added, namely *good cooperation and administration* (Jorens/van Overmeiren 2009: 48). Significantly, Article 17 of the SADC Code on Social Security, which deals with the rights of migrants, foreign workers and refugees, emphasizes that member states should ensure that all lawfully employed immigrants are protected through the promotion of the core principles of coordination, namely *equal treatment*, *the aggregation of periods*, *exportability of benefits* and *the determination of the applicable legislation*.⁴⁶

⁴⁵ See Article 17(2).

⁴⁶ See Article 17(2).

The concept of equal treatment is one of the fundamental principles of EU law and central to any reciprocal agreement.⁴⁷ Article 4 of Regulation 884/04 recognizes this and provides: “Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof”. In other words, all EU nationals should be accorded the same rights and be subjected to the same conditions as home state nationals. The Court of Justice has held that this principle applies to both direct and indirect discrimination.⁴⁸

Despite the fact that the SADC Code stresses the importance of equal treatment, it is important to note that there are no *binding norms* in this regard in the SADC foundational instruments. While the principle of non-discrimination is contained in Article 6(2) of the SADC Treaty, it contains a closed list of protected grounds of which discrimination based on nationality/citizenship is not part.⁴⁹ The absence of such binding norms makes it imperative for the principle of equality of treatment to be specifically embedded in bi- and/or multilateral social security arrangements in SADC (Olivier 2010a: 184). The principle of equal treatment is also contained in ILO Convention 19 of 1925 on Equality of Treatment (Accident Compensation),⁵⁰ which has been ratified by more than two-thirds of SADC countries.⁵¹ This places an international obligation on ratifying countries to abide by the provisions of the Convention, and, as Olivier points out, it would be prudent to reflect this fact in any multilateral and / or bilateral social security agreements (Olivier 2010a: 183).

The principle of aggregation (or totalization) of insurance periods means that periods of contribution within the framework of a social security scheme in one country could count towards complying with the eligibility criteria for access to benefits flowing from a (similar) social security scheme in another country. This principle is particularly relevant in the area of pension-oriented public retirement funds, where workers who divide their career over two or more different countries may contribute to numerous national public retirement schemes.⁵² However, occupational injury schemes are normally not conditional upon the completion of periods of insurance, which makes aggregation or totalization of insurance periods less relevant. For example, none of the occupational injury schemes in SADC countries require a minimum

47 One of the pillars of the EC Treaty is the principle that all discrimination on grounds of nationality is prohibited. See Article 12 EC.

48 See Cornelissen (2009) and the cases referred to there.

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

50 Article 1(1) of the Convention provides that a ratifying member state must undertake to grant to the nationals of any other Member which have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependents, the same treatment in respect of workmen’s compensation as it grants to its own nationals.

51 These are Angola (1976), Botswana (1988), Democratic Republic of Congo (DRC) (1960), Lesotho (1966), Malawi (1965), Mauritius (1969), South Africa (1926), Swaziland (1978), Tanzania (1962), Zambia (1964), and Zimbabwe (1980). Still to ratify are Madagascar, Mozambique, Namibia, and Seychelles.

52 For example, if a person has been insured for 10 years in member state A, 25 years in member state B and 5 years in member state C, each member state has to calculate the pension corresponding to the total 40 years of insurance. Member state A will then pay 10/40 of what a person would have been entitled to after 40 years of insurance in this country and member states B and C will pay 25/40 and 5/40, respectively. See Reyes (2004: 11).

qualifying period before benefits are payable. It may therefore be unnecessary to include this principle in any operationally-focused bilateral or multilateral agreement in the area of occupational injuries (Olivier 2010a: 186).⁵³

The objective behind the determination of the applicable legislation-principle is to ensure that the legislation of only one state can apply at any one time, and thus to prevent a situation in which two or more sets of laws apply, or, even worse, where the migrant worker is not covered by any legislation (Jorens 2009b: 168). Under the EU social security coordination system, the prevailing principle to determine the legislation applicable to a person is that of *lex loci laboris*, or the place of work. As Jorens points out, the idea behind this was to clearly link the social security rights of the migrant to the legal system of the country to which she is most attached in her daily life (Jorens 2009b: 169). However, the principle was clearly designed for coordination rules that concerned only economically active persons. Therefore, as the personal scope of the coordination regulations has been extended over the years beyond the employed and the self-employed, the additional principle of (*habitual*) residence was applied to the economically non-active (Jorens 2009b: 170). While this principle in itself is not controversial and should present few problems in practice, it is nevertheless important that any multilateral or bilateral agreements in SADC clearly spell out what the prevailing principle is (for example, employees are covered in the country of employment; self-employed are covered where they normally engage in their occupation; seafarers are covered in the flag state; not economically active persons are covered in the country of residence)⁵⁴ in order to avoid conflicts in laws and their undesirable consequences (coverage under several social security legislations or no coverage at all).

Article 7 of current EU Regulation 883/04 provides for export/portability of social security benefits. It is clear that not all social security benefits are portable. In the first place, coordination arrangements in general do not cover social assistance benefits (or “special non-contributory cash benefits” as they are referred to in the Regulations).⁵⁵ Secondly, the principle of portability is variable across (contributory) benefits. For example, short-term benefits such as sickness and maternity may be exported only under certain limited conditions; unemployment benefits are exportable for a maximum of three months only (with a possibility to extend this to six months under the latest regulations) and healthcare is as a rule provided by the country of residence, with costs reimbursed by the competent country (Roberts 2009: 19).

The existing bilateral social security agreements in SADC – as discussed in part 4 above – address the issue of portability only tangentially. Apart from the agreement between Malawi and Zambia, the other agreements are essentially labor agreements and mostly do not address social security at all. None of the agreements (including the Malawi-Zambia agreement) is truly reciprocal in nature, as they regulate the position of nationals of one of the respective countries only. Where portability is provided for (as, for

⁵³ However, Olivier argues that it may be prudent to include it in any future multilateral arrangement that would facilitate future bilateral arrangements covering other social risks such as old age (pensions).

⁵⁴ These are the principles applicable in the EU.

⁵⁵ However, as Roberts (2009: 22) points out, the strict dividing line between contributory and non-contributory benefits has become increasingly blurred, and the ECJ, in a number of judgments, has brought benefits under coordination regulations whether or not they were categorized as social assistance by the Member State.

example, in the agreement between South Africa and Mozambique in respect of workers compensation), all indications are that it is poorly operationalized and that the benefits often do not reach the intended beneficiaries. Besides the practical problems associated with implementation of portability arrangements, a recent study also points out that the current legislative framework in SADC countries is not conducive to portability arrangements (Olivier 2010a: 71). The national laws of the major migrant-sending⁵⁶ and – receiving countries⁵⁷ within SADC either contain no portability provisions and mechanisms or, where they are provided for, they are inadequate (Olivier 2010a: 71, 160ff.).

Of course, not all employment injury benefits would require portability, which is best suited to long-term social security entitlements such as pensions and health care benefits. As mentioned earlier, portability proper requires some cooperation between the social security institutions of the origin and the host country. Cooperation is required to ensure a joint determination of benefit levels for a particular migrant. As pointed out in part 6.2, all SADC countries whose occupational injury schemes operate as public compensation funds provide periodic payments (pensions) for those whose injuries are both permanent and severe, or to dependents in the case of death of the worker. In reality, given the fact that most migration in the region is to South Africa, it may be that the main practical focus of any future formalized agreements would be to facilitate and streamline access to South African occupational injury benefits (in the form of pensions). However, as Olivier aptly points out, it would be “improper” – in the light of the important equality of treatment-principle alluded to earlier – not to make provision for migrant (or ex-migrant) workers from South Africa to have access to similar benefits in the other SADC countries (Olivier 2010a: 183). This is both informed by and would simultaneously reinforce the regional integration agenda of SADC (Olivier 2010a: 183). Thus, while the unidirectional flow of migration in SADC might make joint determination of employment injury benefit levels moot, the symbolic value of including the reciprocity principle in any future social security agreements should not be underestimated.

Minor injuries in countries with public compensation funds and all injuries in countries with private insurance arrangements are normally paid out as a lump sum. Eligibility for such lump sum payment and the level of such benefit are determined by the social security institution of one country alone, and would therefore not require cooperation between different social security institutions. Once the eligibility and level are determined, the benefit may require “exportability” to the home country of the migrant in case he or she had returned home. In practice, this simply means that the social security institution has to transfer the money to the migrant’s foreign bank account, as is done in the EU. However, given the lack of access to individual bank accounts in the SADC region, it may be that cooperation of other institutions (either the social security institution in the home country or a third-party such as TEBA – the Employment Bureau of Africa) – would need to be secured in order to ensure that the payment reaches the individual worker or his family. Furthermore, exchange control restrictions and international transaction costs are additional areas which need to be streamlined, ideally by way of arrangements contained in bi- and multilateral agreements.

⁵⁶ Lesotho, Mozambique, Swaziland and Zimbabwe.

⁵⁷ In particular South Africa.

Alongside the other main and familiar principles of the coordination of social security, discussed above, the new EU regulation (883/04) has – for the first time – codified some principles of “good administration and cooperation” considered to be of paramount importance for the smooth implementation of the coordination rules. Title V of the regulations contains a number of articles that provide, *inter alia*, for communication of relevant information between the authorities, good administrative assistance, direct communication between the authorities and with insured persons, the prohibition of refusal of claims or documents based on the language, the mutual information duty between the insured persons and the competent authorities and the obligation for the latter to provide certain information “within a reasonable period of time”.⁵⁸ In addition to these well-known practical rules, the new regulations also stress the importance of the progressive use of new technologies for the exchange, access and processing of the data required to implement the coordination regulations.⁵⁹ It was envisioned that by 1 May 2012, all the information currently exchanged by means of paper forms would be processed electronically.⁶⁰

Administrative capacity not only relates to the cooperation and communication between social security institutions, but also to the ability of countries to administer the agreements. On both these counts, the current state of affairs in SADC raises alarm bells. In the first place, one of the major obstacles restricting access to social security is the lack of assistance that migrants receive from the social security institutions in the migrant-sending countries.⁶¹ Apart from government corruption, which often prevents payment from reaching the intended beneficiaries, social security institutions often fail to assist ex-migrants in their quest to prepare applications for another scheme, file an appeal, pay the migrant on another scheme’s behalf, or advance funds while the applicant is awaiting payment (Fultz/Pieris 1998: 19-20). Studies indicate that applicants for workers compensation in particular face major delays – as long as years – in the certification and processing of such benefits, in particular by migrant receiving countries (Olivier 2010a: 73). This relates in particular to claims by ex-South African mineworkers for compensation for occupational diseases, which require medical examinations and in some cases even medical samples to be submitted and certified (Olivier 2010a: 73). In addition, electronic data storage seems to be the exception rather than the rule in the region. For example, even in South Africa, where the social security system is considered to be one of the most advanced and comprehensive in the region, some of the social security institutions still have a manual system of record-keeping, which of course is more prone to error and time delays than systems utilizing Information and Communication Technology (ICT) (Olivier 2010a: 83).⁶² In sum, therefore, administrative inertia and the inefficiency of institutions in the area of social security delivery are major obstacles to the development of appropriate coordination rules (Olivier 2009: 41).

58 See Article 76 in particular.

59 See Article 78(1) of Regulation 883/04.

60 To provide some idea of the complexity and intricacy of EU coordination rules, there are currently more than 100 paper forms through which information is exchanged between social security institutions, which, by 1 May 2012, would have been replaced by some 2000 E-forms in total (this includes all the different language versions). See the Electronic Exchange of Social Security Information – website at <http://ec.europa.eu/social/main.jsp> (last accessed on 18 April 2011).

61 See Rothgieser (2008: 21). It appears that some of the African institutions have recently started to address this problem.

62 Also see Lee-Archer (2006).

Secondly, the complexity of coordination agreements places tremendous administrative strain on governments and social security institutions. Multilateral and bilateral agreements are complex for the following reasons: (i) they involve multiple points of contact within multiple organizations; (ii) they involve different social security nomenclature and different definitions and provisions that apply to the national schemes; (iii) they require accurate data spanning many years of work history; (iv) they ideally require functional ICT systems; and (v) they require constant monitoring of domestic legislation in order to determine the impact that any amendments to the legislation or enabling rules may have on the international agreement (Lee-Archer 2006: 6). This complexity means that even amongst developed countries, international agreements are not administered with nearly the same level of efficiency as domestic operations (See Lee-Archer 2006: 6). This complexity, coupled with the fact that international agreements normally require ratification and/or enabling legislation at the national level, may cause reluctance among countries in the region to prioritize coordination agreements, especially in light of the serious domestic challenges (such as poverty, inequality, unemployment and the devastating effects of an HIV/AIDS pandemic) that many of them face.⁶³

5.3 *The Mechanism(s)*

A third matter to be considered concerns the appropriate mechanism or construct to provide for the coordination-arrangements discussed above. At least four mechanisms should be considered, namely the existing or revised labor agreements that exist in the region; revising existing MOUs or entering into new ones; targeted social security bilateral agreements; and/or finally, a social security multilateral agreement (Olivier 2010b: 186). It is submitted that the latter two are the preferred vehicles, and the ones that will be considered in more detail below. The existing labor agreements in the region are exactly what the name suggests, namely agreements that primarily regulate labor flows between the countries concerned. Social security, if included, is done so as a tangential matter and currently almost exclusively covers benefits provided by the employer, and not social insurance benefits such as workers' compensation that are provided by the state. While the MOUs show more promise than the labor agreements in this regard, their main drawback is that they do not impose binding obligations on the parties concerned.

As argued above, bilateral (and multilateral) social security agreements still constitute "best practice" on how to coordinate access to, and enable the portability of, social security benefits for migrants (Sabates-Wheeler/Koettl 2010: 125). By ensuring that the acquired (social security) rights (or rights in the process of acquisition) of migrants are protected, multilateral and bilateral agreements have important implications for the decision of migrants to return to their countries of origin. For example, if social security entitlements are linked to residence in a given territory, migrant workers are more likely to remain

⁶³ It may be necessary at this late stage in the contribution to point out that xenophobia is a serious problem in the region, in particular in South Africa (see, for example Everatt 2011). Foreigners, especially migrant workers, are perceived as "stealing jobs from South Africans". One issue that space will not allow us to explore in this contribution is the extent to which coordination arrangements may be viewed as "stealing social security from South Africans". We use South Africa in this example because it is the primary migrant-receiving country in the region and, as such, will play an important role in the establishment of future coordination arrangements.

in the country after becoming unemployed than return to their countries of origin. They become, as one commentator noted, “caught in the web of the welfare state” (Etzinger 2007: 131). One study estimates that fewer than 30 percent of all worldwide migrants who return home would have done so in the absence of the incorporation of the exportability principle in most multi- and bilateral agreements (Paparella 2004, cited in Olivier 2010a: 190-191). Support for such agreements can also be found in the SADC Code on Social Security, which emphasizes that the preferred vehicle for the incorporation of coordination principles is bi- or multilateral arrangements between member states. In addition, the *Committee of Inquiry into a Comprehensive System of Social Security for South Africa* considers coordination agreements to be a natural response to the growing interdependence in the SADC region as well as the extensive migration of the region’s workforce and residents (Committee of Inquiry into a Comprehensive System of Social Security for South Africa 2002: 151).

Targeted country-specific cross-border bilateral agreements between states have the advantage of incorporating regulations and standards that pertain specifically to the unique migratory patterns that may exist between the two states as well as the specifics of their respective national social security laws. For example, bilateral agreements between South Africa, on the one hand, and its neighbors (Lesotho, Mozambique, Swaziland, and Zimbabwe) could take account of current migratory patterns (largely uni-directional) as well as existing institutional arrangements that could be utilized to enable coordination. For example, in Lesotho, a Workmen’s Compensation Trust Fund has already been set up to receive, among others, workmen’s compensation benefits paid over by the South African Compensation Fund to ex-migrants in Lesotho (Olivier 2010a: 178). TEBA (the Employment Bureau of Africa) also currently plays an important role in Swaziland and Mozambique, where it facilitates payments of compensation in respect of South-African mining-related injuries and deaths to ex-mineworkers and their survivors.

The danger inherent in such detailed and context-specific bilateral agreements is the fact that they may result in portability arrangements that are not only highly complex but also difficult to administer (Holzmann et al. 2005: 24). In addition, such agreements may end up granting differing rights and entitlements to migrants, which could undermine regional integration. One way to counteract this is to establish common standards in a regional – or multilateral framework against which all bilateral agreements can be measured. This is the case in the EU. Despite the multitude of bilateral agreements that exist in the EU, the fact that they are all based on a single legal source, namely EU regulation 883/2004, ensures some degree of convergence. Similarly, bilateral agreements between countries belonging to the Caribbean Community, MERCOSUR as well as the Ibero-American Summit are all based on a single multilateral agreement that establishes a standardized framework. There is thus a need for a similar standardized multilateral framework in SADC. In respect of such a framework, Olivier (2010a: 189) suggests the following:

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

Besides establishing a standardized framework for bilateral agreements, another important advantage of such a multilateral framework agreement is that it can provide for a phased and incremental approach in relation to (i) the types of schemes covered; (ii) the benefits provided for; (iii) the categories of persons covered by such an agreement; and (iv) the countries included in the agreement (Olivier 2010a: 189).

Firstly, as argued at length above, the existence of occupational injury schemes in all SADC countries and the presence of common elements within the schemes make them the ideal first candidate for coordination. The multilateral agreement could initially cover such schemes only, and be extended as and when convergence in respect of other schemes (in particular pension-oriented public retirement fund schemes) occurs. While the EU coordination arrangements cover all social insurance schemes, all other regional multilateral social security arrangements (for example CARICOM, MERCOSUR, the Ibero-American Social Security Convention) are less comprehensive and (initially) only cover schemes where sufficient convergence exist.⁶⁴ Secondly, the agreement could initially provide for the payment of those benefits which accrue to migrant workers who work or who have worked in South Africa, but who are unable to access such benefits. As Olivier argues, this does not have to take place on a reciprocal basis; such reciprocity could be achieved in the next phase of the agreement (Olivier 2010a: 189). To sacrifice the principle of reciprocity (at least initially) is not without support. In the context of the EU, some commentators have argued for unilateral action on the part of the receiving EU Member States in respect to third-country nationals – at least as far as the principles of equality of treatment or the exportability of benefits are concerned (Roberts 2002: 221; Vonk 2002: 332).

In the third place, provision could initially be made for extending the benefits of cross-border social security arrangements to certain categories of persons only (for example lawful migrant workers and their dependents), which could over time be extended to include other categories of persons also, such as other categories of non-citizens (for example, self-employed workers) as is the custom in most other regions where a multilateral agreement is in operation (Olivier 2010a: 189). Finally, given the political, administrative and other difficulties involved in the establishment of multilateral agreements, it might be necessary to initially include within the sphere of operation of a multilateral agreement those countries which at this stage have both the capacity as well as the most urgent need to enter into appropriate arrangements. For example, it may be prudent to initially cover South Africa (as the main receiving country in the region) and the main migrant-sending countries (Lesotho, Mozambique, Swaziland and Zimbabwe) within such a multilateral framework. The latter countries all have much in common in terms of (lack of) access to certain South African social security benefits to justify their inclusion within a multilateral framework. Other countries could from time to time be added as the need to do so arises. Precedent for such an incremental approach exists in the Caribbean, where the CARICOM Agreement on Social Security does not yet cover Suriname, which at this stage does not have a security system similar in nature to that of other member states and which can therefore not yet start the required legislative process for the operationalization of such an agreement (Forteza 2008:22).

⁶⁴ The CARICOM agreement, for example, covers invalidity payments; disablement pensions; old age or retirement pensions; survivors' pensions; and death benefits in the form of pensions. See Olivier (2009: 112).

5.4 (Absence of) Free Movement

There are two vital principles that are core to any reciprocal agreement, namely equality of treatment (discussed earlier) and freedom of movement. As pointed out earlier, one of the main reasons for the establishment of coordination principles in the EU was to secure and promote the free movement of workers.⁶⁵ The most recent coordination rules confirm this. The preamble to Regulation (EC) No 883/2004 clearly states that “the rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment”⁶⁶. The objective of the new regulations is thus “to guarantee that the right to free movement of persons can be exercised effectively”⁶⁷.

The freedom of movement principle in SADC is couched in much weaker terms than the EU counterpart. The SADC Treaty does not guarantee freedom of movement, but merely the *facilitation of movement of persons*. Article 5(2)(d) of the SADC Treaty does not regulate the matter conclusively, but requires of SADC to “develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States”. The recently adopted (but not yet implemented) SADC Protocol on the Facilitation of Movement of Persons⁶⁸ does not guarantee freedom of movement in any way which is potentially significant for purposes of enhancing the social security position of intra-SADC migrants. The reason is that the latter document does recognize visa free travel for up to 90 days, but subjects the right to residence and establishment (in the occupational sense of the word) to *restrictions contained in national laws*. It has been remarked that, in terms of content, much of the Protocol merely affirms what is already happening in the region based on either the domestic legislation of SADC member states and/or bilateral and multilateral agreements that have been signed between member states. In this sense, as Crush and Williams argue “the Protocol does not represent any ‘radical departure’ from the status quo, but largely elevates to a regional level, what is already a reality in the region” (Crush/Williams 2010: 69).

As the SADC region is moving closer towards free trade — the free movement of capital and goods — and ultimately economic integration, there has been considerable reluctance to develop a SADC-wide policy on the free movement of people (Crush et al. 2005: 24). It has aptly been remarked that “[f]reeing up flows of goods and capital while simultaneously trying to shut down the movement of people makes limited economic sense” (Crush et al. 2005: 27). In SADC, therefore, the free movement of persons continues to be balanced against the political and economic interests of individual member states. National policies, legislative instruments and institutions and mechanisms designed to manage cross-border migration are inevitably couched in protectionist language, which, as pointed out above, the Protocol is unlikely to change (Williams/Carr 2006: 3).

⁶⁵ See Cornelissen (2009) and the cases referred to there.

⁶⁶ Preamble point 1.

⁶⁷ Preamble point 45.

⁶⁸ The Protocol was formally tabled and adopted at the Summit of the Heads of State in 2005, and has been signed by nine member states (Botswana, DRC, Lesotho, Mozambique, Namibia, South Africa, Swaziland, Tanzania and Zimbabwe), which now allows for the drafting of an implementation plan. However, for the Protocol to come into effect, at least nine member states must have signed and ratified it. See Crush/Williams (2010: 61).

The question that is important for us to consider is the following: What are the implications of the fact that there is no free movement-regime in SADC for the coordination of social security schemes? It is submitted that rather than acting as an impediment to the establishment of coordination principles in SADC, the establishment of coordination principles in multilateral and bilateral arrangements could in fact aid the establishment of a truly free movement regime in SADC. The argument is a simple one: in the absence of binding SADC norms in this regard, the inclusion of the principle of equality of treatment in coordination agreements could indirectly achieve what a weak free movement Protocol cannot, namely facilitate some modicum of free movement to complement free movement in goods and capital. In other words, rather than free movement acting as the driver of coordination arrangements (as is the case in the EU), coordination arrangements could instead (indirectly) promote free(er) movement in the SADC region.

5.5 *Institutional Arrangements: Supranational versus Regional*

It is often remarked that SADC is, unlike the European Union, not a supra-national institution, but a regional organization (Olivier 2009: 75). While this may in the main be correct, it is important to note that supranationalism is neither a matter of “black and white” nor of “all or nothing”.⁶⁹ In other words, no regional arrangement can be characterized as exclusively “supranational” or exclusively “regional”. As Best (2005: 44) notes:

“[... S]upranationalism has to be seen as a set of norms, instruments and institutional arrangements which can be used selectively and in combination with other approaches. Except in the case of outright political unification, it is most unlikely that all spheres of activity will be covered by any kind of supranational arrangement. There are likely to be different combinations of supranational and intergovernmental elements in different issue areas, according to the degree of sensitivity, the likelihood of opportunism, and the need for uniformity in each case.”

While the precursor to SADC (the Southern African Development Coordination Conference - SADCC) initially rejected *any* ceding of national sovereignty (based as it were on gradual and selective regional cooperation rather than across-the-board market integration) (Lenz 2011: 2), recent institutional reforms within SADC arguably strengthened its supranational character. For example, the role of the SADC secretariat has been strengthened to emulate the role of the EU Commission as a supranational “motor” for integration.⁷⁰ In addition, the SADC Tribunal – “a clear ECJ copy” (Lenz 2011: 16) – has a range of powers that go even beyond the powers granted to the powerful ECJ, namely compulsory jurisdiction, exclusive competence to constitutional and administrative review, private access to individuals when all other domestic remedies have been exhausted, and a preliminary rulings procedure (Lenz 2011: 16).

⁶⁹ Supranationalism can broadly be defined as a set of norms, instruments and institutional arrangements which all (to a lesser or greater degree) place limitations on sovereign rights. See Best (2005: 3).

⁷⁰ However, as Muntschick (2008: 18) notes, because no sovereign rights have to date been transferred to the Secretariat, its power and influence is limited because it depends on the goodwill of SADC’s national leaders.

Nevertheless, despite these examples of “supranationalism”, the instruments and institutional arrangements in the area of social security in SADC differ significantly from those of the EU, which has implications for the design of appropriate coordination arrangements. Within the EU, the area of social security (including coordination) is regulated at three levels, namely in terms of primary legislation, secondary legislation as well as the case law of the European Court of Justice (ECJ).

The primary legislation consists of the Treaty provisions on the basic right of free movement of workers (Articles 45-47) as well as the provision on social security (Article 48). The latter provision obliges the European Parliament and the Council to adopt such legislative measures in the field of social security “as are necessary to provide freedom of movement for workers”. The main secondary legal instruments in the field of social security coordination within the EU are Regulation 883/2004 on the coordination of social security systems and Regulation 987/2009, the latter of which lays down the procedure for implementing Regulation 883/2004. The regulations are powerful tools to create uniform law throughout the European Union for three reasons: (i) they have general application; (ii) are binding in their entirety; and (iii) are directly applicable in all member states (Rogowski/Kajtár 2004: 4). Finally, the numerous judgments of the ECJ have played an essential role in the development of the coordination system over the years. As Cornelissen points out, the various coordination regulations have often been modified in order to take into account, if not to “translate”, the case-law of the Court in the wording of the Regulations.⁷¹ In addition, through its case law, the ECJ has arguably contributed towards the advancement of European social integration (Wasserfallen 2009: 2).

Conversely, unlike the EU Treaty, which obliges the European Parliament and the Council to adopt legislative measures in the field of social security to ensure freedom of movement for workers, the SADC Treaty contains no such binding norms in respect of social security or free movement. While the SADC Treaty is a legally binding document, it contains no direct reference to social security; it instead constitutes an all-encompassing framework by which countries of the region shall coordinate, harmonize and rationalize their policies and strategies for sustainable development in all areas of human endeavor (Olivier 2009 : 76).⁷²

In addition, neither the Treaty nor any of the documents that derive their legitimacy directly from the Treaty (Protocols, Memoranda of Understanding, Charters and Declarations) nor any other strategic plans (such as the SADC Regional Indicative Strategic Development Plan (RISDP))⁷³ directly affect the national law of member states by means of secondary law (Muntschick 2008: 17-18). While the Code on Social Security contains crucial provisions for the further development of social security in SADC, its impact is limited to providing strategic direction, including guidelines, a set of principles and standards, a monitoring framework, and an instrument for coordination, harmonization and convergence of social security. In

⁷¹ See Cornelissen (2009) and the various examples cited there.

⁷² Article 6(1) of the Treaty provides that “Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty”.

⁷³ Although it is not a legally binding agreement, the RISDP is a strategic plan that plots an integration agenda that includes the target of a free-trade area by 2008, a customs union by 2010, a common market by 2015 and an economic union by 2018.

essence, the Code is not intended to be a binding document.⁷⁴ In contrast, EU Regulations 883/2004 and 987/2009 represent directly applicable secondary legislation in all member states.

The single truly supranational entity in this context is the SADC Tribunal. However, apart from current concerns about its efficacy⁷⁵ and enforcement of its decisions (Ruppel/Bangamwabo 2008), the Tribunal's primary mandate is "to ensure adherence to and the proper interpretation of the provisions of this Treaty and subsidiary instruments and to adjudicate upon such disputes as may be referred to it"⁷⁶. In the absence of a binding Protocol and other norms in the area of social security and free movement in particular, the role of the Tribunal will be minimal. However, its role may increase significantly once the multilateral and bilateral social security agreements advocated in this paper become a reality. The Protocol expressly states that the Tribunal shall have jurisdiction over "all matters provided for in any other agreements that member states may conclude among themselves or within the community *and that confer jurisdiction to the Tribunal*"⁷⁷. The latter part of the provision makes it clear that the agreement(s) must confer express jurisdiction upon the Tribunal in order for the Tribunal to have any role in resolving disputes flowing from such agreements.

The absence of binding norms and effective judicial review in SADC makes the establishment of multilateral – and complementary bilateral social security coordination agreements vital elements of any strategy to protect the social security rights of migrants in the region. In the area of social security, SADC is indeed more of a regional – than a fully supra-national entity, and this means that the diffusion of EU coordination principles in the region will require a distinctive implementation strategy.

6. Concluding Remarks

The main aim of this contribution was to complement and expand on recent efforts to strengthen social protection for international migrants, in particular South-South migrants. It specifically considered whether and to what extent social protection in SADC could be expanded through the diffusion of EU coordination rules.

74 Instead of enforcing standards in the way international monitoring and supervisory institutions have traditionally done, the Code introduces a promotional independent committee of experts: this committee is tasked with monitoring compliance with the Code and making recommendations to the relevant SADC structures and the respective national structures on the progressive attainment of its provisions. See Olivier (2009: 78-79) and articles 3 and 21 of the Code on Social Security in the SADC.

75 At the time of writing, the Tribunal is suspended while undergoing a review process and is therefore not receiving any new cases. The five members of the Tribunal whose terms have expired have also not been renewed. This follows the refusal of the government of Zimbabwe to comply with a number of judgments, which led the SADC Summit (in August 2010) to task a team of consultants to undertake and complete "a review of the operations of the Tribunal with a view to strengthening it and improving its terms of reference". See SADC Lawyers' Association/ International Commission of Jurists (2011: 1-2).

76 Article 16(1) of the SADC Treaty.

77 Article 14(c) of the Protocol on Tribunal and the Rules of Procedure Thereof (emphasis added).

In suggesting that it is indeed possible to introduce coordination principles through multilateral and bilateral agreements in SADC, the paper also intends to act as a counterpoint to recent studies that suggest that low-income countries are far from being ready to conclude such agreements; that their social security systems are too unprepared to engage in these complex issues; and that concerns about the lack of portability of benefits in SADC and other low-income countries are premature.⁷⁸ To be sure, the diffusion of the highly developed and complex EU coordination norms in SADC will require careful implantation and cultivation in the new environment. Given the lack of convergence that characterizes social security systems in SADC, it is suggested that coordination arrangements initially be limited to employment injury schemes – the only schemes present in all member states.

The introduction of appropriate cross-border arrangements in respect of employment injury schemes in SADC is a matter of urgency. The occupational health consequences, particularly long-term illnesses and progressions of disabling injuries, have been a major cost to labor-sending countries in the SADC region. Often ill-health emerges only after labor contracts have ended and the migrants have returned home. In the absence of proper coordination arrangements, this means that the costs associated with such ill-health all shifted to (mainly rural) households as well as the public health systems of the sending countries. This makes the development of coordination arrangements in respect of workers compensation particularly urgent.

It has been noted that “[i]n this day and age insurance schemes which are not coordinated should no longer exist, and major efforts must be made in order to progress towards improving the coordination of all the insurance schemes in which workers have acquired rights, or are in the process of acquiring rights” (Conte-Grand 2006: 28-31). This contribution represents one such effort.

⁷⁸ See, for example, Avato et al. (2009).

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