

# Regional Overview of Social Protection for Non-Citizens in the Southern African Development Community (SADC)

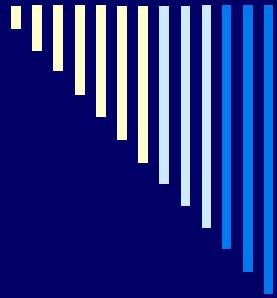
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# Presentation

- Paper presented at an International Conference on Migration and Social Protection: Exploring Issues of Portability and Access
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# Overview

- Differential approach
  - Migration in SADC: the contextual framework
  - Social security for intra-SADC non-citizens: the context
  - Diversity and restrictions
    - Diversity: poverty, the regulatory framework and system dissimilarity
    - Restrictions in the legal system and policy frameworks
  - National level (country) responses
  - Inter-country responses
  - Regional responses
  - International level responses/standards
  - Conclusions
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# Introduction

- ILO definition (ILO Convention 102 of 1952):  
*"The protection which society provides for its members, through a series of public measures, against the economic and social distress that otherwise will be caused by the stoppage or substantial reduction of earnings resulting from sickness, maternity, employment injury, unemployment, invalidity, old age and death; the provision of medical care; and the provision of subsidies for families and children."*
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## Introduction (cont)

- Definitional framework too narrow
    - Range of risks too limited: role of collective risks
    - Immediate needs not provided for
    - Importance of private measures
      - Role of remittances (85% of migrant-sending households; e.g. Lesotho: 26.5% of GDP: 2001) – pre-eminent household income source
      - Informal social security
      - Individual provision
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# Differential approach

- Different categories of non-citizens, whose position in social security differs according to their status
    - Permanent residents
    - Temporary residents, including migrant workers
    - Refugees
    - Asylum seekers
    - Undocumented/irregular migrants
    - Non-citizen children
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# Migration in SADC: the contextual framework

- Migration data and trends
    - Political migration (civil wars, etc.)
    - Economic migration – in particular to South Africa & Botswana
    - Bulk of migration is
      - Intra-SADC (with some qualification)
      - To South Africa
    - Long-standing feature of the SADC labour market framework
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## Migration in SADC: the contextual framework (cont)

- Industrial development of many SADC countries, including South Africa, dependent on migrant labour
  - Therefore: intra-SADC labour migration is deeply entrenched & generations long, often within the same households
  - Some circular migration; mostly of “permanent” nature
    - For many, migration has become a career
    - Majority of those who migrate within SADC are men, household heads, older & married
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# Migration in SADC: the contextual framework (cont)

- Increase in contract labour migration
  - Severe impact of HIV/Aids
  - Precarious position of migrants and their dependants
    - Restrictive policy and legal framework
    - Mostly unskilled and semi-skilled migration: migrants at lower end of the labour market
    - Effect of large-scale retrenchments
    - Negative official and community responses (e.g. xenophobia), especially in South Africa
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# Migration in SADC: the contextual framework (cont)

- Irregular migration
    - Categorisation necessary as a result of restrictive immigration and legal framework
    - Limited access to labour law and social security protection
  - Gender dimension
    - Intra-SADC migration still predominantly male-dominated
    - Migrating women engage primarily in cross-border trade and informal economy
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# Migration in SADC: the contextual framework (cont)

- Deeply gendered characteristics of intra-SADC migration
    - Lack of access to cross-border permits
    - Inability to meet financial thresholds
    - Thus: often irregular migrants and marriages of convenience
    - Increased burden in split-family situations
    - Limited access to social security
  - Thus: gender and migration are dual and intersecting vulnerabilities
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# Social security for intra-SADC non-citizens: the context

- Social protection impact
    - Socio-economic, labour market and poverty contexts have not inhibited, but rather influenced the nature and orientation of intra-SADC migration
      - More affluent countries attract migrants
  - Those who migrate, also because they are poor, are exposed to restrictive legal frameworks
    - E.g. access to social security affected
    - No/limited portability of benefits
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## **Social security for intra-SADC non-citizens: the context (cont)**

- **Poverty: the SADC evidence (UNDP Development Reports) – the indicators**
    - **Human Development Index (HDI)**
      - 5 SADC countries falling within “Medium Human Development” sphere (ranging from places 65 to 145)
      - 9 SADC countries falling within “Low Human Development” sphere (ranging from places 146 to 168)
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## Social security for intra-SADC non-citizens: the context (cont)

- **Poverty: the SADC evidence (UNDP Development Reports) – the indicators**
    - **Human Poverty Index (HPI)**
      - Except Mauritius (at 11.4) SADC countries are ranging from 30.9 (South Africa) to 52.9 (Swaziland)
    - **Percentage of population living below the *national* poverty line**
      - Ranging from 10.6% (Mauritius) to 72.9% (Zambia)
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## **Social security for intra-SADC non-citizens: the context (cont)**

- **Poverty: the SADC evidence (UNDP Development Reports) – the indicators**
    - **Percentage of population undernourished**
      - Ranging from 6% (Mauritius) to more than 30% in the case of 9 SADC countries
      - As high as 47% (Mozambique), 49% (Zambia) and 71% (DRC)
    - **Income inequality: the Gini index**
      - 8 SADC countries have a Gini rating higher than 50
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## **Social security for intra-SADC non-citizens: the context (cont)**

- **Poverty: the SADC evidence (UNDP Development Reports) – the indicators**
    - However, there have been huge improvements in certain areas, such as in Infant Mortality
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## **Social security for intra-SADC non-citizens: the context (cont)**

- **Poverty: the SADC evidence (UNDP Development Reports) – the indicators**
    - First Millennium Development Goal: Halve, between 1990 and 2015, the proportion of people whose income is less than \$1 per day
    - SADC?
      - In a number of SADC countries, more than 50% and even 60% are living below this yardstick
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## **Social security for intra-SADC non-citizens: the context (cont)**

- This also appears to be the picture in the rest of sub-Saharan Africa, where the overall percentage of those living below \$1 per day (an amount which has not been adjusted to reflect the rising living costs) has remained at 44% in 2006 (as opposed to 44.6% in 1990) (United Nations (2006)).
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## Social security for intra-SADC non-citizens: the context (cont)

- "Despite significant progress by some of its subregions and countries, Africa fared worst among the world's regions. It saw the slowest progress overall and suffered reverses in some crucial areas. In sub-Saharan Africa (SSA), the number of people living in extreme poverty (on \$US1 a day or less) rose from 217 million in 1990 to 290 million in 2000, the majority of whom are women. Adult life expectancy is reckoned to have declined from a little over 50 years to 46 years. Based on the trends of the past 15 years, SSA will not achieve the MDGs on time." (Economic Commission for Africa (2005))
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## Social security for intra-SADC non-citizens: the context (cont)

- Labour market context
    - SADC labour markets deeply segmentised
    - Characterised by:
      - Prevalence of and steep increase in the use of forms of atypical labour
      - Informalisation and casualisation of labour
      - Rise in unemployment levels and jobless growth in the economy
        - Unemployment tends to be as high as 50% in several SADC countries
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## Social security for intra-SADC non-citizens: the context (cont)

- Large and expanding informal sector: accommodating as high as 90% of the EAP in many countries
  - Small formal sector: 10-20% of the EAP
  - No formal SADC regional labour market
  - Lack of harmonised labour standards
    - Social Charter providing the framework for future harmonisation
  - Focus until recently has been on economic development/integration, with little emphasis on driving the social development agenda
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## **Social security for intra-SADC non-citizens: the context (cont)**

- Limited reach of labour law regulation
    - Essentially covering those in the formal sector, who work within the framework of an identifiable employment relationship
    - Drive towards flexibility, restricted regulation & low labour costs, as a result of
      - Export-oriented industrialisation
      - Financial lending conditions
      - Globalisation
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## **Social security for intra-SADC non-citizens: the context (cont)**

- Limited reach of labour law: weak institutional support/framework
    - Absent collective bargaining regime
      - No collective bargaining structures
      - Trade unions
        - Restrictive definitional (legal) framework
        - Declining union membership base
        - Little interest
    - Lack of voice regulation and representation
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## Social security for intra-SADC non-citizens: the context (cont)

- Limited reach of labour law: weak jurisprudential responses
    - In particular in the absence of a constitutional and/or statutory rights basis
    - However, some encouraging recent developments
  - Important recent developments
    - Wider definition of “employee“ being adopted in some SADC labour laws
    - Major impact of recent Labour Court judgment in *Discovery Health v CCMA*
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## Social security for intra-SADC non-citizens: the context (cont)

- Limited social security coverage overall due to:
    - Focus of social insurance on often (small) formal sector
    - Insufficient benefits
    - Weak and embryonic social assistance
  - Inadequate conceptual framework
  - Weak institutional, governance and regulatory framework
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## Social security for intra-SADC non-citizens: the context (cont)

- Social insurance invariably inapplicable
    - Limited definitions - “contributor”/“employee”/“worker”:  
National laws and international (e.g. ILO) instruments
    - Specific statutory (definitional) exclusions
    - Limited notion of “dependants”
    - Inability to comply with contribution regime
    - Lack of compulsion
    - Emphasis on public measures?
      - Does not take account of provisioning by means of private and occupational-based measures
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## **Social security for intra-SADC non-citizens: the context (cont)**

- Community, informal, traditional and non-governmental schemes/ arrangements not properly recognised and supported
  - Social assistance often unavailable
    - Generally embryonic
    - Usually discretionary: often no statutory basis and not rights-based
    - Category-based
    - Subject to means-testing
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## **Social security for intra-SADC non-citizens: the context (cont)**

- SADC social security systems:
    - Diverse nature
    - Mostly social insurance-based, with some exceptions
    - Limited range of benefits/risks covered
    - Lack of portability & co-ordination
    - Social exclusion, given limited scope
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## **Social security for intra-SADC non-citizens: the context (cont)**

- Institutional problems, relating to, e.g.
    - Institutional design and governance
    - Investment decisions
    - Mismanagement and service delivery
    - Absence of a regulator
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## **Social security for intra-SADC non-citizens: the context (cont)**

- Important reform initiatives
    - Establishment of progressive labour law systems, with extended coverage
    - Comprehensive social security reforms:
      - From provident funds to pensions schemes
      - Innovative social assistance arrangements
      - Informal social security recognised
      - Appointment of regulators
      - Improvement in governance frameworks
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# Legal & policy framework pertaining to non-citizens

- Differential treatment of distinct categories of non-citizens
  - Social security laws and policies
    - Nationality and/or residence conditions (e.g. the UIF in South Africa)
    - Access to benefits restricted, in particular in terms of portability (e.g. the Compensation Fund in South Africa)
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## Legal & policy framework pertaining to non-citizens (cont)

### □ Immigration laws

- Entitlement to benefits often linked to immigration status
  - Legal residence may be required, but subject to the requirement that the migrant does not become a burden on the State
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## Legal & policy framework pertaining to non-citizens (cont)

### □ South Africa

- Permanent residents: in most respects treatment on par with citizens
  - Temporary residents – migrant may not be or become a prohibited or undesirable person, such as when
    - He/she becomes a public charge
  - Migrant workers – special category of temporary migrants (e.g. labour agreements)
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## Legal & policy framework pertaining to non-citizens (cont)

- Refugees
    - Special protection often eroded by statutory restrictions and official treatment
  - Undocumented migrants
    - Control and deportation (SADC-wide)
    - No labour law and social security entitlements
      - But see now the impact of the Labour Court judgment in *Discovery Health v CCMA*
  - Non-citizen children: special protection
  - Family reunification: limited provision
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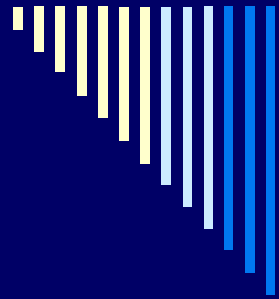


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## Legal & policy framework pertaining to non-citizens (cont)

### □ Conclusions

- Social security position generally weak
  - Precedence of immigration laws over labour and social security laws
  - Immigration policy geared towards security concerns and control
  - Lack of compliance with human rights standards
  - Therefore: Special measures needed to enhance protection
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# National level (country) responses

- Constitutional protection
    - Limited provision of socio-economic rights, and in particular the right to social security/welfare, in SADC constitutions
    - Important exception: South Africa
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## National level (country) responses (cont)

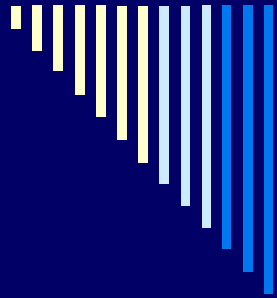
- Statutory protection
    - Extensive statutory regulation of social security
    - Social insurance-focus
    - Social assistance often lacks a statutory basis – subject to government discretion
    - Where statutory protection is available, this has proved to be an important form of protection
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# Inter-country responses

- No multilateral arrangement
  - Bilateral agreements: a limited framework
    - Only a few in SADC
    - Malawi-Zambia agreement
    - Labour agreements between South African and several neighbouring countries
      - Orientation – labour supply for South Africa (in particular the mines)
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# Inter-country responses (cont)

- ❑ The agreements, including the Zambia-Malawi agreement, are not reciprocal in nature, as they stand to regulate the position of nationals of one of the respective countries only
- ❑ "Obligations" are primarily imposed upon the relevant employers, and not the (South African) government
- ❑ Repatriation regulation is dealt with together with labour migration
- ❑ As a rule they do not cover public social security transfers, but only employer-based occupational-based payments



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## Inter-country responses (cont)

- These agreements do not provide for other arrangements typical of co-ordination regimes, such as maintenance of acquired rights, aggregation of insurance periods, and equality of treatment in the receiving country
  - Outside framework of the agreements, non-citizens tend to be excluded from access to social security
  - Impact of existence of agreements: exclusion from South African unemployment insurance
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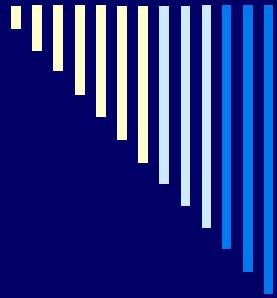




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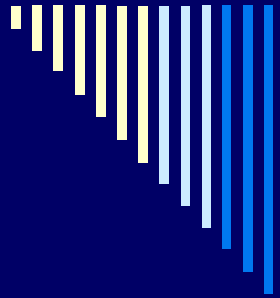
## Regional level responses

- ❑ SADC Treaty (re)focus: emphasising the social dimension
  - ❑ Social Charter: framework protection
  - ❑ Code on Social Security in the SADC: specific guidelines and standards
  - ❑ Draft Protocol on the Facilitation of the Movement of Persons: of limited assistance
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# International level responses

- Range of international instruments:
  - United Nations
    - International Covenant on Economic, Social and Cultural Rights – art 9 & new General Comment No 19
    - International Convention on the Protection of All Migrant Workers and Members of Their Families
    - Convention on the Elimination of All Forms of Discrimination against Women
    - African Charter of Human and People's Rights
    - Specific Refugee Conventions



# International level responses (cont)

- Extensive range of ILO instruments, also in relation to the position of migrant workers
- Evaluation:
  - Extension of human rights protection irrespective of nationality
  - Special protection to particular categories:
    - Refugees
    - Women
    - Children
    - Irregular migrants (to some extent)



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## International level responses (cont)

- Weak SADC ratification record
    - ▣ E.g. ILO Convention 102 of 1952 and UN Migration Convention
    - ▣ In particular, mostly *pre-World War II* ILO Conventions ratified
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# Conclusions

- There is a need to develop an appropriate SADC migration agenda and policy framework
    - Current context: Restricting access, controlling movement and regulating presence
    - Current context: Absence of co-ordinated policy framework and absence of freedom of movement
    - Important direction and pointers: Africa Migration Policy Framework
    - Compelling reasons in the SADC context
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# Conclusions (cont)

- Co-ordinating social security schemes and systems: the import of multilateral and bilateral agreements and changes to the national systems
    - Territorial principle replaced by personal entitlement
    - General advantages: portability; avoidance of double coverage; totalisation
    - Be mindful of portability problems experienced in SADC
    - Advantage of a multilateral framework
    - Examples from the developing and the developed world
      - Caribbean countries
      - Mercosur, South America, Spain and Portugal
      - EU
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# Conclusions (cont)

- SADC application
    - Preferred avenue: either a multilateral framework and/or a model bilateral arrangement
    - Incremental approach: (i) range of benefits; (ii) persons covered
    - Legal residence concept the general basis for coverage and entitlement
    - The need to adopt supporting measures (e.g. at national level)
    - Addressing the freedom of movement issue
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## Conclusions (cont)

- Addressing the precarious social security position of irregular migrants
    - Currently: impact of narrow definitional approach (immigration status); restrictive legal and policy framework; negative treatment; weak jurisprudential responses
    - Improved definitional framework, linked to limited visa-free entry
    - Recognising past contributions
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# Conclusions (cont)

- Migrant Workers Convention:
    - Human rights protection
    - Employer obligations not removed
    - Article 27:
      - *"1. With respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm."*
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## Conclusions (cont)

### □ Africa Union

- The need to develop an appropriate policy regime for migration
- General: Encouragement of freedom of movement and easing of entry restrictions
- No trampling of human rights
- Deportation to be supported by proper re-admission policies and practices

### □ SADC: Code on Social Security

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## Conclusions (cont)

- Adopting integrated labour market policy approaches in the SADC region and extending coverage
  - Ensuring appropriate human rights guarantees are in place and are respected
  - Adjusting national systems in line with the above
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