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Attempts at Harmonization in a Disharmonious Region

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Acronyms

| | |
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| APRM | African Union's Peer Review Mechanism |
| AU | African Union |
| DRC | Democratic Republic of Congo |
| ECOWAS | Economic Community Of West African States |
| EU | European Union |
| ILO | International Labour Organization |
| IOM | International Office for Migration |
| MIDSA | Migration Dialogue Southern Africa |
| RCPs | Regional Consultative Processes |
| RECs | Regional Economic Communities |
| SADC | Southern African Development Community |
| SADCC | Southern African Development Coordination Conference |
| SAMP | Southern African Migration Project (later Programme) |
| UN | United Nations |
| UNHCR | Office of the United Nations High Commissioner for Refugees |
| UNHRC | United Nations Human Rights Council |
| US-INS | United States Immigration and Naturalization Service |
| ZSP | Zimbabwean special dispensation permit |

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Summary

This paper examines prospects for enhanced regional migration governance and protection of migrants' rights in the Southern African Development Community (SADC). Migration in this region is substantial in scale and diverse in nature, incorporating economic, political and mixed migration flows. In addition to movements between countries within the region, migrants also come from across the African continent and even further afield. At its foundation in 1992, SADC as an institution initially embraced a vision of intra-regional free movement, but this has not become a reality. If anything, there has been a hardening of anti-migrant attitudes, not least in the principal destination country of South Africa. There have also been serious violations of migrants' rights. Attempts at regional coordination and harmonization of migration governance have made limited progress and continue to face formidable challenges, although recent developments at national and regional levels show some promise. In conjunction with the 2003 SADC Charter of Fundamental Social Rights and 2008 Code on Social Security, incorporation of migrants into the SADC 2014 Employment and Labour Protocol could signal a shift towards more rights-based migration governance. The paper concludes by arguing that there can be no robust rights regime, either regionally or in individual countries, without extension of labour and certain other rights to non-citizens, nor a robust regional migration regime unless it is rights-based.

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Introduction

This paper considers the prospects for enhanced regional migration governance, along with the protection of migrant rights, in the Southern African Development Community (SADC). SADC consists of 15 member states (figure 1) and, as a regional institution, aims “to promote sustainable and equitable economic growth and socioeconomic development through efficient productive systems, deeper co-operation and integration, good governance and durable peace and security” (SADC 2015). Migration in the SADC region is substantial in scale and diverse in nature. In a context of highly uneven development within and between countries, there are powerful economic motives for both domestic and international migration, with South Africa the primary destination. Cross-border labour migration is a long tradition, originally but decreasingly tied to the region’s mining industry. Several SADC countries, most recently the Democratic Republic of Congo (DRC) and Zimbabwe, have experienced periods of severe political instability and repression, driving many people to leave their countries of origin. Regional migration thus incorporates economic, political and “mixed” migration flows. In addition to flows between countries within the region, migrants also come from across the African continent and even further afield. Despite official SADC commitments to harmonizing migration policy and facilitating intra-regional migration, state and public attitudes towards migration are at best ambivalent and at worst strongly hostile, including serious violations of migrants’ rights. Attempts at regional coordination and harmonization of migration governance have made limited progress and continue to face formidable challenges, although recent developments show some promise. To date, however, migration governance remains a patchwork of national laws and policies, along with bilateral agreements governing streams such as formalized migrant labour.

The paper is organized in three sections. The first section outlines the regional migration context and identifies some of the main challenges to regional migration governance in SADC. The second section sketches the legal and policy framework of migration and migrant rights, addressing the regional scale as well as continental and other international instruments and obligations. The third section describes some initiatives aimed at strengthening regional migration governance in SADC, focusing on Migration Dialogue Southern Africa (MIDSA) which, since its inception in 2000, has been attempting to advance the regional migration governance agenda. The paper concludes with an assessment of the prospects for rights-based regional migration governance in SADC.

Figure 1: Map of SADC



Source: www.sadc.int/about-sadc/overview/.

1. Regional Context and Challenges to Migration Governance

Migration within SADC, and from the rest of the African continent to SADC countries, has increased substantially over the past two decades, building on a long-established tradition of regional labour migration. Although there is some migration between other countries in the SADC region, South Africa is the primary destination for intra-SADC migrants, and is therefore the country of emphasis in this paper. Actual migrant numbers are difficult to determine. As an indication of the scale of general mobility, total legal entries into the single country of South Africa from all foreign sources increased from 1 million in 1990 to 5.1 million in 1996 and 8.5 million by 2011 (Crush 2014). These include people entering the country for tourism, business, trade, work, study and other purposes. The 2011 South African census puts the number of foreign-born people residing in South Africa at 2,199,871, or approximately 4 per cent of the population (Statistics South Africa 2012). This is probably an undercount, as the census is unlikely to have captured all migrants, particularly any who are undocumented.

One migrant stream that has unambiguously decreased is new permanent residents. The number of permanent resident permits issued by South Africa's Department of Home Affairs in recent years has been well below 10,000 per annum, standing at only 1,283 in 2012 and 6,801 in 2013 (Statistics South Africa 2013, 2014a). The main countries of origin were, in order, Zimbabwe, Democratic Republic of Congo, India, Nigeria, China and the United Kingdom, the first two being SADC member states. South Africa, it seems, has effectively abandoned permanent residence as an immigration policy option, preferring to admit migrants, whether from SADC or elsewhere, under various categories of temporary residence and work permits. There were 141,550 temporary residence permits issued in 2012 and 101,910 in 2013, including work permits, with Zimbabwe

and Nigeria being the top two source countries followed by India, China, Pakistan and Bangladesh (Statistics South Africa 2013, 2014a). The sum total of official annual resident admissions to South Africa in recent years thus stands at between 100,000 and 150,000, with SADC member Zimbabwe being the primary country of origin. These figures underestimate the extent of regional labour migration since they exclude close to 100,000 foreign workers hired from neighbouring countries like Lesotho and Mozambique by the South African mining industry on corporate permits (Crush 2014). Also excluded is the unrecorded number of irregular migrants who either enter the country without being recorded at a formal border post, or who say they are entering temporarily for holiday or other purposes but with the actual intention of staying and working. This lack of recording also means their national origins are impossible to state with certainty, although neighbouring SADC countries predominate.

The number of refugees and asylum seekers is more readily quantifiable. At the end of 2013, over 230,000 asylum seekers were awaiting a refugee status determination decision in South Africa alone, making it one of the top destination countries for asylum seekers anywhere in the world (UNHCR 2014). The number of successful refugee claimants living in South Africa has increased steadily from 15,063 in 2000 to 65,210 in 2012 (Crush and Chikanda 2014). Almost all of these refugees and asylum seekers are African in origin, with most coming from the two SADC countries of DRC and Zimbabwe. From outside SADC, Somalia, Ethiopia, Rwanda and Burundi have been major sources. In recent years, Zimbabweans have made up the majority of asylum seekers in South Africa (that is, people awaiting refugee status determination and holding an asylum seekers' permit). Although few Zimbabwean asylum applicants are ever granted refugee status, a special dispensation for Zimbabweans (ZSP) was announced by the Department of Home Affairs in 2009, under which four-year residence and work permits were issued to 245,000 Zimbabweans who were already in South Africa without visas or other permits (Gigaba 2014). These were renewed for a further three years in 2014. Other countries in the region also host significant, if not as large, populations of refugees and asylum seekers, with a regional total of approximately 136,000 refugees and 278,000 asylum seekers at the end of 2013 (UNHCR 2015a). Most SADC countries have a camp-based refugee policy, but in South Africa recognized refugees and asylum seekers have freedom of movement and are permitted to work, as long as their permits are in order. This blurs the distinction between labour and other categories of migrants.

Overall, then, there are significant levels of regional migration, taking a variety of forms. Migration within and to the region includes voluntary and forced migration—although the distinction is blurred, with economic and political factors difficult to disentangle in the forces driving people to migrate. Migration also falls across a spectrum of legality: official immigration under various forms of residence permit; formal labour migration under various forms of work permit; legally determined refugees; asylum seekers both recognized and otherwise; and various forms of undocumented or irregular migration, both those who enter a country legally but then contravene the legal terms of their stay and those who cross borders clandestinely. These various migrant flows also have varying temporalities, from short-term stays and various forms of circular migration to long-term and permanent residence. This creates a complex regional picture of mixed migration flows. Migrants are also diverse in terms of countries of origin, with high levels of intra-SADC mobility as well as migrants from across the African continent and beyond (Segatti and Landau 2011).

Migrants are also demographically diverse, not only in terms of origin but also in terms of age, gender, and education or skills level. Although accurate demographic descriptions of migrant flows are impossible, given their mixed, often circular and sometimes clandestine nature, surveys conducted in migrant source countries immediately neighbouring South Africa provide some insight (McDonald 2000; Pendleton et al. 2006). They show that from historically male-dominated labour migration flows, the number of women migrating across borders within the region has increased, although men are still the majority (Dodson et al. 2008). The labour and livelihoods in which migrants engage have diversified. Mining and agriculture remain important, but there is increasing involvement of migrants in the informal sector, especially small-scale trading. Domestic service and trade are the primary occupations for female migrants. Longitudinally, it seems that migration in the region is becoming more of a long-term occupational strategy, even when it is circular. It also seems that women are increasingly engaging in migration practices previously found among men, migrating independently for work rather than as dependants or spouses of male migrants. Migrants come from across the education and skills spectrum, although the distinction between skilled and unskilled labour is hard to draw, given the widespread employment of educated migrants in unskilled or lower-skilled occupations. The distinction between individual and family migration is also problematic, as even individual migration in the region is commonly undertaken as a family strategy. More applicable is an understanding of migration in terms of transnational households, having members in more than one country, primarily as a means of securing the household's livelihood.

Intra-regional migration is indisputably significant in sustaining households' basic livelihoods in the SADC region. World Bank and other data routinely show Lesotho among the world's countries with the highest proportion of GDP coming from remittances, and Zimbabwean migrants' remittances have been crucial in sustaining household livelihoods during the political crisis of the 2000s.¹ Nationally representative data on remittance flows and usage at the household level in five SADC countries showed that 85 per cent of migrant-sending households reported receiving remittances, which constituted a higher proportion of those households' income than any other income source (Pendleton et al. 2006). By far the largest expenditure of remittances was on food, with the bulk of the rest going to buy other material necessities such as housing, fuel and clothing, together with basic services such as education and medical expenses as well as transportation. Very little remittance expenditure went on anything that might be considered a luxury. There was negligible investment or saving of remittance income, which went almost entirely to purchasing basic needs. Such "basic needs" expenditure was evident regardless of the gender of the migrant. Households sending female migrants received lower remittance amounts, reflecting women's typically lower earnings, but these were similarly spent on food, clothing and school fees (Dodson et al. 2008). Intra-regional migration in SADC can thus be seen as an important means of poverty alleviation and regional redistribution.

Less easy to assess with any certainty is the economic impact of migration on migrant-receiving countries such as South Africa, as there has been little systematic and comprehensive econometric analysis of the effect of migration on the South African labour market (Budlender and Fauvelle-Aymar 2014; Facchini et al. 2013). Cross-border

¹ Bracking and Sachikonye 2010; Crush and Tevera 2010a; World Bank 2015.

migrant labour has declined in the mining sector, although it remains numerically significant, and it persists in the agricultural sector, notably in areas neighbouring Zimbabwe (Rutherford and Addison 2007). Migrants are also commonly employed in construction, security and hospitality sectors as well as in private households as domestic workers or gardeners. Yet given South Africa's high rate of unemployment, estimated at approximately 25 per cent in 2014 (Statistics South Africa 2014b), it is difficult to argue that there is a labour shortage in any but a few highly skilled labour categories (Erasmus and Breier 2009). It is on these perceived skills shortages that the country's official immigration system is founded, making it inaccessible to the majority of regional migrants who lack the skills or training that would make them eligible. Mining, domestic work, agriculture and informal trade, the dominant employment categories among SADC migrants to South Africa, are occupations which in theory could be filled by South African nationals (Griffin 2011). Outside of formal migrant labour, the labour market impact of migration is difficult to evaluate in terms of its effect on wages and employment for local, non-immigrant labour, but is commonly perceived as depressing both (Steinberg 2012; Stern and Szalontai 2006).

The lack of accurate and consistent data on migration and its impact is one of the factors bedevilling migration management and policy in the region and impeding any attempt at harmonization. It is also one of the factors undermining migrant rights. In South Africa, the main destination for all types of migration, not only are the numbers of "illegal" migrants commonly exaggerated, but migrants of all categories are commonly conflated, with legal migrants and refugees lumped together with other foreign nationals and subject to the same kind of abuse and discrimination (Crush et al. 2008, 2013). Migrants are viewed as "stealing jobs" from nationals, and have become subject to anti-immigrant attitudes and xenophobic violence, in addition to having their rights as workers denied by unethical employers.² The outburst of xenophobic violence in South Africa in 2008 that attracted worldwide attention and condemnation was an expression of long-held and deep-seated negative attitudes towards immigrants on the part of South Africans. There was a repeat, if less widespread, outbreak of xenophobic violence in 2015. A national survey of South African attitudes in 2010 showed persistently strong negative attitudes towards foreigners (Crush et al. 2013). Ninety per cent of respondents felt that there were too many foreigners living in South Africa, and 36 per cent believed that immigration should be entirely prohibited. Almost two-thirds (62 per cent) supported a policy of deportation for anyone not contributing economically to South Africa. As many as 27 per cent felt that all migrants should be deported, even if they were in the country legally, and 11 per cent said they would be prepared to use violence themselves to prevent a foreigner from moving into their neighbourhood. Twenty per cent of respondents believed that the majority of foreign nationals were in the country illegally. Sixty per cent believed that migrants were taking jobs from citizens. Only 38 per cent believed that refugees warranted protection, and more than half thought that irregular migrants did not deserve even basic legal rights and police protection. It is not only in South Africa that such attitudes are to be found, with evidence of similar opinions and experiences of xenophobia also reported in Botswana, especially against Zimbabweans.³ In such an inhospitable climate, establishment of a rights-based migration regime in SADC faces an uphill battle.

² Dodson 2010; Everatt 2010; Landau 2012; Matsinhe 2011; Worby et al. 2008.

³ Campbell 2003; Galvin 2015; Marr 2012.

Nevertheless, regional harmonization of migration governance holds considerable potential, and is more likely to be successful at securing migrant rights than piecemeal national efforts. The region's economic integration cannot be sustained without acknowledging and incorporating flows of people along with capital and commodities. Even without official sanction or facilitation, people will migrate as a rational response to the region's highly uneven pattern of development, within and between countries. Political instability continues to undermine economic gains, and unresolved political problems in Zimbabwe and DRC continue to drive economic and political out-migration. Currently, intra-regional migration takes place in a context of unharmonized and contradictory legal and policy frameworks, with uneven and weakly enforced protection and rights regimes. The next section of the paper outlines the governance of migration and migrant rights in SADC, first in terms of the right to free movement and second in terms of regional and other international instruments protecting migrants' rights.

2. Legal and Policy Framework

The Southern African Development Community came into existence in 1992 as the successor to the Southern African Development Coordination Conference, which had been created in 1980 as an affiliated group of nations seeking to reduce their dependence on apartheid-era South Africa and assist in bringing about the end of apartheid rule. Namibia's independence and South Africa's liberation from apartheid led to SADCC's reconstitution as a more formal group of nations under the SADC Treaty, and to the inclusion of South Africa and Namibia as members. The Treaty

sets out the main objectives of SADC—to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. These objectives are to be achieved through increased regional integration, built on democratic principles, and equitable and sustainable development (SADC Secretariat 1993).

One might expect that such regional integration would involve freer movement of people across the region's borders. Indeed Article 5(2)(d) of the Treaty states that SADC shall “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”, within a framework of democracy, human rights and the rule of law (SADC Secretariat 1993).

Over 20 years later, the ideal of freedom of movement among SADC member states remains elusive. Early on, there were signs that Southern Africa would develop a European Union (EU) Schengen-style policy of unrestricted intra-regional mobility. A SADC workshop on the free movement of people was held in Harare in 1993, and a *Draft Protocol on the Free Movement of Persons in the Southern African Development Community* was produced in 1995 (Williams 2006). The Protocol was substantially revised to meet the objections of South Africa, Botswana and Namibia, then shelved, then revived and finally formalized on 18 August, 2005 as the *SADC Protocol on the Facilitation of Movement of Persons*—the shift from “Free” to “Facilitation” being far more than merely semantic (Williams and Carr 2006; Williams 2011). The Protocol has now been signed by a majority of member states, but ratified by only six: Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zambia (Kitimbo 2014; Nshimbi and Fioramonti 2014).

This is still short of the required two-thirds for it to come into effect. Also, and perhaps significantly, the Protocol falls under SADC's Politics, Defence and Security section, rather than Economic Development, Social and Human Development, or Poverty Eradication and Policy Dialogue. This suggests that migration is still viewed primarily as a security issue, rather than one of rights and protections for migrants themselves.

The tension between "free movement" and "security threat" discourses on migration is borne out in SADC's own language around the Protocol. On one hand is a claim to liberalization of regional migration policy:

In pursuance of this objective and eager to support, assist and promote the efforts of the African Union which is encouraging free movement of persons in African Regional Economic Communities as a stepping stone towards free movement of persons in an eventual African Economic Communities [sic], SADC developed the Protocol on Facilitation of the Movement of Persons to facilitate entry, with lawful purpose, without visa into another Member State for a maximum of 90 days, permanent and temporary residence in the territory of another state and establishing oneself and working in the territory of another State (SADC website 2012).

The African Union efforts to which this refers include a 2001 Resolution which called on AU member states to "work towards the free movement of people and to strengthen intra-regional and inter-regional cooperation in matters concerning migration" (African Union 2001). The countervailing discourse in SADC migration policy frames migrants as potentially dangerous:

The region's long and porous borders, economic attractions and the relative peace and stability make it a preferred destination and transit of, not only investments, but also criminal elements. The immigration services of SADC are engaged in collective planning aimed at strengthening the control and facilitation of the movement of persons in the region to benefit development (SADC website 2012).

Subsequent developments at the African Union (AU) level maintain the commitment to advance sub-regional and ultimately continental free movement. The AU's 2006 Migration Policy Framework for Africa included the recommendations to "[e]nhance co-operation and co-ordination amongst States in sub-regions and regions with a view to facilitating free movement at bilateral, sub-regional and regional levels, from which an Africa-wide framework on the free movement of persons would be developed" and to "[c]all upon the Regional Economic Communities (RECs) and their Member States to consider the adoption and implementation of appropriate protocols in order to progressively achieve the free movement of persons" (African Union 2006a). The parallel AU African Common Position on Migration and Development emphasized the positive role of migration in development and urged the "protection of economic, social and cultural rights of migrants, including the right to development, [as] a fundamental component of comprehensive and balanced migration management systems" (African Union 2006b). These positions have been reaffirmed in successive AU declarations and strategic plans. Yet, as acknowledged by Henrike Klavert in a 2011 review of AU migration policy frameworks and positions, their implementation depends on member countries' and Regional Economic Communities' buy-in, something that has so far been lagging except in the Economic Community of West African States (ECOWAS) (Klavert 2011).

The 2005 SADC Protocol itself is far from either the original SADC conception or the AU vision of regional free movement. One of its main provisions is to allow visa-free entry to another SADC country for just 90 days, beyond which national laws governing longer-term migration permits apply. Rights of residence and establishment in the territory of another SADC country are expressed in terms of accordance with the laws of individual states, which in most countries remain highly restrictive, except for tightly defined categories of admissible immigrant. In terms of migrants' wider rights, the Protocol commits states to upholding those enshrined in their own migration and refugee laws as well as international refugee obligations. Beyond that, even persons legally granted residence and establishment are entitled only to "enjoy those rights and privileges as determined by the laws of a host state" (Article 20)—which may or may not extend certain rights to non-citizens (SADC 2005). Other provisions of the Protocol ensure protection against indiscriminate expulsion and set out provisions for expulsion of non-citizens, including rights of appeal and consultation with consular authorities. Nowhere are broader sociopolitical rights for migrants spelled out, for example, through the extension of such rights to non-citizens. As others have noted, the Protocol does not go much beyond national and bilateral agreements already in place, and certainly does little to establish any form of regional citizenship, with the supra-national rights and protections that such might imply (Williams 2006). If it were to come into effect, it could have some symbolic significance, but it would not do much on its own either to protect migrants' rights or to facilitate free cross-border movement.

Despite the absence of extensive rights protections in the Protocol, its implementation in combination with other SADC instruments, together with the member states' individual commitments to international human rights instruments, could still serve to enhance protection of migrants' rights. SADC member states are, for example, committed to uphold fundamental human and workers' rights, as outlined in the Community's Charter of Fundamental Social Rights (SADC 2003). Article 3 states:

This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the ILO [International Labour Organization], the Philadelphia Declaration and other relevant international instruments.

The "universality and indivisibility" of at least basic human rights implies that these rights apply to non-citizens as well as citizens of any particular state, and thus to migrants, whether legal or otherwise. The Charter also includes provision for certain rights and protections under the following categories, each phrased primarily in terms of work and employment: Freedom of Association and Collective Bargaining (Article 4); Equal Treatment for Men and Women (Article 6); and Protection of Children and Young People, Elderly Persons, and Persons with Disabilities (Articles 7, 8 and 9). Articles 10 to 15 all refer specifically to *workers'* rights: Social Protection (Article 10); Improvement of Working and Living Conditions (Article 11); Protection of Health, Safety and Environment (Article 12); Information, Consultation and Participation of Workers (Article 13); Employment and Remuneration (Article 14); and Education and Training (Article 15). Nowhere in the Social Charter are migrants mentioned explicitly, and obligations are expressed in terms of member states. No express provision is made for the portability of rights and protections across state borders. But nor are migrants explicitly

excluded, and thus migrants living and working in other SADC member states are in theory entitled, at least as workers, to the same protections as citizens of those states.

Another SADC instrument protecting the rights of migrants is the (non-binding) Code on Social Security, adopted in 2008 (SADC 2008). Article 17 of the Code deals with Migrants, Foreign Workers and Refugees. After a clause stating explicitly that member states should work towards free movement of persons, and progressively reduce immigration controls, it sets out core principles for each of three categories of migrant. Article 17.1 declares that all member states should ensure that legally employed immigrants are entitled to the same forms of social security as citizens of the host country. Article 17.2 provides that “illegal residents and undocumented migrants should be provided with basic minimum protection”. Article 17.3 commits member states to uphold their obligations to refugees “in accordance with the provisions of international and regional instruments”. As in many other regional contexts, the rights of refugees are more strongly protected internationally than those of other categories of migrant, with undocumented migrants least protected of all, and even legally resident migrant workers being protected primarily through their status as workers rather than persons in their own right. The non-binding nature of the Code is also problematic. On the positive side, it does at least acknowledge that the rights of migrants require explicit attention, and that migrants are variously and unequally protected by other legal instruments, depending on their particular migration status. Its advocacy for freer movement within SADC is also positive from a rights perspective, although this stands in contrast to the seeming reluctance of SADC member states to ratify or implement provisions for the facilitation of movement.

In practice, SADC’s Social Charter, and even more so the Code on Social Security, are more a set of ideals and aspirations than a legally enforceable social protection floor. SADC as an institution is weak and financially under-resourced, with little means of enforcing the Social Charter or Code’s provisions. This leaves current protection of migrant rights largely to the national level. Some individual states, such as South Africa, have constitutional provisions and national acts providing such social protections, although certain of these remain restricted to citizens and others extended only to permanent residents (Olivier 2009, 2014). At the most basic level, irregular migrants have the right to freedom and human dignity and are entitled to security of the person and of property. Yet overall, as legal scholar Marius Olivier concluded in his review of social protection for non-citizens in SADC:

It is...clear that the constitutional and fundamental rights protection informing the social security position of intra-SADC migrants is weak and unsatisfactory. Much more can be done at the national or country level to improve the constitutional protection of socio-economic rights, in particular social security-related rights, and to enhance the constitutional status and protection of non-citizens, in particular intra-SADC migrants (Olivier 2009: 63).

Rights framed in terms of migrant workers are more likely to be ratified and implemented than either regional free movement or general rights protection for migrants.. Here there are a number of promising recent initiatives, where recognition is given explicitly to migrants in SADC labour policies and Protocols. A 2014 SADC Protocol on Employment and Labour contains in its Article 19 the following provisions for labour migration and migrant workers (SADC 2014):

In accordance with African Union and ILO instruments on migration, State Parties shall endeavour to:

- (a) improve migration management and control, and strengthen mechanisms to combat smuggling and human trafficking;
- (b) create a favourable climate to facilitate and encourage the return to and/or participation of emigrants in the development of the country of origin;
- (c) ensure that fundamental rights are accorded to non-citizens, in particular labour/employment and social protection rights;
- (d) adopt measures to provide for the special needs of migrant women, children and youth;
- (e) harmonise national migration legislation and policies; and adopt a regional migration policy in accordance with international conventions to ensure the protection of the rights of migrants;
- (f) adopt measures to facilitate the coordination and portability of social security benefits, especially through the adoption of appropriate bilateral and multilateral agreements providing for equality of treatment of non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits and institutional cooperation;
- (g) develop mechanisms, services and effective financial products to facilitate the transfer of remittances by migrants;
- (h) ensure coherence between labour migration, employment policies and other development strategies within the member states;
- (i) reach an agreement on a common approach towards immigration within the Region;
- (j) establish an autonomous regional agency to address cross-cutting issues pertaining to social protection such as: streamlining and facilitation of portability of social security benefits across borders; stipulating applicable regional minimum standards; and regulating institutional mechanisms that guarantee relevant entitlements, rights and obligations across borders; and
- (k) promote labour migration data collection, analysis and exchange at regional and national levels.

Although embedded in a Protocol on Employment and Labour, these provisions are wide-ranging and go beyond narrowly defined workers' rights and protections, extending to broader rights of non-citizens, portability of benefits, linkage of migration to broader development goals, and harmonization of immigration policies. Also positive from a rights perspective is the fact that the Employment and Labour portfolio falls within the Social and Human Development Directorate, which places it in a more rights-focused section of the SADC institutional architecture. Further, the Protocol has been developed in the context of a SADC Draft Labour Migration Policy (SADC 2013). This contains a number of features that augur well for migrant rights. It pays explicit attention to low-skilled and self-employed migrants, not only those in formal, regulated employment in the historically migrant-employing sectors of mining and agriculture. It addresses abuses and exploitation of migrants by labour brokers, human smugglers and state agents as well as by employers. It also seeks to ensure migrant workers' full integration into workers' organizations and to establish a minimum social protection floor for migrant workers across SADC. There is a related SADC Action Plan on Labour Migration 2013-15 and a 2014 SADC Labour Migration Policy Framework. In some ways these recent developments probably signal the demise, a decade on, of the 2005 Protocol on Facilitation of Movement of Persons, and a move instead to a focus on labour migration. Much will depend on the manner in which labour migration is ultimately defined, but the broad initial definitions of work and worker are certainly encouraging. The question remains as to whether the Protocol on Employment and Labour will have any greater ratification success.

Other international legal instruments with the potential to protect migrants in the region are the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) and the ILO Convention on Domestic Workers (2011), but few SADC states have ratified either of these conventions. For the UN Migrant Workers Convention, Lesotho, Madagascar, Mozambique and Seychelles are the only signatories among SADC member states (UN 2015). Mauritius and South Africa are among the handful of countries worldwide to have ratified the ILO Convention on Domestic Workers (ILO 2015). The UN Migrant Workers Convention accords certain fundamental rights to all migrants, regardless of their legal status, and some additional rights to regular, documented migrants. The ILO Domestic Workers Convention accords rights to decent work for all domestic workers, acknowledging that many domestic workers globally are international migrants, without distinguishing between regular and irregular migration (while including anti-trafficking and ethical recruitment provisions). It would be desirable for more SADC states to ratify both of these Conventions and to incorporate their key provisions into national laws. Yet even were such ratification to occur, the nature of intra-regional migration and migrant employment would make enforcement difficult, as irregular migrants in precarious employment would be unlikely to appeal against exploitation or rights abuses, for fear of deportation. Also, in a context of high levels of poverty and unemployment, migrants are perceived as “stealing jobs” from nationals and thus as undermining citizens’ rights to employment and fair remuneration.

Relative to economic migrants and migrant workers, the rights of refugees are far more securely enshrined and protected in international instruments as well as in domestic law in most SADC States. All SADC member states except Mauritius are signatories to the 1951 UN Convention Relating to the Status of Refugees (UNHCR 2015b), and all but Namibia have signed the 1969 Organization of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa (although Madagascar and Mauritius have signed but not ratified the AU Convention) (African Commission on Human and Peoples’ Rights 2015). Most SADC countries have also enacted their own legislation governing refugee determination and protection (Klaaren and Rutinwa 2004). Refugee laws vary considerably amongst SADC member states, with some grounded in refugee control and others more in refugee protection, but all afford refugees basic protection, if in some cases with restriction on their freedom of movement and access to employment (Makhema 2009). Protection by law, however, does not automatically mean protection in practice. In countries like South Africa, refugees are not confined to camps but instead intermingle with citizens and with other migrants, with whom they are often conflated in the public imagination and thus targeted for similar discrimination, hostility and rights abuses.

Although South Africa is not alone among SADC states in having citizens holding strongly anti-immigrant attitudes, its rights-based Constitution and extensive legislation protecting labour and other rights make the contrast with systemic violation of migrants’ rights especially stark. As long ago as 2007, the African Union’s Peer Review Mechanism (APRM), in its country review, criticized the South African state for its failure to address xenophobia and for rights violations in its own handling of undocumented migrants (African Peer Review Mechanism 2007). At the United Nations, in the Periodic Review of South Africa’s rights record by the General Assembly’s Human Rights Council in 2012, many of the recommendations for South Africa to address its shortcomings in

human rights protection involved the rights of migrants (United Nations Human Rights Council 2012). South Africa was encouraged to ratify the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and to consider ratifying the ILO Convention on Domestic Workers (with the latter being positively acted upon by South Africa's signing in 2013). A number of recommendations by members of the UN Human Rights Council urged South Africa to reinforce measures to combat xenophobia against migrants, refugees and asylum seekers. Three of the recommendations are worth quoting in full, as they show the long road that South Africa still has to travel to secure migrant rights in both legislative and public realms:

124.146 Respect its international and national legal obligations in the field of the protection of the rights of asylum seekers and migrant workers (Belgium);

124.148 Protect and fulfil migrants' rights, in particular by effectively prosecuting offences committed against them and by improving their living conditions (Germany);

124.149 Establish policies and programmes designed to promote the integration of migrants into society and respect to their rights, including the protection of their physical integrity (Slovakia).

For its part, the South African government in its national report to the UN Human Rights Council also identified immigration as an area warranting attention:

South Africa indicated that the Government was developing a comprehensive immigration policy by reviewing its existing legislation, systems and processes... [The government] would undertake a programme of consultation and advocacy with key stakeholders, which would culminate in an amendment of the Immigration and Refugee Acts by the end of March 2013. The policy would be in line with the South African Constitution, which was founded on the principles of self-determination, non-discrimination and human rights. The policy would also take into consideration all the recommendations made by various United Nations human rights treaty monitoring bodies and international humanitarian law agencies (UNHRC 2012).

If anything, there has been regression rather than progress on these fronts. Recent amendments to South Africa's Immigration Act and its regulations have tightened restrictions and heightened hurdles (Government of South Africa 2014; Ramjathan-Keogh 2014). Visa overstayers will be deemed "undesirable persons", prohibiting re-entry for prescribed periods of time. People found in possession of fraudulent visas, permits, travel or identity documents will be declared prohibited persons. There are further restrictive measures for asylum seekers, with the asylum transit visa's validity reduced from 14 to five days. Even more worrying than these legal and regulatory measures, there was a recurrence of xenophobic violence in South Africa in early 2015, with other SADC country nationals again among the victims (African Centre for Migration and Society 2015). The South African state itself violated a number of basic human rights as well as its own legal and constitutional provisions in the heavy-handed, militaristic Operation Fiela (or "sweep clean") launched in response, rounding up undocumented migrants as if they were equivalent to drug dealers and criminals (Lawyers for Human Rights 2015).

Against these negative developments are more hopeful counter-trends, as signalled in a South African Department of Home Affairs "Colloquium on a New International Migration Paradigm for South Africa" that took place in Pretoria on 30 June 2015. With South Africa being the primary destination for intra-SADC migrants, reform in its national immigration law would have wide regional impact. In his introductory remarks,

Minister of Home Affairs Malusi Gigaba stressed the regional context and obligations, saying:

One of our most important international obligations is to the region. South Africa has committed itself to African and regional integration, to progressively weaken colonially imposed borders and make it easier for SADC and African citizens to move without restriction.... So while we may have concerns about the impact of mixed migration on our domestic labour market, we must balance this with regional solidarity and enlightened self-interest, as South Africa will benefit in the long-term from a more integrated, more prosperous region and continent (Gigaba 2015).

Regrettably, however, there was no mention of migrant rights in his speech, and regional and national interests are presented as competing as much as complementary. Gigaba also stressed the need to balance national economic and security concerns, counterposing immigrants as “investors, business owners, traders and buyers of goods, holders of critical skills, professionals, scientists, doctors, nurses, teachers, artists, relatives and spouses” with those who are “fraudsters, terrorists, organized crime syndicates and human traffickers” (Gigaba 2015). Attendees at the Colloquium included representatives from academia, the private sector, labour and other government departments, and it was made clear that the meeting was a first step in a process of consultation leading to comprehensive reform of immigration policy. It is to be hoped that South Africa’s immigration reforms will pay more than lip service to regional cooperation and rights protection, and that governments of other SADC states and the formal SADC institutional machinery will be engaged in future stages of this process. If such progressive immigration policy reform does indeed come to fruition, South Africa could play a leadership role in advancing the harmonization of migration policy and protection of migrant rights in SADC.

3. Migration Dialogue for Southern Africa⁴

One forum working to advance the regional harmonization of migration policy in SADC is the Migration Dialogue for Southern Africa (Crush and Tevera 2010b). MIDSA is one of a number of Regional Consultative Processes (RCPs) on migration that have emerged in many regions of the world since the mid-1990s. These are informal, non-binding, inter-state forums for dialogue on migration matters of mutual interest (Hansen 2010). MIDSA was formally founded in Mbabane, Swaziland, in November 2000, with the primary original goal of facilitating the SADC Secretariat’s efforts to promote the SADC Protocol on the movement of people. After consultative meetings in Harare and Lusaka in July 2000, where SADC government support for the MIDSA process was secured, a steering committee was established, chaired by the International Office for Migration (IOM) and comprising the Southern African Migration Project (SAMP), the United States Immigration and Naturalization Service (US-INS) and the Office of the United Nations High Commissioner for Refugees (UNHCR). The committee was asked to convene a forum for SADC governments to discuss issues of common concern around migration and its management. UNHCR soon withdrew, followed shortly afterwards by the US-INS, but the initiative has continued and evolved into a ministerial-level forum of SADC member states.

⁴ In addition to the authors’ personal experience and communication with MIDSA participants, the primary source for this section is Jonathan Crush and Daniel Tevera, *The Migration Dialogue for Southern Africa (MIDSA): The First Ten Years*, Presentation to Ministerial MIDSA Meeting, Windhoek, Namibia, 15 November 2010. Other material is taken from the MIDSA and SAMP websites, www.migrationdialogue.org/midsa/ and www.queensu.ca/samp/midsa/.

In 2000, the original objectives of MIDSAs were set out as follows (Crush and Tevera 2010b):

- To foster co-operation among SADC Member States on migration-related issues, enhancing their capacity to manage migration within a regional context.
- To contribute to an increased awareness amongst SADC officials and policy makers of the role of migration in the social and economic development of the region, and to ensure that orderly migration is perceived and used as a positive factor in the development process.
- To help develop regional institutional capacities to deal with the challenges of migration management and strengthen the capacity of Governments to meet these challenges in a cooperative and knowledge-based manner.
- To enhance the understanding of officials and policy makers of the causes, dimensions and impacts of migration in Southern Africa.
- To promote dialogue and interaction between governments and other agencies and institutions with migration-related interests and expertise.
- To deliver technical cooperation and training to build capacity for migration management, information sharing and research, and information dissemination activities.
- To enhance the capacity of SADC countries to collectively manage migration including substantial progress towards harmonized systems of data collection and harmonized immigration policy and legislation.

These have since been revised to just three over-arching objectives, signalling a simultaneous thematic refocusing on migration and development and a geopolitical expansion to address emerging continental and global agendas and debates on migration (MIDSAs 2015):

- Assist SADC governments to respond to the AU Strategic Framework on Migration and AU Common Position on Migration and Development.
- Stimulate discussion and debate on the implications of ratifying the SADC Draft Protocol on the Facilitation of Movement.
- Assist governments to participate in global debates about migration and development e.g. Global Commission on International Migration, UN High Level Dialogue on International Migration and Global Forum on Migration and Development.

Despite being implicit in the entire MIDSAs process, and occasionally expressed in MIDSAs dialogue, migrant rights per se have not been a designated theme of any MIDSAs meeting, nor stated explicitly as an objective. Yet MIDSAs has certainly been an effective forum for dialogue. There have been over 20 regional MIDSAs workshops or conferences between 2000 and 2015, and most SADC countries have hosted at least one MIDSAs meeting. MIDSAs workshops, technical meetings and conferences have been attended by government officials from all SADC countries, including representatives from Departments of Home Affairs (or equivalent) and, depending on the meeting theme, Departments of Labour, Health, Social Development and Foreign Affairs. Themes have included migration and development; irregular migration and trafficking; migration and health; labour migration; migration management; and harmonization of migration policy.

After a decade of lower-level meetings and workshops, MIDSAs's first fully ministerial-level conference was held in Windhoek, Namibia, in November 2010, with the theme *Managing Migration through Regional Cooperation*. This was an opportunity to reflect on the

achievements of MIDSAs first 10 years as well as to look ahead at ways to turn dialogue into action. The (non-binding) recommendations that emerged from that meeting were (MIDSAs 2010):

- i. Pursue the integration of current and future recommendations of the MIDSAs ministerial meeting into SADC structures so that these recommendations lead to concrete actions.
- ii. Enhance migration management coordination.
- iii. Encourage countries to expedite ratification of the SADC Protocol on the Facilitation of Movement of Persons.
- iv. Address challenges of irregular migration by increasing public awareness in order to discourage irregular migration as well as promoting legal labour mobility channels and opportunities.
- v. Promote the participation of the diaspora in development and mitigate the effects of brain drain.
- vi. Improve the collection, analysis, dissemination and harmonisation of migration data, ensuring its application to policy making and incorporation into national development plans.

Migrant rights were not explicitly identified in any of the recommendations. As inherent in all migration policy, there is an evident tension between facilitation and control of migration, and thus between granting and restricting the right to mobility. There is clear distinction between legal and desirable *labour* migration that stimulates development and is therefore to be encouraged, and unspecified *irregular* migration that is regarded as undesirable and to be discouraged. SADC's development- rather than rights-focused migration agenda is further evident in recommendations 5 and 6. Migrant rights did nevertheless receive some attention at the MIDSAs 2010 conference, being the subject of a presentation by Daniel Redondo of IOM's International Migration Law Unit (Redondo 2010). Redondo reminded delegates of the various international instruments that address the protection of human rights, noting that the International Convention on the Protection of Migrant Workers and their Families has the lowest ratification rate, at only 44 of the world's states after 20 years of existence. As noted above, Lesotho, Mozambique Madagascar and Seychelles are the only SADC signatories to the Convention, the first two each being a significant labour exporting country and thus with obvious interests in protecting the rights of their nationals abroad.

That Redondo emphasized the rights of migrant *workers* is significant. After 15 years of MIDSAs existence, ratification of the Protocol on Facilitation of Movement of Persons appears less likely than ever, although it remains on the MIDSAs agenda. Instead, there seems to be an emerging dual focus: on labour migrants specifically, rather than migrants in general; and on particular categories of vulnerable migrant, such as unaccompanied children. The second ministerial-level MIDSAs meeting, held in Mozambique in July 2013, was on the theme of labour migration, with the most recent, in July 2015 in Zimbabwe, being on the theme of unaccompanied child migrants (MIDSAs 2015). A similar focus on labour migration is evident in the ongoing involvement of the ILO with SADC to further the Decent Work agenda in this region (Musabayana 2013). The ILO and MIDSAs processes are acknowledged as key impetuses behind initiatives such as the SADC Protocol on Employment and Labour and SADC Draft Labour Migration Policy discussed in the preceding section. In these emerging instruments, the tension between facilitation and restriction of intra-regional migration remains, and while rights are

broadly defined, they are attached primarily to migrant workers. Such a strategy, highlighting the positive development contributions of migrant workers rather than advancing more encompassing rights-based arguments or persisting with calls for freer regional migration, can perhaps be seen as politically astute, given the anti-immigration climate that prevails in the region's primary migrant destination countries. It is, however, a far cry from the original intent of SADC free movement, and leaves those economic migrants who might fall outside the definition of migrant labour with only the barest level of rights protection.

Prospects for rights-based regional migration governance

The SADC region has seen positive, if slight, movement towards coordination and harmonization in migration governance. Disappointingly, however, there has been limited advancement of migrants' rights in this process. To date, enhanced regional migration governance has taken more technocratic and bureaucratic forms, and has been more about cooperation among states in collecting migration data and enforcing their separate national migration laws than about establishing a genuinely regional, rights-based migration governance regime. One of the most formidable and intractable obstacles to regional harmonization is negative public attitudes towards immigrants, including those from other SADC countries, in the main migrant-receiving states. Another obstacle to harmonization is the weakness of SADC as a regional institution. It has limited resources and little political power over national governments, and thus little ability to shape the migration governance agenda. A further challenge is the weak and uneven rights regimes at the national level. Comparing individual SADC member states, even citizens' rights are unevenly and inadequately protected, and still less migrants' rights, which are widely perceived as undermining the socioeconomic rights and entitlements of individual countries' own citizens. Furthermore, whether for citizens or migrants, rights on paper, as enshrined in various legal, constitutional and international obligations, do not necessarily translate into realization or protection of those rights in practice.

In the face of such obstacles, we would still argue that there can be no robust rights regime, either regionally or in individual countries, without extension of labour and certain other rights to non-citizens. Nor can there be a robust migration regime unless it is rights-based. Although genuine freedom of movement across the region remains a worthwhile goal, it is too politically controversial for there to be any hope of its achievement in the short or even medium term. Improving the position of intra-regional and other migrants by securing at least their basic rights, including protection of person and property, labour rights, and protection against arbitrary detention or indiscriminate expulsion, is a more realistic goal, and one that would be significantly advanced through regional coordination and cooperation. SADC's Social Charter and Code on Social Security provide a framework for more rights-based migration governance. Encouraging SADC governments to sign and ratify the International Convention on the Protection of the Rights of all Migrant Workers and their Families is an additional, mutually supporting priority. Moves towards a SADC Labour Migration Policy and the incorporation of migrants into the SADC Employment and Labour Protocol suggest some progress towards more rights-based migration governance in the region. Further progress will require individual country buy-in, together with ongoing support and monitoring from continental and international bodies such as the AU, ILO and UN, if SADC commitments on paper are to be translated into meaningful change in migration policy and practice by individual SADC country governments and their citizens.

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